

Human rights principles as normative tools for the assessment of fairness in the context of intellectual property and the protection of indigenous peoples' heritage

In the intellectual property (IP) context, particularly copyright law, the conclusion that indigenous heritage is unprotected is reached seemingly without a balance of rights. It appears to be mainly based on the doctrine of the public domain, the limited duration of intellectual property rights and questions of an identifiable author and originality as an 'inevitable' outcome. On the other hand, source communities raise concerns that third parties *are* able to obtain intellectual property rights making use of their traditional heritage.

If we compare this to human rights law, the rights of indigenous peoples to participation and free, prior and informed consent¹ and their enjoyment of the moral and material benefits of the protection of their intellectual productions² are generally accepted. For the protection of indigenous heritage, human rights law would then balance indigenous peoples' rights to rights of third parties such as the right to access to cultural heritage³ to reach a fair outcome, guided by principles such as self-determination, non-discrimination, participation and dignity.

In order to measure the fairness of outcomes of intellectual property protection in the context of indigenous peoples' heritage such as their traditional cultural expressions (TCEs), it is useful to see how we can learn from the process of balancing in the human rights framework. The analysis of human rights principles can function as a normative tool to inform the concept of fairness. This seems actually already visible in the context of the Convention on Biological Diversity (CBD), which reflects fundamental principles of self-determination and participation in its provision on access and benefit-sharing of indigenous peoples' traditional knowledge.⁴ This fairness analysis should be placed in a broader (political) context of recognition of indigenous peoples' rights, worldviews and own narrative as to their heritage.

¹ With regard to decisions in matters that affect them, for example in the context of their lands and resources, but also in the context of their heritage, see Article 31 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

² See United Nations Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 17 on Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), par. 8, 9, 10, 32, 45.

³ See Article 15(1)(a) ICESCR.

⁴ See Article 8(j) CBD.