



Normative Consideration of A2K in the Space between Intellectual Property and Human Rights

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Received: 14th February 2023; revised: 25th April 2023

In the long-running tensions between Human Rights Law (HRL) and Intellectual Property Rights Law (IPR), the author is introducing the conceptual placement of Access to knowledge (A2K) movements. Access to knowledge (A2K) is the ‘new politics of intellectual property’ that seeks to fundamentally realign and reform intellectual property law. It is difficult to draw a commonality between an activist protesting for waiving patents on HIV+ medicine and Covid-19 vaccines and a subsistence farmer or a software programmer. A2K politics offers a perfect balance of freedom and control that the IP and HR debate are trying to find. This analysis is relevant because it seeks to investigate two conceptions; one is to understand the relevance of the access to knowledge movements in the IPR - Human rights debate. There is no clear discussion wherein normative examination of this kind has been undertaken. Second is, viewing the solutions to human rights issues caused by IP or caused to due scarcity or governance issues, resolved through IP. Although the concept draws from existing debates, it departs on some conceptual level from the available framework on IP and human rights.

Keywords: Access to Knowledge, Intellectual Property Law, Human Rights Law

*Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.*¹

A letter that Thomas Jefferson wrote to Isaac McPherson is a ‘warning’² crucial to determine the scope and limitations of the Intellectual Property (IP) Law. Jefferson acknowledges that intellectual property rights are not ‘entitlements’ or ‘natural rights’. IP rights are a product of ‘social law’. They have ‘social utilities’ but are ‘temporary’ ‘state granted monopolies’. They cause embarrassment as they restrain the movement of ideas, which should, in the absence of IPRs, spread ‘freely’ and ‘benevolently’ across the globe. Finally, he says that there are some ideas, inventions, and information that are worth the embarrassment. Drawing the line between what is worthy of IP protection and what is worthy of social allocation is very difficult. And it is the inability to draw this line that has resulted in tensions between human rights and intellectual property law.

The expansionist tendencies of intellectual property rights have posed potential threats to the right to life,

health, food, information, education, freedom of speech and expression, privacy, and enjoyment of benefits of scientific progress.³ The states have dual obligations which are conflicting with one another. For instance, to protect *Pharmaceutical Patents v Right to Health and Medicine*, *Plant Breeders’ Rights v Rights of Farmers and Right to Adequate Food*, *Copyright Laws v Right to Freedom of Expression and Education*, etc.³ The encroachments between the field of IP laws and Human rights are inevitable but the approaches to resolve the tensions between the two fields have not reached the conceptual zenith. The approaches that range from conflict to compatibility do not clarify the relevance of the access to knowledge (A2K) movements. A2K is a movement, a field for activism and advocacy that aims at equitable access to knowledge and technology.⁴ It is characterised as the ‘new politics of IPR’.⁵

Interface of IP and Human Rights

The relationship between Intellectual property and Human Rights raises two main questions. The first question is whether intellectual property rights classify as fundamental human rights? The second question is whether Intellectual Property Law is incompatible with Human rights Law? The approaches taken to resolve these questions and

shortcomings in the existing literature on IP and HR will help us map the access to knowledge movements in the debate between human rights and Intellectual property rights.

There is a human right paradox under Article 27 of UDHR and Article 15 of ICESCR that recognises competing rights. These are the right of everyone to 'participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'⁶, and the right of everyone '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'.⁷ This paradox was ignored or considered obscure⁸ during the formative years of intellectual property law. The question of whether IP rights are fundamental human rights and examinations as to its normative content as well as the limitations gained prominence due to the expansion of IP and some realisations on part of human rights.⁹ Before going into these two eventualities which led to the intersection of IP and HR Law, the theoretical foundation of the question 'IP is a fundamental human right' is explored.

For Thomas Jefferson, the answer is a big no. A human right is characterised by a right that is *fundamental* – which essentially means that they are inalienable – they cannot be removed by legislation, *irreducible* – means that they cannot be divided and universal – which means that it applies irrespective of nationality, gender, or inequalities. Are IP rights inalienable, and indivisible? The answer is no because IP rights are temporary rights that exist for 'limited social utility'.¹ A human right is so intrinsic and fundamental to a man that the absence of it will strip a man's life of its dignity and meaning. So, on a spectrum of natural rights, IP rights are clearly a weaker claim or not a claim at all as it's a 'Social Law'.¹ The source of human rights is higher law or something which cannot be traced. Whereas IP laws are 'state granted'¹ 'odious monopolies'¹⁰ or as Bentham said it is 'child of law' not like human rights which are 'imaginary laws' from the unknown untraceable source.¹¹ It is an incentive, a method of production and distribution, it is anything but a moral and natural right. The moral claims to IP rights are postulated in natural rights-based theories such as Lockean labour theory tying labour to ownership¹² and personality-based theory which views work as a reflection of the creator's personality. But these theories are not as appealing as a utilitarian or

consequentialist approach that proposes an incentive-based theory.¹³ Natural rights theory also lacks the 'damning' articulation of Marx who describes the 'rights of man' not as a 'gift of nature' but as a 'dominant ideology of capitalism' used as tools of oppression and exploitation. He goes on to call this 'so-called "universal" rights of man' as nothing but 'formal and abstract formulations concealing an ideology which privileges the pursuit of an egoist, self-seeking individuals separated from others and the community'.¹¹ Last nail in the 'IP is a natural right' preposition was put by the proponents of a liberal market theory which made the market the deciding factor for determining the compensation of the inventor, rendering any claim to IP rights are natural rights nothing more than 'non-sense'.⁹ Intellectual property rights are economic and social rights. The drafting history of Article 27 of the UDHR also indicates that the protections under the provisions were in relation to freedom and creative endeavour.¹⁴

As to the question of whether intellectual property right is a human right? The author seconds the view taken in ECOSOC¹⁵ which states that rights under Article 27(2) 'are not coextensive with IP rights, although IP rights and patent laws could certainly be deployed as tools to secure protections of personal, human rights.'⁹ Article 27 and Article 15 are both an indication of the fact that balance has to be struck between the creator's right over the creation and society's right to enjoy the benefits of the creation. There is an intrinsic moral and material value that underlies IP rights which is a human right. At the same time rights of others to benefit from the creation is also a human right. Intellectual property right is a tool to strike a balance between these two rights, between freedom and control over creativity and inventions. This process of harmonizing between the rights of the author and the rights of others gets more complicated by politics and existing inequity and therefore, is difficult to balance to strike.

It is argued that the overlap between human rights law and Intellectual property law has few traces in history.³ Intellectual property system does not even mention human rights in Paris, Berne, Rome Convention or TRIPS Agreement.² Even though the protections under the Intellectual property law are referred to as rights, the justifications for these rights are more economic than deontological claims about inalienable human rights.¹⁶ The reasoning behind the distinction between human rights and IP is that the

discourse of human rights is more focused on guaranteeing civil and political rights, rendering the socio-economic and political rights less prescriptive.¹⁷ Whereas for the advocates of Intellectual Property law, the focus is on the expansion of IP protection and trade.¹⁸ The human rights argument is not a justification for IP granting monopolies in the intellectual property nor does it act as a standard to check the expansion of IP protection standards.³ In the absence of apparent overlap, both IP and HR remained isolated and developed as distinct fields within the law.

Conflicts between Intellectual property law and Human rights law became prominent due to the expansion of IP law and realizations within human rights law. The 'intensive lobbying' by the United States and European Union pressured developing countries into buying the TRIPS Agreement.³ TRIPS Agreement was sold with a promise that 'protection and enforcement of IP rights will contribute to the promotion of technological innovation, and transfer & dissemination of technology and innovation'.¹⁹ It also encouraged States to implement IP systems to further social and economic goals.²⁰ Although TRIPS Agreement only imposed minimum standards, there was nothing that could stop the developed countries from pressuring the states to impose maximum standards. This was seen when US and EU negotiated TRIPS Plus bilateral agreements with many developing countries.²¹ The TRIPS Agreement was 'hard-edged'. Tied with the World Trade Organization, it also had a dispute settlement mechanism with the threat of sanctions.²²

The expansions resulted in developing states realising that their obligations to recognise and enforce IP laws were fundamentally 'incompatible'²³ with their obligations to discharge Human rights. Meanwhile, Human rights as a field realised the impact of private individuals on the enforceability of human rights.²¹ It also took cognizance of rights of indigenous people's right to recognition of and control over their culture and traditional knowledge.²⁴ The conflict between the right to education and copyright, the right to health and patents, etc, became apparent. There are several reports and deliberations which acknowledge the conflict between human rights and intellectual property and assert the primacy of human rights over economic and trade agreements.²⁵ The Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution

2000/7 on intellectual property rights and human rights stressed that TRIPS was having negative consequences on right to food, transfer of technology, bio-piracy, control of indigenous people, right to health, etc.²⁶ The 2001 report conducted two-step analysis; report on TRIPS's compatibility with Human rights and impact of TRIPS on public health.²⁶ In 2006 Special commission appointment by WHO on public health, innovation, and IP also reported that the right to health will take precedence over states' legal obligation under TRIPS.²⁷

Helfer proposed that there are two ways to view the relationship between intellectual property and human rights: One is the conflict view, and the other is the coexistence view. The co-existence view postulates that the conflict between human rights and intellectual property rights is illusory. Some state that IP rights are 'weaker' protections than other rights while others argue that human rights are 'open-ended' and general.²¹ The conflict view argues that IP rights are not 'fundamental rights' and so human rights have primacy in cases of inconsistencies.⁹ The skeptics believe that the 'rhetoric of human rights is a barrier to the development of intellectual property law. Human rights will dilute IP which has inherent tendencies to deal with issues of economic, social, and public interest. Rochelle Cooper Dreyfuss argues that Intellectual property rights in particular patent rights have the potential to enhance public benefit. According to her the human rights lens to view IP rights polarises the debate between global north and south having adverse effects on IP laws.²⁸ Helfer's third way talks about the protection of IP rights with help of realization of human rights.²⁹ Lea Shaver goes a step further to give a 'fourth way' that involves re-interpreting private right elements of Article 27 and Article 15 to show that these provisions talk about access to knowledge as a public good.³⁰

Shaver's theory of the 'right to science and culture' explores the impact of Intellectual Property law on 'access to knowledge' from the human right as well as IP perspective. Building on Chapman's right to enjoy the benefits of scientific progress and innovations,⁸ for Shaver 'access' becomes entitlements through her right to science and culture. On a theoretical level, Intellectual property conflicts with and frustrates the right to science and entitlement. The tensions between the right to science and culture and IP is a systematic one. She is calling for rebalancing IP law on basis of the right to

science she is proposing.³¹ Special rapporteur Farida Shaheed noted that the relationship between IP and the right to health, food, and climate change is not comprehensive. The report recommended that; states must ensure the right to science and culture which implies the right to access new technologies, ensure that innovations to the right to dignity reach everyone, guard against the promotion of privatisation of knowledge that deprives individuals of enjoying benefits.³²

When dealing with approaches to conflict between human rights and intellectual property law, the approaches by Helfer, Rochelle and Shaver do touch on aspects of access to knowledge movements. But where does access to knowledge movements belong in the space between IP and Human rights? What is the source from which these movements draw its values? Is it human rights law or Intellectual property law or both? What role do A2K movements play in the debate between IP and Human Rights? Is it a catalyst to enhance conflict or a bridge to make IP and Human Rights meet? These questions are intricately connected to how we frame and understand Intellectual property law and also how we define the relationship of IP law with Human rights. For the purpose of my analysis, the author takes the view that Intellectual property is a tool to realize and balance human rights such as the right to science and culture as well as the right to protection of the moral and material interest of the creators. IP is not to be seen to be completely antithetical to human rights. IP laws are not incapable of performing public interest functions. It is also well known that when resources are at stake, it becomes a matter of governance and goes beyond just normative principles. For instance, most liberal cosmopolitan constitutions recognise the right to health and education, either directly or indirectly as a fundamental right. Yet the governments have failed to provide basic health facilities during the covid-19 pandemic outbreaks. The literacy rates in developing countries are low.³³ These are not just issues that can be resolved by declaration of them as human rights. Issues of food, electricity, health, etc. can best be addressed as a matter of policy taking into consideration the socio-economic, legal, and political factors. As IP Law is a policy tool, it is a matter of policy choice and politics that can facilitate harmonization between Intellectual Property Law and Human Rights.

Conceptual Understanding of Access to Knowledge Movements

Access to knowledge (A2K) is the ‘new politics of intellectual property’ that seeks to fundamentally realign and reform IP Law. It mainstreams the pressures and politics required to make changes in anachronistic concepts of IP Law. It is the politics of mobilising law to accommodate the critique of ‘the narrative that legitimates the dramatic expansion in intellectual property rights.’⁵ The movement is seen as a reaction to exponential changes in technology and dramatic expansions of IP law. On one hand, A2K challenges the contours of IP, on the other, it forces IP to reconsider the domains that it has traditionally distanced itself from. The movement has its origin as a response to criticism of IP and is not fully formed.⁵

These A2K movements are distinct movements.³⁴ From distance, these movements might not have anything in common. For instance, a scholar or author or funder decides to make his book or article available openly for people to read has little to do with India and South Africa seeking suspension of intellectual property law from WIPO owing to covid-19.³⁵ The campaigns for access to knowledge include campaigns to access medicine,³⁶ access to educational materials,³⁷ access to agricultural technologies, plant varieties, farmers' rights,³⁸ and access to information that can help battle food insecurity, etc.³⁹ These movements share some commonalities and consistencies. There is no single theory⁵ or concept that can define or characterise the nature of access to Knowledge. It is an amalgam of different concepts such as ‘public domain’, ‘the commons’, and ideas such as ‘sharing’, ‘openness’, and ‘access’.³⁹ These concepts will be discussed in detail later but as of now, it can be deciphered that the A2K movement is not consolidated.

A2K movements challenge the existing justifications for the expansion of intellectual property and address the gaps which intellectual property fails to address. Firstly, let us see how Access to Knowledge movements challenges the legitimization narrative of intellectual property. IP laws create legitimate means to appropriate knowledge. Intellectual property law regime is built on an “upward harmonization”³³ agenda of building uniform and stronger intellectual property law across the globe irrespective of the position of the country in terms of economic growth and technological development. There are two main justifications for IP. One is the

natural right or deontological justification which argues for creators right over their creations.⁴⁰ The second justification is economic justification that argues that IP rights exist to correct a market failure caused by the free flow of information.⁴¹

A2K movements confront this ‘despotic dominion’ account of IP that tries to justify an aggressive expansion of intellectual property rights. Despotic dominion believes that IP Law is needed for promoting investment in informational goods. It is also needed to incentivise creativity and innovation. Knowledge is a non-rivalrous public good.⁴² This means that one person having information does not mean that extra cost is extended to another person. It is also difficult to stop people from using the information for free or copying the information. When informational goods are created for the first time, it is very costly to invent or market them. But making copies is cheap. For example, a scientist would have been funded by a sponsor for creation. The amount spent on research and development of the invention would be high for the first time. Once the invention is launched in the market, then it is a fraction of the initial cost as it is easy to reverse engineer. In such cases, why would the authors or inventors have any incentive to create and innovate. Economists believe that this free flow of information, which is expensive to produce but cheap to reproduce, creates market failure. IP rights such as patents and copyrights are legal tools by which such market failures can be rectified. The patent system helps to improve ‘dynamic efficiency at the cost of static efficiency’ which means that the cost of imposing monopoly is balanced with the benefit of technological progress and innovation.⁴³ Similarly with copyright, the trade-off between the cost of imposing restrictions on free flow of works and creations (especially to prevent free riding) and benefits of rewarding and incentivising the author or the creator. The hole in this story is that there is no empirical evidence to show that employing IP tools is the best way to promote creativity and innovation⁴⁴ when there are other ways of incentivising creators and innovators such as direct government funding.⁴⁵ Economic justification also places heavy reliance on Harold Demsetz’s “tragedy of the common”. He argues that when the property is held commonly, the individuals fail to maintain, improve, and invest in that property.⁴⁶ By logic of this theory, it is only the sense of ownership and duty of care towards

something that can create a sense of responsibility. A system of private property is essential because it permits people to internalise or recoup the benefits of their investments.⁵ This theory misses the distinction between informational and physical goods. Again, there is no evidence as to why is allocating private property better than social norms⁴⁷ and community negotiated rules⁴⁸ or even government taxation schemes⁴⁹ to organise the land.

The problem is not these justifications per se, but the potent expansion of Intellectual property law using this economic justification for meeting industry demands. A2K movement are trying to defeat this despotic dominion account of IP by conjuring an ‘alternative ethic of the condition of creativity and freedom in the information age’. In the words of James Boyle, the only aim is for ‘IP to get things right’.⁵⁰

These movements, going by the language of concepts like ‘public domain’, ‘commons’, ‘sharing’ or ‘openness’ and ‘access’ are trying to destabilise this despotic dominion narrative. Information enters the public domain when IP rights are no longer covering the goods because the term of the right has expired. According to some theorists, all the information is in the Public domain and hence is seen as the rule, and IP rights are exceptions to this rule. Therefore, academics and scholars are of the opinion that it is important to define and characterise the nature of the information ecosystem. James Boyle notes that the public domain needs to be invented before it can be saved. He looks at the public domain as a ‘place we quarry the building blocks of our culture’.² David Lange also argued for clearly marking the domains of the rights against the public domain.⁵¹ By showing how innovation and creativity can thrive in the negative IP space⁵, the public domain disproves that the romantic idea of IP is needed for incentivising creativity and innovation. A2K advocates show how the despotic dominion theory is radically incomplete in its understanding.⁵ The commons is a concept whereby the property is not privately governed but its governed collectively. It is not completely free from permission but just demands permission from the ‘collective’.⁵² Example of commons is free software based on the Copyleft licensing scheme by programmers. This concept is referred by Carol Rose as the “comedy of commons”,⁵³ which challenges the theory of the tragedy of commons and delegitimises the despotic

dominion narrative by showing the difference between physical property and information which is intangible. The concept of sharing and openness challenges the ‘ethic of exclusion’⁵ that is explained using the press publishers’ rights with movements like ‘share and share’, ‘copyright licenses’, ‘open-source software’, and ‘open access’. Another movement is access, which draws from the demand for distributive justice. One of the most prominent campaigns of the access to medicine campaign that we will discuss in detail in the next part. There are some contradictions within these movements as some argue for a space beyond IP (public domain) while others argue for limited control or different kind of control within the IP framework (commons).⁵

To investigate how IP rights create gaps by placing over-reliance on economics, it is important to know the evolution of information as it acquired a great value for economics and society. The growth of IP owes its credence to society becoming increasingly knowledge and information intensive.⁵⁴ IP rights itself are a form of knowledge that determine intangible property rights.⁴² Just to note here, the terms information and knowledge are not interchangeable. A2K is demanding access to “knowledge” despite the term “information” being the choice of vocabulary in circulation. It is noted that the reason behind choosing the term ‘A2K’ (Access to Knowledge) instead of ‘A2I’ (Access to Information) is the etymological distinction between knowledge and information.⁵ The ultimate goal of the movements is ‘generation’ and ‘acquisition’ of Knowledge. By way of knowledge, we process “information to produce ideas, analysis, and skills that ideally should contribute to human progress and civilization.”⁵⁵ Benkler describes the distinction stating that while information is raw data or factual report, knowledge is “the set of cultural practices and capacities necessary for processing the information in appropriate ways to produce more desirable actions or outcomes from the action.”⁵⁶ Coming back to the point of the increasing impact of information on the economy, information became valuable in terms of economics and intellectual property was a way of regulating information flow in the market and society. The intellectual property rights give protection to the information and prevent others from copying or using the work without proper license or authorisation or permission under the exceptions of the law. Every intellectual property right regulates the information in different ways.

The impact of IP rights goes beyond economy as they directly ‘mediate human experience, wellbeing, and freedom’.⁵ Intellectual property is regulating what we read, speak, and the way we think. It is channelling innovation and scientific progress. It shapes, prohibits, and forbids art and music. Intellectual property rights are putting restrictions on the free flow of information, and this gets in the way of producing knowledge. Knowledge is the capacity to “use the information to create new information or to use the information to generate technical effects in the world (knowledge as ‘know-how’)”⁵⁷ and IP rights restrict this capacity, ‘the capacity of knowledge to empower’.⁵ It is not an overstatement to say that the trend of expansive IP law showed its true colours when the world is grappling with one of the worst health crises of the century. Even with millions dying and at risk of infection across the globe, the pharma companies were not keen to waive the patent on vaccines, citing economic reasons. This is how IP is getting in the way of progress and empowerment.

The advocates of the movement are of the opinion that knowledge should be openly available to everyone. They believe in freedom from ‘permission culture’.⁵⁸ One should not be denied any creative or scientific or academic knowledge because they are not able to pay for it. For building the arguments in this essay, heavy reliance is placed on the work of James Boyle, Gaele Krikorian, Amy Kapczynski and Laurence R. Helfer. As an author, this article is building upon their work and intellect. But what if these books and materials are only made available to those who can purchase them? Some of these books are available under a Creative Commons license and are part of the open-access movement. James Boyle quotes Ray Charles Robinson who explains why he never felt bad for copying the work of Nat King Cole’s technique. He said “*it was something like when a young lawyer—just out of school—respects an older lawyer. He tries to get inside his mind, he studies to see how he writes up all his cases, and he’s going to sound a whole lot like the older man—at least till he figures out how to get his own shit together. Today I hear some singers who I think sound like me. Joe Cocker, for instance. Man, I know that cat must sleep with my records. But I don’t mind. I’m flattered; I understand. After all, I did the same thing.*”² This is what the access to knowledge movements are trying to advocate vigorously through different movements. But how free is free? The

intricate thing to note about these movements is that it does not believe that there should be no Intellectual property rights. It only argues for minimisation of areas where knowledge is restricted. IP is about control. A2K is about the free distribution of knowledge. But again, this distribution of knowledge is not complete freedom. The movement is about finding a balance between freedom and control. As Amy Kapczynski pointed out, the A2K will bring about 'top down' legal changes to prevent the expansion of IP through 'bottoms up' initiatives such as public domain, creative commons, access, etc. In the next section, the author looks at some of the major A2K movements and successes and attempts its normative placement in the IPR and human rights debate.

Locating A2K within IP and Human Rights

In the preceding sections the author has drawn from two views: One is that Intellectual property is capable of addressing human rights issues related to medicine, food, education, etc. The second view is that access to knowledge is 'politics' that is fundamentally realigning Intellectual property law and restoring the adequate balance between freedom and control. I have also argued that the existing debate between Intellectual property law and human rights law, needs to normatively explore the access to knowledge movements because these movements have the potential to rescue IP from its despotic dominion logic.

A2K has a conceptual capacity to limit IP extremism.⁵ It is argued that in the space between IP law and Human rights law, A2K movements can act as a harmonizing tool. This statement is based on two beliefs. Firstly, A2K is the key to find a perfect balance between innovation, growth, creativity, and socio-political interest. Second is that such a balance can be achieved by A2K through politics and mobilisations. The A2K movement is the key missing ingredient in understanding the relationship between IP and human rights. That is the normative place it stands on in this relevant debate. There are stark similarities in the origin stories of the A2K movements and the reasons for the conflict between Human rights law and intellectual property law. The main reasons for the stress between human rights and intellectual property is the massive uncontrolled expansion of Intellectual property rights, the asymmetry of power between the global north and

global south, and realisation on part of developing countries that impact of this power asymmetry on their obligations to discharge welfare functions. As discussed, the driving factors behind the A2K movements are radical changes in technology and expansions of intellectual property coupled with postcolonial nations regaining their consciousness⁵ about the undue pressure from industrialised nations for imposition of maximum standards of intellectual property law.

As Benkler said, the coalition of A2K is diverse.⁵ It is important to issue a caveat at this stage. The argument that is made does suffer from running the risk of generality. The range of these movements is spread, and it will be a futile intellectual exercise to restrict the scope of the movements by boxing it into either human rights law or intellectual property law. It is not argued that access to knowledge is a strictly intellectual property law concept or that it originates from human rights law. A2K is not distant concept from human right laws. Access to knowledge is a human right if we read it in Article 27 of the UDHR, but the movements concerned in this article deals with the politics of 'intellectual property'. The literature on the debate between IP and Human rights touches upon this movement as a part of development, which can show the engagement between the fields. Whereas the literature on Access to Knowledge also does not explicitly view the conceptual or practical terrain of these movements using the prism of the debate between IP and HR. The objective of this essay is to get the reader to think about the role of Access to knowledge movements in the Intellectual property and human rights and show how there have not been explicit efforts to show the consolidated impact of these movements. This theoretical enquiry is to discern the core values behind some of the most prominent A2K movements within the project of realigning politics of intellectual property balance the interests.

There is an overlap between access to knowledge activism and reconciliatory efforts³ to resolve HR and IP conflict. Issues of right to education, right to information, right to health, can be reconciled with help of employing a balance between these human rights and the corresponding intellectual property law. And if the equation between human rights law intellectual property law is failing to provide the required working formula, the access to knowledge movements has potential to act as a catalyst and make

the reconciliatory efforts work. Access to knowledge interacts with intellectual property law as well as human rights law but it is focussed on generation, dissemination, and regulation of knowledge.⁵ The argument here is that it will help both IP and HR if the issues are framed in terms of intellectual property.

Taking Right to health and the problem of access to medicine patent hegemony as an example, I will make this argument clearer. The parallels between the HIV aids crisis and Covid-19 pandemic has highlighted how the developing countries' fight for equitable access to essential medicines, medical equipment, technology transfer, and adequate health care facilities is far from over.⁵⁹ The right to health has been given primacy over intellectual property law by numerous reports.⁶⁰ This provided scope for reading human rights law into reading patent laws as 'one that must be tied to levels of socio-economic developments'⁶¹ and for justifying provisions for compulsory licenses for patented medicines during emergencies and public health crises.⁶⁰ Although this led to the Declaration on the TRIPS Agreement and Public Health (Doha Declaration), very little has been achieved by placing reliance on human rights.

Siva Tambisetty writes that using 'the human right to health to correct the technocratic forces in patent law is doomed to fail'. She explains it would be provided better results if human rights are 'uncoupled' from the patent law and let the patent law self-reflect and systematically retool itself.⁶⁰ Dreyfuss argues that the human right narrative can hold true for copyright but fails when it comes to patents as moral and material interest cannot be balanced as invention and scientific research require greater financial investments and lacks the element of personality.²⁸ G. Spina Al'i argues that IP statutes can be reconciled when in conflict with human rights by way of internalization of the conflict through 'limitations and exceptions' and also externalization through 'judicial application of doctrines of proportionality and balancing of competing rights'.²⁸ Drawing from some of these critics is just naming a particular right as a human right or merely declaring the supremacy of the right to health over the patent laws will not redress the problem. The chances to resolve the problem of access to medicine dependencies are at best resolved by a concrete legal and political setup. Even the logic of using patent laws to discharge public welfare functions is insufficient in a transnational set up that requires active leadership and political willingness for

realization of any objective.⁵ Especially with TRIPS flexibilities, the balance has been achieved on paper, but implementation of the flexibilities has failed. In 2006 Thailand issued compulsory licencing for three drugs on its national essential drugs list and asked WHO to provide technical assistance, which it has failed to provide.²⁸ In the case of Covid-19, these flexibilities are not only inefficient but also inadequate, as compulsory licensing do not compel the developed nations to share the technology or medical information.⁶³ That is the reason Countries like India and South Africa have pushed for waivers.⁶³ Therefore, it is argued that the public health concerns should be addressed using A2K language and mobilising politics around calls for equalising and balancing. This holds true for harmonising the right to education and copyrights, the Rights of indigenous people, and IP. The best chance at access and sharing of knowledge and information is through the political mobilisation.

The paper over emphasises politics because the reason for the failure to distribute resources in the world is the power asymmetry between the global north and south. The open struggle goes back to the imposition of the TRIPS and the Intellectual Property on the developing countries that were resisting IP as it will bring the imbalances to development of the economy of these states and they will have to grow in conditions which are more restrictive than the IP free conditions under which the developed nations flourished during a period of their initial growth. This imbalance is reflected throughout the issues between IP and HR law including the debate surrounding patent waiver.

Only times the developing countries have found success in when they have managed to mobilise civil societies and scholars from the west to join their movements and influence the politics of the west. Latif writes about this while explaining the drafting history of developmental agenda.⁵ The WIPO Developmental agenda initially was not about access to knowledge, even though it reflected on A2K issues such as promotion of creative commons and open access. A group of academicians, scholars, and civil society met in Geneva before the Meeting for the developmental agenda and launched Geneva declaration on the future of WIPO. A major part of WIPO's developmental agenda getting received positively was because of the Geneva declaration. It is believed that initiatives of developing countries have

only been successful as they were supported by civil societies from the north who were able to mobilise public opinion and politics in favour of causes that further the interests of developing countries.⁵ After this in 2005 A2K treaty has been discussed. The act of balancing continues even when addressing the power asymmetry issues, as can be seen from the involvement of A2K in the WIPO's Standing Committee on Copyright and Related Rights. The committee raised concerns for access to educational material by expanding the limitations and exceptions in their national Copyright Law. Here A2K is balancing the interest of developing countries that are seeking flexibilities within IP and the interests of developed nations to secure innovation and creativity using IP.⁵

A2K movements are not restricted to representing the interests of developing countries or balancing the power dynamics but also of other addresses other social issues as well as restoring the original logic of IP law. This is evident from the Marrakesh Treaty⁶⁴ that facilitated the production of books for visually challenged persons and rejection of software patents in the EU parliament.⁵ Therefore, I argue that issues of human, social, and political interests are framed in terms of A2K, it can provide a nuance that can resolve the issues.

Conclusion

When contours of the relationship between A2K, IP and HR are drawn, it can pave the way for further investigation as to how IP and A2K can address the state's failure in discharge of human rights instead of just reading Human rights into IP Law. This missing discourse was pointed out by James Boyle during a panel discussion on 'Human rights and intellectual property: Mapping the Global interface' at Duke School of law. Boyle pointed that one of the criticisms of Helfer and Austin's seminal work on relationship between human rights and intellectual property is that they have not taken into account the work done by A2K movements. He suggested that the relationship between human rights and IP is not one-directional. Studying this A2K movement can provide a nuanced perspective on the human right that can show the use of 'private hacks to solve a public dysfunction'. This intricate analysis becomes difficult because the scope, nature, and character of A2K movements are not clear, often too broad, and sometimes even conceptually conflicting with each

other. The work of drawing commonality between these different A2K movements has been done by Amy Kapczynski and Gaëlle Krikorian. What the works by Helfer and Amy misses out is drawing the relevance of A2K in discourse between Human rights and Intellectual property law. That this where my analysis becomes relevant.

World is facing issues of increasing diseases, climate change, and many other factors, the gulf between the global north and south has widened. The Covid-19 pandemic has shown that no country is now exempt from the impact of a health crisis, but it has also shown how developing countries face more hardship and adverse consequences than developed countries. IP is not the only obstacle in overcoming these issues, but it is still one of them. Through this analysis, it is shown that IP can be a solution for many of these issues, and Access to knowledge can be a way in which the internal logic of IP can be rescued from the despotic dominion narrative. The normative enquiry into the Access to Knowledge movements places the concept as a catalyst to facilitate the reconciliation between Intellectual property and Human rights law. Therefore, this enquiry is extremely crucial to start framing the issues of Human rights and IP Law in terms of access to knowledge movements as they can change the outcomes of ongoing debates. A2K can provide the discourse of balance between control and creativity that has gone missing and help draw the line that Jefferson illustrated.

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