

## **Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology**

By Abbe E. L. Brown

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Reviewed by Roxanne A. Stokes

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Intellectual property (IP) rights are necessary rights giving power to the creator or owner of such property. Yet, this power gives rise to concerns when it inhibits access to essential technologies—technologies meeting a certain need that may not become available to others without infringing upon one’s IP rights. *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology*<sup>1</sup> “explore[s] the extent to which competition and human rights law can be used to identify essential technologies, and to manage the power conferred by IP law in such situations.” The author does so by providing a concrete system that courts can apply to cases addressing these issues in order to make the legal analytical process more consistent on national, regional and international levels.

Author Abbe E. L. Brown’s research in the interconnection between intellectual property, human rights and competition law did not begin with this book. She initially took on this issue during her doctoral research<sup>2</sup> and her passion for enabling access to essential technologies is confirmed by the tone of this text.<sup>3</sup> Her practical legal experience in London, Melbourne, and

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<sup>1</sup> ABBE E. L. BROWN, *INTELLECTUAL PROPERTY, HUMAN RIGHTS AND COMPETITION: ACCESS TO ESSENTIAL INNOVATION AND TECHNOLOGY*, 1 (2013).

<sup>2</sup> *Dr Abbe Brown*, UNIVERSITY OF ABERDEEN SCHOOL OF LAW, *archived at* [www.webcitation.org/6FWiUq1li](http://www.webcitation.org/6FWiUq1li).

<sup>3</sup> BROWN, *supra* note 1, at 6.

Edinburgh, adds credibility to her arguments and potential solutions provided in the book.<sup>4</sup> This along with her vast amount of research and publications on issues regarding intellectual property law gives depth to her explanation of concepts and conflicts in IP, human rights and competition.<sup>5</sup>

The book announces from the very beginning that the basis of IP rights is the right to exclude.<sup>6</sup> IP rights are recognized as human rights by various international sources, yet these rights can conflict with other human rights such as “rights to adequate health care, to education, to share in the benefits of scientific progress, and to participation in cultural life.”<sup>7</sup> This book begins by acknowledging the power inherent in intellectual property rights and introduces the concept of an “essential technology.”<sup>8</sup> She offers a pharmaceutical drug as a prime example of an essential technology.<sup>9</sup> She then discusses the problem of IP power and struggles nations, states, and activists have had in attempting to challenge this power in order to make the pharmaceutical drug, for example, available to those that need it.<sup>10</sup> The book then continues by further discussing IP and how IP rights can be limited by standards, the minimum of which are now included in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).<sup>11</sup> When these standards are formally set, it focuses on the technology’s nature and features rather than the fact that it may be controlled by someone.<sup>12</sup> When one’s IP rights have been infringed upon, this may cause the infringer to be liable for a remedy in either the form of an injunction or

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<sup>4</sup> Brown, *supra* note 2.

<sup>5</sup> Brown, *supra* note 2.

<sup>6</sup> BROWN, *supra* note 1, at 1.

<sup>7</sup> *Human Rights and Intellectual Property: An Overview*, WIPO, archived at [www.webcitation.org/6FWi3MYNh](http://www.webcitation.org/6FWi3MYNh).

<sup>8</sup> BROWN, *supra* note 1, at 1.

<sup>9</sup> BROWN, *supra* note 1, at 1.

<sup>10</sup> BROWN, *supra* note 1, at 4.

<sup>11</sup> BROWN, *supra* note 1, at 15.

<sup>12</sup> BROWN, *supra* note 1, at 18.

damages.<sup>13</sup> However, if the technology at issue is within a standard, a court may not grant such remedies to the IP owner, yet Brown suggests that there is no predictable way for IP owners, activists, nations, or businesses to know when such an outcome would occur since courts have wide discretion to make a determination one way or another.<sup>14</sup> Brown suggests that a balancing act between IP, competition (antitrust) law, and human rights is the solution to the issue of how courts handle cases regarding potentially essential technologies.<sup>15</sup>

In Chapter 3: *Existing links and opportunities: human rights, competition and essential technologies*, the book delves deeper into the role competition plays in IP, providing two key factors in determining the existence of an “abuse of the dominant position”: the availability of alternatives and geography.<sup>16</sup> She distinguishes between an acceptable (micro) and abusive (macro) monopoly, stating as an example that, “patent owners obtain ‘a micro-monopoly on the given specific technological solution they have developed, not a macro-monopoly on the industrial sector to which that solution belongs.’”<sup>17</sup> Furthermore, she notes that human rights law plays a crucial role in determining essential objectives and whether a technology is a means (or the only means) to achieving that objective.<sup>18</sup>

Chapter 4: *An existing solution? The judicial and regulatory interface between the three fields* provides case examples from various jurisdictions—mainly focusing on the United Kingdom, European Union, with a few cases from the United States—looking into how courts have addressed IP and human rights, and IP and competition (refusal to license cases).<sup>19</sup> The

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<sup>13</sup> BROWN, *supra* note 1, at 19.

<sup>14</sup> BROWN, *supra* note 1, at 21.

<sup>15</sup> BROWN, *supra* note 1, at 22-23.

<sup>16</sup> BROWN, *supra* note 1, at 48-49.

<sup>17</sup> BROWN, *supra* note 1, at 49.

<sup>18</sup> BROWN, *supra* note 1, at 50.

<sup>19</sup> BROWN, *supra* note 1, at 71-80.

essentials facilities doctrine is presented and defined, suggesting that it can be a tool for requiring access to certain technologies.<sup>20</sup>

However, in Chapter 5: *Using human rights*, Brown suggests another alternative, the Human Rights Emphasis, as a way to balance fundamental rights when more than two of these rights are at issue.<sup>21</sup> The Human Rights Emphasis is a two-step test.<sup>22</sup> Step one consists of identifying relevant rights and step two consists of evaluating and combining rights. The evaluation process includes a point system: each right has an initial value of “one” with this value adjusting up or down one if the criteria for the rights to be balanced are met.<sup>23</sup> There are three outcomes that can result from applying this point system: “plus one” in favor of the IP owner, “minus one” against the IP owner, or neutral.<sup>24</sup> The book then provides four scenarios involving various IP and human rights issues, applying and further explaining the Human Rights Emphasis.<sup>25</sup>

The analysis of the Human Rights Emphasis progresses as the book addresses “limits” on the Human Rights Emphasis by confronting issues in how “abuse” is defined in Chapter 6: *Market definition and abuse: new arguments for access*.<sup>26</sup> Brown encourages a “strained” interpretation of abuse to promote consistency.<sup>27</sup> Brown also discusses the importance of market definition in determining the existence of abuse.<sup>28</sup> She then applies her analysis of abuse and market definition to her four scenarios, concluding that IP owners can be assured that their rights

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<sup>20</sup> BROWN, *supra* note 1, at 95.

<sup>21</sup> BROWN, *supra* note 1, at 123.

<sup>22</sup> BROWN, *supra* note 1, at 124-25.

<sup>23</sup> BROWN, *supra* note 1, at 126.

<sup>24</sup> BROWN, *supra* note 1, at 126.

<sup>25</sup> BROWN, *supra* note 1, at 126-41.

<sup>26</sup> BROWN, *supra* note 1, at 147-49.

<sup>27</sup> BROWN, *supra* note 1, at 148.

<sup>28</sup> BROWN, *supra* note 1, at 156.

will not ultimately be destroyed by the Human Rights Emphasis or a “strained” approach to abuse and market definition.<sup>29</sup>

In Chapter 7: *Wider perspectives*, further suggestions are raised as to how perspectives on IP, human rights and competition can be widened yet Brown is realistic in noting that any change on the national or international level will only come slowly over time.<sup>30</sup> The book offers suggested amendments to TRIPS in hopes of resolving some of the issues in access to essential technologies by adding more definitive language (replacing all “mays” with “shalls”) and addressing abuse of the dominant position more clearly.<sup>31</sup> These proposals are made in hopes of getting greater access to essential technologies on the national, regional and international levels where there are findings of abuse.<sup>32</sup>

The final chapter brings everything full circle by providing an overview of the problems and possible solutions, while also acknowledging that the solutions provided may not solve all issues.<sup>33</sup> Brown reiterates that IP, human rights and competition are intertwined and concludes with her hopes that implementing the Human Rights Emphasis would provide greater, wider and more equitable access while still respecting IP rights.<sup>34</sup>

This book provides a very detailed look into the connections between IP, human rights and competition law with specific suggestions one could take to consistently and fairly rule in favor or against an IP owner regarding essential technologies. Brown has a wide variety of knowledge in these fields with her expertise shown by her focus on the UK and EU regions.

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<sup>29</sup> BROWN, *supra* note 1, at 159-66.

<sup>30</sup> BROWN, *supra* note 1, at 196.

<sup>31</sup> BROWN, *supra* note 1, at 197-99.

<sup>32</sup> BROWN, *supra* note 1, at 199.

<sup>33</sup> BROWN, *supra* note 1, at 213, 218.

<sup>34</sup> BROWN, *supra* note 1, at 220.

Since the focus is more on Europe, some readers from the United States or other nations operating differently from the UK and EU may not find this book as helpful.

The book addresses arguments from all sides while maintaining her position in favor of wider access without coming across as too biased. I appreciate how smoothly the Human Rights Emphasis can be applied and calculated. This book, for this system alone, is a great resource for courts at all levels, businesses and activists that hopefully by reading it will realize how implementing the Human Rights Emphasis could help courts, nations, and IP owners.