Indian Journal of Human Rights and the Law, Vol. 16, No. 1-2, (2019)

INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS

SHIVANAND.H.LENGATI

Abstract: Intellectual property rights and human rights remained strangers for a long time. What was the reason for this isolation? WTO's WIPO regime of Intellectual property rights seeks to balance the moral and economic rights of creators and inventors with the wider interests and needs of the society. At the same time this Intellectual Property Right's Regime is violating the human rights citizens, consumers and indigenous people to some extent. To some extent intellectual property rights and human rights are having conflicts and to some extent they are co-existing. Intellectual property rights and human rights must learn to cohabit together.

INTRODUCTION

The intellectual property rights regime is violating the rights of the rights of the citizen, consumers and indigenous people to some extent. Intellectual property laws are violating the right to food right to health and right to express of the citizen. By patenting of seeds. Plants, (yellow bean patenting, basmati rice patenting) and other biological substances the price of the food items is increasing day by day. So intellectual property rights regime violates the right to food-a human right – of every citizen by patenting of medicinal drugs and treatment process human right to life is violated. By patenting, every commodity is available at higher prices than it would have been available if it is not patented. So it is violating, the rights of consumers to get the commodities at fair prices. Always there is a conflict between copy right and freedom of expression. But it was also argued that copy right was intended to be an engine of expression. in this way intellectual property laws are violating the human rights

By taking undue advantage of existing IPR laws multinational laws are patenting traditional knowledge of indigenous people. By this piracy, property rights of indigenous people are violated over their intellectual creations, culture and folklore. These are the main reasons for conflict between human rights and intellectual property rights regime. At the same time human rights and intellectual property rights are co-existing mutually. According to human

* *Principal,Vijnaneshwara Government Law College, Kalaburagi, Karnataka State,India. E-mail:shlengati@gmail.com*

rights, every person who created a new thing, substance or product by his intellectual efforts he is having property rights over that thing.

He can sell or lease it to anyone. This is recognized and allowed by the intellectual property rights regime.

This is one instance where both intellectual property rights regime and human rights are co-existing. Right to development is a human right. WIPO's regime of intellectual property rights seeks to balance the moral and economic rights of creators and inventors with the wider interests and needs of the society. When a person invents a new thing, machinery or product he is going to patent it to get monetary rewards. As the inventors are allowed to get monetary rewards, more and more inventions will takes place and the society will develop in a short time. Thus intellectual property rights regime allows fulfilling the human right to development.

According to Paul Torremans traditionally there are two dominant views about 'cohabitation', of intellectual property and human rights namely a conflict view, which emphasizes the negative impacts of intellectual property on rights such as freedom of expression or the right to health and security, and a compatibility model, which emphasizes that both sets of rights strive towards the same fundamental equilibrium.[1]

ISOLATION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS REGIME:

It is very surprising that intellectual property rights and human rights remained strangers for a long time. Human rights law's basic document – the 1948 Universal Declaration of Human Rights – protects authors' "moral and material interests" in their "scientific, literary or artistic productions" as part of its catalogue of fundamental liberties. In the mid 1960s, a similar clause was included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has now been ratified by nearly 150 nations.[2] For years intellectual property remained a neglected area in the human rights subject; neglected by treaty bodies, experts, and communicators while other rights emerged from the jurisprudential shadows.

At that time human rights law was having only nominal interest in intellectual property governed by the intellectual property regime. No reference to human rights appears in the major intellectual property treaties such as the Paris and Berne Conventions, or in the recently adopted TRIPs agreement. These treaties have given protections to the authors and inventors as under the label "rights". But the principal justification for these agreements lies not in claims about inalienable liberties, but rather in economic and instrumental benefits that comes from protecting intellectual property products across national borders.

What was the reason for isolation of human rights and intellectual

property? In part, the answer is that both bodies of law were preoccupied with more important issues, and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion.[3] Intellectual Property and human rights must learn to live together.

CONFLICT OF INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS:

As intellectual property rights are increasingly globalized, there is growing concern about the 'one way ratchet' of intellectual property protection. According to critics, the growing protection of intellectual property not only jeopardizes access to information, knowledge and essential medicines throughout the world, but it also has heightened the economic plight and cultural deterioration of less developed countries and indigenous communities.[4]

Patenting of biological resources collected from indigenous groups has become a controversial trend. Two U.S. patents in particular, one claiming a cell-line from a 26 year old Guayami women and one claiming a Leukemia virus from a Hagahai man in Papua New Guinea, illustrates how volatile the patenting of biological resources has become.

The ethical debate surrounding the patenting of biological material has reached new levels now that scientists and researchers have been gathering and patenting DNA samples from indigenous populations around the world. The debate raises numerous issues. For example, the data, which has revealed information on diseases such as leukemia and AIDS, stigmatize or create outsider prejudice towards indigenous populations? Have these isolated groups, which may speak different languages than researchers and scientists, given informed consent to the researchers and scientists? Whether indigenous people are entitle to receive compensation for use of their genetic material? To what extent these indigenous groups control or own their genetic material? For many indigenous groups biological material is very sacred and also having religious significance. Lastly, what are the collective rights of the indigenous community, which oppose the testing of biological material, when few individuals of tribe the who wish to participate in the biological research?

What are the responsibilities of the U.S. Patent and Trademark Office (USPTO) to monitor these ethically questionable patent applications?

The patent of gene sequences did not start with the DNA testing of indigenous people. Public have not opposed this sort of intellectual property. In fact, as early as 1980, the U.S. Supreme Court declared that the patenting of living micro organisms was permissible under U.S. patent laws. There has been increase in what some scholars have called as "hyperownership," a term that refers to the international movement to "own or control access to the sub cellular genetic sequences that direct the structure and characteristics of

all living things, or in popular usage, natures or God's blueprints for life." The U.S. has been the leader in this trend, "extending patent protection to a wide and increasing array of genetic material." By the middle of the year 2000, "the USPTO had issued over 6000 patents on full-length genes isolated from living organisms and were considering over twenty thousand gene-related patent applications."

The legal world has recently addressed human gene sequences as a source of intellectual property. Debate has arisen regarding whether doctors have rights to the research and subsequent patenting of a patient's "discarded" biological tissue. Also a huge uproar ensured when it was discovered that research physicians patented and commercialized a test for Canavan's disease from the bequeathed biological material of patients who donated their biological tissue under the belief that it would be solely to help diseased patients. Critics have noted that "patent lawsuits seeking recovery of a researcher's patent profits, from patents involving the patient's genetic material .... will likely recur." Furthermore, "absent legislative intervention to compensate patients, they have reduced incentives to donate their genetic material to further scientific research." The DNA collection from indigenous groups, however, has created a new, more ethically-charged, dialogue to this decade-old debate.

During the decades following World War II, the most pressing concern for the human rights community was elaborating and codifying legal norms and enhancing monitoring mechanisms. This evolutionary process resulted in a de facto separation of human rights into categories. Economic, social, and cultural rights are the least well developed and the least prescriptive human rights and they have received significant attention only in the last decade.

For advocates of intellectual property protection, by contract, the central focus of international law making was two fold: first, the gradual expansion of subject matter and rights through periodic revisions to the Berne, Paris and other conventions, and later the creation of a link between intellectual property and trade. It provide neither a necessary nor a sufficient justification for strong, state-granted intellectual property monopolies (whether bundled with trade rules or not). Nor, conversely, did it function as a potential check on the expansion of intellectual property law.

At present WIPO's regime of Intellectual Property Right's is a means for third parties to misappropriate the traditional knowledge and heritage of indigenous peoples and there by violate their human rights. Beginning in the early 1990's the U.N human rights system began to devote significant attention to the rights of indigenous communities. Among many claims that these communities sought from nation states was the right to recognition of and control over their culture including traditional knowledge relating to

biodiversity, medicines and agriculture. From an intellectual property perspective traditional knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private ownership rights. By treating this knowledge as un-owned, however intellectual property law made that knowledge available for exploitation by third parties, to be used as an input for innovations that were themselves privatized through patents, copyrights and plant breeder's rights. Adding insult to injury the financial and technological benefits of these innovations were rarely shared with indigenous communities.

United Nations human rights bodies intend to close this loophole in intellectual property law, by setting up a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples and Principles and Guidelines for the Protection of the Heritage of Indigenous People. These documents adopt a decidedly sceptical approach to intellectual property protection. On the one hand these documents urge states to protect traditional knowledge using legal mechanisms that fit comfortably within existing intellectual property paradigms- such as allowing indigenous communities to seek injunctions and damages for unauthorized uses. Both the documents also define protect able subject matter more broadly than existing intellectual property laws and they urge states to deny patents, copyrights and other exclusive rights over "any element of indigenous peoples heritage" that does not provide for "sharing of ownership, control, use and benefits" with those peoples.

EVOLUTION OF LAW

Recent work on intellectual property issues within the U.N. human rights system can be divided into two distinct areas-the rights of indigenous people and a response to the TRIP's agreement. In the first area, the UN has adopted a sceptical view of intellectual property. Declarations and guidelines recognize the need to safeguard the cultural heritage of indigenous people, but also view intellectual property rights as a means for third parties to misappropriate that heritage. These documents question whether existing intellectual property paradigms many of which treat indigenous knowledge as in the public domain and thus freely available for exploitation are appropriate legal tools for protecting indigenous culture.

For the first time the Human Rights Commission and Human Rights sub-Commission considered legal mechanisms to protect the human rights and intellectual creations of indigenous communities in the early 1990. Work proceeded simultaneously in two Commissions. The human Right sub-Commission asked the working group on Indigenous Populations to write a Draft United Nations Declaration on the Rights of Indigenous People's (Draft Declaration). The sub-Commission also appointed a Special Rapporteur to

conduct a study about violations of human rights of indigenous people and later to draft Principles and Guidelines for the Protection of the Heritage of the Indigenous People.

The Draft Declaration on the Rights of Indigenous peoples called for the broad recognition and respect for indigenous people's rights, including cultural and intellectual property rights.

The Draft Declaration recognizes the rights of indigenous people to the full ownership, control and protection of their cultural and intellectual property", and to restitution of such property "taken without their free and informed consent or in violation of their laws, traditions and customs".[5]

The draft declaration does not specify how these rights are to be given effect, nor does it address their relationship to international intellectual property agreements. According to a commentator, however, these rights, were they to become binding, would stand in opposition to existing approaches to intellectual property protection including those found in TRIP's.

Unlike the Draft Declaration, the Principles and Guidelines for the Protection of the Heritage of Indigenous People do not mention "intellectual property" among the rights of indigenous communities requiring legal protection. But the subject matter of intellectual property is encompassed within the broad definition of "heritage of indigenous peoples" which includes "cultural property" and "all kinds of scientific, agricultural, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge". The skeptical approach to intellectual property protection adopted by the Principles and Guidelines for the Protection of the Heritage of Indigenous People (Principles and Guidelines) is evidenced in a section addressing national laws to protect indigenous people's heritage.

National laws should provide the means for indigenous people to prevent the acquisition, use and documentation of their heritage without proper authorization of traditional owners, as well as obtain damages for the same – a claim that fits comfortably within existing intellectual property paradigms. But in a provision that is in consistent with TRIP's such national laws should also deny third parties the ability to obtain "patent, copyright or other monopolies for any element of indigenous peoples heritage" that does not provide for "sharing of ownership, control, use and benefits" with traditional owners".

Alleged violations of indigenous cultural property rights attained visibility during the 1990's before the adoption of Resolution 2000/7. Few examples of indigenous cultures clashing with intellectual property regimes indicate why the sub-Commission felt compelled to advocate human rights protection of traditional knowledge as part of its resolution.

In one of the Australian cases, an aboriginal artist named Terry Yumbulul created an artifact called a 'Dreaming Star Pole', which represents where

one's soul goes after death. The artifact is sacred to the Aboriginal people and Mr.Yumbulul had to undergo initiation rights in order to be allowed to create the artifact. Mr.Yumbulul assigned the copyright on the artifact to an agent. Later the agent passed reproductions of the to artifact the Reserve Bank of Australia. The Reserve Bank of Australia used that image on one of its bank notes. Mr.Yumbulul brought suit against the Reserve Bank of Australia in order to prevent distribution of the notes, which the aboriginal tribe considered a blasphemous use of their sacred image.

The High court of Australia ruled in favor of the Bank on grounds that the copyright had been validly assigned. The court, however, noted that Australians "copy right" law might not "Provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin", but declined to provide relief because "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators".[6]

As legal regimes failed to provide adequate protection for indigenous people's knowledge, culture and human rights the sub-Commission specifically refers to these concerns as a motivating factor for the adoption of Resolution 2000/7.

Review and revision of the Draft Declaration and Principles and Guidelines have occurred as part of the international decade of the world's indigenous people (1995-2004). One of the Decade's principal achievements was the creation in 2000 of a new Permanent Forum on Indigenous Issues. This forum has granted indigenous people and their representatives' equal status with State representatives. Now this forum is acting as a clearing house within the United Nations for issues relating to indigenous people such as culture and human rights. In its first meeting in May 2002, the forum reviewed the activities occurring within the U.N. system relating to indigenous peoples and received information from WIPO and the WTO concerning traditional knowledge. The receipt and review of this information indicates that the forum will continue to devote attention to intellectual property issues as part of its broader mandate to protect the cultural rights of indigenous peoples.

COEXISTENCE OF INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS:

What are the threads that weave intellectual property and human rights together? First intellectual property rights claim to have roots in natural law, most famously as the Lockean moral desert theory, which held that property rights should be commensurate with 'the sacrifice actually incurred'. According to this view, property is justifiable as a (just) reward for work done to create new works from the existing inventory of ideas and public domain works, or on a significant, industrially useful improvement on the existing stock technological knowledge.[7]

Lock's original theory has given importance to the labour sacrifice of a particular land owner. Locke did not advocate property rights in intangibles. When we apply Lock's theory to intangibles number of questions will raise in our mind. For instance, if one adopts a natural law justificatory theory for intellectual property, then one might ask whether the protection of intangible should be proportionate with the author's or inventor's efforts. If one were to argue proportionality, both theoretical and practical questions immediately would appear in one's mind: who could set aside and enforce the criteria to determine the value for a work or a patent? Which kind of value (social, economic etc.), and according to which sets of metrics? How would temporal elements be factored in to the equation (i.e., what is the value now and after twenty years)? What would be the transaction costs of this determination? And the list goes on.

Is the invisible hand the best judge? Few would argue that the market value of a particular piece of music or patent (assuming market value is a valid benchmark) is proportional to the efforts, time or money invested. Poets, whose sweat and coffee stains are the only visible result of a day's work and whose success, if and when it happens, will seem picayune compared to the latest techno or hip hop hit, might agree. The same criticism could be addressed to many physical goods, whose market value bears little relationship to actual costs.

In spite of differences between tangible and intangible property, natural law roots are something that intellectual property in general and copyrights and patents in particular, share with traditional (Eurocentric) human rights theory. One might disagree with the assertion that private property rights are human rights at least in a universal conception. At the opposite end of the spectrum, French polemists asserted that author's rights were 'the most sacred, the most legitimate, the most unassailable and … the most personal of all properties'.[8] The debate, however, is beyond the scope of this Article. Additionally, as Professor Torremans notes in his writings when applied to informational or ideational objects, the concept of property is imperfect. At the very least, in that context 'property' must have a different purpose and meaning, because statutory intellectual property rights are not only non-excludable and non-rival; they are also temporary.

Setting aside the debate, about the support of traditional linkages based on natural law between intellectual property and human rights, this article will argue that entering the field of trade law, as intellectual property norm-making has done over the past twenty years, might allow abandoning its claim to property and/ or human rights status. This shift may be observed inter alia by the exclusion of moral rights from trade agreements concerning copyright, and the application of an effects based test as a common denominator for allowable exceptions to several intellectual property rights in the TRIPs Agreement.

To some extent copyright is relating to and reflects human rights principles and suggests that copyright at least can (re) anchor itself normatively in such principles even if it abandoned traditional natural law based claims by becoming a trade related right. Copyright can rely on both Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights, as well as regional instruments such as Article 13 of the American Declaration on the Rights and Duties of Man.

In recent years, the Organization of American States (OAS) member states and indigenous representatives from around the hemisphere have been working towards broad declaration to promote and protect the fundamental rights of indigenous peoples. In the declaration of Mar del Plata, adopted in November 2005at the fourth Summit of the Americans, the region's Heads of States and Governments called for intensifying the pace of negotiations on this critical document affirming the rights of the region's native peoples.

"We reaffirm our commitment to respect indigenous people's rights and we commit to successfully concluding negotiations on the 'American Declaration on the Rights of Indigenous Peoples'. The full exercise of these rights is essential for the existence, welfare, and integral development of indigenous peoples and for their full participation in national activities. For this reason, we must create the necessary conditions to facilitate their access to decent work and living conditions that allow them to overcome social exclusion and inequality, and poverty."[9]

The draft American Declaration on the Rights of Indigenous Peoples covers a wide gamut of matters that touch the daily lives of the hemisphere's native peoples: family, spirituality, work, culture, health, the environment, and the systems of knowledge, language and communication, etc.

WHY WE HAVE TO ACHIEVE THE CO-EXISTENCE OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS?

We have to achieve the co existence of human rights and intellectual property Rights for the below mentioned reasons;

1) To protect proprietary rights of indigenous people over their knowledge and intellectual creations.

Intellectual Property Law recognizes property rights in intangibles, i.e., any person who created a new product, or instrument or new idea he is having property rights over that product or instrument. He can sell it, he can lease it or he can dispose of it as he likes. He is the absolute owner of that instrument or product. If any person utilizes that product or instrument without his authorization then it amounts to violation of property rights.

2) To give equal status to consumers of intellectual property as that of inventors and producers.

3) To protect human rights of citizens, consumers and indigenous people.

Art 27(2) of the Universal Declaration of Human Rights (UDHR) states explicitly that "every one has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he (or she) is the author."

Article 15(1) (c) of the International Covenant on Economic Social and Cultural Rights ("ICESCR") requires each state party to the Covenant to "recognize the right of every one ….. to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author." Art 13 of the American Declaration on the Rights and Duties of Man (American Declaration), which provides that "every person ….. has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he (or she) is the author." Similarly, art 14(1) (c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 repeats the ICSCR's by requiring all the states parties to "recognize the right of every one …… to benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he (or she) is the author."

Right to property is a human right; if a third person encroaches or utilizes the property of a person without his permission then it amounts to violations of human rights.

INDIAN LAWS FOR ACHIEVING THE CO-EXISTENCE OF INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS:

Indian Parliament passed the Indian Biodiversity Act,2002 and the Indian Plant Varieties Protection and Farmer's Rights Act,2001 for protecting the intellectual property rights and human rights of indigenous people.

Objectives of the Indian Biological Diversity Act, 2002 are "to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge"[10].Objectives of Indian Plant Varieties Protection and Farmer's Rights Act, 2001 are "to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants".

ROLE PLAYED BY INTERNATIONAL TREATIES AND ORGANIZATIONS IN ACHIEVING THE CO-EXISTING OF INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS:

1. The International Labor Organization (ILO).

The ILO was the first United Nations agency to address issues of indigenous

people's rights in their intellectual creations. In 1926, the ILO established an expert committee to develop international standards for the protecting the rights of native workers. This committee in 1957 granted the basis for the adoption of the Convention concerning the Protection and Integration of Indigenous and other Tribal Populations in Independent Countries. This convention commonly called as Convention 107. This Convention was revived in June 1989 as Convention 169 concerning Indigenous and Tribal People's in Independent Countries.

Art.2.2(b) of this Convention provides that Governments shall have the responsibility of developing measures for "promoting the full realization of the social, economic and cultural rights of these peoples with respect to their social and cultural identity, their customs and traditions and their institutions''.[11]

Art.5 (a) provides that "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them as groups and individuals''.[12]

Convention 169 also contains provisions that explicitly recognize collective rights of indigenous peoples. Art.13(1) states that "Governments shall respect the special importance of the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of his relationship".[13]

2. The TRIP's Agreement and TRIP's Plus Treaties:

The 1994 TRIP's Agreement adopted relatively high minimum standards of protection for all WTO members, including many developing and least developed countries with little interest in protecting patents, copyrights and trademarks.

In addition, unlike previous intellectual property agreements, TRIP's has teeth. It is linked to the WTO's dispute settlement system in which states enforce treaty bargains through mandatory adjudication backed up by the threat of trade sanctions.

The United Nations human rights system first turned its attention to TRIP's in 2000. On August 17, 2000 the United Nations sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) adopted Resolution 2000/7, entitled "Intellectual Property Rights and Human Rights"..[14] In adopting resolution 2000/7, the Sub-Commission expressed a fundamental concern that the Agreement on Trade Related Aspects of Intellectual Property does not adequately recognize human rights norms. This resolution signified the Sub-Commission's belief that international intellectual property regimes including TRIP's were not adequately accounting for human rights norms.

Resolution 2000/7 called on U.N. member states, intergovernmental bodies and various U.N entities to re-affirm their commitments toward the achievement of international human rights norms, adopt a human right approach to the development of international intellectual property regimes and further study the interaction between intellectual property protection and human rights.

The Resolution (2000/7), which was highly critical of intellectual property protection, stated that "actual or potential conflicts exist between the implementation of the TRIP's Agreement and the realization of economic, social and cultural rights".[15]

These conflicts are relating to the following matters:

1. The transfer of technology to developing countries.
2. The consequences for the right to food of plant breeder's rights and patents for genetically modified organisms;
3. Bio piracy.
4. The protection of the culture of indigenous communities and
5. The impact on the right to health etc.

To resolve these conflicts the sub-commission asked national governments, Inter Governmental Organizations and Civil Society groups to give human rights "Primacy over economic policies and agreements".

Noting actual or potential conflicts exist between the implementation of the TRIP's Agreement and the realization of economic, social and cultural rights in relation to inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, "bio-piracy and the reduction of communities' (especially indigenous communities) control over their own genetic and natural resources and cultural values and restrictions an access to patented pharmaceuticals and the implications for the enjoyment of the right to health …… .

Declares…….. that since the implementation of the TRIP's Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights ……. there are apparent conflicts between the intellectual property rights regime embodied in the TRIP's Agreement, on the one hand, and international human rights law, on the other.[16]

TRIP's recognizes that nations will have different policy goals with respect to the scope of intellectual property protection depending on their respective levels of development. Art 7 notes that "Protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation.[17] (Right to development).

At the same time this protection should also contribute to the "social and economic welfare". Art 8, explicitly mentions that WTO states may take into

account the protection "of public health & nutrition and ……. promotion of the public interest sectors of vital importance to their socio-economic and technological development", when tailoring their intellectual property regimes to the norms mandated by TRIP's.[18]

These provisions reveal a fundamental tension in TRIP's between the economic interests of intellectual property rights holder's on the one hand and state and public interests in promoting public health and economic development (human rights) on the other.

INTERGOVERNMENTAL ORGANIZATIONS

In this decade intellectual property issues have risen to the top of the agendas of several international organizations. Work in these venues involves not only the creation of new non-binding norms but, more new international agreements. The approaches to intellectual property contained in these treaties, both those that have been adopted and those still in draft form, are closely aligned with the human rights frame work for intellectual property reflected in the CESCR committee's interpretative statement. Several of these agreements expressly draw support from human rights law. In addition they all include provisions that are skeptical of expansive intellectual property protection standards and appear to conflict with the obligations in TRIP's – plus treaties and other intellectual property agreements.

3. International Covenant on Economic Social and Cultural Rights: (ICESCR)

The provisions require each ratifying state to take steps to the maximum of its available resources, with a view to achieving the full realization of the rights recognized in the covenant by all appropriate means.

The United Nations Committee on Economic Social and Cultural Rights (the CESCR Committee) has been the progenitor of a movement to imbue these rights with greater prescriptive force. The Committee is a supervisory body of eighteen human rights experts who interpret the ICESCR and monitor its implementation by its more than 150 member nations.

The CESCR committee's first interpretative foray into intellectual property occurred in 2001, when it published a "Statement on Human Rights and Intellectual Property". The statement offered a preliminary analysis of the ICESCR's intellectual property provisions and their relationship to the other economic and social rights in the covenant.

It also set out a new agenda for the committee to draft general comments on each of the ICESCR's intellectual property clauses.

In November 2005, the committee published the first of these general comments, on Art 15 (1) (c) of the covenant "the rights 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".[19]

In Art 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR) the states parties to the covenant "recognize the right of everyone …….. both to enjoy the benefits of scientific progress and its applications", on the one hand, and 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", on the other.[20]

Hence, international human rights law recognizes the rights of inventors and authors while simultaneously focusing on the public right to benefit form their inventions and works of art.

Art 15 does not describe; how a balance might be achieved between the creators, the economic interests that acquire their intellectual property and the beneficiaries of creativity.

The Committee on Economic Social and Cultural Rights the authoritative interpreter of the ICESCR, has provided specific guidance on how to implement the general and potentially conflicting responsibilities of states parties. The committee has declared that states parties have a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights".

In particular the committee emphasized that any intellectual property regime that makes it more difficult for a state party to comply with its core obligations in relation to health, food or education …….. is inconsistent with the legally binding obligations of the state party".[21]

The committee's statement reminded states parties of the "importance of the integration of international human rights norms into the enactment and interpretation of intellectual property law in a balanced manner that protects "public and private interests in knowledge" without infringing on fundamental human rights.[2222]

Human Rights and Intellectual Property: Statement of the committee on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights,27 thSession, agenda Item 3.p18, U.N.Doc.E/C.12/2001/ 15(2001).

A human rights approach to intellectual property takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. The ICESCR is the major international human rights instrument addressing these issues. Art.15 specifies that States Parties, that is the countries that have ratified or acceded to this instrument, "recognize the right of everyone" both "to enjoy the benefits of scientific progress and its applications" and to "benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author". To achieve these goals, the Covenant obligates the States Parties undertake series of steps. These include "those necessary for

conservation, the development and the diffusion of science and culture." More specifically, States Parties "undertake to respect the freedom indispensable for scientific research and creative activity."

Further, States Parties make the commitment to "recognize the benefits to be derived from the encouragement and development of international contracts and cooperation in the scientific and cultural fields.

A human rights approach, particularly to be consistent with the norms in ICESCR, differs in a number of regards from the standards set by intellectual property law. In brief, it requires that the type and level of protection afforded under any intellectual property regime directly facilitate and promote scientific progress and its applications and do so in a manner that will broadly benefit members of society on an individual, as well as collective level. It establishes a higher standard for evaluating patent applications, namely that the proposed invention also be consistent with the inherent dignity of human person and with central human rights norms. In making these determinations, a human rights approach emphasizes the quality of all persons. Because a human right is a universal entitlement, its implementation is measured particularly by the degree to which it benefits to those who hitherto have been the most disadvantaged and vulnerable. These considerations go beyond a simple economic calculus. A right to the benefits of science and technology implies a right of access on individual and collective levels. Additionally, a right to the benefits of science and technology implies a right of access on individual and collective levels. Additionally, a right to the benefits of science and technology cannot be achieved in the absence of careful government policies to determine priorities for investment in and the development of science. The human rights principle that "all peoples have the right to self-determination" mandates a right of choice for members of society to be able to discuss, access, and have a role in determining major scientific and technological developments. And finally, a human rights approach entails a right of protection from possible harmful effects of scientific and technological development, again on both individual collective levels.

Although more than 130 countries have become a States Parties to ICESCR and therefore are legally obligated to comply with these standards, few attempt to implement its requirements on a systematic basis. Too often, policy makers and legislators do not factor human rights considerations into decision-making on intellectual property regimes, instead relying solely on narrow economic considerations. In part, this situation reflects intellectual fragmentation of spheres of knowledge and interest. An additional complication is that Article 15 of ICESCR can be characterized as the most neglected set of provisions with in an international human rights instrument whose norms are not well developed.

Economic globalization and increasing privatization and commercialization of science have made it even more difficult to achieve the various balances

envisioned in Article. These trends have affected the very conduct and nature of science. Beginning around 1980, the U.S. government decided to encourage the private commercial development of publicly funded research. Other governments have subsequently also began to privatize activities previously delivered by the public sector and to facilitate the generation and distribution of science data on a commercial basis. In turn, this development has stimulated pressures for new and broader forms of intellectual property rights to protect economic investments.

The implications of these developments are several. Commercialization has introduced market considerations into the conduct of science. It has eroded the distinction in many areas of scientific research between basic research, where intellectual property rules are primarily concerned with the attribution of ideas and findings, and applied research, where intellectual property and proprietary concerns predominate. This has particularly been the case in computer science and biotechnology. Commercialization has also changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism to protect the resources of investors. Corporate investment in scientific investment and development has imposed constraints on science's tradition of open publication. In many scientific fields, particularly the life sciences, some scientists are delaying publication and withholding data so as to secure intellectual property rights. There is widespread concern in the scientific community that privatization, accompanied by legal restrictions and high prices will restrict scientists access to data needed for their research.

4. United Nations Economic Social and Cultural Organization (UNESCO)

On October 20, 2005, UNESCO adopted a new international agreement the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention).

The conventions final text contains a reference on intellectual property – a statement of "the importance of intellectual property rights in sustaining those involved in cultural creativity".[23]

In addition the treaty contains three citations to the "Universal Declaration on Human Rights" or to "Universally recognized human rights instruments". These references highlight the importance of certain human rights protected by those documents, such as "freedom of expression, information and communication, and freedom of thought''.

5. Draft Declaration of Rights of Indigenous Peoples

According to Art 12 of the Draft Declaration, "Indigenous People's have the right to maintain, protect and develop the past, present and future traditions

and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs".[24]

Art 29 of the Draft Declaration on the Rights of Indigenous People contains a very important section relating to the co-existence of intellectual property rights and human rights of indigenous populations.

It says "Indigenous people are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts".[25]

6. World Health Organization (WHO)

On January 24, 2003,the WHO's Executive Board recommended to the assembly the adoption of a resolution on traditional medicine which among other things, urges member states "to take measures to protect and preserve traditional medicinal knowledge and medicinal plant resources for sustainable development of traditional medicine including the intellectual property rights of traditional medicine practitioners, as provided for under national legislation consistent with international obligations".[2626] WHO, Resolution of the Executive Board of the World Health Organisation, document EB111.R12 at http://www.who.int/gb/EB_WHA/PDF/FB111/ecb111r12.pdfat 2.

7. The Convention on Biological Diversity

Art 1 of the CBD deals with "the conservation of biological diversity the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources".[27]

Art 8(j) of the CBD states that the parties to the convention shall "respect preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices".[28]

In other words the CBD recognizes the lifestyles and traditional knowledge of indigenous and local communities, but also goes in the direction of protecting the rights of the "holders" of such knowledge, in terms of granting them the benefits derived from the utilization of their practices.

The secretary of the Convention on Biological Diversity is working on the issue of the protection of the rights related to traditional knowledge.

The Guavami case[2929]

Kate H.Murashige, Patent Protection Biotechnology 382PLI/PAT 473,476(1994) (Commenting on the Environmental and Socioeconomic impact of biotechnology" innovations''/Patents).

In this case, for the first time an effort was made to patent the genetic sequence which were revealed by the testing of indigenous groups.

A Guavami woman, who belongs to an indigenous group in panama, was said to have been illiterate and unschooled yet alleged gave informed oral consent to the research, even though neither the tribe nor the woman knew anything about the development of the cell line or the patent application. This patent application was filed on behalf of the development of commerce, published as PCT application wo 92/08784 on may 29, 1992 and directed to Human T-Lymphotrophic virus Type II from Guavami Indians in panama. As a result of the patent application the president of the Guavami general congress wrote a letter to the US Secretary of commerce. First the letter demanded that the patent application be withdrawn because it had been made without consultation with the Guavami community or its traditional organization.

Second, the letter asserted that this is not an invention but As a result of this protest from the Guavami leadership as well as from the rural advancement foundation and numerous public interest groups the patent was withdrawn.

The United Nations also responded to the Guayami patent with a "Draft Declaration on the Rights of Indigenous Peoples …… including human genetic materials as cultural property that indigenous populations are entitled to control".[30]

The U.N. supported a view, as taken up by many protestors, that individuals should have property rights in their biological material and should not be forced to comply with the whims of researchers when it comes to the human body.

WHAT ARE THE CONSEQUENCES OF THE CONFLICT BETWEEN HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS REGIME?

The debate between advocates of a conflict approach and those asserting a coexistence approach to the intersection of intellectual property and human rights is not likely to be solved in near future. On the contrary, the continuing tension between these two subjects is likely to have at least four different consequences for the international legal system.

The first effect will be an increased incentive to develop soft law human

rights norms. For those advocating the primacy of human rights over intellectual property protection rules, it is essential to identify precisely which rights are being undermined. Looking simply at treaty texts, however, there appears to be few clear cut conflicts, at least under the narrow conflicts rules of customary international law. But treaty text alone does not tell the whole story. Human rights law is notably elastic and contains a variety of mechanisms to develop more precise legal norms and standards over time. Advocates endorsing a conflict approach to intellectual property are likely to press human rights bodies to develop specific interpretations of ambiguous rights to compete with the precise, clearly defined rules in TRIPs. In addition to creating fuel for future conflicts claims, this pressure may have a side benefit of speeding the jurisprudential evolution of economic, social, and cultural rights which is a still under developed area of human rights law.

Second important change that may takes place is the treatment of consumers of intellectual property products as the holders of internationally guaranteed rights. In the world of TRIPs, the producers and owners of intellectual property products are the only "rights" holders. Individuals and groups who consume those products are allocated the inferior status of users. A human rights approach to intellectual property, by contrast, grants these users a status conceptually equal to owners and producers. By invoking norms that have received the recognition of intergovernmental organizations in which numerous states are members, governments can more credibly argue that a rebalancing of intellectual property standards is part of a rational effort to harmonize two competing regimes of internationally recognized "rights," instead of a self-interested attempt to distort trade rules or to free ride on foreign creators or investors.

This leads to third consequence of the new intersection between human rights and intellectual property, the framing of "maximum standards" of intellectual property protection. Treaties from Berne to Paris, Paris to TRIPs are all concerned with framing "minimum standards." But higher standards are not considered problematic, and nothing in the treaties prevents governments from enacting more stringent domestic intellectual property laws, or from entering in to agreements that enshrine each standards. Indeed, since TRIPs entered in to force, the United States and the EC have negotiated so-called "TRIPs plus" bilateral agreements with many developing countries. These treaties impose higher standards of intellectual property protection than TRIPs requires. The U.N. High Commissioner for Human Rights and the WHO have made strong objections to "TRIPs plus" treaties on human rights grounds. Together with the particularization of soft law norms, these objections may, for the first time, begin to impose a ceiling on the upward drift of intellectual property standards that has accelerated over the past few decades.

Whether maximum standards of intellectual property protection in fact emerge will depend upon a fourth and final issue: how human rights norms are received in established intellectual property lawmaking venues such as WIPO and the WTO. In the year 2000, the WIPO General Assembly approved the creation of a new Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The Committee held five sessions between September 2000 and July 2003 at which it examined a wide array of issues that were omitted from TRIPs and that respond to the demands of developing countries and indigenous peoples. Recently, the WIPO General Assembly extended the Committees mandate, authorizing it to accelerate its work, which may include the development of new international instruments. The High Commissioner for Human Rights, the WHO, and numerous NGOs have been granted observer status to take part in the Committee's discussions, creating opportunities to raise human rights concerns within that forum.

Prospects for integrating human rights in to the WTO are significantly more uncertain. The Declaration on the TRIPs Agreement and Public Health adopted in November 2001 clearly reflects human rights advocacy in the area of access to medicines. Additionally the Doha Ministerial Declaration directs the TRIPs Council to examine "the relationship between TRIPs and the Convention on Biological Diversity, the protection of Traditional Knowledge and Folklore, and other new developments raised by Members". Yet the United States has so far blocked the CBD Secretariat's application for observer status in the Council, making uncertain the fate of a similar application by the High Commissioner for Human Rights. Perhaps more importantly, the breakdown of trade talks at the Cancum, Mexico WTO ministerial meeting in September 2003 suggests the possibility of new rifts between developed and developing countries that may make compromises – human rights inspired or otherwise – more difficult.

Recent work on intellectual property issues within the U.N. human rights system can be divided into two distinct areas-the rights of indigenous people and a response to the TRIP's agreement. In the first area, U.N. has adopted a skeptical view of intellectual property. Declarations and guidelines recognize the need to safeguard the cultural heritage of indigenous people, but also view intellectual property rights as a means for third parties to misappropriate that heritage. These documents question whether existing intellectual property paradigms many of which treat indigenous knowledge as in the public domain and thus freely available for exploitation are appropriate legal tools for protecting indigenous culture.

CONCLUSION

The debate between supporters of a conflict approach and supporters of a coexistence approach to the intersection of intellectual property and human rights is not going to be resolved in near future.

The debate between the WTO and WIPO regarding human rights is contentious. Trade and intellectual property negotiators should encourage human rights influence over these bodies instead of discouraging. Giving greater opportunities for considering intellectual property issues from human rights perspective will enhance the morale of national and international law makers and NGOs. Consideration of intellectual property issues from human rights perspective will lead to integration of legal rules concerning both the subject matters. That integration will further allow national and international lawmakers and NGOs to consider the most urgent need of defining the human rights and intellectual property coexistence with coherent, consistent, and balanced legal norms that enhance both individual rights and global economic welfare.

The creation of a human rights frame work for intellectual property of indigenous people and consumers is still in the initial stage of development. During last two decades Govt. officials, national and international Jurists, NGO's and commentators many of whom have different views regarding the protection of human rights of citizens in general and consumers and indigenous people in particular had an opportunity to influence the frame work of WIPO's IPR laws.

Full realization of the human rights of indigenous people regarding their intellectual property cannot be achieved in an overnight. Since last two decades we are struggling. We have to struggle very hard for the realization of the human rights of citizens, consumers, and indigenous people regarding their intellectual property. It will take few more decades for the full realization of human rights of all these people which are violated by IPR regime.

Notes

1 Paul L.C. Torremans, "Intellectual Property and Human Rights"– p-3 ©2008 Kluwer Law International BV, The Netherlands.

2 International Covenant on Economic, Social and Cultural Rights, adopted on Dec. 16, 1966 (hereinafter called ICESCR) at http://www.unhchr.ch/pdf/report.pdf (last visited on Nov 21, 2005).

3 Laurance R Helfer "Human Rights and Intellectual Property: Conflict or Co-existence?" 5 Minn.Intell. Prop. Rev. 47.

4 Supra note 2 at p 80.

5 Draft Declaration on the Rights of Indigenous People's, as agreed upon by the members of the working group on Indigenous populations at its Eleventh session, August23, 1993, United Nations Document E /CN.4/Sub.2/1993/29.

6 Yumbulul v/s Reserve Bank of Australia, (1991)21.IPR481.(Austrl).

7 Supra note 2 at pp 3-4.

8 Ibid at p 4.

9 "The Rights of Indigenous People" at p 1, available at http//www.oas.org/key%5Fissues/KeyIssue-Detail.asp?kis-sec=2. Last visited: 27-03-2008.

10 Indian Biological Diversity Act of 2002.

11 Art.2.2, International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 1989 (referred to as Convention 169).

12 Art 5(a) Ibid.

13 Ibid Art 13(1).

14 U.N.Econ and Soc. Council[ECOSOC] Sub-Commission on Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution 2000/7 U.N. Document.E/CN.4/Sub.2/RES/2000/7(Aug17,2000) http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument.

15 Resolution2000/7.Supra note at p 11.

16 Sub-Commission on Human Rights, Resolution 2000/7, Intellectual Property Rights and Human Rights, ESCOR, Commission on Human Rights, sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, 25th meeting,U.N.Doc.E/CN.$/Sub.2/Res/2000/7(2000).

17 Agreement on Trade-Related aspects of Intellectual Property Rights.Apr15,1994,Marrakesh agreement Establishing the world Trade Organisation annex 1C,Legal Instruments-results of the Uruguay round Vol.31,33 I.L.M.81(1994)at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

18 Ibid at Art8(1)

19 Committee on Economic, Social and Cultural Rights, General comment No.17: The Right of Every one 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. Art 15(1) (c),U.N.Doc.E/C.12/2005(Nov.21, 2005).http://www.unhchr.ch/tbs/doc.nsf/898586b dc7b4043c 1256a450044 f 331/03902/45edbbe 797c125711500584ea8/$FILE/G0640060.pdf.

20 Human Rights and Intellectual Property: statement of the Committee on Economic, Social and Cultural rights, Committee on Economic, Social and Cultural Rights 27th Session agenda Item 3,p-17,U.N.doc./E/C 12/200115(2001).

21 The nature of states parties obligations (Art.2.para1.of the International Covenant on Economic, Social and cultural Rights), Committee on Economic, Social and Cultural Rights, General comment No.3,5th Session,P10(1990) in Compilation of General comments and general recommendations Adopted by Human Rights Treaty Bodies. U.N.Doc.HR1/GEN/1/Rev.5 at18 (2001).

23 U.N.Educational, scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct 20,2005 at http://www.unesdoc.unesco.org/images/0014/001429/142919e.pdf.

24 Supra note 1.

25 Ibid.

27 Art.1.The Convention on Biological Diversity 1992.

28 Ibid at Art.8.

30 LindaJ.Demaine and Aaron X.Fellmeth, Reinventing the Double Helix: A novel and Non_obvious Reconceptualization of the Biotechnology patent, 55 STAN L.REVat P.438 (critiquing how theUSPTO has started a spreading trend in "acclaiming the, patentability of naturally occurring biochemical after isolation and purification").