

# The IP Law Book Review

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**HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES**, by **Holger Hestermeyer**. Oxford University Press, 2007. 369 pp. Paperback \$55.00.

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Human rights and patent rights have become increasingly intertwined in discussions surrounding access to pharmaceutical drugs by citizens of developing countries. This discussion is a particularly contentious one for reasons of socioeconomics and geography. Drug companies in more developed countries (“MDCs”) tend to own the patent rights covering newer medicines, and justify the monopoly prices they charge as a necessary return on investment for inventing new drugs. Less developed countries (“LDCs”), lacking the purchasing power to pay monopoly prices for patented drugs, tend to argue that monopoly prices for drugs violate human rights of access to medicines. The result is an often shrill debate over the primacy of patent rights or human rights. In his excellent book, **HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES**, Holger Hestermeyer has tackled this complex and contentious conflict, disentangled it into its essential constituent parts, including patent law, human rights, and international trade under the World Trade Organisation (“WTO”) regime and its side-agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”), and then artfully reconstructed a clear, cogent, and hopeful model of how to approach a resolution. His research is meticulous, his prose spare yet fluent, and his arguments persuasive and well-supported.

One of the signal strengths of the book is its masterful illustration of how interconnected seemingly disparate areas of legal doctrine can be. The book neatly clarifies and contextualizes the clash between patent rights and human rights over access to drugs in LDCs, and then illuminates the most significant issues underlying this clash to make them both accessible and fascinating to the reader. This is more difficult than it might appear to be.

Human rights law is usually associated with passionate advocates and moral arguments. It inspires strong opinions among both supporters and opponents of particular initiatives, and excites broad interest. By contrast, patent law and international trade law are burdened by esoteric doctrines, impenetrable nomenclatures, and highly technical subject matters. Much more limited audiences are attracted to discussions of most-favored nation status, nonobviousness, non-tariff barriers, and swearing behind prior art. However, by demonstrating the vital implications that human rights law, patent law, and international trade law have for each other, the book makes all three fields more interesting. Furthermore, by demonstrating that the apparent independence of human rights law, patent law, and international trade law is illusory, at least in the case of access to medicines in LDCs, the book illustrates the need for legal scholars focused on any one specialty to expand their understanding of other specialties, if only to understand their own specialty more completely.

The book takes a systematic approach to the issue of human rights, patent rights, international trade, and access to patented drugs in LDCs. After a brief précis of the main argument, Chapters 2 and 3 provide backgrounds to patent law and access to medicine as a human right, respectively. These two chapters provide a reader inexperienced in either of these two areas of law with detailed, yet manageable, tours through their histories, rationales, and current legal doctrines. Particular strengths of Chapter 2 include the context it provides for current national and international patent regimes. It accomplishes this through a detailed consideration of the historical origins and diversity of philosophical justifications underlying patents and an effective overview of the rights conferred by the patent grant. Chapter 4 sets up the central argument of the book: that TRIPS-imposed patent regimes in both MDCs and LDCs block access to patented drugs in LDCs by imposing unaffordably high prices. Chapter 5 then suggests that this problem of access may be ameliorated, though not entirely solved, by a “human rights-based interpretation” of TRIPS-imposed patent obligations that privileges rights of access to medicine over strong enforcement of patent rights.

Hestermeyer does not hide that fact that his sympathies lie with greater access to patented drugs in LDCs. Yet, he resists the temptation to call for radical legal change. It is a testament to the balanced and scholarly approach he takes in his book that the solution he advocates relies on countries’ fulfillment of their existing human rights obligations rather than the imposition of new legal obligations concerning patents, international trade, and human rights. The book concludes cautiously, suggesting that

the conflict between patent rights and human rights is permanent, and will require constant rebalancing (p.292).

The weaknesses of the book are rather insubstantial in comparison to its considerable strengths. Only a few bear mention. In general, the citations are excellent. In fact, the wealth of research found in the footnotes alone makes this book a valuable resource for scholars. Occasionally, however, a substantial factual assertion goes unsupported or the support cited is weak or mistaken. For example, early in the book Hestermeyer makes the assertion that there exists a “common claim that inventors traditionally (and everywhere) have a right to a patent” (p.21). No citation is provided to support this bold statement, and little support can be found elsewhere in the book. Later, philosopher John Locke is described as “rooting patent protection in natural law” (p.25), though Locke himself fails even to mention patents in the cited reference. Another weakness involves the strong assertion that patents lead to higher prices for medicinal drugs (e.g., pp.135-166). “Higher” implies a comparison to something else, as Hestermeyer himself acknowledges (p.144). But, for a drug to receive patent protection in a properly functioning patent system, that drug must have been new and nonobvious compared to the prior art. What can the price of a previously unknown drug, adjudicated by a scientifically-skilled patent examiner to be significantly different than existing drugs, be meaningfully higher than? While it is true that competition in the absence of patent protection could lower prices by preventing the patent owner from successfully charging monopoly prices, the book appears neither to advocate the abolition of patents in all countries nor to offer persuasive evidence that, absent the incentive of patent protection, a sufficient supply of new and useful drugs would be invented and developed prospectively. This claim of “higher” prices, so important to the overall thesis of the book, requires either better justification or better explanation of the justification provided. Finally, Hestermeyer focuses his discussions of drugs almost entirely on small-molecule drugs, certainly a traditional mainstay of pharmaceutical medicine, but a category of drugs whose relative importance is rapidly declining in the face of newer “biologics” developed by biotechnology. In fact, the word “biotechnology” does not even appear in the subject index (p.361). Nevertheless, these few quibbles are greatly outweighed by the many and manifest strengths of the book.

HUMAN RIGHTS AND THE WTO is a necessary resource for any scholar interested in the legal nexus of human rights, patents, and international trade. It provides a superb model of how to integrate multiple, disparate bodies of law into a cogent and synthetic account. This book provides a

well-researched, well-written, and persuasive account of, and approach to, a modern medical tragedy the resolution of which has proved complicated, unpredictable, and elusive. Through a combination of meticulous research, an obvious interest in ensuring that medicines reach the patients who need them in LDCs, and a fluent ability to weave together three complex and largely disparate bodies of law, Holger Hestermeyer has produced a masterful synthesis of law, policy, and measured advocacy.

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