Human rights and intellectual property rights – An uneasy alliance?

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1. A DNA fragment encoding human H2-preprorelaxin, said H2-preprorelaxin having the amino acid sequence set out in Figure 2.

21. A polypeptide having human H2-relaxin activity with a primary sequence identical to the A-chain and B-chain comprising the following sequences:

**A-Chain**

Gln Leu Tyr Ser Ala Leu Ala Ala Lys Leu His Val Gly Cys Thr Lys Arg Ser Leu Ala Arg Phe Cys

**B-Chain**

Asp Ser Trp Met Glu Glu Val Ile Lys Leu Cys Gly Arg Glu Leu Val Arg Ala Gln Ile Ala Ile Cys Gly Met Ser Thr Trp Ser Lys Arg Ser Leu.
1. A purified preparation of pluripotent human embryonic stem cells which (i) will proliferate in an in vitro culture for over one year, (ii) maintains a karyotype in which the chromosomes are euploid and not altered through prolonged culture, (iii) maintains the potential to differentiate to derivatives of endoderm, mesoderm, and ectoderm germ layers when the cells are injected into a SCID mouse.

8. The preparation of claim 3, wherein the cells differentiate into cells derived from mesoderm, endoderm and ectoderm germ layers when the cells are injected into a SCID mouse.

9. A method of isolating a pluripotent human embryonic stem cell line, comprising the steps of:

   (a) culturing a human blastocyst;
   (b) dispersing cells from the inner cell mass of the blastocyst;
   (c) enriching the inner cell mass cells on embryonic feeder cells, wherein inner cell mass-derived cell masses are expanded;
   (d) dissociating the mass into dissociated cells;
   (e) culturing the dissociated cells on embryonic feeder cells;
   (f) selecting colonies with compact morphologies and cells with high nucleus to cytoplasm ratios and prominent nucleoli; and
   (g) culturing the cells of the selected colonies to thereby obtain an isolated pluripotent human embryonic stem cell line.

10. A method as claimed in claim 9, further comprising maintaining the isolated cells on a fibroblast feeder layer to prevent differentiation.

11. A cell line developed by the method of claim 9.
Modifying plants by genetic engineering to combat or control insects.
Setting the scene
relationship HR-IP undertheorized - "normative backwater" – two major approaches

• FIRST APPROACH
Human rights and IP are in fundamental conflict

  – Conflict
    Strong IP protection is undermining – and therefore incompatible with – a broad spectrum of human rights obligations, especially in the area of economic, social and cultural rights

  Resolution 2000/7
  “Actual or potential conflicts exist between the implementation of the TRIPs agreement and the realisation of economic, social and cultural rights”

  – Resolving this conflict
    • Recognition of the normative primacy of human rights law over IP law
cf. DRAHOS

• SECOND APPROACH
Human rights and IP are essentially compatible

  – Co-existence
    Human rights and IP share same fundamental question, same function, goal:
    - Benefit society (GEIGER)
    - Defining appropriate scope of private rights, while safeguarding public interest

    Covenant Economic, Social, Cultural Rights

  – Achieving the co-existence
    • IP rights are subordinate to human rights
    • Human rights feed into patent law
    • Recognition of human rights as limits to patent rights
Patent law

Private interest
inventor

Incentive to innovate

Quid pro quo

Social contract
theory (Ghosh, Lord Hoffman)

Consequentialistic
justification

Human rights law

Public interest
society

Incentive to disclose

IP should always be balanced with (other) human rights. But **HOW?**
“Il y a, messieurs, dans ce projet de loi deux grands intérêts à protéger: c’est d’abord l’intérêt des inventeurs qui ont droit à jouir du produit de leur invention; en second lieu l’intérêt du travail national, qui se confond avec l’intérêt de la société”

Charles Rogier, ministre de l'Intérieur, auteur du project de loi de la loi belge sur les brevets (1854) (Travaux préparatoires, 8 Décembre 1853)

Outdated approach – Need for contemporary interpretation
Public Interest

- Abstract approach: theological, philosophical writings (unwieldy notions)
- Concrete definition: desacralize concept, anatomize in its concrete emanations

Components in legal discourse

Contemporary approach
- Human dignity
- Food security
- Informed consent
- Access
- Public health
- Ordre public
- Morality
- Protection consumer
- Public security
- Protection life animals, plants

VAN OVERWALLE, 2000, ‘Naar een herijking van het octrooirecht’, Tijdschrift voor Privaatrecht
Human rights in patent law

- Human rights offer concepts essential to a contemporary interpretation of the notion of public interest, limiting private right
  - Human rights limiting *existence* of patent rights
    » human dignity, right to food
  - Human rights burdening patent rights
    » right informed consent/ access information
  - Human rights limiting *exercise* of patent rights
    » right access health care
Limiting existence of patent rights

• Human dignity limits existence of patent rights
  – Human dignity: well established
    • Preamble UDHR, Preamble Covenant, Preamble Oviedo Conventions, Art. 1 Charter Fundamental Rights EU, Art. 1 Universal Declaration Human Genome and Human Rights, Art. 1 Oviedo Convention

  – Relationship human dignity and patent law: quite recent
    • EU Biotechnology Directive 1998 “the following, in particular, shall be considered unpatentable: (a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings; (c) uses of human embryos for industrial or commercial purposes”

Response to case 2 (stem cells) – not case 1 (DNA)!
Limiting existence of patent rights

• Right to food might limit existence of patent rights
  – Right to food
    • Art. 11 Covenant

  – Relationship right to food and patent law: well established
    • Belgium-Parliamentary Commission 1854, German PA 1877
      Repealed, but re-visited with event of GMO
        • Committee Economic, Social and Cultural Rights (General
          Comment 17, 2005): “State parties should ensure that their
          protection regimes constitute no impediment the their ability to
          comply with their core obligations in relation to the rights of food”
        • States might consider supporting the right to food by limiting
          patent protection for (genetically modified) plants and plant seeds
          Response to case 3 (GMO)
Burdening patent law

- Right to informed consent burdens patent law
  - Right to informed consent
    - Biotechnology: *right to informed consent to further use + commercialisation*
      - Accessory right of other – fundamental - human right?
        » Prohibition torture: art. 5 UDHR, art. 4 Covenant
        » Right physical integrity: art. 3 Covenant
      - Autonomous right
        » Art. 5 and 22 Oviedo Convention
    - Biodiversity
      » Autonomous right
      » Art. 15 (5) Convention Biological Diversity, Bonn Guidelines
  - Right to informed consent and patent law: *quite recent*
    - Biotechnology
      - Recital 26 EU Biotechnology Directive
    - Biodiversity
      - Recital 27 EU Biotechnology Directive
      - Patent legislation various EU member states
Burdening patent law

• Quid right of access to information in a patent context?
  – Right of access to information
    • Art. 27 (1) UDHR, Art. 15 (1) (a) and (b) Covenant
  – Right of access to information and patent law: ambigue
    • Patent law CONTRIBUTES to dissemination of information
    • Patent law might HINDER use of information
Limiting exercise of patent rights

- Right of access to public health (care) limits exercise of patent rights
  - Right of access to health (care)
    - Art. 25 (1) UDHR, Art. 12 Covenant, Art. 3 Oviedo Convention

- Relationship right to health and patent law
  - Formally recognized in TRIPs (art. 8,1 + art. 30, 31) + Doha Ministerial Declaration 2001
  - Implementation instrument limiting exercise of rights, namely compulsory license
    - Catch all: the Netherlands: ‘public interest’
    - Catalogue: Belgium, France: ‘public health’
  Response to case 1 (DNA)
Conclusions

- Human rights are inextricably linked to patent law

Human rights are valuable and necessary complements of patent rights. Human rights serve as a counter balance of patent rights centering too one-sidedly on trade, globalisation of markets and economic calculus. For patent law to be widely accepted and generally recognized as a tool fostering both private and public interest, it is vital that current patent law regimes are inextricably linked with human rights discourse, and that human rights assist in defining the utter limits of patent rights [VAN OVERWALLE, G., ‘Human Rights’ Limitations in Patent Law’, in Intellectual Property and Human Rights. A Paradox, GROSHEIDE, W. (ed.), Cheltenham, Edward Elgar Publishing Ltd, 2010, 236-271]

“Human rights and IP, two bodies of law that were once strangers, have now become increasingly intimate bedfellows” [Laurence HELFER, 2003]