

University of Missouri School of Law Scholarship Repository

Faculty Publications

Faculty Scholarship

2017

Developing a Matrix for Intellectual Property as Subject of International Law

Sam F. Halabi

University of Missouri School of Law, halabis@missouri.edu

Follow this and additional works at: <https://scholarship.law.missouri.edu/facpubs>



Part of the [Intellectual Property Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Sam F. Halabi, Developing a Matrix for Intellectual Property as Subject of International Law, JOTWELL (June 27, 2017)

This Article is brought to you for free and open access by the Faculty Scholarship at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Developing a Matrix for Intellectual Property as Subject of International Law

Author : Sam F. Halabi

Date : June 27, 2017

Henning Grosse Ruse-Khan, [The Protection of Intellectual Property in International Law](#) (2016).

Intellectual property disputes implicating diverse and seemingly unrelated international legal regimes have become more frequent, acrimonious, and high-stakes. This trend has spawned an enormous academic literature endeavoring to rationalize the approach various interpretive authorities take to intellectual property disputes. Graeme Austin and Larry Helfer's *Human Rights and Intellectual Property* offered a framework by which to resolve claims for or against intellectual property protection based on human rights arguments; [Susy Frankel](#) has extensively assessed the application of customary international rules of interpretation in furtherance of a rationalizing approach to complex IP conflicts; and [Jerry Reichman, Paul Uhlir, and Tom Dedeurwaerdere](#) have developed comprehensive approaches to questions arising at the intersection of international research efforts and potential IP-related obstacles. Edited volumes by [Margo Bagley and Ruth Okediji](#), [Carlos Correa and Xuan Li](#), [Daniel Gervais](#), [Shubha Ghosh and Robin Paul Malloy](#), [Christopher May and Susan Sell](#), and [Peter Yu](#) similarly provide useful and targeted analyses of discrete IP-areas (e.g. patent and copyright) to particular contexts (e.g. development, disability, and innovation). The aforementioned works are by no means exhaustive but it is fair to say that none attempts to undertake the quite complex, more comprehensive question of intellectual property law as a fragmented part of the broader international legal order.

Enter Henning Grosse Ruse-Khan's *The Protection of Intellectual Property in International Law*. Ruse-Khan, University Lecturer and Fellow at King's College, Cambridge applies the broader theoretical elaboration of international law's fragmentation to intellectual property disputes so as to provide a more comprehensive approach to issues raised by intellectual property's overlap with discordant international legal regimes other scholars have tackled through narrower lenses. (P. 4.) This book is one I like a lot, and I hope others active in the study and shaping of international intellectual property law do as well. Intellectual property, Ruse-Khan reminds us, was a forerunner of the kind of fragmentation more systematically analyzed by the International Law Commission after 2006: "IP is . . . addressed, from diverse perspectives, in the United Nations Organization for Education, Science and Culture and the Food and Agriculture Organization of the United Nations as well as in the context of the Convention on Biological Diversity and the World Health Organization" even before trade and investment started playing their inevitably influential role. (P. 8.)

Ruse-Khan's book is particularly timely in light of a recent spate of international intellectual property disputes. Last year, an arbitration panel issued a decision rejecting Philip Morris International's claim against Uruguay for adopting tobacco packaging regulations that stripped its ability to use its trademarks to market more than one variety per brand family and required 80% of cigarette packages (along with their distinguishing logos and images) to be covered with graphic warnings. That dispute followed others involving pharmaceutical firms pitted against Brazil, India, and South Africa in both national and international dispute resolution fora, governments claiming insufficient levels of intellectual property protection and enforcement against one another; and, all around, new bilateral and multilateral agreements steepening international law's influence into domestic intellectual property protection regimes. While multifaceted, these disputes may be particularly complex because they require application of rules drawn from ostensibly distinct and self-contained international legal regimes. The PMI-Uruguay panel, for example, used the World Health Organization's Framework Convention on Tobacco Control as part of its analysis of a dispute that originated in a bilateral investment agreement between Switzerland and Uruguay.

In Chapter 3 of the book, the heart of Ruse-Khan's contribution, he provides a framework for evaluating these high-profile disputes. There he argues that cohesive approaches to intellectual property disputes can be logically ordered

from the systems analysis he provides in Chapter 2: “technical– legal tools can derive from the rules or rule- systems whose relationship is to be determined” so that many disputes will implicate specific provisions of applicable law “(eg a Berne Convention rule that regulates the possibility of inter- se agreements such as the WIPO Copyright Treaty . . . or a CBD norm that is made subject to the international rules on the protection of IP).” (Pp. 31-33.) Where “alternative” or “other” systems bear upon IP disputes, more broadly applicable rules of international law like the Vienna Convention on the Law of Treaties’ bias in favor of harmonization or the WTO Appellate Body’s approach to defining conflict can effectively order the rules adopted from outside *lex specialis* circumstances i.e. where applicable treaties or rules do not by their terms resolve IP disputes.

Indeed, as another reviewer has noted, Ruse-Khan’s contribution might be better understood as a systematic analysis of conflict-of-law and conflict-of-norms principles developed and then applied to the subject of intellectual property under various, sometimes competing, international legal regimes. It is not clear, for example, that even applying the useful framework he invents (as he does in Chapters 4-12) results in the “protection” of intellectual property. Yet what does result is a rational approach by which stakeholders, interpreters, and arbiters may manage – with cohesion and legitimacy – the increasing number and severity of international disputes over intellectual property. As those disputes continue to invite application of rule-systems not contemplated by their conscientious designers nor their passive interpreters, Ruse-Khan’s analysis will provide a premier and precise tool.

Cite as: Sam F. Halabi, *Developing a Matrix for Intellectual Property as Subject of International Law*, JOTWELL (June 27, 2017) (reviewing Henning Grosse Ruse-Khan, **The Protection of Intellectual Property in International Law** (2016)), <http://intl.jotwell.com/developing-a-matrix-for-intellectual-property-as-subject-of-international-law/>.