



FACULTY OF LAW
Lund University

Alena Melnikava

Towards Coherence in International Law: The Right of Everyone
to Take Part in Cultural Life and 'Library' Exceptions from
Copyright

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Supervisor: DR. Anna Maria Nawrot

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Summary

In the discussion on the relations between human rights and intellectual property a myriad of human rights are brought up, both directly and remotely connected to IP, but the right to cultural participation, which seems so relevant is, however, mentioned very rarely and even then - only superficially. The present paper is aimed at giving this neglected right a proper attention with regard to copyright.

The paper examines the relations of the two branches of international law – human rights and intellectual property law, in general; further it addresses the content of the right to cultural participation and applies the findings to a specific area of copyright – exceptions and limitations for the benefit of libraries. The paper concludes with the evaluation of the potential of the right to take part in cultural life to reform intellectual property law.

Preface

Thanks to many factors and people this piece of work could see the light.

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Abbreviations

CDIP	WIPO Committee on Development and Intellectual Property
CESCR	Committee on Economic, Social and Cultural Rights
eIFL	Electronic Information for Libraries
EU	European Union
E&L	Exceptions and limitations
FAO	Food and Agriculture Organization
HIV/AIDS	Human immunodeficiency virus/ Acquired immune deficiency syndrome
HR	Human rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFLA	International Federation of Library Associations and Institutions
ILL	Interlibrary loan
ILO	International Labour Organization
InfoSoc	Copyright in the Information society Directive
IP	Intellectual property
IPRs	Intellectual property rights
LCA	Library Copyright Alliance
SCCR	WIPO Standing Committee on Copyright and Related Rights
TPMs	Technological protection measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

US	United States
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

Overview

Surprisingly, in the discussion on the relations between human rights and intellectual property a myriad of human rights are discussed, both directly and remotely connected to IP, but the right to cultural participation, which seems so relevant is, however, mentioned very rarely and even then - only superficially. This paper is aimed at reducing this injustice. The necessary push to conduct the research on the implication of the right to cultural participation to IP was the fact of recent adoption by the Committee on Economic, Social and Cultural Rights of its long-awaited General Comment No 21 on the right of everyone to take part in cultural life. The idea of looking closely at the content of this right in light of new interpretation, especially as applied to intellectual property issues appeared incredibly appealing.

Central Question

The central research question of the present paper is *what can be the contribution of the right to cultural participation to the discussion on copyright?*

Delimitations

The paper limited its scope to focusing on the right of everyone to take part in cultural life as enshrined in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Life. The choice of this particular provision is explained by a broad membership of the Covenant and relatively developed interpretation (including General Comment 21) in comparison to similar provisions in other instruments.

Moreover, the right will be applied to a particular area of copyright – namely limitations and exceptions for librarianship. The choice of this delimitation is also not random. Libraries are important stakeholders in IP area and they are playing an uneasy role of mediators between publishers' IP interests and library patron's interests of access to copyrighted works. Moreover, new technological developments on one hand, brought new opportunities for libraries as well as new concerns. Libraries throughout the world are arguing for expansion of limitations from copyright for library uses. A statement on desirable exceptions for libraries have been recently adopted by the world library community, a comprehensive WIPO Study on library exceptions has seen the light in 2008. 'Library' exceptions are one of a few questions permanently discussed in the WIPO Standing Committee on Copyright and Related Rights. The research might also contribute to the discussions surrounding the yet controversial large-scale digitization initiatives undertaken by libraries around the globe, such as The Library of the Congress World Digital library, Digital library of Bibliotheca Alexandrina, Millennium Book Project and others.

Hence, the central question in light of delimitations is *to what extent the right of everyone to take part in cultural life enshrined in Article 15(1)(a) of the ICESCR provides support to introducing exceptions from copyright for the benefit of libraries.*

Methodology and Outline

- Chapter I is aimed at setting the general theoretical background of the relations between intellectual property and human rights to put the discussed further issues in a broader context.
- Chapter II is fully devoted to identifying States' obligations under Article 15(1)(a) of the ICESCR which might be of use to the discussion on copyright and the activities of libraries.
- Chapter III applies the revealed States' obligations to the area of 'library' exceptions and evaluates the contribution of this right.

Overview of Literature

The main sources of reference of the present paper are scholarly publications.

As regards the normative framework, a very positivistic approach is taken and black-letter-law is predominantly considered. To a big extent attention is devoted to the content of the General Comments of the Committee on Economic, Social and Cultural Rights, especially to Comments No 17 and No 21, however as such they do not constitute official interpretation of the provision of the Covenant. Nevertheless, they are claimed by several commentators to have a *de facto* legal force. As a rule, the adoption of General Comments is not met with strong opposition by states, states follow the recommendations by the Committee while implementing the right and base their reports on these recommendations and thus create a uniform practice of application of the right. Therefore, as concluded by Kerstin Mechlem, the interpretation given in General Comments by human rights treaty bodies, as well as in other documents issued by them, can be accepted as a summary of 'subsequent practice' between the State parties in the meaning of Article 31(3)(b)) of the Vienna Convention of the Law of Treaties.¹ Moreover, as it was argued by Craven, General Comments are able to establish 'subsequent agreements' among the State parties in the sense of Article 31(3)(a) of the Vienna Convention.²

Case law is covered to a very limited extent in the present paper.

Other sources are also considered.

¹ K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt Journal of Transnational Law*, Vol. 42 (2009). Pp. 917.

² Craven, M. *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development* (Clarendon Press, 1995). Pp. 91-92.

2 Human Rights and Intellectual Property: Belated Marriage

The goal in the marriage is not to think alike, but to think together.

Robert. C. Dodds

For decades intellectual property law and human rights law, the ingredients of the international law salad “developed in virtual isolation from each other”.³ Neither the founding fathers of the International Bill of Rights⁴, nor of any other international human rights instrument conducted thorough investigation of how the negotiated human rights rules correlate with the existing intellectual property regime. On the other hand, one would hardly find human rights language in international instruments governing the protection of intellectual property such as Berne Convention, Paris Convention, Rome Convention, TRIPS Agreement and others.

The relations between intellectual property and human rights were outside the scope of attention of legal scholars, governments, courts and international organizations. Recently the issue, however, has been increasingly discussed on several international fora and in academia. First of all, the debates were provoked by the adoption of TRIPS agreement in 1994 which was criticized for treating IP as a trade-related matter and for establishing a relatively high minimum level of intellectual property protection for the states-parties of WTO.⁵ The rules of TRIPS 1994 and later – of so-called “TRIPS Plus”, increasingly applied on bilateral basis among states – are being strongly contested as meeting the interests of IP rights holders at the expense of human rights of the public. The controversies escalated with the introduction and distribution of digital technologies, which significantly simplified creating, multiplying, distributing and access to intellectual creations, as well as controlling the access to such creations.

New issues were brought for discussion on international fora: protection of traditional knowledge and cultural expressions of indigenous communities in the current IP system, access to patented pharmaceuticals in countries plagued by HIV/AIDS, malaria and tuberculosis pandemics, food

³ L. R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?', 5 *Minnesota Journal of Law, Science & Technology* (2003), pp. 47-59, <<http://ssrn.com/abstract=459120>>, visited on 20 September 2009. P.47.

⁴ The International Bill of Rights includes the Universal Declaration of Human Rights of 1948, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. as well as Additional Protocols to the Covenants.

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 Apr. 1994, 33 I.L.M. 1197 (1994).

security with regard to patents for genetically modified organisms and protection of plant varieties, etc.

More and more often commentators while addressing the above challenges to the IP regime direct their eyes to the human rights norms. By some human rights are considered as a long-awaited panacea to challenge the whole concept of intellectual property protection, for others – as an additional argument to address certain deficiencies of IP, for still others – to support the existing rules of IP law, for the rest human rights do not seem as an equal interlocutor to intellectual property law at all.

The present Chapter demonstrates the importance of examining the relations between human rights and intellectual property regimes. We are, however, skeptical about the notion '*human rights framework for intellectual property*' which is being widely advocated nowadays. It discusses the main arguments in favor of '*marrying*' intellectual property and human rights law regimes and adhere to the idea that such a framework is necessary for the purpose of contributing to the coherency and legal certainty in the international legal order.

Further the focus of the research shifts to examining the legal nature of both sets of norms. For the purpose of further examining the relations between the two '*fiancés*' we touch upon the issue of hierarchy of norms in international and domestic law which seems of high relevance to the discussion.

In light of the findings which are supposed to be revealed, the legitimacy of the *conflict* and *coexistence* approaches which are widely discussed in the scholarship nowadays is being estimated. The Chapter will be concluded with examining possible frameworks of HR-IP relationships which have been suggested in the literature. Moreover, an additional approach will be identified.

The present Chapter is aimed at providing the general theoretical background for the further discussion on specific issues, namely copyright and the right to take part in cultural life and more specifically – with regard to libraries' concerns.

2.1 Why Not Remain Single?

Why human rights law and intellectual property law should be discussed together is without a doubt the first question to be addressed. Several opinions have been expressed about the reason and the practicality for doing so.

As a rule, the argument about bringing human rights law in the discourse on intellectual property accompanies criticism of different levels of harshness of the IP regime. Human rights are believed to be a solution or a contribution to the elimination of the 'evils' of intellectual property.

Laurence R. Helfer advocates for the necessity of establishing a 'human rights framework' to intellectual property law and policy because of

the the lack of theorization of the human rights provision addressing the protection of the interests of authors and inventors⁶, unclarity of the relations among these provisions, other human rights and IP law, as well as the 'deepening crisis facing the international intellectual property system'.⁷

Peter K. Yu is supportive of the professor's Helfer belief in the virtue of establishing a human rights framework for IP for the general well-being of the society, for contributing to the balanced intellectual property system.⁸ He argues that the development of such a framework “not only will offer individuals the well-deserved protection of their moral and material interests in intellectual creations, but also will allow states to harness the intellectual property system to protect human dignity and respect as well as to promote the full realization of other important human rights”.⁹

Christophe Geiger claims that “[m]ore than ever, intellectual property is going through a crisis of legitimacy”. It is, first, being increasingly criticized for failing to strike the adequate balance among the interests of individuals and the general well-being.¹⁰ Second, he shows it at the example of copyright, IP has 'forgotten' its initial function - to protect the interests of authors when shifting to the protecting of investment.¹¹ Third, Geiger argues that the classical theories backing IP, namely natural law and utilitarian theories, if applied separately are both inconsistent.¹² Human rights are believed by Geiger to resolve the above adverse phenomena. Reconciliation of human rights and intellectual property would lift the foundation of IP on the level of constitutional norms and hence 'constitutionalize' IP. '[C]onstitutionalization of intellectual property law can offer a remedy for the overprotective tendencies of intellectual property and can help this field of law recover its legitimacy'. Moreover, Geiger believes that human rights would bring together the natural rights and utilitarian approaches and thus compensate the insufficiencies of both “[t]he reason why fundamental rights and human rights are an ideal basis from which to start is that they offer a synthesis of the bases of natural law and utilitarianism and represent the values from which intellectual property developed.”¹³ Cultural rights, right to property, freedom of expression, right to privacy – they reflect both the natural law concept by supporting moral

⁶ Article 27(2) of UDHR and Article 15(1)(c) of the ICESCR, which will be examined later.

⁷ L. R. Helfer, 'Toward a Human Rights Framework for Intellectual Property', *U.C. Davis Law Review* 40 (2007). Pp.976-977.

⁸ P. K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', *U.C. Davis Law Review* 40 (2007). P.1123.

⁹ *Ibid.* P.1149.

¹⁰ C. Geiger, 'The Constitutional Dimension of Intellectual Property', Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008). P. 103.

¹¹ *Ibid.* P. 110.

¹² *Ibid.* Pp.107-110.

¹³ *Ibid.* P.111.

rights of authors, and the utilitarian concept – as they aim at encouraging 'creativity and inventiveness and disseminating culture and science'.¹⁴

Daniel Gervais criticizes the recent trend of justifying IP protection (he is specifically focusing on copyright) by referring exclusively to economic analysis and trade practicalities. In other words, he claims that the utilitarian theory has completely overridden the natural rights justification of IP. For this reason he suggests to have a close look at human rights. He finds the support for copyright in, first, the right to property (although limitedly) and second, and most importantly, in the cultural rights, as provided, *inter alia* in Article 27 of the UDHR.¹⁵ He poetically calls the provisions in the Article 'an interesting mirror for copyright's sleeping beauty'¹⁶ meaning that these provisions of human rights body of law reflect the initial underpinnings of the copyright law. He argues for the human rights approach to IP as “[h]uman rights approaches bring values back to the system”.¹⁷

Antony Taubman welcomes reconciliation of human rights and intellectual property which would 'entail constructing an inclusive international jurisprudence of IP that is at once seen as legitimate by all interested parties'.¹⁸

Audrey Chapman also supports the initiative of developing a human rights approach to intellectual property as she believes it will offer “an alternative vision of the purpose and requirements of intellectual property as well as a set of obligations that places intellectual property in wider context”.¹⁹

The majority of approaches to human rights – intellectual property relations depart from the assumption of supremacy of human rights law over intellectual property law. Commentators, as a rule, are talking about human rights as a necessary *injection* to cure IP or looking on IP through human rights *lens*²⁰ or, most often, are using the language of human rights *framework or approach* for intellectual property thus intending to put human rights at the *basis* of IP law.

¹⁴ *Ibid.* Pp.112-113.

¹⁵ D.J. Gervais, 'Intellectual Property and Human Rights: Learning to Live Together', Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008). P.14.

¹⁶ *Ibid.*

¹⁷ *Ibid.* P.15.

¹⁸ A.Taubman, 'TRIPS Jurisprudence in the Balance : Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic', Hoppe, Andarno [eds.], *Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology* Lenk (Ashgate, 2007). P.24.

¹⁹ A.R. Chapman, 'The Human Rights Implications of Intellectual Property Protection', *Journal of International Economic Law* (2002). P.879.

²⁰ G.W. Austin, A.G. Zavidow, 'Copyright Law Reform through a Human Rights Lens', Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008), pp. 257-285.

Being devoted to human right values we, however, suggest to avoid the supremacy language in the discussion on human rights and intellectual property. The relations between the two regimes are considerably more complex than a superior-inferior model. This issue will be addressed, although on a very basic level, in the further subsection. We suggest from the beginning to treat the two regimes as equal individuals, but strongly support the idea of their marriage. We believe that such an approach has better chances to produce the desired effects. If human rights community intends to achieve certain developments or reforms of intellectual property law, a better start is to suggest equal cooperation, rather than begin with accusation, especially if there is still a long way to develop arguments based on human rights law of sufficient specificity.

'Marriage' of intellectual property and human rights is highly desirable for the achievement of the coherence of the international legal order and compatibility of state's obligations. This argument will be developed further after addressing the issues of the nature of HR and IP norms and the hierarchy of norms in international law.

2.2 The Legal Nature of Intellectual Property and Human Rights

This is not the aim of the present work to develop too much on the philosophical foundations of human rights and intellectual property as well as on the history of evolution of the norms of the two regimes. Extensive scope of literature is devoted to these issues. The present subsection will only focus on relevant aspects which are of added value to the further discussion on the relations between the two regimes and the possible frameworks of such relations. Three main issues are subject of discussion further: 1) the place of the norms of the both regimes in the international legal order; 2) the place of both in the domestic law; 3) the issue of whether the regimes are completely independent or whether they overlap.

2.2.1 International Legal Order: Hierarchy

Human rights, in comparison to other regimes within international law traditionally tend to be attributed a special status. As mentioned by Robert Howse and Makau Mutua, “[i]n the last fifty years, the body of international human rights law has achieved a moral plateau rarely associated with any other area of international law”.²¹ Very often this incontestably high moral and political character has been equaled to the understanding that human rights have a higher place in the hierarchy of international law norms.

As already mentioned, very frequently the departing point of many discussions of the human rights influence on IP is the supremacy of the first over the second. As noted by Dinah Shelton, human rights is one of the

²¹ R. Howse, M. Mutua, 'Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization', http://www.dd-rd.ca/site/PDF/publications/globalization/wto/protecting_human_rightsWTO.pdf P.8.

regimes which rather aggressively assert their primacy.²² The U.N. Sub-Commission on the Promotion and Protection of Human Rights, as an example, stated that human rights obligations have primacy over economic policies and agreements.²³ The Vienna Declaration and the Programme of Action of the World Conference on Human Rights proclaimed that “human rights are the first responsibility of Governments”.²⁴ Professor Yu applied this principle when addressing the resolution of one type of conflicts between the regimes.²⁵ Nevertheless, the issue of the place of human rights norms in the international legal system is more complex than that.

The system of international law, unlike domestic legal systems, is not homogeneous but very fragmented. As stated by Gerhard Hafner, “[i]nternational law consists of erratic blocks and elements; different partial systems; and universal, regional, or even bilateral subsystems and subsystems of different levels of legal integration. All these parts interacting with one another create what may paradoxically be called an “unorganized system, full of intra-systematic tensions, contradictions and frictions». ²⁶ As stated in the comprehensive report on fragmentation of international law, prepared by the International Law Commission in 2006 “[f]ragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security.”²⁷

One of the ways to reduce the negative effects of fragmentation of international law, for example to resolve the tensions among the rules of different 'self-contained regimes', such as human rights law and IP law²⁸ is resorting to the rules of hierarchy of norms. As noted by Anthony Cassimatis, “[w]ith the focus on human rights obligations under general international law, conflict resolution rules that rely upon hierarchical relations amongst rules of international law will have particular relevance”.²⁹ However, it seems that as far as the relations between the

²² D. Shelton, 'International Law and Relative Normativity', Evans, M.D.[ed.], *International Law*, Second Edition (Oxford University Press, 2006).

²³ *Intellectual Property Rights and Human Rights*, UNHCHR Res., U.N. Doc. E/CN.4/Sub.2/RES/2000/7, par. 3.

²⁴ Vienna Declaration and the Programme of Action.A/CONF.157/23, 12 July 1993. Para.1.

²⁵ Yu, *supra note* 8. P.1045.

²⁶ G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International law', *Michigan Journal of International Law*, 25 (2004). P.850. More on fragmentation of international law see M.Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', [Modern Law Review 70/1 \(January 2007\), pp. 1-30.](#)

²⁷ International Law Commission, Fragmentation of International Law: Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006. Para. 491.

²⁸ Term used in the report. Such regimes governing a particular field are considered the regimes of the third type.

²⁹ Cassimatis, A.E. *Human Rights Related Trade Measures under International Law: The Legality of Trade Measures Imposed in Response to Violations of*

human rights and IP regimes are concerned, the rules on hierarchy do not contribute to the resolution of tensions in case such tensions are revealed.

It has been claimed that “[n]otwithstanding theoretical critiques, the existence of forms of hierarchy amongst rules of international law nonetheless appear to be manifested in the recognition of peremptory norms (*jus cogens*) and the existence of international obligations owed *erga omnes*.”³⁰

Peremptory norms of international law or norms *jus cogens* are norms “accepted and recognized by the international community of States as a whole from which no derogation is permitted”.³¹ By no means all the norms of human rights law are generally accepted as having a character of peremptory norms. Articles on State Responsibility enlist among peremptory norms prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity, torture and the right to self-determination.³² Human right which are usually invoked in the human rights – IP discourse, such as right to freedom of expression, right to food, right to health, right to education and others are not proved to be norms *jus cogens* and hence they can not be claimed to have primacy 'over economic policies' on this ground.

Nevertheless, human right norms are expressly recognized by the International Court of Justice in its widely known *Barcelona Traction* case as obligations *erga omnes*, i.e. “obligations of a State towards the international community as a whole”.³³ Does it, however, tell us anything about the primacy of human rights norms over norms of other regimes, such as IP? No, it doesn't, even if highly desired. As the International Law Commission noted, “It is recognized that while all obligations established by *jus cogens* norms [...] also have the character of *erga omnes* obligations, the reverse is not necessarily true. Not all *erga omnes* obligations are established by peremptory norms of general international law. This is the case, for example, of certain obligations under “the principles and rules concerning the basic rights of the human person”³⁴

Human Rights Obligations under General International Law (Martinus Nijhoff Publishers, 2007). Pp.14-17. Cassimatis discusses the legality of trade measures taken for the human rights purposes, but makes a comprehensive analysis of the interrelation of two regimes, which is highly relevant for the present research.

³⁰ *Ibid.* P.192.

³¹ Article 53 of the Vienna Convention on the Law of Treaties 1969.

³² *Official Records of the General Assembly*, Fifty-sixth Session, Supplement 10 (A/56/10), commentary to article 40 of the draft articles on State Responsibility, paras. 4-6.

³³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase) I.C.J. Reports 1970, p. 3 at p. 32, para. 33.

³⁴ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.702, 18 July 2006. Para.38.

The above brief analysis demonstrates that one should not take the supremacy of human rights law over IP law for granted and note that such claims are more of emotional and political character, rather than legal.

2.2.2 Domestic Law: Hierarchy

In addition to the claims on primacy of human rights law in the international legal order, human rights are rather often attributed paramourity in the domestic legal systems as having constitutional character. The situation is again far from being simple, because in several jurisdictions intellectual property rules are also given a status of constitutional norms.

Article I, Section 8, Clause 8 of the US Constitution, known as Intellectual Property Clause, empowers the US Congress “to promote the Progress of Science and useful Arts, by securing the limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.³⁵

As noted by Graber, at least on the European continent, copyright “enjoys a constitutional foundation.”³⁶ In Germany, for example, economic interests of authors are covered by the freedom of property clause enshrined in Article 14 of the German Grundgesetz, and moral rights – by the constitutional provision which protects human dignity or personality.³⁷ In Sweden Article 19 of the Constitution provides that “[a]uthors, artists and photographers shall own the rights to their works in accordance with rules laid down in law.”³⁸

The Belarusian Constitution explicitly enshrines in Article 51(3): “Intellectual property shall be protected by law”.³⁹

Constitutional clauses on intellectual property provision is rather an exception than a rule, but the existence of at least several examples of such clauses remind us of the unacceptability of generalization and claiming the primacy of human rights over intellectual property due to their constitutional nature.

³⁵ Unites States Constitution. Text available at <http://www.house.gov/house/Constitution/Constitution.html> retrieved on 20 May 2010.

³⁶ C.B. Graber, 'Copyright and Access – a Human Rights Perspective', Graber, C.B., Govoni, C., Girsberger, M., Nenova, M. [eds], *Digital Rights Management: The End of Collecting Societies?* (Bern: Stämpfl, 2005). Pp. 8-9.

³⁷ *Ibid.* P. 8.

³⁸ Chapter 2, Article 19 of the The Instrument of Government of 1975, one of the four constitutional acts of Sweden. Text available at http://www.riksdagen.se/templates/R_Page_6357.aspx Retrieved on 12 May 2010.

³⁹ Constitution of the Republic of Belarus of 1994 (with alterations and amendments adopted at the republican referendums of November 24, 1996 and of October 17, 2004), text available at <http://law.by/work/EnglPortal.nsf/6e1a652fbefce34ac2256d910056d559/d93bc51590cf7f49c2256dc0004601db?OpenDocument> retrieved on 13 April 2010.

2.2.3 Human Rights Components of Intellectual Property

The last question to address within this section is whether protection of intellectual property is just a part of an economic policy or whether it has human rights implications. If the previous subsections demonstrated the impossibility of building a clear hierarchy between the regimes, the current subsection will complicate the picture even more by demonstrating that the regimes overlap at least in part as IP protection includes human rights elements, although generally the bodies of norms are clearly of different nature.

The most relevant human right which can be invoked in this discussion is “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”. This right was first proclaimed in the Universal Declaration of Human Rights⁴⁰, but became legally binding for the relevant states with the adoption of the International Covenant on Economic, Social and Cultural Rights.⁴¹

Some commentators, such as Paul Torremans, interpreted this provisions as recognizing a human rights status of copyright (the situation with patents and trademarks is more contradictory): “the protection of moral and material rights of authors and creators is clearly exactly what is covered by the area of law know as copyright and this second paragraph of Article 27 of the Universal Declaration of Human Rights must therefore be seen as elevating copyright to the status of a Human Rights, or maybe it is more appropriate to say that article recognizes the human rights status of copyright”.⁴²

Other commentators deny the existence of any sort of human rights component in IP. As argued by Jerome Reichman “the phrase “moral and material interests of authors and creators” was not understood as a euphemism for IP protection, but rather as a related doctrine, compatible with a number of approaches to IP policy”.⁴³ Joost Smiers also strongly

⁴⁰ Article 27 of the *Universal Declaration of Human Rights*, adopted 10 December 1948, G.A. Res. 217A (III), U.N. Doc.A/810 (1948).

⁴¹ Article 15 (1) (c) of the *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966).

⁴² P.L.C. Torremans, 'Copyright (and Other Intellectual Property Rights) as a Human Right, Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008). P.200.

⁴³ L. Shaver, 'The Right to Science and Culture', *Wisconsin Law Review*, 121 (2010), p. 173.

opposes attribution of human rights character to copyright⁴⁴ as do Lea Shaver and Catherine Sganga.⁴⁵

The right of authors under the Covenant remained uninterpreted by the Committee on Economic, Social and Cultural Rights until 2005. In 2005 the Committee issued General Comment No 17⁴⁶, in which it emphasized the necessity to distinguish the right enshrined in Article 15 (1) (c) from the rights provided under intellectual property regime. In contrast to human rights, which are by nature “fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities.”⁴⁷, “intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else”⁴⁸. As the High Commissioner for Human Rights stated in its report to the Economic and Social Council before, IPRs are *granted* by states under certain conditions and “are more akin to privilege”, while human rights are not granted, but *recognized*.⁴⁹ Therefore the UN human rights bodies clearly articulated that human rights regime and intellectual property regime contain norms of different legal nature. The Committee further stated that “the protection under article 15, paragraph 1(c), *need not necessarily reflect* the level and means of protection found in present copyright, patent and other intellectual property regimes” (italics added).⁵⁰ This revolutionary statement challenged the generally accepted idea that rights of creators can be only protected through intellectual property regime. However, the Committee did not deny that the human rights of authors *might be reflected* in IP as well. As a rule, States' reports on implementation of the right enshrined in Article 15(1)(c) mainly describe measures of intellectual property protection.

Professor Yu is strongly advocating for careful delimitation between the “human rights-based interests” of creators and “intellectual property

⁴⁴ J. Smiers, 'No Copyright and No Domination of Cultural Markets: two conditions for realising active participation in cultural life', background paper submitted for the day of general discussion on the right to take part in cultural life (article 15(1)(a) of the Covenant) during the fortieth session of Committee on Economic, Social and Cultural Rights, E/C.12/40/6, 9 May 2008. Para.2.

⁴⁵ L. Shaver, C. Sganga, 'The Right to Take Part in Cultural Life: Copyright and Human Rights', *Wisconsin International Law Journal* 27 (2009), p.650.

⁴⁶ *The right to 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 (article 15, paragraph 1(c), of the Covenant)*, General Comment N 17, Committee on Economic, Social and Cultural Rights, adopted 21 November 2005, E/C.12/2005.

⁴⁷ *Ibid.*, para. 1.

⁴⁸ *Ibid.*, para. 2.

⁴⁹ Commission On Human Rights, Sub-Commission On The Promotion And Protection Of Human Rights, *Economic, Social And Cultural Rights The Impact Of The Agreement On Trade-Related Aspects Of Intellectual Property Rights On Human Rights*, Report Of The High Commissioner (E/Cn.4/Sub.2/2001/13, 27 June 2001).

⁵⁰ *Ibid.*, para. 10.

rights that lack human rights aspects”.⁵¹ He argues that corporate intellectual property rights and transferrable interests⁵² as well as employees inventions lack human rights basis.⁵³ This list might also include protection of the material interests after the death of the author which are arguably outside the requirements of the human rights law as it seems logical that if there is nobody in place to be attributed a human right, there can not be a human right. The question whether human rights law protect the moral interests of authors after their death is less clear. According to General Comment No 17: “[a]uthors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration of their labour, a moral right on their work and/or discovery which shall not disappear, *even after such a work shall have become the common property of mankind.*”⁵⁴ Shall this statement be interpreted as requiring protection of moral interests of authors and creators forever and thus beyond their lifespan? These issues are incontestably of high relevance to the IP – human rights discussion and are extremely intriguing, however, they require additional research, which, unfortunately can not be conducted within the present work.

Among intellectual property rights which bare human rights character moral rights take the central position. In general, understanding of the concept 'moral interests of authors' is very similar to the concept of 'moral rights' in IP law (both of them recognize the right to attribution and the right to the integrity of work⁵⁵). Moreover, material rights (exclusive rights of reproduction, performance and communication to the public in copyright, exclusive right to use the patented invention in patent law, etc.) to an extent as to allow authors to enjoy the adequate standard of living should be also considered as having a human rights nature.⁵⁶

In addition to the right provided in Article 15 (1) (c) of the ICESCR, there are other human rights reflected in intellectual property. As CESCR stated, the protection of this right is closely linked to the right to own

⁵¹ P. K. Yu, 'Ten Common Questions about Intellectual Property and Human Rights', 23 *Georgia State University Law Review* (2007), pp. 709-753.

⁵² P.K. Yu, 'Challenges to the Development of a Human-Rights Framework for Intellectual Property', Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008), pp. 83-86. Richard Pierre Claude adheres to this idea. See R.P. Claude, *Scientists' Rights and the Human Right to the Benefits of Science*, in CORE OBLIGATIONS: Building a framework for Economic, Social and Cultural Rights. Pp.316-317. As for the exclusion of corporate interests, the same idea has been expressed in General Comment No 17, *supra* note 46, para.7.

⁵³ Yu, *supra* note 51, p. 727.

⁵⁴ General Comment 17, *supra* note 46, para.12.

⁵⁵ Yu, *supra* note 8, pp. 1081-1083.

⁵⁶ Under the Comment, only basic material interests of authors are subject to protection until they enable the author to enjoy an adequate standard of living. Extra protection lies outside states' core obligations. General Comment No 17, *supra* note 46, para. 39(c).

property, as well as to the right to adequate remuneration and adequate standard of living.⁵⁷

The human rights character of different intellectual property rights has been recognized by judiciary, on the domestic and regional levels.

In the famous case *Charlie Chaplin v. Société Les films Roger Richebé* the Paris Court of Appeal recognized on 29 April 1959 the moral rights of Charlie Chaplin, a British citizen, in France by making reference to Article 27 (2) of the Universal Declaration of Human Rights. His moral right, namely the right to the integrity of work (the film) was found to be in breach due to unauthorised addition of a soundtrack.⁵⁸ The United States Supreme Court emphasized in *Harper & Row v. Nation Enterprises* case the contribution of copyright to the freedom of expression.⁵⁹

On the European level IP has several times been interpreted as falling within the scope of right to property enshrined in Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms.

The European Commission and the European Court of Human Rights interpreted the term 'possessions' of Article 1 of Protocol 1⁶⁰ as covering not only material, but also immaterial property such as patents – in *SmithKline and French Laboratories LTD v. the Netherlands* case⁶¹, *Britisch-American Tabacco Company v. Netherlands* case⁶² and copyright – in *Melnithouk v. Ukraine* case⁶³. Relatively recently the court recognized in *Anheuser-Busch, Inc. v. Portugal* case that the protection of the right to property also extends to corporate trademarks.⁶⁴

It seems that professor Yu rightly claims that corporate intellectual property rights should not enjoy human rights protection, however, there is still room for the right to property, as well as for some other rights, in intellectual property regime. Nevertheless, we are aware that in the majority of cases it would be hard to distinguish between the elements of IP regime

⁵⁷ General Comment 17, *supra* note 46, par. 15.

⁵⁸ Société Roy Export Company Establishment et Charlie Chaplin v. Société Les films Roger Richebé, RIDA 28 (July 1960) 133; Dalloz 1959, 402, n. Lyon-Caen and Lavigne; JDI 1960, 128, n. Goldman. As cited in François Dessemontet, 'Copyright and Human Rights' <http://www.unil.ch/webdav/site/cedidac/shared/Articles/Copyright%20&%20Human%20Rights.pdf> Retrieved on 9 May 2010.

⁵⁹ Graber, *supra* note 36, p.1.

⁶⁰ Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11, Paris, 20.III.1952

⁶¹ *SmithKline and French Laboratories LTD v. the Netherlands*, Decisions and Reports, 66 (1990), at pp. 79

⁶² *Britisch-American Tabacco Company v. Netherlands*, judgment of 20 November 1995, A Series N 330.

⁶³ *Melnithouk v. Ukraine*, Case 28743/03, judgment of 5 July 2005, CEDH 2005-XI.

⁶⁴ *Anheuser-Busch, Inc. v. Portugal*, App. No 73049/01, ECHR, 10 October 2005.

which bare a human rights compound and the ones which do not. This factor additionally complicates the understanding of the relations between IP and human rights regimes.

As indicated, besides seeking to meet human rights interests of authors intellectual property regime provides additional protection, going beyond human rights requirements. On the other hand, intellectual property regime provides a more narrow protection than that required by human rights provision on the rights of authors. One example is limitations of rights of authors, provided for in both human rights and intellectual property regimes. Limitations should generally undergo a certain test to be recognized as legitimate, which is more stringent in human rights, than in intellectual property law. Limitation of a human rights of author 1) must be “determined by law; 2) in a manner compatible with the nature of these rights; 3) must pursue a legitimate aim; 4) must be strictly necessary for the promotion of the general welfare in a democratic society”; 5) must be proportionate (the least restrictive measures must be adopted out of all available).⁶⁵ In intellectual property law the test which limitation should meet is significantly lower. Limitations should 1) be applicable in certain special cases; 2) should not conflict with a normal exploitation of the work and 3) not unreasonably prejudice the legitimate interest of the author.⁶⁶

How do the two tests, the test on author's rights in HR and the IP three-step test, correlate with each other? Does it mean that the more stringent test (or both tests combined) should be applied to deviate from IP rules which have human rights elements, and human rights test – for justifying IP provisions providing additional protection? This constitutes a rather confusing task for courts and law makers, especially due to the fact that in many circumstances delimiting 'human rights based elements' from 'non-human rights based elements' of IP is not simple. The issue without a doubt requires comprehensive analysis.

Another example of the area when the standard of protection of author's rights is higher in human rights regime than in IP is the protection of folklore and traditional knowledge of indigenous communities. Such protection is required under Article 15 (1) (c) of the ICESCR⁶⁷, but not yet regulated in IP law, at least on international level.

As professor Helfer concluded, “a human rights framework for author's rights is thus both protective and less protective than the approach endorsed by copyright and neighboring rights regimes”.⁶⁸ We fully adhere to this opinion.

The present section made an attempt to demonstrate the main points of the author. First, it seems that the approach departing from the assumption of primacy of human rights law over intellectual property law should be

⁶⁵ General Comment No 17, *supra* note 46, paras. 22-23.

⁶⁶ 'The three-step test' (TRIPS, WIPO Copyright Treaty).

⁶⁷ General Comment No 17, *supra* note 46, para. 32.

⁶⁸ Helfer, *supra* note 7, p. 997.

avoided. We acknowledge the high value of human rights based arguments on political fora and emotionally are very supportive of approaching all the arising issues with human rights glasses on. However, from a positivist point of view human rights and intellectual property regimes are equal regimes with no hierarchy revealed between them (with an exception of human rights norms *jus cogens*). On the international level the subordination character between the two regimes has not been established. International law is highly fragmented and these 'self-contained' regimes operate rather independently. On domestic level, the rules of both regimes might take the same place in the hierarchy of norms (as shown above both can be enshrined in constitutions). For this reason it is argued that any sort of superiority approach to the relations between human rights and intellectual property regimes should be avoided. It is not only legally ungrounded, but also practically inefficient. Reconciliation shall not begin with accusation of the current IP system, what is rather often happening now as it will only cause natural resistance from the IP community and from the beginning undermine the possibility of constructive dialogue. For this reason wording such as 'human rights *framework for* intellectual property' will be omitted but a more neutral language such as 'marriage' or 'reconciliation' of the two regimes will be used. By doing so we by no means deny the necessity of such reconciliation with the purpose of reducing the negative consequences of fragmentation of international law. International legal order should be coherent and predictable and domestic obligations – mutually supportive but not contradictory.

The second point argued in the present section is that the two regimes can not be seen as two completely independent sets of norms regulating non-meeting interests. The regimes overlap in part: there are IP rights based on human rights concerns. This is also important to note for the accurate assessment of the relations between the two sets of norms which will be addressed further.

2.3 Conflict or Compatibility?

A hot topic on the agenda of several fora as well as in academia is the issue whether intellectual property and human rights law are two conflicting regimes, fundamentally or potentially, or, on the contrary, they coexist and supplement each other.

The conflict approach has been expressed by human rights bodies, such as the United Nations High Commissioner on Human Rights which stated in its Resolution 2000/7: “since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS

Agreement, on the one hand, and international human rights law, on the other”.⁶⁹

Several commentators also see the two regimes as completely incompatible with each other. Lea Shaver, for example, argues that intellectual property protection is in frequent tensions with human rights obligations, and in fundamental conflict with the obligations under the right to science and culture⁷⁰. According to her, this conflict derives from an approach implemented by IP regime treating culture, information, science and technology as private, but not public goods.⁷¹

Another approach expressed in the literature is that both regimes pursue the same goal – to define the appropriate scope of protection of the creation or invention while ensuring that the interest of the public in access to the creation are also met.⁷² Professor Torremans criticizes the conflict approach for focusing “primarily on the practical effects of certain forms of intellectual property rights in specific situations. In doing so it does not address the broader picture, involving the function and nature of the elements involved in the interaction. The second approach comes to the interaction between intellectual property rights and human rights from this broader perspective. Looking at it from that perspective, both intellectual property rights and human rights deal with the same fundamental equilibrium”.⁷³ So, according to Torremans, the two regimes are concerned with the same aim and thus are totally compatible with each other.

The majority of the legal commentators adhere to the third approach, that intellectual property law is generally in conformity with states' human rights obligations, however, there are apparent or potential hotspots (areas of tension) among the rules of two regimes.

Daniel Gervais is of the opinion that both conflict and compatibility models are correct with regard to the HR-IP relationship, however, “there is, and should be, much more truth to the second approach in the coming years”.⁷⁴ According to him, human rights instruments “provide the blueprint for cohabitation, because the human rights principles they embody closely mirror the internal equilibrium of the copyright system, with its limited exclusive rights and exceptions to such rights mainly based on public interest considerations”.⁷⁵ Nevertheless he admits that occasional conflicts between copyright and human rights (e.g. with the freedom of expression) might occur, but the tension is not prominent. Bigger concerns, however, exist with regards the relations between protection of patents and the right to

⁶⁹ Resolution 2000/7, *supra* note 5, par. 2.

⁷⁰ A term suggested by Lea Shaver to refer to the threefold right enshrined in Article 27 of the UDHR and Article 15 of ICESCR.

⁷¹ Shaver, *supra* note 43, p. 124.

⁷² Helfer, *supra* note 3, p. 48.

⁷³ Torremans, *supra* note 42, pp.196-197.

⁷⁴ Gervais, *supra* note 15, p.3.

⁷⁵ *Ibid.*, p.6.

health, implementing technological protection measures and right to privacy.⁷⁶

Estelle Derclaye also argues that first, there is no intrinsic immanent conflict between IP and HR, because IP are human rights and they pursue the same objectives as other HR.⁷⁷ She also argues that the rule is that generally IP law is balanced in itself. However, legislators might annihilate or significantly restrict the internal limits of IP which might lead to real, not apparent, conflicts with HR.⁷⁸ According to her, IPRs and human rights coincide and sometimes cooperate in several areas: copyright and the right to property, copyright and the right to privacy, copyright and the right to education (promoting pluralism of ideas, avoiding public or patron funding), copyright and the freedom of thought, conscience and religion (through freedom of expression), patents and the freedom of speech (due to invention disclosure requirement), patents and the right to food, patents and the right to health (as providing incentives to innovate), trademarks and the freedom of speech, IP and the right to development, IP and the right to a safe and clean environment.⁷⁹

Sam Ricketson also considers IPRs either as 'species of human right in itself' or 'as containing within them internal arrangements that seek to achieve a balance with other kinds of human rights'.⁸⁰ So again he rejects the fundamental conflict approach. However, he identifies areas of potential tension, 'hotpoints', such as protection of databases, limitations to on-line protection of copyright, the scope of protectable subject-matter, famous marks vs human rights.

In addition to the above researches, the Council of Europe also adhered to the third approach in relation to copyright and the freedom of expression. In its recently issued report it stated that due to internal limitations of copyright, there is no fundamental conflict between copyright and freedom of expression. However, there might be areas of tension in the digital era.⁸¹ CoE therefore encourages states to make use of IP 'safety valves' or of pro-access business models (creative commons, open source software, open access, digital libraries) in order to preserve the balance which is achieved in relation to offline works in the digital environment.⁸²

⁷⁶ *Ibid.*

⁷⁷ E. Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding or Cooperating', Torremans, P.L.C. (ed.) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008). P.134.

⁷⁸ *Ibid.*, p.153.

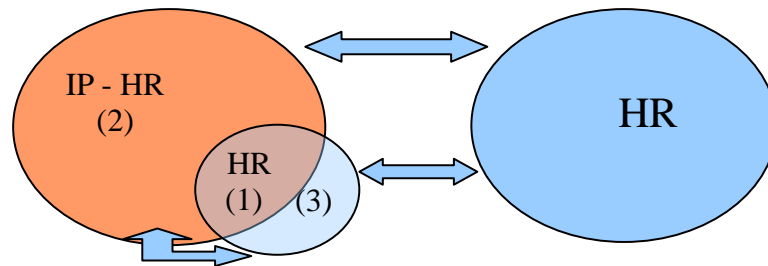
⁷⁹ *Ibid.*, pp.155-159.

⁸⁰ S. Ricketson, Intellectual Property and Human Rights, Bottomley, S., Kinley, D. [eds.], *Commercial Law and Human Rights* (Ashgate, 2002). P.197.

⁸¹ *Copyright and Human Rights*, report prepared by the Group of Specialists on Human Rights in the Information Society (MC-S-IS), September 2008, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg, 2009. P.5.

⁸² *Ibid.*

To evaluate the above approaches the discussed above legal nature of human rights and intellectual property rights shall be recalled. It was explained that some rules within intellectual property regime reflect authors' and inventors' rights of a human rights character. Other rules provide protection which goes beyond protection required under Article 15(1)(c) of the ICESCR. On the other hand, intellectual property regime meets some, but not all the requirements of human rights law. This is schematically shown at the picture below.



As in part some human rights find their realization in the intellectual property regime, claiming that intellectual property is in 'fundamental conflict' with human rights would be an incorrect generalization.

On the other hand, IP and human right do not coincide completely. As it was examined earlier, there are rules in the intellectual property law not associated with any human right.

Therefore, the third approach seems mostly reasonable - the two regimes are generally compatible, although tensions of different kinds between them can occur. It seems that regardless of an area of tension discussed, it is rather hard to prove convincingly the existence of a conflict as such. There are two main reasons for it. First, provisions on human rights, especially the ones belonging to the category of economic, social and cultural rights, which are most often referred to in IP discourse, are usually drafted in a very vague language, quite understandable for known reasons. The lack of specificity as regards human rights obligations makes it complicated to reveal apparent clashes with the precise and technical language of intellectual property law. Secondly, it seems rather problematic to prove the exact effects of certain IP provisions or policy on the states' ability to comply with their obligations under human rights instruments. For example, strong patent protection, on one hand intensifies research and development of new pharmaceutical products, but on the other hand, significantly contributes to the price of drugs making them unaffordable for many persons in need, at least in the short term, and therefore it is hard to claim precisely whether IP fulfills the objective of the right to the highest attainable health or rather impedes it.

It seems that for any claim on the conflict between human rights and intellectual property regimes a thorough analysis of the exact states' obligations should be conducted and the impact of IP protection on such obligations examined. Otherwise such claims do not bare much content and cannot be a driving force for any legislative change. Therefore defining the

areas of conflicts between the two regimes as a starting point will be avoided. However, we will not turn a blind eye on the potential tensions between two sets of norms, but will address them very generally by identifying the types of tensions possible.

Firstly, human rights of the receivers such as the right to benefit from scientific progress, the right to food, the right to education, the right to freedom of expression, etc. (big blue circle) may collide with the author's intellectual property rights which have human rights character (1). Secondly, human rights of the public might be found in tension with the intellectual property rights which provide protection to the author, additional to that required under human rights law (2). Thirdly and finally, human rights of authors may not find their full realization within the intellectual property regime (3).

2.4 Types of Marriage

The types of marriage, in other words the frameworks of relations between human rights and intellectual property suggested in the literature are closely connected to the above discussed opinions on conflict and compatibility and the possible tensions. Professor Helfer proposed three possible approaches to framing their relations: 1) using human rights to expand intellectual property; 2) using human rights to impose external limits on intellectual property and 3) achieving human rights ends through intellectual property means.⁸³ The present subsection argues that all the three approaches are legitimate and could be applied in certain circumstances. Moreover, a 4th framework – 'use human right to provide for internal limitations from IP' – is also introduced.

It was discussed earlier that, on one hand, as intellectual property regime does not fully depict the scope of author's rights under human rights regime, it might be expanded until they are fulfilled completely. For example, to protect the creations of indigenous community, as required under the CESCR according to the Comment No 17, intellectual property might additionally include communities in the list of potential right holders, extend the term of protection of folklore, etc. If it happens that the South African Intellectual Property Amendment Bill 2008 enters into force it will expand the applicability of the Copyright Act 1978 to traditional works.⁸⁴ In this sense *human rights can be used to expand intellectual property*.

The discussion of the remaining approaches should be preceded by a brief analysis of what is known as *external* and *internal limitations* to

⁸³ Helfer, *supra* note 7.

⁸⁴ Copyright Act of South Africa, 1978 (No. 98 of 1978, as amended by the respective Copyright Amendment Acts No. 56 of 1980, No. 66 of 1983, No. 52 of 1984, No. 39 of 1986, No. 13 of 1988, No. 61 of 1989 and No. 125 of 1992). Text available at http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4067 Retrieved on 24 May 2010. Intellectual Property Laws Amendment Bill, 2008 to the Copyright Act of South Africa. Text available at <http://www.info.gov.za/view/DownloadFileAction?id=81111> Retrieved on 24 May 2010.

intellectual property⁸⁵ as it is highly relevant for understanding the possible role of human rights in approaching IP law.

There are two ways of restricting the exclusive rights of authors or of other copyright holders. First is known as 'external' restrictions of copyright or applying legal or other norms and principles which restrict the scope of established rights but which are separate from copyright. Such restrictions, for example, include rules on censorship or competition law.⁸⁶

The second way of restricting author's rights lies within the copyright regime itself and is known as 'internal' restrictions. First of all, copyright laws usually limit the scope of works which can be protected by copyright. Such works, for example, should often meet several criteria, for example the criterion of originality.⁸⁷ Some categories of works are sometimes explicitly denied copyright protection. The Berne Convention, for example, does not expand the scope of protection to the news items and allows the State Parties to exempt official texts from protected subject matters.⁸⁸ Moreover, the exclusive rights of copyright holder are limited in time to 50, 75 or 90 years after the death of the author.

However, traditionally, the notions 'limitations' and 'exceptions' from copyright are understood narrowly and refer only to a certain category of 'internal' restrictions, namely exemptions of particular kinds of *uses* or protected materials. International and regional instruments do not give a definition of the notions 'limitations' and 'exceptions'.⁸⁹ Neither do they define the difference between the two and usually treat them as synonymous.⁹⁰ As a rule, while invoking the term 'exceptions and limitations', combined or separately, as well as often used 'E&L' we will understand them in this narrow sense.

In the following paragraphs we will demonstrate that human rights can both serve as external limitations of intellectual property and be the driving force for introducing internal limitations to it.

The second approach is now to be considered. Human rights, including those reflected in intellectual property regime, "are universal,

⁸⁵ They will be discussed in relation to copyright only, but the concept is applicable to all the areas of intellectual property.

⁸⁶ Sterling, J.A.L. *World Copyright Law* (Sweet & Maxwell, 2003). P. 434, Lewinsky, S. *International Copyright Law and Policy* (Oxford University Press, 2008). P. 153.

⁸⁷ The originality test, for example, should be met by databases as prescribed by Article 3(1) of the EU Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

⁸⁸ Articles 2(8) and 2(4) of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979, 25 U.S.T. 1341.

⁸⁹ Lewinsky, *supra* note 86, p. 153.

⁹⁰ Sterling, *supra* note 86, p. 434.

indivisible, interdependent and interrelated”⁹¹ and hence not only mutually supportive, but also mutually restrictive. That means that they should be adequately balanced with each other. In search of a balance between human rights based interests of authors and human rights of the public, the first, the latter or both will undergo limitations. Moreover, intellectual property rights, which do not contain human rights elements, are subject to limitations by corresponding human rights of the consumers. Therefore, *human rights can impose external limits on intellectual property*. It seems that such an approach is most likely to be applied by judiciary on a case-to-case basis, rather than by parliaments. This approach has been applied in several cases by the courts on the European continent (see, for example *Schlussels Dornen-Krone* case of 3 October 2000 in which the Austrian Supreme Court referred to the constitutional provision on freedom of expression to expand the scope of exception for the purpose of quotation).⁹²

The third approach suggested by professor Helfer emphasizes that intellectual property regime is just one of the means which can be used to implement human rights. This approach was expressed as desirable by the CESCR which stated that intellectual property protection must serve the objective of human well-being, which is primarily given legal expression through human rights.⁹³ In case IP fails to efficiently fulfill the objectives of human rights two alternatives are possible: to amend the existing IP regime or to make use of additional means, which depend on the context. For example, to protect material interests of authors as required under Article 15(1)(c) of the ICESCR a state can refer to IP means, as well as to other ones such as state reward systems or other sort of payments to authors or inventors without providing monopoly rights. Protecting the human rights of the public connected to access to the intellectual materials might be provided through internal exceptions and limitations of IP or through other means such as, for example state procurement in the case of access to essential drugs and the right to health. Therefore, *intellectual property can be used as one of the means at states' disposal in achieving human rights ends*.

There can be another possible approach to the HR – IP relations which might fit within professor Helfer's third approach, but is still distinct and thus worth being discussed separately. The approach might be applicable by lawmakers on the level of incorporation of norms of international IP instruments on the domestic level – *human rights can be used to provide for internal limits to intellectual property* (in contrast to external limiting under 2nd approach).

⁹¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-15 June 1993, A/CONF.157/23, par. 5.

⁹² Austrian Supreme Court, 4 October 2000, *Schlussels Dornen-Krone*, in *medien und recht* 6/2000. For the overview of the case law with regards to freedom of expression and copyright see, for example, Graber, *supra* note 36.

⁹³ Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions: *Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., Annex XIII, ¶ 4, U.N. Doc.E/2002/22-E/C.12/2001/17 (2001).

This approach is mainly to do with introducing exceptions and limitations allowed by international copyright law but subject to the so-called Berne 'three-step test':

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 1) in certain special cases, 2) provided that such reproduction does not conflict with a normal exploitation of the work and 3) does not unreasonably prejudice the legitimate interests of the author” (numbers added).⁹⁴

Later such test was incorporated in the TRIPS Agreement 1994, World Copyright Treaty 1996 and other international and regional instruments which expanded its application to other exclusive rights of authors, besides reproduction right.⁹⁵

Applying the 4th approach has clear advantages. It would be highly desirable if all the tension between IP rights and human rights of the public were eliminated within domestic IP system and through the means of domestic IP law, such as exceptions and limitations. However, such E&L might be insufficient and thus additional exceptions might be required. Therefore human rights can be invoked as an argument to make use of the Berne flexibility and to introduce new exceptions into domestic law. In other words, the 4th approach is about using human rights to encourage introduction of internal limits to IP, which are allowed on the international level, but not yet introduced on a national level.

As it was indicated above, different frameworks for the relations between intellectual property and human rights can be applicable depending on the area of tension. The last two ones, namely – achieve human rights ends through IP means and use human rights to provide for internal restrictions from IP are arguably more preferable. These approaches should be given priority over the 2nd approach (use human rights as an external limit to IP) in case when the human rights of the public requiring access to protected materials should be supported. The following position expressed by several commentators seems very reasonable – the balance should be, first of all achieved, through internal IP means and only in case it turns out to be impossible human rights can be explicitly invoked in court to limit IP protection.⁹⁶ Christoph Graber sees a threat to the principle of division of power among institutions of a state when courts take the responsibility to readjust the balance of copyright legislation. He considers it a serious interference into the competence of the judiciary branch and argues that such interference should take place only in exceptional cases when the

⁹⁴ Article 9(2) of the Berne Convention, *supra* note 88.

⁹⁵ Article 13 of the TRIPS Agreement, *supra* note 5, Article 10(1) of the World Copyright Treaty.

⁹⁶ See, for example, C. Geiger, 'Author's Rights, Copyright and the Public's Right to Information: A Complex Relationship (Rethinking Copyright in the Light of Fundamental Rights), *New Directions in Copyright Law*, Fiona Macmillan [Ed.], Vol. 5, Edward Elgar Publishing Limited (2007). P. 42-43.

information access to which is at stake is of significant importance to the public.⁹⁷

Moreover, such an approach – using human rights to put external limits on IP – has a relatively narrow applicability. Until now the predominant number of cases in which such an approach was considered were dealing with the right to freedom of expression and sometimes – with the right to privacy, which belong to the category of civil and political rights. The majority of human rights which are usually invoked in the discussion on intellectual property, such as right to food, right to health, right to education, are however, economic, social and cultural rights, are less precise in terms of states' obligations and therefore hardly adjudicable. There is at present almost no case law considering such human rights together with intellectual property issues.

For the above reasons it is argued that the later two approaches have a better potential – human rights, especially economic, social and cultural, have higher chances to influence IP on legislative level. However, in case it appears to be impossible or insufficient (due to the requirements of the three-step test, for example), human rights might be invoked in court to limit IP externally.

2.5 Conclusions

Defining the character of relations between human rights and intellectual property regime is far from being easy. In the world where information and knowledge became one of the main economic and political resources, human rights and intellectual property intertwined significantly.

We roughly examined the place of the norms of both regimes in the international and domestic legal orders and concluded that no hierarchy of norms between them can be clearly established. Therefore, we suggest to avoid a superior-inferior approach towards the relations of intellectual property and human rights. However, we argue for the necessity of 'marrying' (or reconciling) them with the aim of reducing the negative consequences of fragmentation of international law and contributing to the coherence in the international legal order.

In the course of the above deliberations we concluded that the relations between two regimes are rather sophisticated. To certain extent human rights find their implementation through intellectual property rules. Therefore we deny that the two regimes are in fundamental conflict. There are, however, many aspects which might be in tension among the two regimes. Human rights can both extend and limit intellectual property protection, externally or by encouraging internal limits. Meanwhile, IP as such remains one of the means for implementing human rights as well as for ensuring a balance between human rights of different groups. We argue that all the approaches have its logic and value and thus might be used. However, it is argued that, if possible, two approaches: *achieve human*

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Graber, *supra* note 36, pp. 28-35.

rights ends through IP means and use human rights to encourage internal limits of IP, should have priority over the policy of using human rights as an external limit.

The present chapter provided the general theoretical background for the issues discussed. The following chapters will focus on concrete examples – they will assess the contribution of the right to cultural participation in the human rights – IP discussion and how this right can be used to influence the introduction of specific sort of exceptions from copyright – exceptions for the benefit of libraries.

3 The Right of Everyone to Participate in Cultural Life

Thus as time went by, the chateau fell into disrepair for the family fortunes were squandered upon the vain and selfish step-sisters while Cinderella was abused, humiliated, and finally forced to become a servant in her own house. And yet, through it all, Cinderella remained ever gentle and kind, for with each dawn she found new hope that someday her dreams of happiness would come true.

'Cinderella', Disney Cartoon, 1950

Surprisingly, in discussions on human rights and intellectual property cultural rights are invoked very rarely. As a rule, the emphasis is made on the right to food to challenge the rules on IP protection of plant varieties, right to health – to question patenting of pharmaceuticals, right to freedom of expression and right to privacy – to advocate for broader private copying exception from copyright and right to education – for exception for teaching purposes.

Not only in “Human Rights – IP” discussion is the right to culture neglected. It has been generally marginalized in the human rights discourse. For six decades it has been clearly ignored by international organizations, courts as well as by academia. Janusz Symonides has called cultural rights 'poor relatives of other human rights'⁹⁸ and Yvonne Donders – 'the Cinderella of the human rights family'⁹⁹ (which gave the idea for the epigraph of the present Chapter). However, recently several attempts have been undertaken to interpret some cultural rights which now allowed to talk about them in terms of more specific states' obligations.

In the present Chapter it is argued that the unjustly ignored right of everyone to take part in cultural life¹⁰⁰, according to its interpretation, has a potential to contribute to discussion on IP. Lea Shaver argued recently that

⁹⁸ Symonides, J. Cultural Rights: a neglected category of human rights. UNESCO. 1998. P. 559.

⁹⁹ Y. Donders, The Legal Framework of the Right to Take Part in Cultural Life, *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (ed. Yvonne Donders and Vladimir Volodin), UNESCO Publishing (2007), p. 232.

¹⁰⁰ The right to take part in cultural life is one of a few generally acknowledged cultural rights, in both narrow and broad senses. On what rights fall in the category of cultural rights see, *inter alia*, L. Protz, 'Cultural Rights as People's Rights', *The Rights of Peoples*, J. Crawford [ed.], Vol. 1, Oxford, Clarendon Press, 1988. Pp. 94-95, A. Eide, 'Cultural Rights as Individual Human Rights', *Economic, Social and Cultural Rights: A Textbook*, Second Revised Edition, Eide, A., Krause, C., Rosas, A. (ed.) (Martinus Nijhoff Publishers, 2001), pp. 289-302, S. P. Marks, 'Defining cultural rights', *Human Rights and Criminal Justice for the Downtrodden: Essays in honour of Asbjorn Eide*, Morten Bergsmo (ed.) (Martinus Nijhoff Publishers, 2003).

“[w]ith greater scholarly development, however, the right to science and culture¹⁰¹ can offer fertile ground for judicial and legislative experimentation to restore balance to international IP law”.¹⁰² To evaluate the potential of the right, its content should be first analyzed.

In identifying specific obligations of states under the right to cultural participation we will, first, make an overview of the normative framework of the right to culture. Second, we will examine the existing interpretation of the vaguely formulated provision of the right enshrined in the International Covenant of Economic, Social and Cultural Rights. While interpreting the provision we will follow traditional rules of interpretation of international treaties and by doing so recourse to the documents of the Committee on Economic, Social and Cultural Rights (the supervisory body of the Covenant), United Nations Educational, Scientific and Cultural Organization, the works of leading commentators and other sources.

It is intended that the above analysis of the interpretation of the right to take part in cultural life will reveal that obligations under Article 15(1)(a) of the Covenant include, *inter alia*, the obligation *to provide a wide access of public to cultural materials* encompassing several more specific obligations. The utility of the finding will be demonstrated in the final Chapter.

3.1 Normative Framework

The right to cultural participation in one way or another is enshrined in numerous international instruments, both universal and regional.

The right was firstly proclaimed in the Universal Declaration of Human Rights 1948, Article 27 of which provides:

1. *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
2. *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*¹⁰³

The right to cultural participation has been further inserted in the texts of numerous human right treaties of binding character. International Convention on Elimination of All Forms of Racial Discrimination obliges the State Parties to “guarantee the right to everyone [...] equal participation

¹⁰¹ Right to science and culture' is a term offered by Lea Shaver and covering several dimensions, including the right to take part in cultural life.

¹⁰² Shaver, *supra* note 43, p. 127.

¹⁰³ Universal Declaration of Human Rights, *supra* note 40.

in cultural activities”.¹⁰⁴ Convention on the Rights of Person with Disabilities provides for “the right of persons with disabilities to take part on an equal basis with others in cultural life”.¹⁰⁵ International Covenant on Civil and Political Rights enshrines the right of persons, belonging to ethnic, religious or linguistic minority the right “to enjoy their own culture, to profess and practise their own religion, or to use their own language”.¹⁰⁶ This is not the full list of universal instruments recognizing the right to culture.¹⁰⁷

Several regional human rights treaties have incorporated the right to cultural participation as well. For example, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Protocol of San Salvador) provides for “the right of everyone [t]o take part in the cultural and artistic life of the community”.¹⁰⁸ African Charter on Human and Peoples’ Rights guarantees the right of every person to “take part in the cultural life of his community”.¹⁰⁹ The American Declaration, adopted by a resolution of the Organization of American States, enshrines this right in similar words as the Universal Declaration for Human Rights.¹¹⁰ The later two instruments are of recommendation character. Such non-binding documents are still of considerable importance as their provisions are often voluntarily incorporated into domestic laws and, additionally, they are often referred to in the course of interpreting of binding documents.

The present work will, however, focus on the provision on the right to cultural participation enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹¹ There are several reasons for this

¹⁰⁴ Article 5(e)(vi) of International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

¹⁰⁵ Article 30(1) of Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 at the United Nations Headquarters in New York and opened for signature on 30 March 2007.

¹⁰⁶ Article 27 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

¹⁰⁷ The list also includes Convention on the Elimination of All Forms of Discrimination against Women (Article 13(c)), Convention on the Rights of the Child (Article 31), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 43 (1)(g)).

¹⁰⁸ Article 14(1)(a) of Protocol of San Salvador.

¹⁰⁹ Article 17 (2) of African Charter on Human and Peoples’ Rights, *adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, *reprinted in* 21 ILM 58 (1981), *entered into force* 21 Oct. 1986.

¹¹⁰ Article XIII of American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

¹¹¹ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

choice: first, the binding character of the treaty; second, its wide acceptance¹¹² and, third, the fact that its provision on the right to cultural participation was most thoroughly interpreted in comparison to equal provisions of other instruments.

The Covenant in its Article 15 (1)(a) provides for the “right of everyone [t]o take part in cultural life”. It seems important to cite the full text of Article 15 for the better understanding of the content of the right and for the purpose of further interpretation. Article 15 of the Covenant provides:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) 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.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

1. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural field.

3.2 Interpretation

It seems that the right enshrined in Article 15(1) of the Covenant was intended to mean a single right encompassing various dimensions of it (cultural participation, enjoying scientific progress, author's right). This is demonstrated by the wording of the Covenant proclaiming 'the *right* of everyone' (italics added). Later the provisions were predominantly understood as three separate rights. This is proved by the fact that they are usually examined and interpreted separately.¹¹³

¹¹² At present there are 160 parties to the Covenant. Information on ratifications and reservations is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en Retrieved on.

¹¹³ General Comment No 17, *supra note 46*; Committee on Economic, Social and Cultural Rights, *General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/21, 21 December 2009.; A.R. Chapman, 'Towards the Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009), etc.

Stephen Marks expressed a different idea. He argues that there are two core substantive rights enshrined in Article 15 of the Covenant: the right of everyone to take part in cultural life (Article 15(1)(a)) and the right of everyone to enjoy the benefits of scientific progress (Article 15(1)(b)). Two of the provisions, namely on the rights of authors (Article 15(1)(c)) and on respect of freedom of scientific research and creative activity (Article 15(3)) are instrumental (supporting) rights for the core substantive rights. The rest of the provisions of the Article, namely provisions on conservation, development and diffusion (Article 15(2)) and on international cooperation (Article 15(4)) are instrumental (supportive) means to achieve the realization of the core rights.¹¹⁴

Lea Shaver, is, however, of the opinion, that all the provisions of Article 15 are interconnected and indivisible and constitute a single right. She further offers a common name for this multifaced right - 'the right to science and culture'.¹¹⁵ According to her, all the elements of the right to science and culture pursue a common goal(s). The elements of the right include: 'cultural' element (Article 15(1)(a)), 'scientific' element (Article 15(1)(b)) (together – 'access' dimension), 'authors' element (Article 15(1)(c)) ('protection' dimension), 'conservation, development and diffusion' element (Article 15(2)) and 'international cooperation' element.

Indeed, the provisions of Article 15 of the ICESCR are interlinked and mutually supportive. However, the architecture of Article 15 should be rather described in the following way: provisions of paragraphs (1)(a), (b) and (c) constitute three core substantive rights, using the terminology of Mr. Marks. The rights to cultural participation and to benefiting from scientific progress are independent and equal, while the right of authors is both supportive and restrictive of the above rights. The rest of the provisions of the Article are the means to achieve the substantive rights of Article 15(1), two of which are mandatory (preservation and diffusion of cultural heritage and respect of creative and scientific freedoms) and one is optional (international cooperation).

For the purpose of the present research the focus will be on the right of everyone to take part in cultural life (Article 15(1)(a)) as mostly relevant in the discussion on exceptions from copyright for the benefit of libraries, which will be discussed in the final Chapter. The right of everyone to enjoy the benefits of scientific progress is also of high importance for the discussion on 'library' exceptions as library collections contain not only cultural, but also scientific materials. However, examining this right will be omitted for the purpose of delimitation of the research.

Connections of the right to cultural participation to the other provisions of Article 15 will also be covered. The paper will limit itself to these as well as to general provisions of the Covenant applicable to all economic, social and cultural rights, although the right to participate in cultural life is closely linked to other human right, such as the right to enjoy

¹¹⁴ Marks, *supra* note 100, pp. 296-297.

¹¹⁵ Shaver, *supra* note 43.

the benefits of scientific progress and its applications, the right to education, the right to self-determination, the right to an adequate standard of living.¹¹⁶

Supported by some human rights, the right to participate in cultural life can enter into a conflict with other human rights. It can potentially be in tension with such rights as:

1. the right to life (in case of certain cultural practices such as self-immolation (sati));
2. the right to health (when harmful cultural practices such as female genital mutilation (FGM) are exercised);
3. the right to family life (which might be violated by, e.g. the practice of forced marriage cultivated in several cultural communities);
4. prohibition of discrimination (often against women like in case of polygamy allowed for men);
5. and others.¹¹⁷

Examining these potential conflicts is also beyond the current research.

3.2.1 Sources of Interpretation

While interpreting the meaning of the provision of Article 15(1)(a) of the Covenant 'the right of everyone to take part in cultural life', we follow the rules of interpretation of international treaties provided in the Vienna Convention on the Law of Treaties¹¹⁸:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

¹¹⁶ General Comment No 21, *supra* note 113, para. 2.

¹¹⁷ This aspect is, however, is rather underresearched which is criticized by Almqvist 2005.

¹¹⁸ Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended (emphasis added).

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) *leaves the meaning ambiguous or obscure; or*

(b) *leads to a result which is manifestly absurd or unreasonable* (emphasis added).

In the present study considerable attention will be devoted to examining the provision in light of other provisions of the Covenant (contextual or systematic interpretation) as well as to the historical background of adopting the provision, i.e. the preparatory work and the circumstances of conclusion of the Covenant (historical interpretation). The recourse to history is of added value to the understanding of the real meaning of the right of everyone to take part in cultural life and of the scope of States' obligations under it. We by no means deny the principle of evolutive (or dynamic) interpretation of human rights treaties and acknowledge the supplementary role of historical interpretation.¹¹⁹ However, it seems necessary to bare in mind the original intent behind the provision to avoid missing the necessary elements of the right and narrowing its scope. As Lea Shaver observed, the content of rights should expand over time, corresponding to new demands and historical developments. However, she finds it necessary to investigate the drafters intent due to the fact, that the right under consideration, unlike other human rights, have not expanded, but shrunk by modern interpretation, which she

¹¹⁹

Dynamic interpretation implies that the interpreter of human rights provisions should go beyond the original intent of the authors and consider the new values and needs developed in the society since the adoption of the instrument. The principle of evolutive interpretation was recognized throughout the world by international courts. See, *inter alia*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31; *Tyrer v United Kingdom*, A 26 (1978); (1979–80) 2 EHRR, para.31; Inter-American Court of Human Rights *Advisory Opinion OC-10/89 July 14, 1989*.

finds unacceptable. She suggests that the original intent should “open our eyes to more expansive readings of the text”.¹²⁰

To approach the content of the right of everyone to take part in cultural life we will refer to various commentaries of the right elaborated on inter-governmental, non-governmental and scholarly levels.

First of all, the attention will be devoted to the documents of the Committee on Economic, Social and Cultural Rights. Recently, in November 2009, the CESCR has adopted the long-awaited General Comment No 21 where it expressed its understanding of the right to take part in cultural life based on analysis of the State's reports and expertise of the leading commentators. At present this is the 'youngest' General Comment of the Committee. Moreover, General Comment No 17 interpreting the right of authors under Article 15 (1)(c), adopted a few years earlier, in November 2005, is also important to touch upon to approach the relations with the rights of authors. The contribution of the Comments is expected to be of high value to the research. Moreover, the materials from the days of general discussion of the right organized in 1992 and 2008 by the Committee would be also examined.

Considerable attention for the purpose of revealing states' obligations under Article 15(1)(a) of the ICESCR will be devoted to contemporary scholarly work. Moreover, the traditional sources of interpretation of economic, social and cultural rights will be referred to with the aim of defining the basic principles of realizing the right. The sources include Limburg Principles¹²¹, Maastricht Guidelines¹²², General Comment N 3¹²³, General Comment N 9¹²⁴.

While interpreting the provision of Article 15(1)(a) we will mainly focus on states' obligations which can be relevant to the human rights-copyright discourse as well as to the work of libraries.

3.2.2 Definitions

First of all, the main components of the provision “the right of everyone to take part in cultural life should be given clarification.

¹²⁰ Shaver, *supra note* 43, p. 136.

¹²¹ UN Doc. E/CN.4/1987/17, “The Limburg Principles of the Implementation of the International Covenant on Economic, Social and Cultural Rights”.

¹²² *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Human Rights Quarterly, Vol. 20 (1998), pp. 691–705.

¹²³ Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, par.1)*, U.N. Doc. E/1991/23, 14, December 1990.

¹²⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The domestic application of the Covenant*, U.N. Doc. E/C.12/1998/24, (1998).

3.2.2.1 Cultural Life

The terms 'culture' and 'cultural life' are probably the most controversial notions used in the wording of the provision of Article 15(1)(a). The founding fathers of the Covenant omitted giving any definition of either notion. It has been argued that the right to take part in cultural life has been lacking interpretation because of the lack of universal consensus on the definition of these terms.

It is argued that the right to participate in cultural life was initially understood narrowly, focusing basically on *expressions of creativity* or *cultural products* (such as arts and literature)¹²⁵ as well on as on *institutional establishments* serving as accumulators, preservers and distributors of such creative products (libraries, museums, theaters).¹²⁶

Without a doubt, these elements constitute an important dimension of the notion 'cultural life'. Nevertheless, there has been a pronounced trend towards expanding the understanding of culture in human rights law. Various commentators, such as Stephen A. Hansen and Roger O'Keefe, argued for adoption of a broader meaning of culture and cultural life, going beyond simply creative products¹²⁷. Lea Shaver and Caterine Sganga suggested that the term implies "all the ways in which human beings express creativity, seek beauty and truth, exchange ideas and create shared meanings".¹²⁸ Yvonne Donders observed that State reports on Article 15(1)(c) increasingly tended to interpret the the term 'cultural life' broadly.¹²⁹ Fribourg Declaration on Cultural Rights adopted in 2007 stands on the position of an anthropological understanding of 'culture', which includes traditional elements such as knowledge, arts and institutions, but goes much further, including also values, ways of life, etc.¹³⁰

The Committee on Economic, Social and Cultural Rights also gradually took a broader, anthropological approach towards understanding of cultural life. Since 1990-s it expanded its meaning beyond pure cultural manifestations to a broad range of aspects of a lifestyle of human beings

¹²⁵ Donders, *supra* note 99, pp. 231-271.

¹²⁶ Konate as cited in *ibid.*, p. 252.

¹²⁷ S.A. Hansen, 'The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(A) of the International Covenant on Economic, Social and Cultural Rights', in: A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Right* (Intersentia 2002) P. 285., R. O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR', *The International and Comparative Law Quarterly*, Vol. 47, No. 4 (Oct., 1998), pp. 904- 923. P. 905.

¹²⁸ Shaver, Sganga, *supra* note 45, p. 643.

¹²⁹ Donders, *supra* note 99, pp. 250-252.

¹³⁰ Article 2(a) of the Fribourg Declaration of 7 May 2007 drafted within the research programme on cultural life launched by the Fribourg University.

(language, traditions, clothes, etc).¹³¹ Nevertheless, the precise definition was given by the CESCR only in 2009. In General Comment No 21 the Committee did not address the notion 'cultural life' as such, but pointed out at the main features of 'culture'. In doing so it adhered to the most extensive anthropological definition: “culture is a broad, inclusive concept encompassing all manifestations of human existence”, which is dynamic and evolving, not static.¹³² The Committee stated:

“culture, for the purpose of implementing article 15 (1) (a), encompasses inter alia ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environment, food, clothing and shelter, the arts, customs and traditions, through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.”¹³³

Therefore, nowadays it is widely accepted that human rights law understand 'culture' and, consequently, 'cultural life' in a broad anthropological sense which we certainly welcome.

Nevertheless, for the purpose of the present study, focusing on the access in public libraries to copyrighted works, the original, narrow definition of culture (which is an inherent part of a broader, anthropological definition) is mostly important. For this reason we will address 'culture' and 'cultural life' primarily as a body of creative materials or artefacts, i.e. literature, music, arts – everything what might be contained in library collections, although we acknowledge that these elements is only the top of the 'cultural life' iceberg.

3.2.2.2 *Everyone*

The term 'everyone' is probably the only one in the provision of Article 15(1)(a) which the text of the Covenant itself can throw light on.

The term 'everyone', first of all, serves as an additional emphasis on prohibition of discrimination in participating in cultural life. It therefore reinforces the anti-discriminatory provision of Article 2(2) of the ICESCR “the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status». Lea Shaver and Caterine Sganga interpret the term 'everyone' in this vein: ““Everyone” includes women as well as men, children as well as

¹³¹ This conclusion can be drawn from the text of the Guidelines for the Reporting Procedure under the ICESCR adopted in 1990 and from the Committee's concluding observations. Donders, *supra* note 99, pp. 249-252.

¹³² General Comment No 21, *supra* note 113, para. 11-12.

¹³³ General Comment No 21, *supra* note 113, para. 13.

adults, popular classes as well as elites, rural dwellers as well as urbanites, the poor as well as the wealthy, and amateurs as well as professionals.»¹³⁴

The CESCR, however, addressed the term 'everyone' by recognizing two dimensions in the right to take part in cultural life – individual and collective. It therefore acknowledged that the right to participate in cultural life, like other cultural rights, may be exercised “a) as an individual, or b) in association with others, or c) within a community or group, as such”.¹³⁵ By doing so the Committee relegates the right to both the so-called 'second generation' and the 'third generation' groups of rights.

In very general terms these dimensions, individual and collective, depend on the aspect of 'cultural life' which is being discussed. It is argued, that speaking about cultural life in the narrow sense, i.e. as purely creative products and cultural institutions, the individual dimension of the right is more relevant. If a broader concept of culture is considered, including a vast range of manifestations of culture, such as language, traditions, beliefs, ways of life, etc., the collective dimension comes into play.¹³⁶ In other words, enjoying cultural products, e.g. watching a theater play, sharing a DVD or downloading an mp3, is most commonly exercised from an individual perspective, even in case it is exercised in a group. Speaking a local language or exercising cultural practices, on the contrary, usually takes place in a community and hence is a collective right.

At present the commentaries on the right to cultural participation clearly tend to focus only on the collective dimension of the right – the right of cultural communities, including indigenous communities, to preserve and enjoy their culture and cultural identity.¹³⁷ This dimension of the right has been mostly developed and translated into rather specific obligations of States. For example, States' obligations under General Comment No 21 to a big extent include specifically those for the benefit of cultural communities: “to respect the right of everyone to identify or not to identify themselves with one or more communities and the right to change their choice”¹³⁸, to “respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression”¹³⁹, to promote “the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights” and many others.¹⁴⁰ Audrey Chapman, for instance, while defining States' core obligations in respect to the right to participate in cultural life has also made an emphasis on the 'community'

¹³⁴ Shaver, Sganga, *supra* note 45, p. 646.

¹³⁵ General Comment No 21, *supra* note 113, para. 9.

¹³⁶ O'Keefe, *supra* note 127, p. 917.

¹³⁷ Laaksonen, A. *Measuring Cultural Exclusion through Participation in Cultural Life*, report presented at the Third Global Forum on Human Development: Defining and Measuring Cultural Exclusion, 17 – 19 January, 2005 Paris. P.4.

¹³⁸ General Comment No 21, *supra* note 113, para. 55.

¹³⁹ *Ibid.* Para. 50 (c).

¹⁴⁰ *Ibid.* Para. 52 (c).

dimension of the right.¹⁴¹ Several commentators go beyond the understanding that the right to take part in cultural life serves exclusively the needs of cultural communities.¹⁴²

We acknowledge that cultural minorities are important beneficiaries of the right to take part in the cultural life and that they require special protection. However, we urge the reader to bare in mind that the community dimension is not the only dimension of the right to take part in cultural life.

Recalling *travaux preparatoire* can be useful to avoid narrowing down the meaning of the provision. The draft of the article, proposed by the director-general of UNESCO but formally submitted by Chile was adopted without serious objections.¹⁴³ However, there was a proposal to include community dimension and to formulate the provision as the right of everyone to “take part in the cultural life of the communities to which he belongs”. However, this proposal failed in comparison to UDHR, which includes reference to communities. Yvonne Donders thus concludes that at the time of adoption of the Covenant the right was basically referring to taking part in *national* cultural life.¹⁴⁴ Moreover, as it was mentioned above, the initial understanding of 'cultural life' was limited to cultural expressions or creative products, enjoying of which is exercised individually. We can therefore conclude that the founding fathers of the Covenant, which is sometimes forgotten now, understood the right which they proclaimed in Article 15(1)(a) of the ICESCR as an individual right.

We favor the approach taken by the Committee to recognize both collective and individual dimensions of the right. However, for the purpose of the present study we will omit describing specific States' obligations for the benefit of local communities while interpreting the right, but only consider obligations towards general public.¹⁴⁵ By doing so we by no means deny the importance of libraries, as well as other public institutions, in promoting the right to cultural participation of the communities. However, we consider that community dimension does not provide decisive arguments for supporting the thesis. Moreover, as the present research is dealing exclusively with cultural materials contained in public libraries, we argue that the originally intended, individual dimension of the right to take part in cultural life is more important for the present research..

¹⁴¹ Chapman, *supra* note 19.

¹⁴² See, for example, Shaver, Sganga, *supra* note 45.

¹⁴³ Donders, *supra* note 99, pp. 246-249.

¹⁴⁴ *Ibid.*, pp. 248-249.

¹⁴⁵ Lea Shaver and Caterine Sganga applied the same approach while examining the relations between the right to take part in cultural life and IP. See Shaver, Sganga, *supra* note 45.

3.2.2.3 Take part

As expressed by Lea Shaver and Catherine Sganga, 'take part' bares the central meaning of the right of everyone to participate in cultural life.¹⁴⁶ This term has also become a subject of evolutive interpretation.

Traditionally it has been understood as requiring access and availability of cultural materials, in other words – *consumption*. This approach also requires conservation and preservation of cultural materials for the further enabling of persons to have access to them.¹⁴⁷

Later the meaning of the term 'to take part' was significantly broadened by other elements, namely *contribution* and *participation in decision-making*.¹⁴⁸

Molly Beutz Land in her submissions to the CESCR claimed that the right includes two dimensions: 1) participatory (“the ability of individuals to consume, transform and share culture”) and 2) protective (the ability of individuals and communities to control the access and the use of cultural goods related to their way of life for the purpose of preservation their cultural life).¹⁴⁹

We support the broad approach in relation to the meaning of participation, however, for the present study the focus is on traditional understanding of the term – access to creative products, which is described “as an underlying determinant of the right to participate in cultural life”.¹⁵⁰

Moreover, the provision of Article 15(1)(a) should be understood as ensuring *real* and *wide* access of the public to the products of cultural life.

The Constitution of the United Nations Economic, Scientific and Cultural Organizations can be brought up in this discourse as law in force among the Parties in the meaning of 31(3)(c) of the VCLT.¹⁵¹ According to UNESCO Constitution¹⁵² “the wide diffusion of culture[...]” is “indispensable to the dignity of man and constitute a sacred duty which all

¹⁴⁶ *Ibid.*, p. 645.

¹⁴⁷ Prott, *supra* note 100, p. 165.

¹⁴⁸ Donders, *supra* note 99, pp. 231-271.

¹⁴⁹ M.B. Land, *Intellectual Property and the Right to Participate in Cultural Life*, background paper submitted to the Committee of Economic, Social, and Cultural Rights (revised November 2008 for public distribution). Electronic copy available at: <http://ssrn.com/abstract=1475430>. P.2.

¹⁵⁰ *Ibid.*, p.3.

¹⁵¹ Out of 160 State Parties to the Covenant, 99% are the Members of UNESCO and therefore – had signed the UNESCO Constitution (an agreement which established the Organization). The list of 160 Parties to the Covenant is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. The list of 193 Members of UNESCO is available at <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en>

¹⁵² Constitution of the United Nations Educational, Scientific and Cultural Organization, signed on 16 November 1945, came into force on 4 November 1946.

nations must fulfil in a spirit of mutual assistance and concern”¹⁵³. States signatories entitled the Organization to “[m]aintain, increase and diffuse knowledge; By assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science” and “[b]y initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them”¹⁵⁴.

It might be concluded therefore that States acknowledge the common aim of wide diffusion of culture, and logically – wide access to it, which would be impossible without conservation and protection of cultural materials, such as books, and providing access to these materials despite the frontiers.

Lea Shaver additionally recalls the political and social climate of the time preceding the adoption of almost identical provisions of Articles 27(1) of the UNDHR and 15(1)(a) of the ICESCR which can be also considered as the circumstances of conclusion of the treaty in the meaning of Article 32 of the VCLT. She focuses on the experience of the United States of America in 1920-1940s which is marked, as she claims, by struggle of the public for wide access to science and culture and positive actions from the state to ensure this access.¹⁵⁵ She claims, the US government during this period has significantly democratized the arts by supporting public libraries, public theater and projects to document folk culture as well as significantly democratized higher education. Shaver assumed this was more or less a common trend all over the world which moved the drafters-representatives from various countries to include the provision on participation in cultural life in the text of, first, Universal Declaration of Human Rights, and later – the ICESCR.¹⁵⁶

Yvonne Donders has come to a similar conclusion after examining the background against which the provision of Article 15(1)(c) was drafted. In those time, as she claims, culture has been the domain of a handful elite, but the drafters intended to encourage wider participation and democratization of culture.¹⁵⁷

To sum up, we agree that the meaning of the term 'take part' used in the provision under consideration encompasses various manifestations. However, we focus on the traditional 'access' dimension as most important in the discourse on libraries and cultural materials. Taking the narrow

¹⁵³ Preamble of UNESCO Constitution.

¹⁵⁴ Article 1(2)(c) of the UNESCO Constitution.

¹⁵⁵ She mainly focuses on the movements for the access to electric power and to Polio vaccine. Shaver, *supra* note 43, pp. 137-140.

¹⁵⁶ Shaver, *supra* note 43, pp. 140-141.

¹⁵⁷ Y. Donders, 'Cultural Life in the Context of Human Rights', background paper submitted for the day of general discussion on the right to take part in cultural life (article 15(1)(a) of the Covenant) during the fortieth session of Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/40/13, 9 May 2008. P.3. See also O'Keefe, *supra* note 127, p. 910.

approach to participation does not mean we argue for a narrow access. On the contrary, as was indicated above, both the law in force among the Parties (UNESCO Constitution) and the context in which the provision was drafted indicate the belief of the drafters in the importance of culture and popular inclusion in it and therefore support the reading of 'access' element in the broadest way possible.

3.2.3 States' Obligations

Once developed by academia, the so-called 'tripartite typology', is now a widely accepted method of analyzing the obligations of States under the Covenant.¹⁵⁸ The method implies categorizing States' obligations into three groups: obligations to respect, to protect and to fulfill. This is a convenient tool to categorize obligations of States' according to the type (level) of action they should undertake.¹⁵⁹

According to, *inter alia*, Maastricht Guidelines, the obligation to respect requires States to refrain from interfering, in direct or indirect way, with the enjoyment of the right; the obligation to protect means preventing third parties from interfering with the right; the obligation to fulfill requires States to take positive measures towards full realization of the rights.¹⁶⁰

3.2.3.1 Respect

Copyright (or IP in general) constitutes a law adopted by a state and hence a state's act which in many cases restricts the right to freely enjoy the right to cultural participation, including the right to access cultural goods. Such restriction constitutes a violation of the right, unless it is justified under Article 4 of the Covenant which will be examined further.

The States' obligation to respect, i.e. not to intervene, is reinforced in the further text of Article 15. According to paragraph 3, States "undertake to respect the freedom indispensable for scientific research and creative activity".¹⁶¹ No news that the majority of works and inventions derive from what has been already created. The authors are standing on the shoulders of the giants indeed. For this reason it is of high importance to provide a wide and an unrestricted access to cultural works and consider very carefully in which circumstances the barriers, such as copyright laws, can be applied.

¹⁵⁸ The 'father' of the tripartite typology is considered Asbjorn Eide, who first introduced it with regard to the right to food: Eide, A., *Right to Adequate Food as a Human Right* (1989).

¹⁵⁹ Sepulveda M. *The nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (INTERSENTIA, 2003). P. 12.

¹⁶⁰ *The Maastricht Guidelines*, *supra* note 122, para. 6.

¹⁶¹ The CESCR also pointed out at the close link between the States' obligation to respect the right to take part in cultural life and the obligation to respect creative freedom. Para.49(c) of the General Comment No 21, *supra* note 113.

Roger O'Keefe argues that the provision requiring respect for freedom of creative activity fills in the missing word "freely" from the text of Article 15(1)(a) (which appears in Article 27(1) of the UNDHR).¹⁶² Once again it demonstrates the true intent behind the provision on the right to take part in cultural life – to provide a wide access to cultural materials as only in this case creative freedom would be truly respected.

3.2.3.2 *Protect*

Not only States' own actions imposing barriers on the right to take part in cultural life, but also States' failure to prevent the abuse by private actors constitute a violation of the right. In the field of copyright there are two main means which are commonly exercised by right-holders with the aim of restricting the access to their works even in case the copyright law permits such access (i.e. when the state does not restrict such access directly). First, is the possibility to override the permitted use, e.g. allowed in accordance to an exception or a limitation from copyright, in a contract.¹⁶³ Second, is application by right-holders of technological protection measures, such as anti-copying devices, etc. Such measures, although effective in restricting unauthorized uses, are nevertheless blind and unselective and can hence restrict uses permitted by law. In order to remain in observance with the obligation to protect the right to take part in cultural life, States should take all the available measures to prevent such an abuse by third parties.

The Committee on Economic, Social and Cultural Rights did not separate the obligations to respect and to protect as they often go hand-in-hand. According to the Committee, they include, *inter alia*, the obligation to adopt specific measures to ensure to everyone “access to their own cultural and linguistic heritage and to that of others”¹⁶⁴ and the obligation to preserve, develop, enrich and transmit to future generations cultural heritage.¹⁶⁵ Although the Committee enlisted these obligations under the 'respect and protect' category, we consider that they constitute positive actions of states and thus are within the group of obligations 'to fulfill.

3.2.3.3 *Fulfill*

The obligation to protect requires from states to take positive actions, e.g. “legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights».¹⁶⁶

¹⁶² O'Keefe, *supra* note 127, p. 910.

¹⁶³ See, *inter alia*. Guibault L.M.C.R. *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International, 2002). P. 76.

¹⁶⁴ General Comment No 21, *supra* note 113, para. 49(d).

¹⁶⁵ *Ibid.*, para. 50(a).

¹⁶⁶ The Maastricht Guidelines, *supra* note 122, para. 6.

The Covenant itself points out at one of the means through which the right to cultural participation can be fulfilled: “[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture”.¹⁶⁷ Therefore, we can conclude that preservation and diffusion of cultural goods is one of the States' obligations under the right to take part in cultural life.

The states have a margin of discretion with regard to the means through which conservation, development and diffusion can be fulfilled.¹⁶⁸ However, it can be claimed that the subsequent practice¹⁶⁹ has been established among the State Parties to the Covenant which created the common understanding that the above activities should be fulfilled, first of all, through public cultural institutions such as libraries and museums.

Arguably, the practice has been unified due to the efforts of the Committee on Economic, Social and Cultural Rights. First, in its Reporting Guidelines the Committee required the States to “[p]rovide information on the institutional infrastructure to promote popular participation in, and access to, cultural life[...].” and to “indicate the measures taken to promote broad participation in, and access to, cultural goods, institutions and activities, including measures taken: (b) To enhance access to the cultural heritage of mankind[...].”¹⁷⁰

Furthermore, the Committee emphasized the importance of institutional infrastructure in fulfilling the obligations under Article 15(1)(a) in its General Comment 21. Among the obligations to 'facilitate' (a subcategory of the 'fulfill' category) it enlisted, among others, the obligation to facilitate access to wide variety of cultural expressions through, “inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure”.¹⁷¹ Specifically mentioning institutions as means of fulfilling the obligations under Article 15(1)(a) the Committee thus acknowledged their high relevance and high level of consent among State Parties that this is one of the best strategies to comply with their obligations under the right.

Recently Catherine Sganga has analyzed about 80 State reports submitted by States to the CESCR under Article 16(1) since 2001.¹⁷² One of the main findings which have been revealed is that in their reports States

¹⁶⁷ Article 15(2) of the ICESCR.

¹⁶⁸ The Maastricht Guidelines, *supra* note 122, para. 8.

¹⁶⁹ Article 31(3)(b) of the VCLT.

¹⁷⁰ Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to Be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2008/2, 24 March 2009. Para. 67. A similar provision existed in the previous version of the Reporting Guidelines 1991.

¹⁷¹ General Comment No 21, *supra* note 113, para.52(a).

¹⁷² The reports are available at the OHCHR web-site <http://www2.ohchr.org/english/bodies/cescr/sessions.htm>

tend to emphasize the quantity of cultural institutions (libraries, museums, theaters) which are made available and affordable for the public. We consider it as a sufficient indicator the States' practice, which establishes the agreement of the States on the interpretation of the provision on the right to take part in cultural life and argue that the necessity of establishing and supporting the activities of public cultural institutions, such as libraries, should be considered as an obligation under the right enshrined in Article 15(1)(a).

Another means which can facilitate the fulfilling of obligations under the right to cultural participation is promoting international cooperation. States are encouraged to enter into agreements among one another in numerous provisions: the Covenant (Article 2(1), Article 15(4) and 23 of the ICESCR), General Comment 3, General Comment 21 (para. 56-59), Limburg Principles (para.29-34).

Article 15(1) of the Covenant, for instance, provides that “[t]he States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural field”.

An important observation has been made by the CESCR in respect to State Parties' membership in other international agreements and organizations. The Committee urged the States being members of UNESCO, ILO, FAO, WHO and, most importantly, WIPO and WTO, that they should safeguard that the acts adopted within those organizations are in compliance with States obligations under the right to take part in cultural life.¹⁷³ The Committee appealed additionally to those organizations to take into consideration the obligations in respect to the right of cultural participation while designing relevant policies or taking relevant decisions on cultural matters.¹⁷⁴

3.2.4 *Limitations of the Right*

3.2.4.1 *General Rules*

The right to take part in cultural life is not absolute. It can be limited by other human rights or by other colliding interests. The Covenant, however, establishes a test applicable to any limitation of the right. According to Article 4 of the ICESCR, a limitation of any economic, social and cultural right is justified if the following three conditions are met:

- a limitation is determined by law;
- a limitation is compatible with the nature of the right;
- a limitation aims exclusively at the promotion of the “general welfare in a democratic society”.

¹⁷³ General Comment No 21, *supra note* 113, para. 75.

¹⁷⁴ *Ibid.* Para. 76.

Article 5(1) prohibiting limitations going beyond the permitted under the test is supportive of the above provision.

The Committee while interpreting the right under Article 15(1)(c) of the Covenant in its General Comment No 21 reinforced this test and concluded that “any limitation must be therefore proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed”.¹⁷⁵

Due to the fact that copyright protection rather often leads to limitation of the right to take part in cultural life, the above test is applicable to it as well. The question whether the current international copyright regime meets the requirements of the test should be a subject of a separate research. Nevertheless, it can be said that even now according to several commentators, copyright would fail the test. For instance, Lea Shaver argues that IP regime treats culture, information, science and technology as private good. Nevertheless, the right to take part in cultural life departs from public good character of culture.¹⁷⁶ Therefore, we might conclude, that if we accept the argument of Lea Shaver, copyright will at least fail the second element of the human rights test. Mr. Smiers goes that far as to say that copyright is an equally bad tool for protection of rights of authors and the public.¹⁷⁷ Hence he denies that copyright at least somehow serves the needs of a democratic society and thus fails the third element of the test.

Another question arises, how the test enshrined in Article 4 of the Covenant correlate with the Berne three-step test. As already said, the ICESCR test equally applies to copyright as to any other limitation of the right to take part in cultural life. The Berne test is applicable to limitations from exclusive rights of a copyright holder, which can be introduced by States, *inter alia*, in order to fulfill the obligations under the right to take part in cultural life. According to the test, limitations are justified if applied (1) in certain special cases, 2) provided that such reproduction¹⁷⁸ does not conflict with a normal exploitation of the work and 3) does not unreasonably prejudice the legitimate interests of the author”.¹⁷⁹

If we compare the two tests it becomes unclear whether they can coexist together. Both of them treat the deviations from the set of rules they apply to as highly exceptional: human rights test would permit intrusion of copyright into the right to cultural participation to a very limited extent while copyright is also very resistant to limitations, including ones based on the right to take part in cultural life. Without a doubt, this issue deserves

¹⁷⁵ *Ibid.* Para. 19.

¹⁷⁶ Shaver, *supra* note 43, p. 124.

¹⁷⁷ Smiers. *Arts under pressure*. Smiers, J., Schijndel M. v., *Imagine there is no copyright and no cultural conglomerates too... Better for artists, diversity and the economy* (Institute of Network Cultures, 2009).

¹⁷⁸ And other exclusive rights as expanded by TRIPS Agreement, *supra* note 5.

¹⁷⁹ Article 9(2) of the Berne Convention, *supra* note 88.

special attention and hopefully will become a subject of thorough analysis in the nearest future.

3.2.4.2 *Rights of Authors*

The right to take part in cultural life can be limited by numerous human rights, some of which were briefly mentioned above. However, the current study will delimit itself by focusing on the most relevant human right of the Covenant which is usually invoked in the human rights – IP discourse – 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 (from time to time in the text addressed as 'authors' rights). Mr. Smiers at the Day of General Discussion of the right to take part in cultural life organized by CESCR expressed the opinion that the provision of Article 15(1)(a) should not be read independently from Article 15(1)(c).¹⁸⁰

Nowadays the two rights are perceived almost as incompatible or at a serious tension with each other. We, however, support the recently articulated idea that the conflict is exaggerated and therefore, the right proclaimed in Article 15(1)(c) does not limit the right of Article 15(1)(a) to the extent as being frequently claimed. Two arguments can be invoked in support of this claim: first, that the rights are not equal in their scope: while the right of authors under human rights law has the maximum limit of protection, the right to cultural participation, at least in terms of providing access to cultural materials, does not have such a limit. In other words, the right of authors in the human rights regime is rather limited while the right to take part in cultural life is unlimited, unless it enters into conflict with other human rights, and therefore is broader in scope than the right of authors. The second argument is that the two rights serve a common goal, which has been forgotten now, and therefore there are not that contradictory as it may appear.

To support the first argument, that the scope of the right of authors under human rights law is much more narrow than that of the right to cultural participation, it is necessary to recourse again to the history of adoption of both provisions as well as to the CESCR interpretation of the right enshrined in Article 15(1)(c) of the Covenant.

In comparison to the provisions on the right to take part in cultural life and to benefit from scientific progress, which were included in the text from the very beginning without objections, adoption of the provision on the authors' rights was by far much more controversial. It was not included in the initial draft of the UNDHR and was a subject of hot debates. No other provisions in the International Bill of Rights faced an opposition of an equal strength as this one (not only the wording of it but the issue of its inclusion

¹⁸⁰

Smiers, *supra* note 44, para. 2.

as such was hotly contested). The same happened during the negotiations of Article 15 of the ICESCR.¹⁸¹

According to Lea Shaver, there were two main reasons for disagreement on the inclusion of the provision protecting the rights of authors. First is the disagreement on the rationale of copyright law among common law and civil law countries. In common law countries the exclusive rights of authors are considered as having a pure economic character (utilitarian approach to copyright), while the civil law concept of *droit d'auteur* recognizes the existence of the personal link between the author and his creation and of the moral rights of authors. In other words, in comparison to common law countries, civil law countries raise several authors' rights to the level of human rights and therefore they advocated for the inclusion of such rights in the text of human rights documents. As a proof of the above, the supporters of the provision were predominantly civil law countries (France, Latin America) while the opponents were common law countries (the USA, the UK, India). The second disputed issue about the provision was its restrictive character as it established the rights only for a special class of citizens, namely authors, and thus lacked the general character, as the UNDHR was intended to have.¹⁸²

The fact that the adoption of the provision on cultural participation was less problematic and more widely supported does not necessarily lead to the conclusion about prevalence of it over the provision on author's rights. However, it inevitably poses questions whether the two provision are of equal value.

What is arguably more important is comparing the scope of both rights. It seems that the interests of authors are protected under human rights regime to a limited extent, while there is no limit set for the right to cultural participation. Under human rights law the understanding of material interests of authors' is quite limited, much more narrow than under copyright regime. According to General Comment No 17, the right of authors to benefit from material interests is protected as a human right only to the extent as to allow them to obtain *an adequate standard of living*.¹⁸³ Human rights law does not necessarily require protection of the interests of an author after his death, like copyright law (the issue was raised in Subsection 1.2.3.), and even during the entire life-span of the creator¹⁸⁴ and thus constitutes a threat to the right to take part in cultural life to a much lower extent, than claimed by those who equals provision of Article 15(1)(c) to copyright. Therefore, the conflict between access right and author's right is limited under the human rights regime. This is also proved by the fact that

¹⁸¹ Shaver, *supra* note 43, pp. 144-147.

¹⁸² *Ibid.*, pp. 147-149.

¹⁸³ General Comment No 17, *supra* note 46, para. 15.

¹⁸⁴ *Ibid.*, para. 16.

the framers of the bill of rights never acknowledged the potential for tension between the two rights.¹⁸⁵

Secondly, the goals of the right to take part in cultural life and the right of authors to a big extent overlap which should be remembered to avoid a purely conflicting understanding of their relations.

The concept of moral rights of authors, understood as the rights of attribution and the integrity of work is by no means in contradiction with the right to cultural participation in widest interpretation possible. On the contrary, according to Lea Shaver, protecting the moral rights of authors supports the right to take part in cultural life as it secures access to works in “their original form and correct attribution”.¹⁸⁶

As for the material interests of authors, the scale of the conflict is again overestimated, according to Lea Shaver. She claims, in view of the historical context the right of authors should be interpreted as a right of authors against the misconduct of publishers¹⁸⁷, but not against the access of the public, as being frequently claimed today. Historically publishers often refused to compensate the author, mutilate significantly the original work or failed to include the name of the author in the publication. This understanding of the underpinnings of the rights of authors' help to see the provisions of Article 15(1)(a) and 15(1)(c) as much less contradictory.

To sum up, in the present subsection we argue that States' obligations under the right of to benefit from moral and material interests deriving from authorship do not significantly limit the obligations under the right to cultural participation or at least do it to a much lower extent than frequently claimed. Consequently, the argument based on the right of authors can be brought up as justification of restricting cultural participation to a rather limited extent.¹⁸⁸

3.2.5 *Other Obligations of States of General Character*

We will conclude the examining of States' obligations under the right of everyone to take part in cultural life by considering the remaining general provisions relating to implementation of all the rights in the ICESCR which are of importance to the present discussion.

¹⁸⁵ M. Green, 'Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights', background paper submitted to the Committee of Economic, Social, and Cultural Rights, E/C.12/2000/15, 9 October 2000.

¹⁸⁶ Shaver, *supra* note 43, p. 151.

¹⁸⁷ On the issue see also Geiger, *supra* note 96, pp. 30-31.

¹⁸⁸ General Comment No 17, *supra* note 46, para.35: [i]n striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad *access to their productions* should be given due consideration.

3.2.5.1 *Progressive Realization*

According to Article 2(1) of the ICESCR, States should “achieve progressively the full realization of the rights”. This provision is central in defining the nature of States' obligations under the Covenant and, according to the Committee, the main obligation of result.¹⁸⁹

As the preparatory work of the ICESCR shows, inclusion of the word 'progressively' emphasized the dynamic character of States' obligations which means that the realization of the economic, social and cultural rights should never stop regardless of the level achieved.¹⁹⁰

Although formulated in rather vague language, it does not allow the States to postpone realizations of the rights or avoid it. The States, although enjoying a certain margin of discretion in the ways and speed of realizing the rights, are under an obligation “to move as expeditiously and effectively as possible towards that goal”.¹⁹¹

Moreover, the CESCR imposes a very precise requirement on States with regards to 'progressive realization' provision - to abstain from retrogressive measures which “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”¹⁹² Any retrogressive measure constitutes a limitation of the right in the terms of Article 4 of the Covenant (see subsection 2.2.4.) and hence is subject to the above test.¹⁹³

Therefore, States' should always bare in mind that introduction of a higher level of copyright protection, which in many cases would restrict the access to cultural goods (one of the components of cultural participation, as described above) would inevitably constitute a retrogressive measure which should meet all the requirements of Article 4 as well as of para. 9 of the General Comment N 3.

3.2.5.2 *Maximum of the Available Resources*

According to Article 2(1) “Each State Party[...] undertakes to take steps [...] to the maximum of its available resources”.

It has been argued that the lack of resources is the principal constraint preventing States from realizing economic, social and cultural rights immediately. If circumstances allow, States should implement the rights immediately.¹⁹⁴

¹⁸⁹ General Comment No 3, *supra* note 123, para. 9.

¹⁹⁰ Craven, *supra* note 2, p. 129.

¹⁹¹ General Comment No 3, *supra* note 123, para. 9.

¹⁹² *Ibid.*, para. 9.

¹⁹³ Craven, *supra* note 2, p. 132.

¹⁹⁴ *Ibid.*

We acknowledge that in general realization of the right of everyone to take part in cultural life requires considerable expenses. For example, to provide access to cultural works, an institutional infrastructure should be established, necessary translation and adaptation of works should be done to ensure a wide inclusion of population, etc. However, States can contribute to providing access to creative materials relatively 'cheaply' – by removing copyright barriers. As Lea Shaver noticed “[i]ntellectual property represents a unique case where governments actually spend resources – on IP administration and enforcement – to artificially limit access to enjoyment of a human right”.¹⁹⁵

Therefore, we argue that lifting copyright restrictions, by, *inter alia*, introducing exceptions and limitations from copyright, is one of relatively easy means of fulfilling the obligations under the right to take part in cultural life in terms of affordability and hence can be used by a big variety of countries regardless of GDP and/or general socio-economic conditions.

3.3 Conclusions

The present Chapter was fully devoted to interpretation of the right of everyone to take part in cultural life enshrined in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Life.

The States' obligation under this rights are multi-faced and numerous, as well as the scope of the right itself. However, due to the fact that the present study focuses on implications of the right to cultural participation on copyright and public libraries, we limited ourselves to traditional elements of the right to cultural participation ('cultural life' as creative materials, 'participation' as access to creative materials, 'everyone' in the individual dimension) as well as on examining only relevant obligations under the right.

The findings of the present Chapter can be briefly described in the following way: States' obligations under Article 15(1)(a) include, among others, *an obligation to provide wide access to the general population to cultural materials*. This obligation implies necessarily, *inter alia*:

- abstaining from introducing copyright rules which do not meet the test enshrined in Article 4 of the ICESCR (obligation to respect);
- preventing copyright-holders from restricting legitimate access of the public to cultural materials (obligation to protect);
- conserving and preserving cultural goods (obligation to fulfill);
- supporting the activities of public libraries (obligation to fulfill).

¹⁹⁵

Shaver, *supra* note 43, p. 175.

4 The Right to Take Part in Cultural Life as a Weight Piece on the Copyright Scales in Favor of 'Library' Exceptions

The best of my education has come from the public library... my tuition fee is a bus fare and once in a while, five cents a day for an overdue book. You don't need to know very much to start with, if you know the way to the public library.

Lesley Conger

This Chapter is aimed at applying the discussed above findings on the content of the right to take part in cultural life to a specific area, namely one type of exceptions and limitations from copyright – exceptions for the benefit of public interest institutions – public libraries. It is intended to demonstrate the applicability of the 4th approach to the relations between human rights and intellectual property regimes – *use human rights to encourage internal limits to intellectual property*.

The terms 'exceptions' and 'limitations' will be understood narrowly as exemptions of particular kinds of *uses* or protected materials (see Subsection 1.5.). As there is no universally accepted approach towards the differences between the two notions, they will be understood as addressing the same phenomenon and will be used interchangeably.

4.1 Why Libraries?

Many poetic words have been dedicated to libraries and hardly anybody would dare deny the significance of the role they are playing in the society. Further we will just quote some of them.

The following words belong to Siva Vaidhyanathan:

“Librarians should be our heroes. The library is not just functionally important to communities all over the world; it embodies Enlightenment values in the best sense. A library is a temple devoted to the antielitist notion that knowledge should be cheap if not free – doors should be open. Supporting libraries – monetarily, spiritually, intellectually, and legally – is one of the best things we can do for the life we hope to build for the rest of the century”.¹⁹⁶

¹⁹⁶

Vaidhyanathan S. *The Anarchist in the Library: How the Clash Between Freedom and Control Is Hacking the Real World and Crashing the System* (Basic Books, 2004). P.119.

As stated in the IFLA¹⁹⁷ Alexandria Manifesto on Libraries:

*“Libraries are not just shelves of books or collections of databases. Resources are carefully selected and organised by trained professionals. The unique role of libraries is that we provide personalised information because we respond to the particular questions and individual needs of citizens. This complements the general transmission of knowledge by the media, and makes libraries vital to the creation of a well informed citizenry and a democratic and open information society”.*¹⁹⁸

A special role among the libraries is without a doubt attributed to public libraries. Public libraries are seen as the basic and most important custodians of national cultural heritage, as promoters of literacy and the guides to the universe of knowledge. The important feature of public libraries is their mission to serve the interests of all and to be available for all without any distinction. Public libraries are strategic tools at the disposal of states to fulfill basic educational and cultural missions of the state.

As stated in the Public Library Manifesto prepared by UNESCO together with IFLA,

“The public library, the local gateway to knowledge, provides a basic condition for lifelong learning, independent decision-making and cultural development of the individual and social groups...

*...It has to be an essential component of any long-term strategy for culture, information provision, literacy and education”.*¹⁹⁹

Libraries find themselves in a unique position – a position of an agent, an intermediary between a publisher and a user.²⁰⁰ Libraries are highly interested in enriching their collections and therefore they generally maintain amicable relations with the publishers. On the other hand, they need to serve their basic missions of preserving the materials in their funds for future generations and efficient and broad disseminating of them among their patrons. The dual focus of libraries, to be allies of both content-providers and users, not only remains but also attracts more considerations as regards the protection of intellectual property.

Intellectual property and, first of all, copyright is a highly important concern of any library accompanying numerous activities of them. “Libraries are significant stakeholders in the intellectual property structure

¹⁹⁷ The International Federation of Library Associations and Institutions is representing libraries and library associations in 150 countries since 1927, IFLA .See more at the web-site of IFLA <http://www.ifla.org/en/>

¹⁹⁸ IFLA Alexandria Manifesto on Libraries, the Information Society in Action. Adopted in Alexandria, Egypt, Bibliotheca Alexandrina, on 11 November 2005 <http://www.ifla.org/III/wsis/AlexandriaManifesto.html>

¹⁹⁹ IFLA/UNESCO Public Library Manifesto adopted in 1994 <http://archive.ifla.org/VII/s8/unesco/eng.htm>

²⁰⁰ W. P. Lougee, 'Scholarly Communication and Libraries Unbound: The Opportunity of the Commons', Hess, C., Ostrom, E. (ed.) *Understanding Knowledge as Commons: From Theory to Practice* (The MIT Press, 2006). P.321.

as they are major purchasers of content; they negotiate and manage rights and access to content; and they provide a direct link to the user community”.²⁰¹

Generally libraries are not enemies to copyright, because they are aware of the publisher's interest in copyright protection and would not abuse it not to threaten the cooperation with them. On the other hand, libraries are interested in the broadest possible freedom of conducting their traditional activities, preservation and providing access, with regards to both tangible and digital products. As Paul Pedley said: “Library and information service professionals find themselves in a difficult situation playing the role of 'piggy in the middle'²⁰², acting as guardians of intellectual property whilst at the same time being committed to supporting their user's needs to gain access to copyright works and the ideas that they contain'.²⁰³

Therefore, a library, especially free and non-profit, is an extremely important servant of the public interest in preserving cultural materials and disseminating information and learning. Moreover, it is an important institution where the balancing of proprietary interests of copyright holders and the interest of public to access occurs.

4.2 'Library' Exceptions from Copyright

Out of all concerns of libraries with regards to copyright, a special attention is without a doubt given to the issue of exceptions and limitation from copyright for the purpose of fulfilling by libraries its functions. This subsection specifically addresses this issue. First, let us examine the normative framework for such exceptions.

4.2.1 *International Regulation of 'Library' Exceptions*

On the universal level there is no explicit mentioning of 'library' exceptions, neither among mandatory or optional for states to implement. However, international instruments provide a general basis for such exceptions.

²⁰¹ Joint Statement by International Federation of Library Associations and Institutions and Library Copyright Alliance by Victoria Owen, Representative, IFLA and Janice T. Pilch, Representative, LCA at WIPO, Committee on Development and Intellectual Property Second Session, Geneva, 7-11 July 2008.

²⁰² **piggy in the middle**, as defined by The Free Dictionary
<http://www.thefreedictionary.com/pig+in+the+middle>

a. (Group Games / Games, other than specified) a children's game in which one player attempts to retrieve a ball thrown over him or her by at least two other players

b. a situation in which a person or group is caught up in a disagreement between other people or groups

²⁰³ P. Pedley, *Essential Law for Information Professionals* (Facet, 2003) as cited in Rikowski, R. *Globalisation, Information and Libraries: The implication of the World Trade Organisation's GATS and TRIPS Agreements* (Chandos Publishing, 2004). P.222.

4.2.1.1 Berne Convention

Berne Convention has affected significantly copyright law of the majority of the countries. As of the date of writing this paper there have been 164 Contracting Parties to the Convention.²⁰⁴

While requiring the Member States to protect a considerable range of author's rights the Berne Convention leaves a wide margin of appreciation to them in drafting exceptions and limitations from the reproduction right. The original text of the Berne Convention contained only two limitations: a mandatory one in respect to news reporting and a voluntary one for educational purposes. Further in the course of reviews of the Convention other exceptions were introduced: a one regarding mechanical recording – in 1908, the compulsory license for broadcasting – in 1928, an exception regarding quotation and incidental use while news reporting – in 1948 and the ones for the reproduction right as well as the right to authorize reproduction itself – in 1967.²⁰⁵

The Berne Convention, as was discussed in the previous Chapters has introduced a general framework in Article 9(2) within which exceptions from the reproduction right can be drafted, namely 'the three-step test'. We will hereby quote this provision again:

*“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.*²⁰⁶

4.2.1.2 TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) was drafted during the Uruguay Round of the GATT negotiations and adopted in 1994. At present there are 153 Member States of the World Trade Organization and hence – parties to the TRIPS Agreement.²⁰⁷ TRIPS has incorporated almost all the provisions of the Berne and developed them.

²⁰⁴ Information on ratifications can be found on the WIPO official web-site http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 retrieved on 8 February 2010.

²⁰⁵ *Ibid.*, pp. 151-152.

²⁰⁶ Article 9(2) of the Berne Convention, *supra* note 88.

²⁰⁷ Adoption of all the WTO agreements, including TRIPS, is a precondition of WTO membership. Legal texts, information on the WTO activity and membership can be accessed on the official web-site of the WTO www.wto.org retrieved on 8 February 2010.

The TRIPS Agreement, as the Berne Convention, does not contain provisions on 'library' exceptions as such. In the same way as the Berne Convention, TRIPS sets the framework for adoption exceptions and limitations from copyright by incorporating the three-step test. Article 13 of the Agreement provides:

*“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.*²⁰⁸

Despite the likeness of the provisions of the Berne Convention and the TRIPS Agreement, there are several differences between them which are of high importance. First, the three-step test embodied in the Berne applies only to limitations from the reproduction right. TRIPS goes further and requires application of the test to limitations from all the exclusive rights (including the right to adaptation, making available to the public and others). Second, the text of the Berne Convention refers to the interests of the author which should not be unreasonably prejudiced, while TRIPS takes into consideration the interests of any right holder.

A very important feature of the TRIPS Agreement which distinguishes it from all the other instruments governing copyright issues, is the enforceability of its provisions. First, TRIPS requires from Member States to introduce effective domestic procedures of enforcement of the rights of the right owners.²⁰⁹ Moreover, State Parties' implementation of TRIPS can be subject of scrutiny by the WTO panel which can impose sanctions against a State which does not fulfill the requirements of TRIPS properly.²¹⁰

4.2.1.3 World Copyright Treaty

World Copyright Treaty (WCT) which was adopted in 1996 under the auspices of WIPO and therefore also known as WIPO Copyright Treaty is a 'special agreement' of the Berne Convention developing the provisions of the latter and valid among several members of the Berne Union.²¹¹ At present there are 88 Parties to the Treaty.²¹²

WCT has expanded the list of exclusive rights of authors in comparison to the provisions of the Berne and reaffirmed the applicability of the Berne three-step test to possible limitations from all these rights.

²⁰⁸ *Supra* note 5.

²⁰⁹ Part III of the TRIPS Agreement, *supra* note 5.

²¹⁰ Article 64 of the TRIPS Agreement, *supra* note 5.

²¹¹ Article 1 of World Intellectual Property Copyright Treaty, adopted in Geneva on December 20, 1996. Available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379 Retrieved on 8 February 2010.

²¹² Information on ratifications and the list of State Parties are available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 Retrieved on 8 February 2010.

WCT has become in a sense a pioneer in the international copyright law by introducing the provisions on the so-called 'anticircumvention measures' which are highly relevant for many exceptions from copyright, including the ones for the benefit of libraries and similar institutions. Article 11 of the World Copyright Treaty provides:

“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”(emphasis added).

In other words, the WCT requires from the Member States to effectively prevent the acts aimed at evading codes, passwords, etc. which are applied by right owners against unauthorized uses of copyrighted works. On the other hand, the above provision allows the states which introduce exceptions and limitations, i.e. permit several uses by law, to exclude application of anticircumvention provisions to such uses. That means that the beneficiaries of statutory exceptions of limitations should have the right to bypass the technological measures applied by right owners. Otherwise the exceptions would not be effective at all as the right holders would always be able to override them by introducing technological measures.

4.2.2 Geographical and Other Influences

Despite the big influence by universal instruments on domestic copyright laws, the role of regional forces should not be underestimated.

4.2.2.1 EU InfoSoc Directive

The European Union has undertaken several efforts in harmonizing the laws of its Member States in the field of copyright. For the present research the European Directive on Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (also known as InfoSoc or Copyright Directive) is the most relevant.²¹³

InfoSoc Directive entered into force on 22 June 2001 and subject to compulsory implementation by 27 states members of the EU. Its main objectives were to introduce further changes into EC copyright legislation in respect to adopted in 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty²¹⁴ as well as to adapt the EC legislation to new technological challenges²¹⁵.

²¹³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society.

²¹⁴ Recital 15 of the Directive.

²¹⁵ Recital 5 of the Directive.

The Directive establishes the exclusive rights of copyright holders and provides an exhaustive list of possible limitations from them. Only one of the exceptions is drafted as mandatory to implement for the Member States.²¹⁶ Implementation of all the rest limitations are left to the discretion of the Member States.

The distinctive feature of the InfoSoc Directive is that it explicitly allows introducing of two exceptions for the benefit of libraries and other public interest institutions into domestic legislation of the EU countries.

One of them provides an exception from the reproduction right:

*“in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”*²¹⁷

The other exception refers to the right of communication and making available to the public of copyrighted works. Under Article 5(3)(n) it can be introduced

“for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”.

It should be emphasized that the “library exceptions” do not cover “uses made in the context of on-line delivery of protected works”.²¹⁸

Furthermore, the Berne Convention 'three-step test', which is provided in Article 5(5) of the Directive, should be undergone when applying, inter alia, exception for the benefit of the above-mentioned institutions.²¹⁹

The Directive also requires from the Member States to provide necessary legal measures against the acts of circumvention of technological measures applied by right holders and manufacturing, importing, etc. of devices and products aimed at circumventing such measures.²²⁰ Article 6(4) of the InfoSoc Directive requires that in case a State introduces an exception from exclusive rights of a right holder, it should ensure that the right holder provides the means of benefiting from this exception. Surprisingly, not all exceptions which can be introduced according to the Directive are covered by this provision and the selection of them seems random.²²¹ While the

²¹⁶ Under Article 5(1) of the Directive Member States should allow temporary transient or incidental acts of reproduction.

²¹⁷ Article 5(2)(c) of the InfoSoc Directive.

²¹⁸ Recital 40 of the Directive.

²¹⁹ Article 5(5) of the Directive.

²²⁰ Article 6(1) and 6(2) of the Directive.

²²¹ IViR Study on Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related

exception from reproduction right by libraries, archives, museums and educational institutions should be secured against technological measures, the exception permitting these establishments communication to the public in dedicated terminals is not. In respect of the limitations not mentioned in Article 6(4) rights holders have complete discretion to override these limitations by using technological protection measures.²²² This is clearly the case of the exception allowing libraries and other institutions to communicate to the public copyrighted works in their premises.

4.2.2.2 *The British Imperial Statute*

The application of the British Copyright Act 1911²²³ went far beyond the country of origin. It was in force in numerous colonies and dependent territories of Great Britain. The law of the United Kingdom is a distinctive one as far as library exceptions are concerned: it contains detailed provisions on allowable uses. Statutes of many former dependencies of Great Britain, such as Belize, Saint Lucia, Sierra Leone and many others, have perceived the structure, style and language of the British law.²²⁴

4.2.2.3 *Bangui Agreement*

Bangui Agreement is in force for sixteen francophone countries, located predominantly in central Africa.²²⁵ The agreement allows non-profit libraries and archives to reproduce works for meeting the needs of natural persons (obviously, the patrons) and for the purposes of preservation or replacement.²²⁶ Due to the membership in the Bangui Agreement many of those countries have incorporated library exception in their domestic laws. A distinctive feature of several statutes in this region is the broadness of

Rights in the Information Society, Institute for Information Law, University of Amsterdam, February 2007. P. 109-110.

²²² *Ibid.*, p. 110.

²²³ Text of the Act is available at http://en.wikisource.org/wiki/Page:The_copyright_act,_1911,_annotated.djvu/1 Retrieved on 9 February 2010.

²²⁴ Robert Burell & Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005): 249-251 as quoted in *Study on Copyright Limitations and Exceptions for Libraries and Archives*, prepared by Kenneth Crews for the Seventeenth Session of the Standing Committee on Copyright and Related Rights, SCCR/17/2 August 26, 2008. P. 26.

²²⁵ The State Parties to the Agreement are enlisted at <http://www.oapi.wipo.net/en/OAPI/historique.htm> Retrieved on 10 February 2010.

²²⁶ Article 14 of the Annex VII 'Literary and Artistic Property' of the Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization. Text available at http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf Retrieved on 10 February 2010.

library exception, i.e. applicability to a vast range of libraries and to numerous types of uses.²²⁷

4.2.2.4 Tunis Model Law

The Tunis Model Law on Copyright for Developing Countries was drafted in 1976 at the Committee of Governmental Experts initiated by the Government of Tunis with the assistance of WIPO and UNESCO.²²⁸ The provisions of the Model Law were widely perceived in the world, including a library exception which has shaped the relevant exceptions in numerous countries.²²⁹

Section 7(v) provides an exception from reproduction right of the author by allowing:

“the reproduction, by photographic or similar process, by public libraries, non-commercial documentation centers, scientific institutions and educational establishments, of literary, artistic or scientific works which have already been lawfully made available to the public, provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”.

The experts of the Secretariat of UNESCO and the International Bureau of WIPO have drafted a commentary accompanying the Model Law, in which they emphasized the preferableness of drafting of the above exception in general terms. They clearly articulated the adherence to the Berne three-step test which, according to them, was fully transmitted into the text of the Model Law. The last two conditions of the test were incorporated word for word, while the first condition, namely the condition “to permit reproduction [...] in certain special cases” was fulfilled by, first, defining the range of possible beneficiaries of the exception (public libraries, non-commercial documentation centers...) and, second, narrowing the freedom to make use of the exception strictly to the needs of the activities of such institution.²³⁰

A brief conclusion which can be made is that the universal copyright instruments do not explicitly mention libraries as a beneficiary from the exceptions from copyright. They, however, provide for the general basis of

²²⁷ Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews for the Seventeenth Session of the Standing Committee on Copyright and Related Rights, SCCR/17/2 August 26, 2008. P. 26.

²²⁸ The Tunis Model Law on Copyright for Developing Countries. UNESCO, WIPO, 1976, No. 812 (E). Text available at http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf Retrieved on 11 February 2010.

²²⁹ Study, *supra* note 227, p. 27.

²³⁰ Paragraph 51 of the commentary. The text available at http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf Retrieved on 11 February 2010.

introducing of such exceptions subject to the three-step test which is almost identical in such treaties. Several regional instruments and other documents enlist some types of uses for the benefit of libraries which might be chosen by states parties to incorporate in their domestic laws. These regional instruments and other documents adhere to the three-step test. That means that international IP law does not require states to specifically entitle libraries to any sort of privileges as regards copyright but allows them to do so in case they meet all the three criteria of the test.

All the discussed instruments have affected the introduction of E&L for the benefit of libraries into domestic laws. The general overview of such implementation will be addressed in the further subsection.

4.2.3 Prevalence of 'Library' Exceptions in the World and their Main Features

The first exception from exclusive rights of authors specifically for the benefit of libraries was introduced in the United Kingdom in 1956.²³¹ During the following decades library exceptions, at least in some form, became relatively prevalent in many regions of the world and known to any legal system.

In recent time the issue of exceptions for the benefit of libraries has become rather high on the agenda of the World Intellectual Property Organization. This topic is at present among a few in the field of copyright which are regularly discussed at the sessions of the WIPO Standing Committee on Copyright and Related Rights.²³² In 2007 WIPO commissioned a study which aim would be to research on the prevalence of library exceptions among the Member States of WIPO and on the general trends in this respect. In 2008 Kenneth Crews, an independent expert assigned for this task, provided the Standing Committee with a comprehensive study on the issue (further addressed as 'Study').²³³ For the first time the provisions on library exceptions of almost all the WIPO members were gathered and analyzed. Due to the extensive and unique character of the study by Mr. Crews on the issue (further – the Study), this study will be the main source of reference in this subsection.

Of the 184 Member States of WIPO, the Study has analyzed the copyright statutes of 149 countries. The study summarized the provisions devoted specifically to limitations for the benefit of libraries, although the author acknowledged that library uses in some countries might benefit from fair use or fair dealing provisions or from other types of statutory exceptions

²³¹ The text of the UK Copyright Act of 1956 is available at the web-site of Office of Public Sector Information http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga_19560074_en.pdf Retrieved on 15 May 2010.

²³² The issue was discussed, among others, at the 17th Session of the SCCR. http://www.wipo.int/meetings/en/details.jsp?meeting_id=16828 Retrieved on 15 May 2010.

²³³ Study, *supra* note 227.

such as private copy exception.²³⁴ The study revealed that of the examined 149 countries, 128 have at least one statutory exception for the benefit of libraries specifically. The majority of countries have adopted multiple legislative acts governing a variety of library issues. Copyright statutes of twenty one Member States do not contain any library exception at all.²³⁵

The ways states introduce limitations for libraries are highly diverse. These ways are affected by different factors, such as historical (influence of the British Imperial Statute), regional (implementation of the InfoSoc Directive) or other (influence of the Tunis Model Law on the statutes of numerous developing countries).²³⁶ As stated by professor Crews, “[t]he specific terms of the library exceptions reveal much about the relationship of copyright law to library services in different countries. These statutes do more than simply govern library activities. They are a reflection of cultural, historical, and economic objectives”.²³⁷ Moreover, the example of the United Kingdom shows that the adoption of 'library' exceptions there was “the outcome of forces that are political, institutional, constitutional, and accidental”.²³⁸

The most prevailing types of 'library' exceptions identified by professor Crews include the statutory provisions allowing libraries to make limited number of copies for library users, as a rule for private study or research (seventy four countries)²³⁹, an exception for preservation, usually making a copy of a work before its loss or damage (seventy two countries) and for replacement, i.e. making a copy of a work which has been already lost or is not anymore suitable for the use of the patrons (sixty seven countries). The approach towards digital reproduction for these purposes differs from country to country significantly.²⁴⁰

Generally many countries have implemented provisions prohibiting circumvention of technological protection measures (TPMs), twenty-six of which enacted exceptions for, *inter alia*, the benefit of libraries.²⁴¹ Other limitations are applicable in different jurisdiction, but they do not enjoy wide acceptance (such as exception from the reproduction right for the purpose of interlibrary lending existing in six countries).²⁴²

Professor Crews emphasized the relatively small number of case studies with regards copyright limitations for library uses. According to him, two reasons for this are possible: either libraries throughout the world

²³⁴ Study, *supra* note 227, p.31.

²³⁵ *Ibid.*, p. 7.

²³⁶ Study, *supra* note 227, p.7.

²³⁷ *Ibid.*, pp.7-8.

²³⁸ *Ibid.*, p.70.

²³⁹ *Ibid.*, pp.45-51.

²⁴⁰ *Ibid.*, pp.53-55.

²⁴¹ *Ibid.*, p.66.

²⁴² *Ibid.*, p.63.

are not making the full use of the exceptions, or avoid struggling with uncertainties of the statutes. Alternatively, it might be an indicator of the fact that the statutes are in fact sufficiently clear and uncomplicated. However, some examples provided by libraries indicate that sometimes copyright provisions on library exceptions are far from being clear and do not really address concerns of libraries.²⁴³

4.3 Libraries' Concerns and Proposals

The concerns of libraries are rather foreseeable. The library community throughout the world is basically criticizing the lack of universal harmonized approach towards E&L and claiming the expansion of copyright protection and strengthening of its enforcement not accompanied by the same level and speed of protection of the interests of the public in access to the copyrighted works. Moreover, the library guild is concerned about the fact that the countries, especially defined as developing and least developed, refuse to make the most of the flexibilities provided in international copyright law and to introduce exceptions, including specifically for library uses, in the domestic laws. These concerns are most frequently expressed in WIPO, namely during the sessions of the Standing Committee on Copyright and Related Rights or of the Committee on Development and Intellectual Property (CDIP). As an example, at the 17th session of the SCCR IFLA stated:

“While copyright is mandated by international treaties, most limitations and exceptions are optional, dependent upon the statutes in each country. This has resulted in great variations that are often in conflict with one another in a globalized, networked world. While owners’ rights have been strengthened and extended, limitations and exceptions for users have not, creating a critical imbalance.

*Exceptions are important to libraries everywhere, but they are of critical importance to developing countries whose capacity to access knowledge is defined primarily by exceptions and limitations”.*²⁴⁴

The opportunities opened by new technological developments are posing additional concerns for libraries. On one hand, they allow rendering traditional library services with the efficiency not known before. Digital preservation of library stock, making available of collection items in the digital form, in the premises of libraries and on-line, digital reproduction of material for interlibrary loan and others – all these would expand the possibilities of libraries to an unprecedented level. Probably to the same level it would affect the interests of copyright holders. For example, making works available on-line or conducting on-line delivery of works by libraries would completely replace electronic subscription and deprive the business

²⁴³ *Ibid.*, p.70.

²⁴⁴ Statement of Committee on Copyright and other Legal Matters of IFLA, 'Copyright Limitations and Exceptions for Libraries', at the 17th Session of the Standing Committee on Copyright and Related Rights (SCCR), Geneva, 3-7 November 2008 <http://archive.ifla.org/III/clm/p1/limitations-exceptions-200811.htm>

of purely electronic journals of any rationale. Therefore the interest of libraries in new technologies is understandably high, but careful regulation of the relevant exceptions should be conducted to maintain the desired by all and everybody balance.

On the other hand, new technological findings can pose threats to the traditional missions of libraries. The phenomenon of the so-called technological protection measures (TPMs) which are often designed to block access or certain uses of the copyrighted materials and which are 'blind' to whether the use is permitted or not by statutory exception has been extensively addressed in the literature. The Report prepared by the Council of Europe focusing predominantly on freedom of expression and digital environment stated that one of the most affected by TPMs groups of exceptions, together with private copy exception and exceptions for persons with disabilities, are exceptions for libraries.²⁴⁵

Another issue which is of high interest and importance for libraries' activities is the issue of so-called 'orphan works', i.e. works, the author of which can not be identified or reached.

In light of the above concerns, numerous suggestions on E&L from copyright for the benefit of libraries have been expressed.

Professor Crews suggested that the minimum exceptions which should be available for libraries to fulfill their fundamental missions include at least exceptions ensuring distribution through lending. He also welcomes further expansion of the exceptions for the purposes of preservation and replacement and reproduction for the use of library patrons.²⁴⁶

The Council of Europe specifically emphasized the necessity to preserve traditional activities of libraries in the digital environment and encouraged states to allow libraries to circumvent TPMs to allow reproduction for private study and research, for preservation and replacement.²⁴⁷

The libraries themselves advocate for a broad list of exceptions. At the 18th session of WIPO SCCR the library community introduced a joint statement, where they enlisted desirable exceptions for library uses subject to introduction into domestic copyright legislations.²⁴⁸

We will hereby quote the main suggested E&L:

- **Preservation** (“[a] library should be permitted to make copies of published and unpublished works in its collections for purposes of preservation, including migrating content to different formats».)

²⁴⁵ CoE Report, *supra* note 81, p.10.

²⁴⁶ Study, *supra* note 227, pp.70-71.

²⁴⁷ CoE Report, *supra* note 81, p..12.

²⁴⁸ Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives by Electronic Information for Libraries, International Federation of Library Associations and Institutions, and Library Copyright Alliance, WIPO Standing Committee on Copyright and Related Rights, 18th Session, Geneva, May 25-29, 2009.

- **Legal deposit** (“[l]egal deposit laws and systems should be broadened to include works published in all formats and to allow for preservation of those works”.)
- **ILL and document supply** (“[l]ibraries should be able to supply documents to the user directly or through the intermediary library irrespective of the format and the means of communication”).
- **Education and classroom teaching** (“[i]t should be permissible for works that have been lawfully acquired by a library or other educational institution to be made available in support of classroom teaching or distance education in a manner that does not unreasonably prejudice the rights holder. A library or educational institution should be permitted to make copies of a work in support of classroom teaching».)
- **Reproduction for research or private purposes** (“[c]opying individual items for or by individual users should be permitted for research and study and for other private purposes.
- **Persons with disabilities** (“[a] library should be permitted to convert material from one format to another to make it accessible to persons with disabilities. The exception should apply to all formats to accommodate user needs and technological advances. To avoid costly duplication of alternative format production, cross-border transfer should be permitted”).
- **General free use** (“[a] general free use exception consistent with fair practice helps ensure the effective delivery of library services»).
- **Orphan works** (“[a]n exception is needed to resolve the problem of orphan works, where the rights holder cannot be identified or located»).
- **TPMs** (“[i]t should be permissible for libraries and their users to circumvent a technological protection measure for the purpose of making a non-infringing use of a work»).
- **Contracts** (“[c]ontracts should not be permitted to override exceptions and limitations»).

Moreover, the library community advocate for the adoption of an international instrument on exceptions and limitations which would harmonize domestic laws throughout the world in this respect.²⁴⁹

4.4 The Right to Cultural Participation to Support Libraries' Claims

As indicated above the claims of the library guild are many and varied. Up until now they were predominantly argued for involving public interest considerations. Introduction of such exceptions has always been a matter of public policy aimed at promotion education, culture and knowledge. In contrast, several other exceptions, in addition to simply public interest claims, were backed by arguments built on the legal claims, namely on

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J.T. Pilch, 'International Copyright: Why it Matters to Libraries', Library Copyright Alliance, Issue Brief, October 12, 2009. Pp.2-3.

human rights obligations. Private copy exception, for example, has a strong support of the right to privacy while the exception for the purpose of news reporting, parody and some others – on the right to freedom of expression. Lucie Guibault argued that individual rights are not applicable to library exceptions, as arguments in favor of them refer to collective good, as the beneficiaries of the exception constitute collective bodies being formed by students, library patrons, etc.²⁵⁰

The present section will make an attempt to demonstrate that the exceptions from copyright for the benefit of libraries can also have human rights underpinnings and legal arguments based on human rights law can be also applied when designing 'library' exceptions. The human rights which is well suited for this mission is the right to take part in cultural life which was analyzed in Chapter II.

As revealed, the obligations of States Parties to the ICESCR under Article 15(1)(a) include the obligation to provide a wide access to the general population of cultural materials. Libraries in general and public libraries, in particular, are incredibly important agents at States' service to fulfill this mission. Moreover, the role of libraries and similar institutions have gained such a high level of acknowledgement universally that the article as such can be interpreted as requiring States to support the activities of such institutions.

These obligations, the obligations to provide broad access to cultural goods to wide population and to support libraries, as such can form a basis for libraries' claims in support of introducing exceptions from copyright for their benefit. It is hard to claim the existence of a conflict between copyright law and these obligations, but what can be argued is that providing certain freedoms for libraries with regards copyrighted materials would incontestably enhance the possibilities of libraries to render their traditional services and thus contribute to providing of wide access to the public to the cultural heritage. The special role of public libraries should be emphasized here again as they established to approach each and everybody and bring learning to anyone interested. Generally all the exceptions advocated for by the librarian guild and enlisted in the previous subsection can be argued in light of these general obligations under Article 15(1)(a).

Several other, more specific obligations have been also revealed in the course of interpreting the right to take part in cultural life. One of them constitutes a negative obligation, which makes it closer in character to civil and political rights which are traditionally described as 'negative', in contrast to 'positive' economic, social and cultural rights. This is the obligation to abstain from obstructing access to cultural materials (by, e.g. introducing copyright laws) which do not meet the test enshrined in Article 4 of the ICESCR. This obligation clearly resembles the obligation of States not to violate the freedom of speech, which includes, among others, freedom to

²⁵⁰ Guibault L. Discussion paper on the question of Exceptions to and limitations on copyright and neighboring rights in the digital era, Council of Europe, Secretariat Memorandum prepared by the Directorate of Human Rights, Strasbourg, MM-S-PR (98) 7, October 1998.

seek and receive information²⁵¹, which is human right most frequently invoked in copyright - human rights disputes. This obligation is of high potential as an argument for all supporters of limiting copyright, and can be also of support of any 'library' exception. However, in contrast to the relatively well interpreted provisions on the freedom of expression, referring to the obligation to abstain from obstructing access to the cultural materials under Article 15(1)(a) should be preceded by fundamental thinking on the copyright's compliance with the ICESCR test.

An obligation to prevent third parties (who might be copyright-holders) from restricting legitimate access of the public to cultural materials identified in Chapter is another rather specific obligation at the service of library guild. Third parties, as discussed earlier, might restrict legitimate access to copyrighted materials by implementing technological protection measures or imposing licensing terms which might prevent library uses authorized by copyright law. Nowadays, however, only rare countries allow anticircumvention of TPMs by libraries. Moreover, not many jurisdictions adequately address the problem of contractual overridability of statutory exceptions. Hence, the revealed obligation under Article 15(1)(a) to prevent third parties from restricting legitimate access to cultural materials can be definitely used for lobbying for circumvention exceptions as well as establishing the primacy of statutory exceptions over contractual terms.

Finally, the last obligation identified – the obligation to conserve and preserve cultural goods – can built the content of the argument in favor of exceptions from reproduction rights for the purposes of preservation and replacement.

The right to take part in cultural life under Article 15(1)(a) of the ICESCR can without a doubt provide a certain contribution to the discussions on balancing copyright, specifically – on E&L from copyright, more specifically – on 'library' exceptions.

Despite the increased attention received by this 'Cinderella of human rights' in the recent time, there is still a long way until it will gain relative specificity. Therefore, it is hardly possible that in the near future we would see a court decision on copyright matters mentioning this right explicitly. This right can be rather of service at the level of copyright law-making. On this level even at this point the right to cultural participation can cause certain affects on copyright law.

It can not be claimed though that amending copyright law by introducing 'library' exceptions is the necessary way to achieve the goals of the right to take part in cultural life. There are numerous ways to provide access to cultural materials and thus fulfill the right. Reforming copyright can, however, contribute to this goal and therefore states might include amending copyright acts which provide for 'library' exceptions in their annual reports to the Committee on Economic, Social and Cultural Rights as means of fulfilling obligations under Article 15(1)(a) of the ICESCR. As argued before, reforming copyright laws in general and providing for

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Article 19(2) of the International Covenant on Civil and Political Rights.

'library' exceptions in particular is a relatively 'cheap' way of fulfilling obligations to ensure cultural participation as it basically requires lifting barriers imposed by the states themselves, in contrast to costly positive measures.

This is not, however, as simple as it is. The three-step test, the universal measurer of the legality of exclusion of certain uses from exclusive rights, should be never forgotten. This is not absolutely clear how many and which exceptions advocated by libraries would pass through the sieve of this test. Careful assessment should be conducted in every context of the effects of introduction of a certain exception to the rights of the right-holders.

However, we predict that at least some of the exceptions enlisted in the IFLA/CPA Statement if applied limitedly would undergo this test. This is arguably the case of relatively widespread exceptions for private study and research and for preservation and replacement purposes. In case the imbalance of the copyright law is proved it seems a logical strategy to start with exploiting the copyright built-in flexibilities. This is where the 4th framework – use human rights to encourage internal limits – comes into play. It seems reasonable at first to introduce 'library' exceptions which will meet the copyright three-step test and hence exhaust the possibilities of the 4th approach before moving further.

Many commentators are skeptical about the ability of the copyright regime to balance different interests within itself. Ruth Rikowski, for example, argues that TRIPS as a bulwark of pure capitalism would never be capable to address the concerns of all the stakeholders, including libraries, within itself. She claims that '[f]undamentally, TRIPS is not concerned with and does not 'fit in' with the library and information profession's agenda, with its concern for the balance and with its basic professional ethics'.²⁵²

It seems, however, that the idea of reducing the tension among the interests of copyright holders and the interests of users to access within the copyright system is worth try. The potential of the copyright system to do so is arguably not exploited enough, at least in some countries. Human rights, specifically, right to cultural participation, can be an additional factor for lawmakers to recourse to such flexibilities provided by international instruments and to set internal limits in domestic copyright law. In case the 4th approach does not fully reach the goal of reducing the tensions between the human rights obligations and copyright protection and thus to bringing coherence in the international legal order in this field, recourse to other models of HR-IP interaction can be made. This might be the case of the 2nd framework – use human rights as external limits to IP. However, it does not seem to be a very promising one, especially in the case of economic, social and cultural rights, such as the right to take part in cultural life. Hence the 4th approach is highly preferable, especially in the absence of the proven hierarchy among different self-contained regimes in international law, which are intellectual property and human rights.

²⁵²

Rikowski, *supra* note 203, p.258.

4.5 Conclusions

In the present Chapter the application of the 4th framework to IP – HR relations (use human rights to encourage internal limits on IP) has been examined at a specific example. The right to take part in cultural life analyzed in Chapter II was applied to the issue of the exceptions from copyright for the benefit of libraries.

First, the normative regulation of such exceptions has been covered. The analysis demonstrated that if regional instruments or other documents, such as the Tunis Model Law, might provide for such exceptions as optional for member states to implement, the universal instruments contain only a general framework for introducing such exceptions subject to the three-step test.

Further an overview of the prevalence of 'library' exceptions in the world has been made on the basis of the study commissioned by WIPO in 2008. The study revealed a big variety of approaches to such exceptions. Generally, some exceptions are rather widely implemented, the others are not.

As demonstrated, the library guild is concerned about the lack of imperative instructions on the international level to make limitations from copyright for library uses and about the insufficient introduction of such limitations on the domestic level.

As argued in the present Chapter, the right to take part in the cultural life can provide arguments of legal character, in addition to ones based on public interest considerations, in favor or making use of flexibilities existing in the international copyright law and implementing 'library' exceptions. This might be one of the areas where the marriage between human rights and intellectual property might happen which therefore can incontestably contribute to the coherence in the international legal order.

5 Conclusions

The present paper has attempted to assess the potential of 'marrying' two self-contained regimes of international law – international human rights law and international intellectual property law. For this purpose one human right has been specifically focused on – the right of everyone to take part in cultural life enshrined in Article 15(1)(a) of the ICESCR.

This 'Cinderella of human rights', forgotten and neglected for six decades, can possibly provide a new vision of copyright law and influence it. The right to cultural participation is of relevance to many areas of copyright, and incontestably to the issue of E&L for librarianship, which was specifically addressed in the present paper.

This right, belonging to the group of economic, social and cultural rights, providing for rather vaguely drafted obligations and hardly adjudicable directly, still can offer valuable argument in the IP-HR discussion. The present research was intended to demonstrate that the right provided in Article 15(1)(a) of the Covenant can be invoked in domestic law-making and encourage exceptions from copyright for certain library uses based on flexibilities provided in international copyright law.

Marrying human rights and intellectual property is not an easy task. Many uncertainties about their relations and frameworks of such relations remain and the academic debate would unlikely deplete but rather kindle. Numerous issues long for serious reflection. Several of them were identified but left outside the scope of the paper:

1. What exactly are the human rights elements of the current IP law? The answers would help us build better grounded claims on whether the two regimes are conflicting or not and if yes, to what extent and in which areas. One of the questions raised is whether protection of interests of an author, both material and moral, extending over his life, can be attributed human rights character and why?

2. How do two tests correlate: the ICESCR test on limitations of author's rights and the copyright 'limitation on limitation' test provided in Berne or TRIPS?

3. How to approach the relations between the ICESCR test on limitations of the right to culture and copyright three-step test?

There are probably more questions than answers in this field, and we hope they will attract attention of the international bodies, academia, courts and parliaments – all with the aim of bringing more coherence in the international legal order.

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