



**20th BILETA Conference:  
Over-Commoditised; Over-Centralised; Over-  
Observed: the New Digital Legal World?**

British & Irish Law, Education and Technology Association *April, 2005, Queen's University of Belfast*

## **Guarding the guards: the practical impact of human rights on protection of innovation and creativity**

**Abbe E. L. Brown,**  
University of Edinburgh

### **1. Introduction**

As technology pushes back frontiers, new horizons and opportunities are opened, particularly through digitisation, medical science and biotechnology.[1] The status quo is questioned, with “[n]ew technologies challeng[ing] old notions as to the regulation of the innovative and creative processes”,[2] and the present legal regime attacked. [3] A focal point of this has been the proper scope and impact of various intellectual property rights (“IP”).

“Human rights” can be raised in this debate: indeed this seems an attractive and easily understood solution. It can appear obvious that “the right to life” should prevail over use of patents to limit access to medical treatment;[4] “the right to information” over use of copyright to limit use of online material,[5] or over use of copyright and database rights to restrict access to information;[6] and “the right to free speech” over use of trade marks to prevent corporate criticism through “suckssites”. [7] Questions of the proper justification and role of IP, the place of economics and property rights, and international treaty obligations, can appear irrelevant and selfish distractions.[8]

This paper will consider the basis for the relationship between IP and human rights; use which has been made of the relationship to date, focussing largely on case law; [9] synergies in approach against different social, cultural and constitutional backdrops; and the possible needs, opportunities and challenges for the future use of this interface in the field of technology.

### **2. The theoretical framework**

What is meant by “human rights”? It has been said that “[t]he concept of human rights is a concept distinct from the concept of law, for human rights exist at the level of philosophy rather than the law. True they are constantly in the process of translation into law, but the concept of human rights is not dependent on legal formulation or enactment for its validity.”[10]

Taking the right to free expression as an example, there are indeed key distinctions between its role in human rights law,[11] and as a value, goal or philosophy. The legal right can be relied upon in national[12] or regional[13] courts to bring about a specified end – for example publication of an article - provided the necessary criteria are met, as the right is not absolute.[14] The “value” is useful in protest, rhetoric and policy activity – for example, it has been used in the World Summit on the Information Society as a tool to call for practical change in a digitised world.[15] Outside of codified form, however, the actual content and scope of “the right to freedom of expression” is unclear.

More basically, it is unclear what can in fact be termed “human rights”; different answers come from natural rights, justice or utilitarian theories, and from different international instruments. The right to life is widely recognised; freedom of expression less so, at least at a theoretical level; [16] and there is also some form of right to property – which would appear to cover IP.[17] Further, arguments exist that IP is itself a human right worthy of protection, not only as a form of property but as a reward of author’s and innovator’s activity, recognised by (some) human rights instruments,[18] or pursuant to natural rights and utilitarian doctrine.[19]

### 3. In the real world

#### *The esoteric...*

If human rights and IP are potentially intertwined, whatever the basis and scope, what use has been made of this? The debate on IP and human rights has to date taken four main forms: academic writing;[20] activist lobbying;[21] discussion and resolutions of international institutions;[22] and case law. The first three categories have seen aspirational use of human rights values to bring about a more morally and socially acceptable application of IP. Work has focussed on solving real world practical problems, without reference to legal nicety; or on developing creative, law based solutions to such problems. Neither approach has required detailed analysis of the precise human right in question; its scope; its relationship with IP; and the basis upon it may, or must, be considered by a court.[23]

In contrast, these factors are fundamental to case law. This is the key means of exploring whether human rights motivated approaches to IP[24] will actually work to protect those improperly threatened by its application. It has been said that “[i]t is often forgotten that law as a matter of fact is frozen politics”;[25] even if this is accepted, the law remains “frozen”. Judicial activism, however well motivated, is generally undesirable. Change should be incremental, on the basis of evolving norms,[26] rather than through a judicially driven human rights based revolution. Thus a court may be sympathetic to the argument that enforcement of copyright to control access to and downloading of potentially life saving information is morally unacceptable, contrary to natural law, or in breach of an international human rights instrument. However, unless the relevant law provides a means of taking these factors into account, the arguments are worthless.

#### *...and the functional*

There are a number of cases in which human rights were indeed able to be considered, explicitly or implicitly, together with IP. Few of these, particularly outside the United States, in fact consider cutting edge technology. However, the principles arising are of value in analysing the future value and relevance of this area of law, and in illuminating any inadequacies in the present IP systems, including existing limitations[27] and exceptions.[28]

Further, although it would have been possible for cases to have existed in any national jurisprudence protecting both IP and human rights,[29] and also in the literature of human rights[30] or IP[31] bodies, comparatively few cases have been identified. In addition, available case law is from courts of developed, or more advanced developing, countries and regions which have sophisticated legal and IP systems, and existing, or evolving, means of protection of human rights.[32] This may be inevitable, given the resources and locations of IP owning corporations. Further, there is the greater ability/luxury in such countries to have access to relevant fora and to focus on more creative approaches to IP and human rights.[33] However, the sources of relevant case law appear symptomatic of tensions in the present global IP system. As with TRIPS, this aspect of evolution of IP is being driven by those in developed regions.[34] As a result, the law may move forward on the basis of cases mainly considering the interests of corporations, prominent individuals and activists; which may not always coincide with the more obvious questions of IP and human rights considered at the outset of this paper.

## 4. Case Analysis

### 4.1 Copyright

The most fruitful source of case law is copyright and freedom of expression. Cases are found in the United Kingdom (“UK”), the Netherlands and the United States.

#### England

In the UK, the new relevance of ECHR rights stems directly from the Human Rights Act 1998. This provides excellent scope for analysis of the possible practical impact of ECHR human rights on IP. [35]

A seminal case is the decision of the English Court of Appeal in *Ashdown v Telegraph Group Ltd* (“*Ashdown*”), [36] a copyright infringement claim concerning extracts of minutes of a meeting between the former Leader of the UK Liberal Democrats and the UK Prime Minister. The case provides an excellent overview of the terrain, considering the relationship between different human rights, and copyright, given the exceptions inherent in all three; the distinctions between rights and more general concepts; and policy concerns in respect of using human rights to reopen the balance.

The Courts considered the ECHR right to freedom of expression, it being argued that as the UK Human Rights Act 1998 requires courts [37] to give effect to the ECHR, the relevant legislation, including defences relating to fair dealing [38] and the public interest, [39] should be construed to protect the right to free expression.

The ability for human rights matters to be considered in a dispute between individuals were not challenged. [40] At first instance, this was rejected on the basis that the existing regime contained appropriate balances between the rights of the copyright owner and wider public questions, which included rights of freedom of expression. [41] The court placed great weight on the exceptions to article 10 ECHR, [42] and on the fear that human rights scrutiny of existing adequacy of exceptions in IP rights could lead IP litigation to “burgeon out of control”. [43] As a result, the court considered the claim purely within the copyright legislative matrix. [44]

In contrast, the Court of Appeal engaged in a detailed analysis of human rights, referring not only to freedom of expression and its restrictions, but also to the ECHR property rights of the copyright owner. [45] It clearly stated that as infringement of copyright is breach of a human right to property, [46] a corresponding restriction of free expression could be justified in some circumstances.

However, as both copyright and free expression were not absolute, the essential question was what was the appropriate balance.

The Court of Appeal held, on the basis of existing article 10 jurisprudence, that there may be rare cases where the existing balance was not appropriate - where there was a wider interest in not only the publication of information (which copyright should not prevent) [47] but in the publication of specific words or quotations. In such circumstances, copyright should not be used to prevent this. [48] Publication could then be justified by using the public interest provision as a vehicle for article 10 freedom of expression to prevail over copyright. [49] The Court of Appeal stressed that this would depend very much on the facts of individual cases, and rejected previous attempts by the Court of Appeal to limit the circumstances when the public interest provision could apply. [50]

Much of value has been written about this decision. [51] The case supports the argument that the public interest provision should be interpreted to give effect to freedom of expression, and that this should prevail over copyright in “rare cases”. [52] The one caveat to this is the widely considered question as to the proper role, if any, in UK law of the public interest defence after the EC Copyright and Information Society Directive. [53]

This support for the public interest provision, and more general references to impact of “the public interest in freedom of expression” on fair dealing<sup>[54]</sup> (where it may have been more accurate to refer to the impact of article 10 free expression on fair dealing)<sup>[55]</sup> may also be of wider relevance. This could be a piece of the jigsaw to be combined with such dicta as “public interest is a defence outside and independent of statutes, is not limited to copyright cases and is based on a general principle of common law”, to build and strengthen a general public interest concept. This could continue to evolve in conjunction with fundamental rights<sup>[56]</sup> and public policy,<sup>[57]</sup> to construct a framework to import human rights values and law to address problems with IP in the UK. For example, in extreme cases (say, involving patents and the right to life) reliance could be placed on the concept of iniquity to prevent a patent owner relying on its rights.<sup>[58]</sup>

Needless to say, a key aspect of such an argument and, indeed, the *Ashdown* rare circumstance, is judicial activism of the nature criticised above. In limited extreme cases, however, such an approach would be appropriate, and would not upset the constitutional balance between court and legislature, nor remove legal certainty. This approach is reflected by the development of, and later retreat from, the non derogation from grant/spare parts exception. This was developed by the House of Lords in *British Leyland*<sup>[59]</sup> to deal with another excessive enforcement of IP.<sup>[60]</sup> In *Canon Kabushiki*,<sup>[61]</sup> however, an attempt to apply the doctrine to printer cartridges, the Privy Council held that there was no legal basis for the concept and it should be seen as one of public policy, with limited effect outside its own facts; the facts in that case did not warrant its application. Further, the Privy Council said it was “constitutionally questionable” for a court to declare public policy and override express legislation.<sup>[62]</sup>

The final step came in *Mars*,<sup>[63]</sup> by which time new legislation<sup>[64]</sup> had been enacted to address the specific problems in question, and then amended pursuant to Community Directives to include relevant protections for computer programs and database rights. Interestingly in the present context, it was argued that the right to repair exception had been retained by the public interest provision considered in *Ashdown*.<sup>[65]</sup> This argument was rejected, on the basis that the legislation was a complete code in this regard, that it did include specific exceptions, could have referred to the non derogation exception and did not.<sup>[66]</sup> However, the court went on to hold that if the exception did in fact continue, then it was to be interpreted in line with public policy grounds and applied only when “the court [was] reasonably certain that no-right thinking member of society would quarrel with the result”.<sup>[67]</sup>

For present purposes this has two implications: judicially created exceptions will be abandoned when the law or facts do not require them; <sup>[68]</sup> and that it is still possible for some public policy exceptions to exist in UK and to be applied by the courts in limited cases.

### Netherlands

The Constitution of the Netherlands<sup>[69]</sup> protects free expression of thoughts and opinions, subject to other legal obligations.<sup>[70]</sup> The Netherlands is also a signatory to the ECHR. Superior Dutch courts have recently considered two important cases about the relationship, and appropriate balance, between freedom of expression and copyright

The District Court of Amsterdam in “*Harry Potter*”<sup>[71]</sup> considered a book about a girl wizard called “Tanya Grotter”. Importantly, for present purposes, the court held that the constitutional right of free speech did not provide a licence to infringe copyright.<sup>[72]</sup> The decision was appealed. After focussing on infringement, the Appeal Court stated, without reference to the Dutch constitution, that article 10 ECHR did not prevent infringement in this case, as the Dutch copyright regime fell within the permitted exceptions to article 10: “[n]o matter how essential the protection offered by Art.10 ECHR may be, in this case ....has overstepped the legitimate boundaries.”<sup>[73]</sup>

As is invariably the case, the actual reasoning is very much based on the facts and the extreme

similarity, and lack of justification for it, between the two stories. The decision appears, however, to mirror standard practice in the Dutch courts, with freedom of expression arguments rarely succeeding.[74]

An exception was the latest case concerning copyright in the works of the Church of Scientology. *Church of Scientology v XS4ALL* considered extracts of the works placed without consent on a Dutch website, and an attempt to have them removed. Relying on article 10, which included the interest of the public in receiving information about the Church, it was held that these interests should prevail over copyright.[75]

These cases and commentaries on them confirm the importance of subject matter. In *Ashdown*, it was considered to be an extreme case where there was a need to see the actual words, so free expression should prevail; in *Church of Scientology*, for different extreme reasons, free expression again prevailed. However, in the less morally acceptable, and more commercial, environment of *Harry Potter* and parodic books, copyright prevailed. This continued relevance of facts, and the prevalence of human rights only in rare justifiable cases, is also seen in the copyright case law of the United States.

### United States

In the United States there is no relevant human rights legislation or treaty, and the key source is the Constitution. The well known First Amendment protects the right to free speech.[76] However, there is also a constitutional basis for protection of IP, with article 1 Section 8 (8) conferring power on Congress to “promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”. This is similar to the apparent basis for IP in human rights instruments – with the addition of “limited times”. [77] However, the history of the different rights is revealing; whereas the international instrumental rights have stimulated debate for a human rights based approach to IP, the United States constitutional protection of IP has led to argument that an entrenched and inflexible approach must be adopted to the future of IP, at the expense of the wider interest.[78]

There have been three relevant areas of case law in the United States regarding the impact of human rights on IP challenges posed by technology. The first mirrors the consideration elsewhere of circumstances in which free speech will prevail over copyright in more traditional fields. The second is whether extension of copyright term is in breach of limitations set out in the constitutional IP power. Although the proposed extension was introduced for reasons of international harmony, concerns in respect of the power of copyright owners in the digital world made free speech considerations relevant. The third is the validity of legislation specifically introduced to deal with digitisation questions.

In the first set of cases, the fundamental question was the impact of the US doctrine of “fair use”, now codified in the copyright law, as an exception to infringement[79]; and the resulting relevance, if any, of the First Amendment.[80] In contrast to the detailed exceptions existing in, for example, the UK legislation, the US has an apparently relatively flexible system based upon this concept.[81]

Given the existence of the exception, courts traditionally proved reluctant to consider the First Amendment in the copyright context,[82] although it has been argued that the First Amendment (or perhaps its values) did in fact inform and guide use of the fair use test.[83] As with the initial court in *Ashdown*, the consensus was that the existing copyright regime was adequate in itself, containing its own internal checks and balances; and that as it was also in itself an instrument of free speech (through encouraging creativity) there was no need to rely on external factors such as the First Amendment.[84] A significant change came regarding “The Wind Done Gone”, an parodic approach to “Gone with the Wind”, from the perspective of a slave. For the first time, the court did specifically consider and apply the First Amendment in the copyright context; free speech was held to prevail over copyright in that case.[85]

However, a more traditional view of copyright subsequently prevailed regarding the extension of copyright term, in the decision of the US Supreme Court in *Eldred v Ashcroft*.<sup>[86]</sup> It was argued that the extension breached the constitutional IP power considered above, as it was not for a “limited time”, and was also in breach of the First Amendment. After hearing detailed arguments, including from a wide variety of interested non parties, the court came down firmly on the side of copyright. It held that the extended term was still limited; the copyright law contained adequate safeguards for the interests of others; and that the two constitutional provisions were adopted at around the same time, which suggested that the Framers of the Constitution considered the two rights to be compatible. Interestingly, however, the Supreme Court stated that copyright law contained its own free speech safeguards, such as fair use (which allowed ideas to be used and, in some circumstances, the actual words themselves) and the idea/expression dichotomy.<sup>[87]</sup>

The third field considered the anti-circumvention provisions in the United States Digital Millennium Copyright Act. (“DMCA”)<sup>[88]</sup> These prohibitions on provision of products or information which could be used to circumvent encryption devices has led to much concern and human rights argument.<sup>[89]</sup>

In *Universal City Studios v Corley*,<sup>[90]</sup> it was argued that prevention of supply of information relating to anti-circumvention technology was in breach of the First Amendment, and prevented enjoyment of the fair use provisions of the copyright law. The Court of Appeals rejected these arguments. It held that the relevant information, while capable of First Amendment protection, was unconstitutional, as it was a tool which could enable important security devices, akin to burglar alarms, to be neutralised. The court considered it appropriate for Congress to limit free speech and fair use in such circumstances, given the key aim of prevention of piracy. In *Elcom*, a Russian academic was prosecuted for selling a computer program enabling a user to circumvent online restrictions. It was held again that while computer code was speech within the First Amendment, the DMCA protected legitimate government interests, was not in breach of First Amendment rights, and did not impermissibly violate users’ rights.<sup>[91]</sup>

Similar issues were considered in *321 Studios v Metro Goldwyn Mayer Studios, Inc*<sup>[92]</sup>, regarding technology which cracked encryption codes on DVDs, so that back up copies could be made. *Eldred* had now been decided, and it was argued that the copyright law contained free expression protection, including fair use, such that the conduct should be permitted, as making a copy of the DVD would constitute fair use. This argument was rejected. It was held that the First Amendment could not save conduct which had been found to be criminal under the DMCA;<sup>[93]</sup> that fair use was still possible, it was simply more difficult than if the technology could be used – eg non digital copying of DVD content; and there were also alternative acceptable means to access non copyrighted works which may be on DVDs.<sup>[94]</sup> Further, “it is a stretch to claim that *Eldred* mandated absolute First Amendment protection for fair use of copyrighted works”.<sup>[95]</sup> Once again, it was held that some incidental limitations on First Amendment freedoms were permissible, and the DMCA was not more burdensome than necessary.<sup>[96]</sup>

This line of cases is highly relevant to, and not very promising for, those hoping to rely upon human rights to restrict the implication of IP in the digital world. *Eldred* and “The Wind Done Gone” decision would appear to open the door to human rights arguments, reiterating the *Ashdown* concept of permitted copying in limited cases. United States courts are appearing reluctant, however, to engage in any judicial activism, or basic interpretation, against the IP owners. They are seemingly swayed by the wider policy objective of prevention of piracy and the supremacy of Congress in this field. While this recourse to an exterior policy, albeit a presently undesired one, means that the tide may turn in the future, for the time being the prospects are not encouraging.

However, previous use in the United States of the general public interest in making information available (as opposed to the First Amendment), may be relevant in restricting the implications of copyright. This has been used in extreme cases such as regarding publication of images of President

Kennedy's assassination<sup>[97]</sup> and the publication of a biography of Howard Hughes.<sup>[98]</sup> Further, it has been said that the arguments for use of the First Amendment in copyright are

“lacking in persuasive authority. And there the matter of the First Amendment and copyright lies. Or, at least, it seems that there it would lie if it were not something that commentators refuse to let go of and defendants refuse to give up.”<sup>[99]</sup>

It would indeed seem that, in the right case, the door may not be entirely closed on the First Amendment or broader policy bases in the United States, particularly given the activism and determination of some academics.

### Conclusion

In the jurisdictions reviewed, in copyright it is well accepted, both on the basis of actual constitutional protection of free speech, or ECHR rights with effect in national law, that freedom of expression may operate to restrict copyright. However, this will only be done in limited cases, and the willingness of courts to be creative appears a key factor. Progress, from the human rights perspective, must be seen as limited; when existing exceptions are considered, human rights have had little impact on the end result; however, the application of human rights and general policy considerations in difficult boundary cases may be of future use in a battle to restrict copyright in appropriate cases. Is this conclusion reflected in case law concerning other IP rights?

### **4.2 Trade Marks**

Human rights have been of most relevance to trade marks in the fields of “sucksites”,<sup>[100]</sup> highly important in the digital world, and parallel importing.

England<sup>[101]</sup>

In parallel importing, human rights were relied upon in a dispute between Levi and Tesco. This concerned whether, and in what circumstances, Levi could rely on its trade marks to prevent Tesco importing, and selling on the UK market, genuine goods bearing the “Levi” trade mark, which had been put on the market outside the European Economic Area.<sup>[102]</sup>

Tesco argued<sup>[103]</sup> that for the English court to apply the ECJ decision, which potentially limited parallel importing, would be inconsistent with basic principles of Community law, which included respect of fundamental human rights; that the court should strive to avoid this;<sup>[104]</sup> and that the relevant legislation must be interpreted so as to be compatible with Tesco’s human rights.<sup>[105]</sup> It was argued further that application of the decision would breach Tesco’s right to freedom of expression<sup>[106]</sup> in informing the public that the jeans are from “Levi;” and also its right to enjoyment of property, <sup>[107]</sup> in restricting its owning and disposing of the jeans.<sup>[108]</sup> In turn, reference was made to Levi’s human right to enjoyment of property in their trade mark.

The English court rejected Tesco’s argument.<sup>[109]</sup> It held that in the battle between the two economic rights to property (trade mark and jeans), there is a wide discretion on legislatures to strike the appropriate balance in the general interest. The balance struck here was not without reasonable foundation.<sup>[110]</sup> Further, the right to freedom of expression was not absolute, was weak in the context of “commercial expression” and had to be balanced against Levi’s human rights in its trade mark.<sup>[111]</sup> The law relating to parallel importing did again strike a proper balance.<sup>[112]</sup>

Further guidance on human rights and trade marks should be forthcoming from the European Court of Human Rights. The Court will consider the relationship in a dispute regarding rights to use “Budweiser” in Portugal.<sup>[113]</sup> It will be interesting to note whether the greater grounding of the court in human rights has any significant impact on the decision.

More generally, *Levi v Tesco* suggests<sup>[114]</sup> that where the dispute involves balancing economic and commercial concerns, albeit within human rights discourse, it will be difficult to upset the pre-existing balance of interests reflected in the IP regime. Further, it is clear that the interpretative obligations of the UK Human Right Act<sup>[115]</sup> do not entail the unquestioned supremacy of ECHR rights. Although the Act “introduces a principle of benevolent construction,” it does not permit a construction of a statute contrary to its plain meaning. The will of the UK Parliament remains supreme. <sup>[116]</sup> This is a firm reminder of the practical limits, in the UK context, of reliance on allegedly fundamental human rights in the face of express parliamentary will. Notwithstanding the similarity of the copyright decisions against different constitutional backdrops, successful reliance on human rights is most likely in countries which have constitutional recognition of human rights. Although balancing acts will still be required, if legislation is unconstitutional, then it will be invalid.<sup>[117]</sup>

France

Examples of successful reliance on constitutional rights over trade marks are found in France, in “critical comment” involving “jeboycottedanone.com” and “E\$\$O”. It was held that the constitutional interest in freedom of expression would prevail over the trade mark rights. The human right would only be restricted as necessary to protect the rights of others – and that requirement was not met here. <sup>[118]</sup> In these cases the allegedly infringing use formed part of considered, albeit unwelcome, criticism, rather than use for commercial gain, or to engage in mindless abuse.

WIPO domain name panels

The same themes can be extracted from decisions of WIPO domain name panels. A helpful decision (although the decisions of panels are not binding in subsequent cases) is “vivendiuniversalsucks.com”.<sup>[119]</sup> It was decided, by majority only, having reviewed a variety of



(conflicting) decisions on similar themes, that the name should be transferred to the trade mark owner. The panel found that the use of “sucks” would not always indicate there was no connection with the trade mark owner particularly when, over the internet, the site may be accessed by non English speakers; and found that the right to express views about goods or services did not entail the right to apparently identify oneself as the provider of them. Key factors appear to be whether there is genuine criticism of another’s activity, and the possibility of confusion as to the relationship between the operator of the site and the trade mark owner.

### South Africa

Further support for this approach comes from the Supreme Court of South Africa in *Laugh It Off v South African Breweries*<sup>[120]</sup> in a comprehensive analysis of relevant issues and case law in other jurisdictions.<sup>[121]</sup> The case concerned variations on labels for “Carling Black Label” beer,<sup>[122]</sup> done by an anti-capitalist activist, who objected to all forms of branding. <sup>[123]</sup> The court considered the appropriate balance between trade mark infringement, on the basis of dilution; and permissible conduct, on the basis of the constitutional right to free expression,<sup>[124]</sup> and found there to be infringement.

The themes considered above emerge again: the court did not look kindly on purely derisory attacks on, or abuse of, the trade mark, done with predatory intent, for commercial gain. This was abuse, not exercise, of free speech.<sup>[125]</sup>

### United States

The First Amendment is also of potential relevance to trade marks, although the established position was that given the function of trade marks to reduce consumer confusion, the use of trade marks to restrict free speech was appropriate and justified.<sup>[126]</sup> As was seen in South Africa, however, corporate criticism using trade marks, and the introduction of “suckssites”, reopened the question. <sup>[127]</sup> The US courts have remained reluctant to consider First Amendment questions in this field, but have been prepared to do so when use is for expressive, commentary purposes, with no risk of consumer confusion.<sup>[128]</sup>

### Conclusion

As with copyright, in the jurisdictions considered the courts have accepted human rights to be relevant in the trade mark context. From the balancing acts carried out, however, it would seem that human rights will prevail only in cases of genuine comment seeking to advance public debate. If the trade mark use is merely abusive, or in a wholly commercial context, then the courts will be unwilling to interfere with the scope of trade mark protection. Cases such as *E\$SO* suggest, however, that human rights may be of use as a step towards curbing the greater excesses of multinational corporations.

## **4.3 Patent**

It is in this field that human rights have most intuitive application, and where they may do the greatest good. As yet, however, there are only two relevant cases, one of which settled.

### South Africa

This case involved South African legislation to facilitate access to treatment for HIV/AIDS through compulsory licensing and importing of generic drugs.<sup>[129]</sup> Although this case settled, and is therefore strictly speaking outside the stated ambit of this paper, given the fundamental questions raised, it will be reviewed here.

This legislation met with a challenge from several pharmaceutical companies on the basis that it was

inconsistent with South Africa's obligations under the TRIPS agreement. Ultimately this case settled – theories abound as to the reason – but strong arguments exist that in any event the challenge would have been unsuccessful. The two main avenues of argument were that TRIPS permitted the relevant provisions; and that the provisions were permitted and required given the protections for access to healthcare and emergency medical treatment, and the right to life in the 1996 South African Constitution.[\[130\]](#)

A decision would have given increased validity (arguably unnecessary) to those who consider that rights to life and health should prevail in such cases; the attitude of large companies and large developed countries would also have been of interest.

### European Court of Justice

Questions of a similarly fundamental nature were considered by the ECJ[\[131\]](#) in a challenge by the Netherlands to the validity of the EC Directive on Legal Protection of Biotechnological Inventions (“the Directive”)[\[132\]](#) One alleged basis was that the Directive was inconsistent with the right of human dignity, a fundamental principle of Community law.

The ECJ confirmed that EU institutions were to act in line with general principles of Community law, and that this included observing the fundamental right to human dignity.[\[133\]](#) Further, the Advocate General in his detailed consideration saw human dignity as a fundamental right which must be respected, and noted that it was now expressed in article 1 of the Charter of Fundamental Rights of the EU.[\[134\]](#) The ECJ held, however, that, given the balance and limitations in the Directive,[\[135\]](#) including restrictions on patenting life per se, and prohibition on patenting contrary to ordre public, morality[\[136\]](#) and human dignity,[\[137\]](#) the Directive was not incompatible with human dignity - adequate safeguards existed.[\[138\]](#)

The decision is significant as it confirms the practical relevance in EU IP case law, as well as discourse, of the fundamental rights which are referred to in other case law[\[139\]](#) and in the Treaty on European Union.[\[140\]](#) This decision may form another piece of the jigsaw towards incorporating more general questions of human rights into IP enforcement. Although there may be challenges in identifying relevant fundamental rights and, as in respect of the Directive, reliance on such rights will not necessarily prevail, once again this may be a useful avenue in cases of extreme concern.

### Scotland

Confirmation that arguments based on human rights to property may be used by IP owners was recently provided in *ITP SA v Coflexip Stena Offshore Ltd.*[\[141\]](#) The patent owner argued that an infringement action should be put on hold, not dismissed, pending an appeal from a decision of the European Patent Office revoking the patent in suit. It was argued that to do otherwise would breach the right to property in the patent. This argument was rejected on more technical, rather than human rights, grounds, but it received due consideration. The case is a reminder, however, of the potentially ambivalent power of human rights.[\[142\]](#)

## 5. Conclusion

When human rights and IP appear in conflict, in most cases a middle ground position can be reached, applying the inbuilt exceptions in each. The cynic would say that this simply results in IP prevailing, however in the cases in question, with the likely exception of the United States anti-circumvention cases, an appropriately balanced decision was reached. It cannot be said, so far, that a human rights based approach to interpretation of IP is having any significant effect.

More encouraging is the repeated suggestion, in different countries and contexts, that there may be extreme cases where human rights could prevail over IP, where the existing internal IP regime may not have brought about this result. This approach would enable cases of extreme concern to be dealt with; and if societies and expectations should evolve through technological change such that, for example, it is considered a legitimate expectation for all to be able to access information music line for no charge, than the parameters of rare cases should evolve accordingly.<sup>[143]</sup>

That said, the piecemeal nature of case law, its limits identified above, and the risk/opportunity of settlement of cases, as seen in South Africa, are a timely reminder of the need for a global, holistic, inclusive approach to the wider development of IP and human rights. A need remains for academic writing, activism and involvement in policy making to direct and mould the longer term future of IP in this field.

- 
- [1] some planned by society and some unanticipated – see Weeramantry, C.G. (1983) “The Slumbering Sentinels” Penguin Books Australia, Australia, (“Weeramantry”) preface
- [2] Birnhack, M.D. “Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act” Ent. L.R. 2003, 14(2), 24-34 (“Birnhack”), 33
- [3] Eg see Netanel, N.W. “Locating Copyright within the First Amendment Skein” October, 2001 54 Stan. L. Rev. 1 (“Netanel”); Kingston, W. “Intellectual Property’s Problems: How Far is the US Constitution to Blame” I.P.Q. 2002, 4, 315-341 (“Kingston”), 316
- [4] Eg see Oxfam Discussion Paper 12/01 “Intellectual Property and the Knowledge Gap” (“Oxfam”), [http://www.oxfam.org.uk/what\\_we\\_do/issues/trade/trips\\_wsf2002.htm](http://www.oxfam.org.uk/what_we_do/issues/trade/trips_wsf2002.htm) (last accessed 16 March 2005) Section 1, para 2
- [5] See Oxfam Section 1, para 2, and Cornish, W.R. (2004) “*Intellectual Property. Omnipresent, Distracting, Irrelevant?*” Clarendon Law Lectures, Oxford University Press, Oxford, UK (“Cornish”) (“Cornish”), 60-61
- [6] See Chapman, A.R. “A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science” 1998 at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/chapman.pdf> (“Chapman1”)(last accessed 15 March 2005) 30, 33-5
- [7] See eg Richardson, M. “Trade Marks and Language” (2004) 26 Sydney Law Review 193 (“Richardson”) paras 26-43 – which also makes the point that often such sites have in fact been used to move forward dialogue between parties, rather than simply being destructive or unidirectional
- [8] See generally Brown, A.E.L. “Power, responsibility and norms: could and should human rights be used as a curb on intellectual property rights <http://www.law.ed.ac.uk/ahrb/publications/online/ipandhumanrights.doc> (“Brown”)
- [9] Where available and in English primary sources are consulted. Where indicated, secondary summaries have been used.
- [10] Weeramantry, 15
- [11] Eg article 10 European Convention on Human Rights and Fundamental Freedoms 1950 (“ECHR”)
- [12] Eg in the United Kingdom pursuant to section 3 Human Rights Act 1998, courts are to interpret legislation to give effect to ECHR
- [13] European Court of Human Rights - see article 19 et seq ECHR for framework and access
- [14] The right is not absolute: article 10(2) “The exercise of these freedoms....may be subject to such formalities, conditions, restrictions....as are prescribed by law and as are necessary in a democratic society ..for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence...”
- [15] See article 4 Declaration of Principles World Summit on Information Society at <http://www.itu.int/wsis/docs/geneva/official/dop.html>> (last accessed 10 March 2005) - wider relevant aspirations of the WSIS are at articles 1,2, 7, 8, 24-28 and re IP see article 42
- [16] For an overview of this field see Symonides, J.(ed) (2002) “*Human Rights: Concepts and Standards*” Dartmouth Publishing Co Ltd, Aldershot, England and Ashgrove Publishing Co, Vermont, USA and UNESCO, Paris; also Brown, 7-11; regarding right to life, see ECHR article 2, International Covenant on Civil and Political Rights 1966 (“ICCPR”) article 6; American Declaration on Rights and Duties of Man 1948 (“ADRM”), article 1; American Convention on

Human Rights 1969 (“ACHR”) article 4(1), Universal Declaration Human Rights 1948 (“UDHR”) article 3, African Charter of Human and People’s rights 1981 (“African Charter”) article 4 and Charter of Fundamental Rights of the European Union, article 21 (“EU Charter”); regarding right to free expression see ECHR article 10, ICCPR article 17, ADRDM article 4, ACHR article 13, UDHR article 19, African Charter article 9 and EU Charter article 11.

[17] See Lockean natural rights theories and also, instrumentally, Protocol to ECHR, article 1; ACHR, article 21; UDHR, article 17; African Charter, article 14; and EU Charter, article 17 – article 17(2) specifically refers to IP.

[18] Article 27(2) UDHR and article 15(1)(c) International Covenant on Economic Social and Cultural Rights 1966 (“ICESCR”). See Chapman, A.R. “Approaching intellectual property as a human right: obligations related to Article 15 (1)(c)” Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing (“Chapman”), 6; and article 1, UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2000/7 (“2000 Resolution”)

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>> (last accessed 16 March 2005)

[19] See Afori, O.F. “Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law” Winter, 2004 14 Fordham Intell. Prop. Media & Ent. L. J. 497, (“Afori”) 498-9, 501, 518-525, 531-6 538, 548-560); and Gordon, W.J. “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” May, 1993 102 Yale L.J. 1533, 1535-1539, 1606-9. Needless to say, these are not universally accepted, with the more conventional view of IP as artificially created economic rights still finding favour – see Birnhack, 30 and Jehoram, H.C. “Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Approaches” E.I.P.R. 2004, 26(7), 275-279 (“Jehoram”).

[20] Eg Chapman and Chapman<sup>1</sup>; Helfer, L.R. “Human Rights and Intellectual Property: Conflict or Coexistence” 5 MINN. INTELL. PROP. REV 47 (2003) at <http://mipr.umn.edu/archive/v5n1/Helfer.pdf> - last accessed 16 March 2005 (“Helfer”); Afori

[21] See eg <http://www.gene-watch.org/genewatch/articles/14-5aids.html> last accessed 16 March 2005);

<http://www.freeexpression.org/> (last accessed 16 March 2005)

[22] See 2000 Resolution; UN High Commissioner for Human Rights, Intellectual Property and Human Rights, Sub-Commission on Human Rights Resolution 2001/21 (“2001 Resolution”) <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.RES.2001.21.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.RES.2001.21.En?Opendocument)> (last accessed 16 March 2005) (“2001 Resolution”); and Brown, 28/9. Note also WIPO Meetings 1998, papers from which include Chapman<sup>1</sup>, Steiner, C. “Intellectual Property and the Right to Culture” 1998 WIPO Panel Discussion “Intellectual property and human rights”, at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/steiner.pdf> (last accessed 1 March 2005); and Drahos, P. “Intellectual Property and Human Rights” I.P.Q. 1999, 3, 349-371

[23] Although activities in this field cannot always be compartmentalized – see the wide involvement of US academics in representing parties, and preparing amici briefs, in leading cases such as *Eldred v Ashcroft* (considered below) and in generating debate and activity, eg through The Free Expression Policy Project (see relevant report “The Progress of Science and Useful Arts’ Why Copyright Today Threatens Intellectual Freedom” at

<http://www.fepproject.org/policyreports/copyright2dexsum.html> (last accessed 16 March 2005) (“Free Expression

Report”); and in movements towards more involvement of civil society in international institution such as WIPO (see Geneva Declaration on Future of WIPO 2004 at <http://www.cptech.org/ip/wipo/futureofwipodeclaration.doc> (last accessed 16 March 2005) and WTO, see eg [http://www.worldcivilsociety.org/REPORT/EN/06/18-jul-02/summ\\_18.07.html](http://www.worldcivilsociety.org/REPORT/EN/06/18-jul-02/summ_18.07.html)> (last accessed 16 March 2005)

[24] Eg as advocated by Chapman 13, and Chapman<sup>1</sup>, 1-2, 6, 11, 13; Helfer 48,58; Geiger, C. “Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law” IIC vol. 35 vol 3.2004 268-280 (“Geiger”) 278-80 and see Brown 32

[25] Eriksson, L.D. “The Indeterminacy of Law or Law as Deliberative Practice” in Hirvonen, A. (ed.) *Polycentricity. The Multiple Scenes of Law* (1998): 52 cited in May, C. “Commodifying the ‘information age’: Intellectual property rights, the state and the Internet” (2004) 1:3 *SCRIPT-ed* 448 (“May”)

[26] See May, 450-1 and Brown 35,37

[27] Eg based on articles 9, 12, 19, 27(1), 28 and 33 TRIPS

[28] Eg based on articles 9(2), 13, 27(2) and 30 TRIPS. Note (1) that such exceptions can be and are applied differently in national laws; and (2) that these exceptions largely reflect existing balances developed over the history of IP – for analysis in terms of copyright see Dinusha Mendis, *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*, vol 7.5 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2003) at <http://www.ejcl.org/75/art75-8.html> (last accessed 15 March 2005), (“Mendis”) Sections 2-5. Note also the impact of article 13 TRIPS on the import of the “three step test” in article 9(2) Berne Convention regarding exceptions to copyright as interpreted by the WTO panel in 2000 – WT/DS 160 (accessible through <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#bkmk31](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk31)> (last accessed 16 March 2005)) as considered in Ginsburg, J.C. “Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions” Columbia Law School January 2001 at [http://papers.ssrn.com/paper.taf?abstract\\_id=253867](http://papers.ssrn.com/paper.taf?abstract_id=253867) (last accessed 15 March 2005) (“Ginsburg”) and Johnson, P. “One Small Step or One Giant Leap” E.I.P.R. 2004, 2696), 265-272 (“Johnson<sup>1</sup>”). The test does not allow for reference to human rights considerations and the panel found motive and policy to be irrelevant – but note Ginsburg, 14-6 and Johnson 1, 268 as to potential arguments and situations of concern

[29] Bearing in mind that through TRIPS all WTO members should have or be introducing IP regimes

[30] For example the European Court of Human Rights, Human Rights Committee of International Covenant on Civil and Political Rights

- [31] For example, WTO Appellate Body, European Patent Office, European Court of Justice
- [32] UK, other EU member states, the United States and South Africa.
- [33] rather than on more fundamental questions of introduction of an IP system to comply with TRIPS obligations, and prevention of torture and genocide
- [34] See eg Drahos, P. “*Negotiating Intellectual Property: Between Coercion and Dialogue*” in Drahos, P. and Mayne, R. (eds) 2002 “Global Intellectual Property Rights. Knowledge, Access and Development” Palgrave MacMillan, Basingstoke and New York
- [35] See Pinto, T. “The Influence of the European Convention on Human Rights on Intellectual Property Rights” E.I.P.R. 2002, 2, 24(4), 209-219 (“Pinto”), 209
- [36] [2002] R.P.C. 5
- [37] Section 6 - as public authorities
- [38] Section 30 Copyright Designs and Patents Act 1988 (“CDPA”) - UK legislation.
- [39] Section 171(3) CDPA
- [40] Notwithstanding previous views that human rights arguments were only available in the “vertical” context. See *Campbell v MGN Ltd* [2002] UKHL 22, para 17-19 and Geiger, 275
- [41] Para 2, 18, 38 – decision also reported at [2001] R.P.C. 34
- [42] Para 16 refers to this
- [43] Para 17 refers to this
- [44] Para 19-21 refers to this
- [45] Para 25 : ECHR article 1 protocol 1: “Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law. The preceding provision shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest....”
- [46] Para 28
- [47] Para 30/1
- [48] Para 39-43, 45
- [49] Para 45, 47, 58
- [50] Para 52-8 and see *Hyde Park Residence Ltd v Yelland* [2000] R.P.C. 604
- [51] Eg Waelde, C. “Copyright, Corporate Power and Human Rights” (publication forthcoming) paper for AHRB Birkbeck Copyright Network, June 2004 (“Waelde”) 6-10; Pinto; Griffiths, J. “Copyright Law After Ashdown – Time to Deal Fairly with the Public” I.P.Q. 2002, 3, 240-264 (“Griffiths”); Birnhack; Johnson, P. “The Public Interest: Is it still a Defence to Copyright Infringement” Ent. L.R. 2005, 16(1), 1-6 (“Johnson”)
- [52] See Griffiths, 246; and Pinto, 218 for examples of what may be such rare cases ; cf Jehoram, 276 for a review of prior consideration of the issue
- [53] European Parliament and Council Directive 2001/29/EC of 22 May 2001, OJ 2001, L 167/10 which includes a finite list, not including the public interest, of possible exceptions to copyright. However, the consensus appears to favour some continued future and room for flexibility in UK exceptions to copyright see eg Waelde, 1, 13; Mendis, para 6 ; Johnson, 1, 5.
- [54] Para 66
- [55] because of the Human Rights Act sections 3 and 6
- [56] See below for consideration of their role in Community law in the context of the validity of the Directive on Legal Protection of Biotechnological Inventions
- [57] See *British Leyland Motor Corporation v Armstrong Patents Company Limited* [1986] R.P.C 279 (“*British Leyland*”) et seq below
- [58] See Lord Denning, obiter, in *Fraser v Evans* [1969] 1 Q.B. 349, 362 referred to at para 51 *Ashdown*
- [59] *British Leyland Motor Corporation v Armstrong Patents Company Limited* [1986] R.P.C 279
- [60] to enable spare parts for a car to be obtained from sources other than the original manufacturer – the case concerned the interface between industrial designs and copyright before the CDPA. See 361, 374, 376; and on this issue, see Brown, 25
- [61] *Canon Kabushiki Kaisha v Green Cartridge Company (Hong Kong) Limited* [1997] F.S.R. 817
- [62] At 824
- [63] *Mars UK Ltd v Teknowledge Ltd* [2000] E.C.D.R. 99
- [64] CDPA
- [65] Section 171(3)
- [66] At 105-7 – similar to the arguments considered above regarding the Copyright and Information Society Directive.
- [67] At 108
- [68] See also Llewellyn, G. “Does Copyright Law Recognise a Right to Repair” E.I.P.R. 1999, 21(11), 596-599
- [69] 1989
- [70] Article 7
- [71] *J.K. Rowling, Uitgeverij De Harmonie B.V. and Time Warner Entertainment Company, LP v Uitgeverij Byblos B.V.*
- [72] See H3 of report of appeal : *Uitgeverij Byblos B.V. v J.K. Rowling, Uitgeverij De Harmonie B.V. and Time Warner Entertainment Company, LP* [2004] E.C.D.R. 7
- [73] Para 29, 4.7.10
- [74] Jehoram, 279 and footnote 27
- [75] See Krikke, J. “Netherlands - Infringement by Quotation - Confidentiality of Documents - Freedom of Speech –

Human Rights” See also Jehoram, 278 – note this view that this decision is incorrect given Jehoram’s (rather sweeping) view that in Europe copyright is to protect moral as well as economic interests, unlike in the United States. Jehoram considers that, given the desire of the Church of Scientology to keep information secret, these interests in the copyright should have prevailed over wider interests of publication. It remains to be seen if this decision will be appealed.

[76] See Netanel, 31-36; and Loughlan, P.L. “Looking at the Matrix: Intellectual Property and Expressive Freedom” E.I.P.R. 2002, 24(1), 30-39 (“Loughlan”), 30-34 for a general review of the First Amendment

[77] See Chapman

[78] Kingston; Netanel 37

[79] Now found in 17 U.S.C. 107(2001). The factors which will be considered include: the purpose and character of use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use on the market for or value of the copyrighted work

[80] See Free Expression Report for a detailed policy focussed overview of the field

[81] See also Jehoram, 277 and Burrell, R. “Reining in Copyright Law: Is Fair Use the Answer” I.P.Q. 2001, 4, 361-388 (“Burrell”), 361, 381-388

[82] For a detailed analysis, see Netanel – and note concerns that the protection provided is inadequate

[83] See Loughlan, 36

[84] See Jehoram, 275 for further analysis

[85] *Suntrust Bank v Houghton Mifflin Co.*, 252 F.3d 1165 (11<sup>th</sup> Cir. 2001). See Netanel, 2, 82-4

[86] 537 U.S. 186, 123 S.Ct 769

[87] LEHN2. S.Ct 788-89 For one of many criticisms, particularly regarding the ongoing merit of the idea/expression dichotomy, see Free Expression Report, Section II

[88] Cf in Europe, Copyright in the Information Society Directive

[89] For fuller analysis, see Free Expression Report, Chapter III and Waelde, 13 regarding Europe. s

[90] 273 F. 3d 429 (2<sup>nd</sup> Cir. 2001)

[91] *United States v Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002)

[92] 307 F. Supp. 2d 1085

[93] Para 33

[94] Para 43

[95] Para 42, see also 51

[96] Para 46

[97] *Time Inc v Geis* 293 F. Supp. 130 – although note Loughlan, 37 arguing that the decision was in fact on First Amendment grounds

[98] *Rosemount Enterprises v Random House* 366 F. 2d 303 (2<sup>nd</sup> cir 1966) – and see Jehoram, 278

[99] Loughlan, 38

[100] The growth of activity in this area has led AIPPI to focus on it in its international comparative study Question 188 “Conflicts between trademark protection and free speech” see [www.aippi.org](http://www.aippi.org) <last accessed 9 March 2005>.

Preliminary national responses are were due 1 February 2005. The Working Guidelines provide a helpful overview of the field.

[101] England and Scotland are separate jurisdictions within the UK. In the field of parallel importing, there have been conflicting decisions (on other issues), and England, as opposed to the UK, is therefore considered here.

[102] Joined Cases C-414/99, C-415/99 and C-416/99, *Zino Davidoff S.A. v A&G Imports Ltd* [2002] R.P.C. 20, European Court of Justice (“ECJ”) - holding that the key question was the consent of the trade mark owner to sale in the EEA, which consent would not necessarily be implied.

[103] *Levi Strauss & Co v Tesco Stores Ltd* [2003] R.P.C. 18 - argument summarised at paras 21-23, 27-8

[104] On the basis of the “Marleasing” doctrine

[105] On the basis of section 3 UK Human Rights Act 1998

[106] ECHR article 10

[107] ECHR article 1 protocol 1

[108] Para 39 - relying on *Sporrong and Lonnroth v Sweden* (1983) 5 E.H.R.R. 35 – right to use and dispose of property is central to right of property and although it may be restricted in the public interest, restrictions must be proportionate – which Tesco argued it would not be as the very substance of their property right was impaired by the ECJ decision.

[109] Para 4 – indeed saw the argument as “startling”.

[110] H12,(7) para 40, relying on *Mellacher v Austria* (1990) 12 E.H.H.R. 391 regarding the scope of discretion re restrict enjoyment of property in accordance with the general interest.

[111] H13 (8), para 41

[112] H15 (10), para 41-2

[113] The case will consider Anheuser-Busch’s Portuguese trade marks and a treaty between Portugal and Czech Republic regarding the rights of Budjovický Budvar NP to use the term in Portugal *Anheuser-Busch Inc v Portugal* Case No. 73049/01. See <http://www.bloomberg.com/apps/news?pid=10000085&sid=aUSHUmUNJrhQ&refer=europe> (last accessed 14 March 2005)

[114] See paras 40-42

[115] Section 3

[116] Para 44.

[117] Cf UK Human Rights Act – only “remedy” in the case of UK legislation is declaration of incompatibility, section 4

[118] For a detailed analysis of the decisions and commentary, and other European cases, see Geiger

- [119] *Vivendi Universal v Mr Jay David Sallen* at <<http://arbitrator.wipo.int/domains/decisions/html/2001/d2001-1121.html>> (last accessed 15 March 2005)
- [120] <http://wwwserver.law.wits.ac.za/sca/files/2422003/2422003.doc> (last accessed 16 March 2005)
- [121] Paras 21, 23, 30
- [122] Paras 2-3
- [123] Para 4, 8
- [124] Section 16(1)
- [125] Para 31-33. The court noted that this was similar to the position in France, the United States and Germany – paras 37-40
- [126] Loughlan, 33-34
- [127] The approach taken in the US is reviewed at Loughlan, 34-36
- [128] *Charles Atlas Ltd v DC Comics Inc*, 112 F.Supp. 2d 330(2000) and *Mattel, Inc v MCA Records* 28 F. Supp. 2d 1120 (1998); see Loughlan, 35
- [129] the Medicines and Related Substances Control Act (As Amended) 1997 – in particular section 15C
- [130] See Articles 6, 8(1), 31 TRIPS. See Murakymbe, H. and Kanja, G.M. “Implications of the TRIPS Agreement on the Access to Cheaper Pharma Drugs by Developing Countries: Case Study of South Africa v The Pharmaceutical Companies” *Zambia Law Journal* vol 34, 2002, 111; and text of British Academy lecture by Judge Edwin Cameron October 2004 “Patents and Public Health: Principle, Politics and Paradox” at <<http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp>> (last accessed 16 March 2005), Section VI
- [131] [2001] 3 C.M.L.R. 49
- [132] (98/44)
- [133] Para 70
- [134] Para 197 AG
- [135] Article 5(1)
- [136] Article 6
- [137] 38<sup>th</sup> recital to preamble
- [138] Paras 71-5
- [139] Eg *Levi v Tesco*
- [140] *International Handellsgesellschaft v Einfuhr* [1971] C.M.L.R 255 and article F(2) – including ECHR rights and fundamental rights resulting from constitutional traditions of member states
- [141] <http://www.scotcourts.gov.uk/index1.asp> (last accessed 15 March 2005)
- [142] See MacQueen, H.L. “Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Competition and Human Rights” (unpublished at time of writing) Paper following conference at University of Edinburgh, December 2004, 18-9
- [143] See Weeramantry, 201; Brown, 34-7