Human Rights Frames in IP Contests

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Chapter 11
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Introduction

One of the most dramatic developments in the area of intellectual property in the last two decades has been the shift in regulation from the domestic to the international. Although treaties such as the Berne and Paris Conventions have long set international intellectual property standards, the conclusion of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) in 1994 ushered in a new era of globalization. Since that time, we have seen a plethora of new international instruments articulating global intellectual property norms, ranging from the Development Agenda of the World Intellectual Property Organization (WIPO) and the Declaration on the TRIPS Agreement and Public Health to bilateral free trade and investment agreements containing “TRIPS-plus” norms.

Recent years, however, have seen a renewed emphasis on the importance of domestic implementation and enforcement of global prescriptions. The ways in which states conform their domestic law to international standards and whether, and if so how, they enforce them play a crucial role in the effect these standards have on the ground. The chapters in this book are an important part of this reorientation toward the domestic. Spanning an impressive range of countries in South America (Argentina, Brazil, Chile, Colombia, Ecuador) and Central America (Costa Rica, El Salvador, and Guatemala), these studies examine the actors, institutions, and discourses employed in domestic contestations over intellectual property standards and their effect on public health. As such, this volume provides a valuable contribution to our understanding of the domestication of international intellectual property norms.

This Comment adds to this discussion by examining the role of norms and framing—specifically, human rights norms and framing—in the processes of domestic change described in these case studies. More precisely, it seeks to understand the general absence of human rights norms and frames in many of these stories. Despite considerable attention to the human rights impact of intellectual property rules by international human rights institutions and the prominence human rights norms and language have had in domestic battles over intellectual property in South Africa and Brazil, human rights has played far less of a role in shaping the discourse around innovation and medicines in other places. By
comparing those cases with the experience of activism around medicines in South Africa and Brazil, the Comment draws some preliminary conclusions about the legal, societal, and cultural conditions that may lend themselves to the use of human rights frames in activism around intellectual property issues.

The Comment also begins tracing the trajectory of human rights framing in debates about the effect of intellectual property on health. This tracing reveals that in the area of human rights and intellectual property, the path of norm diffusion appears to have been turned on its head. Although discussions about norm diffusion often assume a general downward directionality from the international to the domestic, the normative framing of intellectual property as a human rights issue was a bottom-up enterprise. Human rights norms were first used to frame intellectual property issues on the national level. These frames were then “uploaded” to the international level, provoking a series of international pronouncements on the relationship between human rights and intellectual property. Over time, however, these frames gave way to the language of “access to knowledge” or A2K. The Comment concludes by considering the reasons for this and arguing that a complete strategy for challenging the effect of intellectual property rights on access to medicines requires the use of both human rights and A2K frames.

I. Frame Determinants

One of the most surprising aspects of many of the volume’s case studies is the relatively limited reference to human rights. In these case studies, intellectual property contestations were framed more frequently in terms of consumer’s rights, dignity, free competition, the environment, and the rights of the poor. The narratives use the phrase “human rights” throughout, but they do so most often in a general sense, as a placeholder for the public interest, rather than as a distinctly legal entitlement guaranteeing to each individual the right to a particular standard of treatment simply by virtue of being human.

That human rights law did not play a larger role in many of the case studies is all the more unexpected in light of the high-profile experiences of South Africa and Brazil, where human rights played a central role in organizing opposition to intellectual property reform. In South Africa, the human right to health was a key organizing element in the work of the Treatment Action Campaign (TAC), a community-based organization that took the lead in the South African effort to promote access to treatment in the context of HIV/AIDS (Kapczynski and Berger 2009). TAC’s litigation over access to medicines explicitly invoked the right to health under the South African Constitution, which was modeled on and drew inspiration from international instruments protecting the human right to health. In Brazil, human rights norms, which had played an important role in Brazil’s transition from authoritarianism, provided a powerful and readily available frame for activism around medicines in the context of the HIV/AIDS epidemic (Galvão 2005). The efforts of Brazilian activists galvanized the government and led to the establishment of a healthcare system based on a principle of universal access.
Although the struggles in South Africa and Brazil helped catalyze the debate about access to medicines and intellectual property in other countries, these later debates were not typically framed in human rights terms. Thus, this Comment began as a way to better understand this shift, asking why human rights was employed as a frame in some cases and not others. Comparing these cases reveals two primary factors that correlate with the use of human rights law as a framing device in intellectual property contexts: the extent to which human rights norms are embedded in domestic law, and the involvement of organizations with human rights expertise in the debate about access to medicines and intellectual property.

First, international human rights norms appear to be more commonly used to frame intellectual property discussions when they are also embedded in domestic constitutional law. Legal embeddedness can imbue a claim with a legitimacy it might not otherwise be perceived to have, and reliance on a legal right offers at least the possibility of enforcing desired objectives with the police power of the state. Legal embeddedness was a crucial factor in the framing of access to medicines as a human right in both South Africa and Brazil. In South Africa, human rights norms are explicitly part of national constitutional law. The existence of this right on the books was a galvanizing element in the South African campaign for access to medicines and a critical factor in TAC’s adoption of a human rights frame in challenging the role of intellectual property in making medicines unaffordable. By framing high drug prices as a human rights violation under the South African Constitution, TAC was demanding a legal remedy (Heywood 2009). As Rosina and Novaes discuss in their chapter on Brazil in this volume, access to healthcare is also a constitutional right in Brazil, protected in Article 196 of the 1988 Brazilian Constitution. Implementing this right, Brazilian law establishes a Unified System of Healthcare (Sistema Único de Saúde or SUS), which provides for universal public healthcare open to all regardless of means. Access to medicines is also explicitly embedded in Brazilian legislation. For example, Law 9.313 requires the government to provide those with HIV/AIDS the medication needed for their treatment. This embeddedness of the right to health in Brazilian law played an important role in driving healthcare policy on access to medicines and to treatment (Flaer and Younis 2009).

Second, human rights frames also require the involvement of organizations that use human rights norms and institutions in their advocacy work. The work of intermediaries plays a crucial role in the process of translation, as international norms are appropriated and translated into local cultural narratives (Merry 2006). When intermediaries with experience in human rights were among the first to respond to increased drug prices resulting from the enforcement of intellectual property rights, the problem was much more likely to be defined in human rights terms. In South Africa, for example, TAC first championed the right to access treatment for HIV/AIDS and challenged the price increases that resulted from the introduction of patents on pharmaceuticals. Human rights had been a central component of TAC’s work from the very start (Heywood 2009). In large part, this orientation was a function of TAC’s leadership. The chairman of TAC, Zackie Achmat, had been active in the United Democratic Front, which had used a human rights approach to challenge apartheid. TAC also formed alliances with lawyers and
other organizations (such as the Law and Treatment Access Unit of the AIDS Law Project) that used human rights law in their work (Matthews 2001).

In Brazil, human rights was also deeply embedded in the practices of the organizations that first worked for access to medicines. Early advocacy around the HIV/AIDS epidemic included widespread civic mobilization within the gay community in São Paulo working in conjunction with the *movimento sanitária*, a democratization and human rights movement that had come of age challenging the country’s military dictatorship and advocating for universal access to healthcare (Galvão 2005; Gómez 2011). In the 2000s, the human rights organization Conectas joined the effort to increase access to medicines, becoming involved in the Working Group on Intellectual Property of the Brazilian Network for People’s Integration; as part of that group, Conectas has been involved in the legal challenge to pipeline patents and patent oppositions before the National Industrial Property Institute (INPI) (Vieira and de Almeida 2011; Conectas 2011; Conectas 2009). As Rosina and Novaes note in their chapter in this volume, Conextas was one of three nongovernmental organizations that the individuals they interviewed identified as most active in responding to the effect of intellectual property laws on the right to health.

Other than in the case of Brazil, the cases studied in this volume generally possessed the first but not the second of these framing determinants. Although they protected human rights in their national laws and constitutions, the actors leading the campaigns against intellectual property tended not to be organizations with human rights expertise or a history of using human rights norms in their work. This was particularly evident where resistance to higher intellectual property standards was driven by the local pharmaceutical industry. In Chile, for example, the national generic pharmaceutical industry took the lead in lobbying against intellectual property reform. Similarly, in Argentina, the initial contestations over intellectual property reforms took place within the government, with the executive in favor of incorporating standards urged by the United States and the parliament engaged in acts of resistance. The resistance of the legislature was supported by legal professionals, scientists, and other academics, accompanied by only a small group of actors from within civil society. Even those civil society actors involved in this movement were industry oriented, such as medical and pharmaceutical associations. In Colombia, the situation was slightly different. To be sure, debates about data exclusivity were led primarily by the organization ASINFAR, a national association of generic pharmaceutical producers, but public health was also part of the discussion. However, even here, those involved were organizations focused on public health, not human rights.

It is perhaps most surprising that parliamentary actors in Argentina did not rely on human rights arguments to advocate for greater policy space to develop local innovation policies. Human rights discourse, because it involves a claim that the state *must* act in a particular way to comply with its international obligations, can be used strategically by political actors seeking to increase their bargaining power domestically (de Mello e Souza 2005; Ferreira 2002). Human rights frames might have presented the parliamentary actors resisting reforms with political resources in opposing the executive. It is possible, however, that human rights frames are adopted more easily by those branches of government directly involved in foreign relations and thus most familiar with the law and institutions of human rights.
II. The Trajectory of Human Rights Framing

Comparing the case studies in this collection with the examples of South Africa and Brazil also allows us to begin to chart the trajectory of human rights norms in intellectual property contestations. The access to medicines story is an example of normative frame diffusion—the dissemination of a particular way of legitimizing the demands of activism and identifying desired outcomes. The normative framing of intellectual property policies as a human rights issue followed a unique path. Intellectual property was first considered a matter of human rights domestically and then that conceptualization was uploaded to international and other national arenas. After that, narratives of human rights were joined by an emerging frame of "access to knowledge" or A2K.

Although advocacy around global intellectual property norms and access to medicines dates back to the early 1990s, these issues were not initially thought of in human rights terms. Resistance to the expansion of intellectual property law and concern about its effects on the public interest began in the early 1990s with protests by farmers over the TRIPS Agreement in India and mobilization around databases in the European Union (Kapczynski 2008). The transnational network that eventually emerged around access to HIV/AIDS drugs was originally a US-based movement led by Ralph Nader and James Love of the Consumer Project on Technology (CPTech, now Knowledge Ecology International, or KEI). These activists began with a focus on drug prices in the United States but then turned their attention to concerns about international equity after the conclusion of the TRIPS Agreement (de Mello e Souza 2005). Several other international organizations eventually joined in the access to medicines campaign, including Health Action International, Essential Action, Médecins Sans Frontières/Doctors Without Borders, Oxfam, Act Up Paris, Health Gap Coalition, Third World Network, and the International Centre for Trade and Sustainable Development (Barnard 2002). These NGOs were consumers’ rights groups, public health advocates, and humanitarian aid organizations; they did not self-identify as human rights organizations nor did they explicitly use human rights norms or institutions in their work.

Conversely, human rights circles initially paid little attention to intellectual property. Although the HIV/AIDS epidemic was being increasingly viewed as a human rights issue, there was no consideration of the role of intellectual property, even in discussions on the affordability of medicines. For example, the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS jointly organized the United Nations Second Annual Consultation on HIV/AIDS and Human Rights in 1996. That effort produced the first version of the Guidelines on HIV/AIDS and Human Rights two years later, in 1998—the same year that TAC was formed in South Africa. The guidelines discussed medicines, noting that states “should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of . . . safe and effective medication at an affordable price,”
but no mention was made of intellectual property law’s role in the availability or affordability of medicines (Guidelines 1998).

It was only after the initial framing of intellectual property as a human rights issue in South Africa and the media attention generated by this movement in the late 1990s and early 2000s that human rights institutions became involved. Indeed, the year 2001 saw international human rights organizations and institutions engaged in a veritable flurry of activism and lawmaking activity in the area of intellectual property. In one of the earliest invocations of a human rights framework on issues of intellectual property, the South African lawsuit led Oxfam to write to Mary Robinson, then the United Nations High Commissioner for Human Rights, that the lawsuit was preventing the South African government from complying with its international human rights obligations (Oxfam 2001). This was also the year of, among other things, a report on the impact of the TRIPS Agreement on human rights by the United Nations High Commissioner for Human Rights, a resolution on intellectual property and human rights by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, a report on intellectual property and human rights by the United Nations Secretary General, and a resolution from the Commission on Human Rights calling on states to pursue policies that promote access to medicines as a part of the right to health (Helfer and Austin 2011).

In short, the framing of intellectual property as a human rights issue was a bottom-up enterprise. Intellectual property was first framed as a human rights issue in South Africa and then shifted up to international arenas. The bottom-up framing of intellectual property in human rights terms demonstrates the complexity of the relationship between the domestic and international arenas in both norm diffusion and framing. Although theories of norm diffusion tend to assume a general downward directionality, with norms being articulated internationally and then diffusing downward and resulting in domestic political change, the reality is much more complex (Finnemore and Sikkink 1998). Frames shift and flow both vertically and horizontally as they are taken up by actors with the resources and opportunity to exploit them. The use of human rights law to challenge intellectual property policies in South Africa was itself a product of norms domesticated in other, earlier contests. It was a continuation of a human rights story that had deep roots in the struggle against apartheid, which was influenced in important ways by transnational norms and activism (Black 1998). Human rights norms—which were transformed and domesticated in the process—were institutionalized in the post-apartheid legal structure. The socialization of activists and the embeddedness of human rights in law contributed significantly to the later choice of human rights as a frame for struggles around access to medicines and intellectual property.

### III. A2K and Human Rights

Although there were important benefits associated with the use of human rights language and norms in early battles over access to medicines in South Africa, Brazil,
and elsewhere, human rights law did not seem to provide a strong basis for tackling the powerful economic and innovation-based arguments deployed on behalf of intellectual property rights. A new frame, one organized around “access to knowledge” or A2K, soon emerged to provide that basis. Over time, this shift led to less reliance on human rights norms in framing issues of intellectual property. This section charts some of the reasons for this shift and then returns to the case studies to consider what they illustrate about synergies between human rights and A2K framings in debates about intellectual property and access to medicines.

There were several benefits associated with the use of human rights norms and language in initial contests around the impact of intellectual property on individual health and welfare. First, the human rights frame offered a clear alternative to the economic narrative of intellectual property expansion and thereby reoriented debates on the effect of intellectual property policies on individual people. Discussions about the global regulation of intellectual property were often cast in economic terms, focused on the extent to which intellectual property regulation fostered innovation or promoted economic growth and development. Human rights provided an “alternative moral framework,” one that emphasized the right to life and health rather than piracy and counterfeiting (Matthews 2011: 103). Human rights also offered the advantage of clarity. The complexity of intellectual property issues allowed industry initially to frame the debate in terms advantageous to itself (de Mello e Souza 2005). Human rights, with its focus on the individual, allowed activists to tell a much simpler and far more compelling story that placed the consequences of intellectual property policies for individuals on the same level as the effect of these policies on innovation and development (Klug 2005; Forman 2008).

Second, human rights also provided an established set of norms, language, and networks for thinking about the problems associated with intellectual property reforms that South African and then transnational and local activists could access immediately. Going into conversations about intellectual property and human health, industry coalitions had an advantage because they had helped set the multilateral agenda. Being able to tap into an existing framework allowed access to medicines activists to “jump start” a discussion of the issue in terms favorable to their agenda and provided activists with important preexisting humanitarian networks, resources, and audiences (de Mello e Souza 2005). The use of this established framework linked domestic struggles around access to medicines to other international and domestic advocacy networks and provided legitimacy for the demands of activists.

After considerable activity by international human rights organizations and institutions on intellectual property issues in the early 2000s, the pace slowed considerably. Human rights institutions continued to consider the intersection of human rights and intellectual property, including through a 2006 interpretive comment of the Committee on Economic, Social and Cultural Rights on creators’ rights. Overall, however, there has been far less activity since then. For example, a 2009 interpretive comment on the right to take part in cultural life makes no mention of intellectual property rights, despite the importance of copyright for the ability to create and enjoy cultural works.
The A2K frame, in contrast, has played an increasingly important role in organizing debates about intellectual property. The Development Agenda, for example, originally proposed by Brazil and Argentina in 2004 to reorient the work of WIPO on the innovation and knowledge needs of developing countries, is now administered by WIPO’s Committee on Development and Intellectual Property. The Committee is charged with developing plans of action for implementing each of the original forty-five recommendations in the Development Agenda. Among other things, working groups under the auspices of the Committee are creating databases of experts who can provide technical assistance, fostering the development of local capacity on intellectual property issues through assistance in establishing national intellectual property institutions and systems, and providing information and technical support for local efforts to use copyright and its flexibilities to increase access to knowledge (WIPO Program Activities).

In part, it may have been the very strengths of the human rights frame that also led to its declining use in discussions about the impact of innovation and intellectual property policies. Human rights provides a clear orientation on the minimum standards of health and welfare to which each individual is entitled. It does not, however, provide a good basis for critiquing the means chosen by states for meeting these minimum standards. As long as the state has the appropriate structures, processes, and outcomes (Chapman 2007), human rights law is relatively agnostic about how the state chooses to achieve those goals. As a result, human rights law provides a poor basis for responding to rights owners’ arguments that strong intellectual property rights would in fact foster innovation and human rights. What advocates needed was an analytical frame they could use to engage in a detailed critique of particular innovation policies and to develop alternatives that might result in more protection for human rights.

That frame emerged around “access to knowledge” or A2K. Activists from a variety of fields, ranging from healthcare to agriculture to open source software, questioned the assumption that exclusive rights are necessary to encourage innovation and argued that overprotection can be as harmful for innovation as under-protection. This international activism on intellectual property and the public interest began to coalesce around a frame of “access to knowledge,” which allowed new groups of activists to collaborate on intellectual property issues and their impact on public welfare (Kapczynski 2008). A2K framings, with their emphasis on law and expertise in both intellectual property and economic structures, were ideally suited for critiquing the content of innovation policies.

Although there continued to be important collaborations between the human rights and A2K advocacy communities, the A2K frame began exercising a “gravitational pull” (Kapczynski 2008: 860) and crowding out human rights language in debates about intellectual property and medicines. This was for several reasons. First, the deepening engagement with intellectual property rationales posed expertise barriers for human rights organizations. Although NGOs had driven the initial domestic framing of intellectual property as a human rights issue in South Africa and Brazil, activity on the international level had been concentrated within the human rights institutions of the United Nations. For the framing of intellectual property as a human rights issue to take hold elsewhere, it would have to be taken
up by domestic and international NGOs. The level of engagement needed to refute the market-based rationales driving higher drug prices, however, made it difficult for international and domestic organizations without expertise in intellectual property issues to enter into this discussion.

Second, A2K advocates grew increasingly concerned that human rights law could be used to support claims to intellectual property rights themselves. International human rights law does protect some of the attributes associated with ownership of intellectual property rights—namely, an author’s moral and material interests in his or her work. Regional human rights law has also been interpreted as protecting intellectual property rights directly (Helfer 2007). A2K advocates grew increasingly skeptical of human rights frames, fearing their use would only strengthen the position of rights holders (Helfer 2007) and “further entrench some dangerous ideas about property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community” (Raustiala 2007: 1032).

Third, the technical nature and complexity of intellectual property and its interface with human health and welfare made it much more difficult to fit intellectual property stories into human rights frames. Medicine is a relatively easy case; in South Africa and elsewhere, it was possible to directly connect the introduction of patents to increases in the cost of antiretrovirals. In other areas, however, intellectual property affects individual rights in a much more indirect way. For example, mapping the relationship between copyright and the right to education requires a sophisticated understanding of copyright law, the market for educational materials, and economics. On the surface, copyright does not seem to be a significant barrier to the distribution of textbooks; copyright protects only expression and not ideas, so if one textbook were too expensive the state would be free to commission other textbooks that conveyed the same information. However, if the state did not have the actual capacity to develop new books—because there were no individuals to produce or manufacture them, for example—then copyright does contribute to an access problem (Chon 2007; Helfer and Austin 2011). This, however, is a very complicated story, and human rights campaigns are most successful when they can tell a clear causal story and identify those responsible for the harm in a direct and concise manner (Keck and Sikkink 1998).

Although the use of human rights to frame intellectual property issues has diminished with time, there are important reasons for employing both human rights and A2K frames in challenging the effect of intellectual property rights on access to medicines. The language of A2K provides a powerful tool for understanding and responding to some of the market distortions that can be caused by intellectual property. At the same time, the way in which A2K understands the nature of the problem and the solutions it proposes can lack resonance in some contexts. The Central American case study in this book illustrates why it can be helpful to pair human rights and A2K frames in advocacy around access to medicines.

Although A2K was an excellent frame for the debate about solutions to problems with innovation systems, it sometimes did not translate well. In the case study of Central America, advocacy around the intellectual property provisions of the
Central American Free Trade Agreement was largely driven by transnational groups focused on the public interest effects of intellectual property. As Godoy explains in her chapter in this volume, these groups encountered difficulty in getting local civil society groups engaged with the issue of intellectual property because health issues had historically been understood in terms of the dysfunctionality of state institutions in charge of purchasing and administering drugs, not in terms of international market forces on price. The A2K mobilization, to the extent it was focused on the effects of intellectual property, may not have been viewed as responding to local needs in places where intellectual property was only one, and perhaps not even the most important, factor affecting realization of the right to health.

Human rights, in contrast, might be a more effective frame for mapping intellectual property issues onto local concerns in such contexts. A human rights approach is rights-driven—that is, it is oriented toward and organized around individual rights. This focus on rights encourages consideration of the broad range of activities that can affect those rights, rather than just the effect of particular laws. For example, in the context of HIV/AIDS, a human rights framework emphasizes the variety of factors that can affect the rights of individuals with HIV/AIDS, including but not limited to stigmatization, discrimination, and violence (Galvão 2005). For this reason, the human rights frame may have more resonance when intellectual property is only one of many barriers to access to knowledge. In such situations, adopting a rights-driven framework may provide a more effective strategy for advocates seeking to address distributional inequities in the area of access to knowledge.

Human rights and A2K also provide complementary frames for identifying the actors who bear responsibility for ensuring affordable medicines. As I have discussed in more detail elsewhere (Beutz Land 2009), a human rights frame generally tends to propose solutions oriented toward the state and failures of public authority. A2K, in contrast, with its deep engagement with the market-based rationale of intellectual property, focuses more often on the role played by corporations, markets, and the global economic order. The South African example suggests that both approaches are needed. Although the South African government had initially seemed supportive of the claims of the access to medicines movement, economic pressure and AIDS denialism eventually led the government to resist reforms (Klug 2005; Nolan 2007; Heywood 2003). The government’s about-face forced TAC to examine not only the responsibility of pharmaceutical companies but also the obligations of the state more broadly to control prices and create innovation policies that promote access to medicines (Heywood 2009). The Central American case study similarly reflects the importance of developing strategies that focus on both public and private actors. As Godoy’s chapter in this volume observes, local advocates resisted the intellectual property agenda in part because of a lack of trust in the quality of generic production and a concern that generic producers would charge high prices. Although generic production could have made important contributions to making medicines more affordable, it was not an acceptable solution in the absence of regulatory measures designed to ensure the generics would be both safe and affordable.
IV. Conclusion

Human rights framing played an important role in catalyzing activism around intellectual property and access to medicines. Particularly in places where human rights law was embedded in both law and public discourse, human rights provided a bottom-up framing of intellectual property as much more than a means for incentivizing creation, but rather as a set of policy choices that can have profound effects on human lives. The trajectory of that framing also reveals important synergies between the frames of human rights and A2K. The analytical approach of A2K allowed activists to challenge the economic incentive rationales underlying claims of expanded protection. Although the discourse of A2K came to partly displace human rights language in debates about intellectual property, both frames play an important role in successful organizing around access to medicines. Human rights frames provide an orientation toward failures of state authority and a broader context for understanding the harms of intellectual property that may be particularly important in low-resource settings. A2K frames, in turn, offer a powerful response to the innovation rationales of intellectual property. The case studies in this book not only aid our understanding of how international norms on intellectual property have been domesticated, but also the importance of employing both human rights and A2K frames in the process.

References


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