



EU law and the International Covenant on Economic, Social and Cultural Rights

Foundation for a Free Information Infrastructure (FFII), 2013

Introduction

This note is an attachment to the Foundation for a Free Information Infrastructure's submission to the 2012 - 2013 EU Commission's consultation "Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures". (EC, 2012)

This note argues that EU law has to be made compatible with the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).

This note limits itself to three ICESCR rights relevant for the digital environment: access to knowledge, access to culture and authors' rights.

The first section introduces the ICESCR. The second section distinguishes intellectual property rights and ICESCR rights. It discusses how to deal with conflicts within the ICESCR system. It argues EU intellectual property law needs exceptions for under served markets, remix artists, independent rediscovery and

sequential innovation. The third section discusses the right to enjoy intellectual property and concludes that the right to enjoy intellectual property does not change the conclusion that EU law needs the aforementioned exceptions.

This note concludes that to be compatible with the International Covenant on Economic, Social and Cultural Rights, EU substantive and enforcement law need exceptions for under served markets, remix artists, independent rediscovery and sequential innovation. Some of these exceptions may best be made in substantive law. As long as they are not implemented in substantive law, enforcement law has to make such exceptions. The EU has to update the Intellectual Property Rights Enforcement Directive (IPRED).

The European Union and the ICESCR

The EU's legislation on intellectual property rights has to be made compatible with the UN International Covenant on Economic, Social and Cultural Rights.

The EU is obliged to respect, protect and fulfil the human rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). This follows from constitutional traditions common to the Member States (Article 6 (3) Treaty on European Union; see also ECJ case C-73/08 Bressol and Others). The EU must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of ICESCR rights.

This note limits itself to the rights mentioned in article 15 (1) (a), (b) and (c) of the ICESCR.

Article 15 (1) (a) and (b) of the ICESCR recognize the right of everyone to take part in cultural life; and to enjoy the benefits of scientific progress and its applications. This note uses “rights to access to knowledge and culture” for these two rights.

The right of everyone to take part in cultural life includes the rights to access to cultural goods, to benefit from the cultural heritage, to be involved in creating the spiritual, material, intellectual and emotional expressions of the community, to seek and develop cultural knowledge and expressions, and to share them with others. (ECOSOC, 2009)

Under ICESCR 15 (1) (c), authors have the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This note uses “authors' rights” for this right. The Universal Declaration of Human Rights has the same balance between the rights in article 27.

Intellectual property rights versus ICESCR rights

The Committee on Economic, Social and Cultural Rights (CESCR) clarifies in its authoritative interpretation General Comment No. 17, that it is important not to equate intellectual property rights with the human right recognized in ICESCR article 15, paragraph 1 (c): “Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole. (...) Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is

referred to as intellectual property rights under national legislation or international agreements.” (ECOSOC, 2006).

How to deal with conflicts between human rights, for instance the right to access to knowledge and authors' rights? Within the ICESCR system, the rights to access to knowledge and culture have to be balanced with authors' rights. Yu, P. (2011) recommends just remuneration for conflicts taking place within the human rights system: “Under this approach, authors and inventors hold a right to remuneration (rather than exclusive control), while individuals obtain a human rights-based compulsory license (as compared to a free license).”

General Comment No. 17 also clarifies that under ICESCR article 15, paragraph 1 (c) legal entities are not protected at the level of human rights.

Article 4 of the ICESCR provides that states may subject ICESCR rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. Article 4 ICESCR provides a tool to assess whether EU laws are compatible with the ICESCR. Four examples may clarify this for the digital sector.

Example one: Access to knowledge and culture. In emerging economies, there are serious access to knowledge and culture deficiencies. Karaganis et al. (2011) show that relative to local incomes in Brazil, Russia, or South Africa, the price of a CD, DVD, or copy of Microsoft Office is five to ten times higher than in the United States or Europe. There is no distribution of legal CDs and DVDs outside the capitals. Up to 90 percent of the people in emerging economies can only turn to illegal media copies.

Such problems also exist in eastern European emerging economies.

Euractive.com (2012) reports: “Ivan Dikov writes in an op-ed with the Bulgarian news website Novinite that Bulgaria is a country much poorer than the remaining

ACTA signatories and could not in fact assume the same responsibilities. Torrent sites such as Zamunda and Arena are the most popular websites in Bulgaria. The reason for that is not just the enormous amount of music, films, software, and books that they make available to anybody for free. The sites are not accessible from outside the country. These torrent sites are technically in violation of all sorts of copyright laws but what they offer has no alternative for the people in Bulgaria for the time being given the country's social and economic development, Dikov argues."

In Bulgaria, digital technology helps to solve deficiencies in access to knowledge and culture, but EU law harms this access. In Bulgaria, and other countries in similar circumstances, EU law nullifies or impairs the rights to access to knowledge and culture for many, this is neither compatible with the second condition of article 4 ICESCR, "compatible with the nature of these rights", nor with the third, "promote the general welfare in a democratic society".

The EU needs an under served market exception. As long as EU substantive law does not have such an exception, EU enforcement law (IPRED) has to make such an exception.

Example two: Remix artists. It is often impossible to ascertain (affordable) licenses for remixing music and movies. This interferes with various human rights:

- authors' rights of remix artists. The ICESCR does not exclude any author ("everyone"). Artists remixing music or movies are protected at the level of human rights.
- artists and public's access to culture rights, which include the rights to benefit from the cultural heritage, to be involved in creating the spiritual, material, intellectual and emotional expressions of the community, to seek and develop cultural knowledge and expressions, and to share them with others - as seen above.

Under current EU intellectual property enforcement law remix artists face injunctions and damages. This nullifies or impairs the human rights mentioned in this example, this is not compatible with two conditions of article 4 of the ICESCR, as it is neither compatible with these rights, nor promotes the general welfare in a democratic society. The EU has to update IPRED.

An ICESCR compatible solution could be that the individual original authors have a right to remuneration and the individual remix artists obtain a human rights-based compulsory license.

Example three: Patent trolls. A software developer may never look at patents, and still infringe them. Patents create a legal minefield in the software sector; there are many trivial and over broad software patents. This situation is abused by non-practicing entities or patent trolls. They acquire patents at low cost, for instance by buying bankrupted companies. Their patents tend to have broad claims on trivial methods so that infringement is unavoidable. All software developers ignore software patents to some extent, simply because every single useful program they write may infringe on several patents.

Software developers are authors under ICESCR article 15 (1) (c). Using trivial and over broad patents, patent owners, including patent trolls, can sue developers who create their software themselves, from scratch. Injunctions and damages nullify or impair the authors' rights of these developers, while no copying took place. This is not compatible with article 4 of the ICESCR. A human rights-based independent rediscovery defence for individual developers could be a solution. In cases of independent rediscovery, two (or more) authors (in ICESCR sense) come to the same result. No copying takes place, there is no ground for remuneration.

Neither European patent law nor IPRED contains a human rights-based independent rediscovery defence, or a comparable solution. The EU has to update IPRED.

Example four: Sequential innovation in the software sector. Patents, trivial or brilliant, are exclusive rights, the rights holder can block sequential innovation. Hargreaves, I. (2011) notes that for sequential inventions “higher welfare and more innovation may be more likely to result from the absence of patenting opportunities. Over time, as digital technology becomes pervasive across the economy, this represents a serious concern. (...) Given the pace of change in the digital world and the strongly sequential nature of innovation in computer programs, the problems arising from thickets in this environment are particularly severe and it is essential that changes do not worsen the situation.”

Individual software developers involved in sequential invention are authors under ICESCR article 15 (1) (c), patent trolls (as legal entities acquiring patents) are not. Under EU law, individual software developers involved with sequential innovation face damages and injunctions, this nullifies or impairs their authors' rights. This is not compatible with two conditions of article 4 of the ICESCR, as it is neither compatible with these rights, nor promotes the general welfare in a democratic society. An ICESCR compatible solution could be that the individual first inventor(s) have a right to remuneration and the individual sequential inventor(s) obtain a human rights-based compulsory license.

In an ICESCR compatible solution, there is no room for damages and injunctions against sequential innovation. The EU has to update IPRED.

The right to enjoy intellectual property

The section above showed that, from an ICESCR perspective, EU law needs exceptions for under served markets, remix artists, independent rediscovery and sequential innovation. This section will discuss whether such exceptions conflict with the right to enjoy intellectual property.

Europe has two regional human rights instruments, the Council of Europe's

European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFR). Both instruments protect the right to enjoy property, including intellectual property.

The ICESCR rights are freedoms, they are rights inherent to the human person as such. Interference with ICESCR rights is only allowed if the interference is compatible with article 4 ICESCR mentioned above.

The European human rights instruments protect the right to enjoy property, after it is lawfully acquired. The protection is limited.

Intellectual property rights are not rights inherent to the human person as such. They are granted by law, they are rule-based privileges. They may arise by law and are limited by law. They can not interfere with rights inherent to the human person as such, unless the interference is compatible with article 4 ICESCR.

European human rights instruments protect intellectual property rights, but only after they are lawfully granted, that is, after the ICESCR art 4 test. The ICESCR art 4 test comes first.

In case of conflict between ICESCR rights and intellectual property rights, the first step is to identify and balance the ICESCR rights.

The next step is to assess whether interference of intellectual property rights with ICESCR rights is compatible with article 4 ICESCR. In the four examples above, injunctions and damages nullify the enjoyment of ICESCR rights. This is not compatible with the nature of these rights. They fail the article 4 ICESCR test.

From an ICESCR perspective, EU law needs exceptions for under served markets, remix artists, independent rediscovery and sequential innovation. The right to enjoy intellectual property does not change this conclusion, as intellectual property rights are law-based and have to be compatible with the ICESCR.

Conclusion

To be compatible with the International Covenant on Economic, Social and Cultural Rights, EU substantive and enforcement law need exceptions for underserved markets, remix artists, independent rediscovery and sequential innovation. Some of these exceptions may best be made in substantive law. As long as they are not implemented in substantive law, enforcement law has to make such exceptions. The EU has to update IPRED.

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