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**HUMAN RIGHTS PERSPECTIVE ON THE ROLE
OF WIPO IN PROMOTING INTELLECTUAL
CREATIVITY**

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SUMMARY

The thesis is concerning the lack of emphasis of human rights in the works and treaties of World Intellectual Property Organization. So, it looked at finding a human rights framework for World Intellectual Property Organization, which would provide greater accessibility and participation by the society. In order to frame it, the impacts of intellectual property on human rights were analyzed. The implementation of the WIPO Development Agenda was also considered and its contribution along with the participation of NGOs towards the building of such a framework was evaluated. The thesis finds that as there is nothing in the WIPO mandate which prevents WIPO from emphasizing human rights to a greater extent, the integration of human rights into intellectual property policies in the future implementation of the WIPO Development Agenda would be an advancement in building a human rights framework for WIPO.

KEYWORDS: WIPO, access, human rights framework for intellectual property, NGO/civil society, intellectual creativity, WIPO Development Agenda.

PREFACE

I am thankful for being able to write the Master thesis on this unique topic, in which I am greatly interested and this has also allowed me to present the workings of World Intellectual Property Organization for everyone to know and appreciate.

I would like to thank quite a lot of people in making this Master thesis becoming a reality.

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ABBREVIATIONS

A2K	Access to Knowledge
ARDI	Access to Research for Development and Innovation
BIRPI	United International Bureaux for the Protection of Intellectual Property
CESCR	Committee on Economic, Social and Cultural Rights
CDIP	Committee on Development and Intellectual Property
CSOs	Civil Society Organizations
ECOSOC	Economic and Social Council
FAO	Food and Agricultural Organization
FOD	Friends of Development
GA	General Assembly
HDI	Human Development Index
IAC	Industry Advisory Commission
ICG	Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Human Rights
IGOs	Intergovernmental Organizations
IP	Intellectual property
IT	Information Technology
IPRs	Intellectual property rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communication Technology
LDCs	Least Developed Countries

NGO	Non-governmental Organization
PAC	Policy Advisory Commission
PCDA	Provisional Committee for Development Agenda
PLT	Patent Law Treaty
R4L	Research4Life
TPM	Technological Protection Measure
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
TACD	Trans Atlantic Consumer Dialogue
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHA	World Health Assembly
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

INTRODUCTION :-

1.1. Overview

Intellectual property law is primarily concerned with providing incentives for the production of new, creative and applicable arts and knowledge, while human rights law is primarily concerned with providing improved access to goods crucial for human well-being and survival. Over the last 15 years, the prominence of intellectual property rights on the international agenda, including on the international human rights agenda, cannot be compared with any previous period. The triggers for the increased awareness among human rights bodies were the shift in emphasis from focusing primarily on the amounts of good (availability) toward an equally strong focus on the actual access to the goods (accessibility).

World Intellectual Property Organization (WIPO) is an incredibly important institution in the shaping of international intellectual property law. WIPO remains the main international intergovernmental organization responsible for the administration and negotiation of new intellectual property treaties and the provision of intellectual property. The mandate of WIPO is to promote creative intellectual activity. It also recognized the need to maintain a balance between rights of authors and the large public interest towards accessibility. Furthermore, as a specialized agency of United Nations (UN), WIPO is subject to the UN Charter which specifies, *inter alia*, that promotion and protection of human rights is one of the purposes of the UN.

However, human rights are not frequently referred to by WIPO. WIPO has not made use of the opportunities to integrate human rights in its work, either through substantive human rights provisions or by human rights principles. Nothing in the WIPO mandate prevents WIPO from emphasizing human rights to a greater extent.

Therefore, the thesis focused on how to build a human rights framework for WIPO – which would be open and inclusive - and would promote intellectual creativity rather than the protection of intellectual property only. A framework which would serve the purpose of the

public interest by having greater accessibility; as well as increased participation of civil society and public interest groups in the policy making of WIPO.

1.2. Outline

The chapter two following the introductory chapter one deals with the background of the World Intellectual Property Organization, mainly discussing about the historical background of WIPO and overall presenting an idea about WIPO's functions. Chapter three deals with the themes of intellectual creativity, intellectual property and the relation of intellectual property with human rights; which presents a general idea about what is intellectual creativity and how it contributes to society along with what we understand by intellectual property, its contributions as well as the criticisms that are associated with it; and the link between intellectual property and human rights, how globalization is affecting the society and making it knowledge based economy and the importance of Access to knowledge and lastly how it is adversely affecting the relation between human rights and intellectual property, in relation to the rights associated with health, cultural life and development.

Chapters four and five deal with the normative and legal framework of human rights and intellectual property with regard to WIPO, United Nations and World Trade Organization. Chapter four also deals with the WIPO Development Agenda starting with its formation till the role played by the A2K in the Agenda and how much it is yet to achieve.

Chapter six is on how to build a human rights framework for WIPO, taking as its basis the human rights framework for intellectual property and the integration of human rights in intellectual property policies. Thereafter, the activities of WIPO were considered to assess how far human rights are integrated in its work and finally analyzing the roles of NGO and the WIPO Development Agenda towards the building of such a human rights framework for WIPO.

1.3. Methodology and Sources of materials

The methodology covered theoretical analysis of theories in various fields as well as an historical and legal interpretative analysis. With regard to the research materials, most of the information regarding WIPO was used from the website of WIPO as well as from its Handbook, surveys and treaties. The normative part on human rights was covered from the International human rights instruments by United Nations and World Trade Organization as well as the General Comments made by the Committee of ICESCR. However, the main sources of reference are from the books and articles written by legal and other scholars like Helfer, Shaver, Chapman, Peter K. Yu, Drahos, Mary Wong, Ruth Okediji etc., in relation to the specific chapter and sub-chapter of the thesis. Different reports and treaties of various international bodies like WHO, UNESCO and WIPO were also taken into consideration. Lastly, critical analysis was used to reach the ultimate conclusion based on an analysis of the various treaties, the WIPO Development Agenda and the human rights approach in its workings within WIPO.

1.4. Delimitation

Due to the vastness of the workings and treaties in WIPO, it was not possible to cover all the aspects in WIPO. Thus, the present research only dealt with the areas concerning the treaties in relation to patent and copyright. In addition to it, the cooperation of WIPO with other international organizations was also limited to these two aspects, mainly World Health Organization in relation to patent and United Nations Educational, Scientific and Cultural Organization in relation to cultural participation. Moreover, in the implementation of the WIPO Development Agenda, the main emphasis was in respect of accessibility and participation of civil society. Further analysis of the other works/projects of the Development Agenda was not undertaken in this thesis.

BACKGROUND OF WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

WIPO is working towards the development of a flexible, user-friendly, cost-effective and fully responsive international intellectual property system that is widely accessible, and that provides an appropriate balance between the rights of inventors and creators and the public interest in general.

'Kamal Idris'¹

2.1. History of WIPO

The roots of World Intellectual Property Organization (WIPO)² go back to 1883, when Johannes Brahms was composing his third Symphony, Robert Louis Stevenson was writing *Treasure Island*, and John and Emily Roebling were completing construction of New York's Brooklyn Bridge. The need for international protection of intellectual property (IP) became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873, because they were afraid their ideas would be stolen and exploited commercially in other countries.

The year 1883 marked the birth of the Paris Convention for the Protection of Industrial Property, the first major international treaty designed to help the people of one country obtain protection in other countries for their intellectual creations in the form of industrial property rights, known as: inventions (patents), trademarks, and industrial designs. The Paris Convention entered into force in 1884 with 14 member States, which set up an International Bureau to carry out administrative tasks, such as organizing meetings of the member States.

¹ The former Director General of WIPO, Kamal Idris, in an interview titled: 'The World Intellectual Property Organization (WIPO) and the developing World', available at:

http://ec.europa.eu/development/body/publications/courier/courier201/pdf/en_024.pdf

² WIPO Treaties – General Information, available online at: <http://www.wipo.int/treaties/en/general/>

In 1886, copyright entered the international arena with the Berne Convention for the Protection of Literary and Artistic Works. The aim of this Convention was to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works such as: novels, short stories, poems, plays; songs, operas, musicals, sonatas; and drawings, paintings etc.

Like the Paris Convention, the Berne Convention set up an International Bureau to carry out administrative tasks. In 1893, these two small bureaux united to form an international organization called the United International Bureaux for the Protection of Intellectual Property (best known by its French acronym BIRPI). Based in Berne, Switzerland, with a staff of seven, this small organization was the predecessor of the World Intellectual Property Organization of today - a dynamic entity with 184 member States, a staff that now numbers some 938, from 95 countries around the world, and with a mission and a mandate that are constantly growing.

As the importance of intellectual property grew, the structure and form of the Organization changed as well. In 1960, BIRPI moved from Berne to Geneva to be closer to the United Nations (UN) and other international organizations in that city. A decade later, following the signature of “the Convention Establishing the World Intellectual Property Organization” in Stockholm in 1967³ and entering into force in 1970, BIRPI became WIPO. It underwent structural and administrative reforms and acquired a secretariat answerable to the member States.

In 1974, WIPO became a specialized agency of the United Nations system of organizations, with a mandate to administer intellectual property matters recognized by the member States of the UN. The Agreement between the United Nations and WIPO recognizes that WIPO is, subject to the competence of the UN and its organs, responsible for taking appropriate action in accordance with its basic instrument and the treaties and agreements administered by it, inter alia, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development.

³ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (Second Edition, WIPO Publication, Geneva, 2006), pages. 4 -5.

WIPO expanded its role⁴ and further demonstrated the importance of intellectual property rights (IPRs) in the management of globalized trade in 1996 by entering into a cooperation agreement with the World Trade Organization (WTO).

The impetus that led to the Paris and Berne Conventions - the desire to promote creativity by protecting the works of the mind - has continued to power the work of the Organization, and its predecessor, for some 120 years. But the scope of the protection and the services provided have developed and expanded radically during that time.

2.2. Mission and Activities of WIPO

The mission of WIPO⁵ is to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind. Its effect is to contribute to a balance between the stimulation of creativity worldwide, by sufficiently protecting the moral and material interests of creators on the one hand, and providing access to the socio-economic and cultural benefits of such creativity worldwide on the other.

In 1898, BIRPI administered only four international treaties. Today its successor, WIPO, administers 24 treaties (three of those jointly with other international organizations) and carries out a rich and varied program of work, through its member States and secretariat, that seeks to: harmonize national intellectual property legislation and procedures, provide services for international applications for industrial property rights, exchange intellectual property information, provide legal and technical assistance to developing and other countries, facilitate the resolution of private intellectual property disputes, and marshal information technology as a tool for storing, accessing, and using valuable intellectual property information.

The activities of WIPO have not only expanded but also greatly diversified. In its more recent history, WIPO does not stop short of promoting all kinds of intellectual property. This is only the means to achieve an end, which is to promote human creativity that results in industrial and

⁴ WIPO Treaties – General Information, loc. Cit. n. 2.

⁵ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, pages. 5-7.

cultural products and services enriching human society as a whole. Thus, WIPO is increasingly involved in helping developing countries, whose creativity has yet to be adequately harnessed, to receive the full benefits of the creations of their citizens, as well as those of the outside world.

WIPO's approach to development program is twofold: to identify and promote international solutions to the legal and administrative problems posed by digital technology, especially the internet, to the traditional notions and practices of intellectual property. WIPO is increasingly adopting a global approach not only to intellectual property in itself, but to the place of intellectual property in the wider framework of emerging issues such as traditional knowledge, folklore, biological diversity, environmental protection and human rights. One of the most significant present-day tasks of WIPO is to demystify intellectual property, so that it is recognized as a part of everyday life not only by those directly involved in it at governmental, legal, industrial and cultural levels, but also by any others who compose civil society, whether in non-governmental organizations or small businesses, whether farmers, public health personnel, individual creators or simply interested members of the general public. WIPO's agenda of outreach to all members of society is through their inclusion as stakeholders and partners in global and national intellectual property systems. WIPO's activities aim to give to all levels of society an awareness of how they have a stake in a healthy intellectual property system, and also to provide them with access to the knowledge, experience, and expertise that will enable them to sue those systems effectively.

2.3. Structure of WIPO

Intellectual property rights are limited territorially⁶; they exist and can be exercised only within the jurisdiction of the country or countries under whose laws they are granted. But works of the mind, including inventive ideas, do and should cross frontiers with ease in a world of interdependent nations. Moreover, with growing similarity in the approach and procedures governing intellectual property matters in various countries, it makes eminent sense to simplify practice through international standardization and mutual recognition of rights and duties among nations. Therefore, governments have negotiated and adopted multilateral treaties in the various

⁶ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, pages. 7-8.

fields of intellectual property, each of which establishes a “Union” of countries which agree to grant to nationals of other countries of the Union the same protection as they grant to their own, as well as to follow certain common rules, standards and practices.

The Unions administered by WIPO are founded on the treaties. A Union consists of all the States that are party to a particular treaty. The first group of treaties establishes international protection, that is to say, they are treaties which are the source of legal protection agreed between countries at the international level. The second group consists of treaties which facilitate international protection. The third group consists of treaties which establish classification systems and procedures for improving them and keeping them up to date.

WIPO’s Member States determine the strategic direction and activities of the Organization⁷. They meet in the Assemblies, committees and working groups (WIPO decision-making bodies). There are currently 184 Member States, i.e. over 90 percent of the countries of the world.

2.4. Administration of WIPO

The Convention establishing WIPO provides for four different organs: the General Assembly⁸, the Conference, the Coordination Committee and the International Bureau of WIPO or Secretariat.

The General Assembly is the supreme organ of WIPO. Among its other powers and functions, the General Assembly appoints the Director General upon nomination by the Coordination Committee; it reviews and approves the reports and activities of the Coordination Committee as well as the reports of the Director General concerning WIPO; it adopts the financial regulations of WIPO and the biennial budget of expenses common to the Unions; it approves the measures proposed by the Director General concerning the administration of the international agreements designed to promote the protection of intellectual property etc. The fourth organ of WIPO is the International Bureau of WIPO or Secretariat. It is headed by the Director General, and further

⁷ How WIPO Works; available online at: http://www.wipo.int/about-wipo/en/how_wipo_works.html

⁸ WIPO Handbook on Industrial Property Information and Documentation; available at: <http://www.wipo.int/standards/en/>

consists of those who make up its regular staff, who ensure the efficient administration of the Organization.

2.5. Consultation and Public Outreach of WIPO

WIPO has increasingly sought to build up the broadest possible base throughout the world. For this purpose, several advisory bodies have been established, and a policy of public outreach has been pursued.

2.5.1. The Policy Advisory Commission

The Policy Advisory Commission (PAC)⁹ was set up of eminent international personalities drawn from politics, diplomacy and administration, to “enhance the Secretariat’s capacity to monitor and respond in a timely, informed and effective manner to international and regional developments in intellectual property, in information technology and in other fields bearing on WIPO’s operations and its policy environment.” PAC was to consider vital topics such as the advance of globalization, digital technology, breakthrough discoveries in biotechnology, transfer of technology to developing countries, conservation of biodiversity and the environment, electronic commerce, protection of indigenous cultures and the viability of an “international patent” ensuring the continuing and widespread availability of pharmaceuticals, and the relation of those topics to the intellectual property system.

2.5.2. The Industry Advisory Commission

The Industry Advisory Commission (IAC) was established in 1998 as part of the efforts by WIPO’s Director General to take into consideration the broadest range of opinions in the context of policy-making. The Commission is composed of some 20 top-level representatives from the private sector. Among the industries represented are those connected with entertainment (motion

⁹ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, pages. 12 -14.

pictures, theatre, music), telecommunications, pharmaceuticals and biotechnology. The idea of the IAC arose from the Director General's conviction that an organization like WIPO, whose mission is to promote the protection of intellectual property worldwide, must stay abreast of developments in the private sector. Being a purely advisory body for the Director General of WIPO, the IAC's recommendations are not binding, and the IAC does not in any way replace the decision-making powers of WIPO's Member States.

2.5.3. Ad Hoc Advisory Panel

Bearing in mind the importance of the issue of privatization in an increasing number of countries, the Director General of WIPO created a new body, the Ad Hoc Advisory Panel on Privatization, in 2000, to assist Member States in determining strong intellectual property policies and strategies for their efforts at privatization. It is a panel of nine experts representing governmental, diplomatic and academic circles.

2.5.4. Public Outreach

Since 1998 WIPO has made a concerted effort to reach out not only to the intellectual property community but also to the general public, in order to demystify a hitherto specialized field for a wider public. The aim is to promote a general understanding of the role of intellectual property and of the need to foster and protect it. WIPO has concentrated these efforts on using three types of means – information technology, more traditional information materials and “live” activities promoting media and personal contact and interchange. The major tool used in information technology to reach a wider public is the Internet. Media activities and exhibitions on aspects of intellectual property extended public outreach. WIPO press releases, articles in the press and media coverage on radio and television worldwide gave WIPO and its activities greater exposure amongst the public, as did exhibitions on various aspects of intellectual property held at WIPO and elsewhere. WIPO also worked with certain Member States and organizations (notably in the framework of cooperation for development) in the field of public outreach, with the object of raising awareness in the general public of the nature and importance of intellectual property.

THEMES OF INTELLECTUAL CREATIVITY, INTELLECTUAL PROPERTY AND RELATION WITH HUMAN RIGHTS

*We do not see through our eyes; we see
through our eyes and with our minds.*

'Anonymous'¹⁰

3.1. Theories of Intellectual Creativity

Intellectual abilities¹¹ comprise those higher-order cognitive skills that are involved in coping with environments in which we live, included but not limited to learning and thinking skills. Intelligence, creativity and wisdom are three of the major intellectual abilities.

The concept of creativity has its own history¹², taking an intellectual path that was for two centuries independent of the institutionalization and conceptualization of research. It took 150 years after research was a recognized and widely encouraged undertaking before the concept of creativity was sufficiently sculpted out of the many debates regarding the meaning and eventual separation of such competing ideas as imagination, originality, genius, talent, freedom and individuality.

Creativity has been researched for years and even though a lot of progress has been made on how creativity affects our lives, there is still much to be learned about how creativity works¹³. The definition of creativity is vague and complex. The concept of creativity has traditionally been an elusive one to pin down. There seems to be some agreement on what creativity requires but not on how it should be defined.

¹⁰ Maria Gonzalez, 'Implicit Theories of Creativity Across Cultures', Master of Science, Buffalo State College, State University of New York, International Centre for Studies in Creativity (2003), page. 1.

¹¹ Robert J. Stenberg, 'Intellectual Ability', Encyclopedia of Cognitive Science (2006).

¹² Mark A. Runco and Robert S. Albert, 'Creativity Research: A Historical View' in *The Cambridge Handbook of Creativity* By Kaufman, James C and Stenberg Rober J, USA, Cambridge University Press (2010), page. 4.

¹³ Joyce R. Robinson, 'Webster's Dictionary Definition of Creativity', Online Journal of Workforce Education and Development, Vol. III Issue 2.

Researchers in the field of creativity define it differently depending on how they view the creative function. Prentky¹⁴ suggested that “what creativity is and what it is not, hangs as the mythical albatross around the neck of scientific research on creativity”. In a summary of scientific research into creativity Michael Mumford¹⁵ suggested: “Over the course of the last decade, however, we seem to have reached a general agreement that creativity involves the production of novel, useful products”. Thus, some definitions are formulated in terms of a product, such as an invention or discovery; others in terms of a process, a kind of person or a set of conditions.

Early romantic concepts of creativity (Reichenbach, 1958)¹⁶, viewed it in the context of discovery and context of justification. Context of discovery was seen as to how people created new ideas. This was considered irrational, intuitive mystic processes that cannot be scientifically investigated. On the other hand, context of justification was seen as to how people validate or test new ideas. This was seen as verifying a hypothesis empirically by analyzing its logical consequences (i.e. scientific)

Creativity is viewed on modern days as new ideas which do not emerge accidentally or randomly and creativity is not based on a spontaneous, unique and unanalyzable subjective processes; new idea may arise as a sudden insight that is, however, preceded with a relative long period of working with a problem; creative processes and mechanism can be analyzed, explained, and understood scientifically; and by learning to know processes involved in creative activity, we may learn to help people to become more creative.

Much has been written about creativity¹⁷ from social, psychological, developmental, cognitive, and historical perspectives and a number of theories have been proposed from those view points. Lubart and Sternberg¹⁸ suggested that specific aspects of six resources – intellectual processes,

¹⁴ M. Batey and A. Furnham, ‘Creativity, Intelligence and Personality: A Critical Review of the Scattered Literature’, Genetic, Social and General Psychology Monographs, Vol: 132:4 (2006), page. 357.

¹⁵ Michael D. Mumford, ‘Where Have We Been, Where Are We Going? Taking Stock in Creativity Research’, Creativity Research Journal, Vol. 15, Nos. 2 & 3 (2003), page. 110.

¹⁶ K. Hakkarainen, ‘Theories of Creativity’, University of Helsinki, Dept. of Psychology; available at: http://mlab.taik.fi/polut/Luovuus/teoria_creativity.html

¹⁷ Arne Dietrich, ‘The Cognitive Neuroscience of Creativity’, Psychonomic Bulletin & Review (2004).

¹⁸ Todd I. Lubart and Robert J. Sternberg, *The Creative Cognition Approach: - An Investment Approach to Creativity: Theory and Data*, Second Edition, USA, MIT Press (1997), page. 271.

knowledge, intellectual styles, personality, motivation and environmental context – contribute to creativity. Rhodes¹⁹ (1961/ 1987) suggested that creativity is an alliterative scheme that divides creative studies (and findings) into four categories: person, process, press and product. The person category includes research on personal characteristics. Process research may be less personal and more behavioral. Press refers to the relationship of human beings and their environment. Amabile and Grysiewicz (1989) and later Witt and Beorkrem (1989) identified the following “situational influences on creativity”: freedom, autonomy, good role models and resources (including time), encouragement, specifically for originality, freedom from criticisms, and “norms in which innovation is prized and failure not fatal”. Some influences can inhibit creativity. These include a lack of respect (specifically for originality), red tape, constraint, lack of autonomy and resources, inappropriate norms, project management, feedback, time pressure, competition and unrealistic expectations. The product approach to creativity focuses on outcomes and those things that result from the creative process.

The concept of organizational creativity²⁰ identifies a relatively unexplored area in organizational change and innovation. Organizational creativity is the creation of a valuable, useful, new product, service, idea, procedure or process by individuals working together in a complex social system. It is, therefore, the commonly accepted definition of creative behaviour, or the products of such behaviour. Innovation is then characterized to be a subset of even broader construct of organizational change. Interestingly, theories of organizational creativity²¹ have tended to include more levels of analysis than creativity theories within psychology. This may be because organizational scholars converge from the disciplines of economics, sociology, organizational behaviour and others, as well as psychology.

3.1.1. Benefits and Limitations of Intellectual Creativity

Creativity is the key to achieving a better standard of living and has an impact on our lives even when we are unaware of it²². Great creative thinkers like Albert Einstein, Martin Luther King,

¹⁹ Mark A. Runco, ‘Creativity’, *Annual Review of Psychology*, Vol. 55:1 (2004), pages. 661 – 663.

²⁰ Woodman, Sawyer and Griffin, ‘Toward A Theory of Organizational Creativity’, *Academy of Management Review*, Vol. 18:2 (1993), page. 293.

²¹ Beth A. Hennessey and Teresa A. Amabile, ‘Creativity’, *Annual Review of Psychology*, Vol. 61:1 (2010), page. 590.

²² Joyce R. Robinson, *loc. Cit.* n. 13.

Frank Lloyd Wright and Ben Franklin have created ideas and technology that have shaped our lives today. The fast pace of technological advances creates demands to adapt to the changes; one way to deal with these demands is through creativity. Being creative means being able to change with the time, being flexible, innovative, and coming up with better ways to produce and market products and services.

Creativity is one of the key factors that drive civilization forward²³ and has clear benefits for individuals and society as a whole. It is a useful and effective response to evolutionary changes²⁴. As Paulus & Nijstad (2003) described it, innovation is a vital process today and that innovation requires change. In their words, “the basis for such change comes down to the stimulating effects of new ideas....Creativity is therefore often defined as the development of original ideas that are useful or influential.” Because of its role in innovation and entrepreneurship, creativity has become one of the key concerns of businesses and organizations. Creativity drives innovation and evolution, providing original ideas and options, but it is also a reaction to the challenges of life. It sometimes helps when solving problems, but also sometimes allows problems to be avoided. It is both reactive and proactive.

Creativity is important to societal and economic well being²⁵. It is a response to the continual innovation and resourcefulness that have become necessary for economic survival²⁶. Economists have long believed that innovation is a primary source of economic development²⁷. Robert Sternberg and Todd Lubert²⁸, in their ‘investment theory’ of creativity, proposed that creative people are like successful investors in the financial marketplace, they buy low and sell high. Buying low in the realm of creativity means pursuing new or undervalued ideas that have growth potential – that may be successful for solving one’s problem. Selling high means releasing a novel idea in the market when it has gained value and not holding an idea so long that others eventually have the same idea.

²³ Beth A. Hennessey and Teresa A. Amabile, loc cit n. 21, page. 570.

²⁴ Mark A. Runco, loc. Cit. n. 19, page. 658.

²⁵ Daniel L. Rubenson and Mark A. Runco, ‘The Psychoeconomic Approach to Creativity’, *New Ideas in Psychology*, Vol. 10:2 (1992), page. 131.

²⁶ Joyce R. Robinson, loc. Cit. n. 13.

²⁷ David W. Galenson, ‘Understanding Creativity’, *Journal of Applied Economics*, Vol. XIII:2 (Nov, 2010), page. 352.

²⁸ T. Lubart and I. Getz, ‘Economic Perspectives on Creativity’, *Encyclopedia of Creativity*, Second Edition (2011), page. 429.

Rubenson and Runco described the market for creativity²⁹. Markets can provide benefits to certain behaviours, or impose cost on them. Benefits tend to reinforce and elicit certain behaviours, whereas costs inhibit them and make them less likely. An individual may derive extrinsic benefits such as recognition and financial benefits, and intrinsic benefits such as satisfaction with one's own work and a feeling of accomplishment³⁰. Also creative accomplishments can open the door to further opportunities, creating a positive effect of expected future gains.

However, there are also costs to creative work. First, there are pecuniary costs such as time and resources expended during the work. Second, there are psychic costs such as emotional wear and tear of overcoming the obstacles often encountered in creative work. There are transaction costs as well – costs that the creative person pays to a third party to facilitate the exchange with the audience.

Creativity is often associated with deviance, rebelliousness, daring and independence³¹. Creativity involves uncertainties because it is difficult to know the consequences of something truly new. Novel, useful ideas or products could bring benefits or wreak havoc. To some extent, we must trust that creations are benevolent for them to be allowed to come into existence.

Thus, creativity creates a bumper ride: the result is more unpredictable than if the situation is stable and we can count on tomorrow to be much like today was. Our optimism holds that new will be better but the law of unintended consequences says we might want to hedge our bets. Still, creativity is often considered good because it invents and perhaps controls the future.

²⁹ A. Kozbelt, R.A. Beghetto and M.A. Runco, 'Theories of Creativity', in *The Cambridge Handbook of Creativity* By Kaufman, James C and Stenberg Rober J, USA, Cambridge University Press (2010), page. 30.

³⁰ T. Lubart and I. Getz, loc. Cit. n. 28, pages. 431-432.

³¹ Seana Moran, 'The Roles of Creativity in Society', in *The Cambridge Handbook of Creativity* By Kaufman, James C and Stenberg Rober J, USA, Cambridge University Press (2010), pages. 76-77.

3.2. Theories of Intellectual Property

Intellectual property regimes seek to balance the moral and economic rights of creators and inventors with the wider interests and needs of the society³².

‘Intellectual Property’ is a generic term that probably came into regular use during the twentieth century³³. This generic label is used to refer to a group of legal regimes, each of which, to different degrees, confers rights of ownership in a particular subject matter. Copyright, patents, designs, trade marks and protection against unfair competition form the traditional core of intellectual property. The subject matter of these rights is disparate. Inventions, literary works, artistic works, designs and trade marks formed the subject matter of early intellectual property law. One striking feature of intellectual property is that, despite its early historical links to the idea of monopoly and privilege, the scope of its subject matter continues to expand. The twentieth century has seen new or existing subject matter added to present intellectual property systems, and new systems created to protect existing or new subject matter.

The term "intellectual property"³⁴ refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia. Trying to define the essence of intellectual property is difficult³⁵. Most definitions, in fact, simply list examples of intellectual property rights or the subject matter of those rights (often in inclusive form) rather than attempting to identify the essential attributes of intellectual property. One should also note that individual intellectual property statutes provide definitions of the subject matter of their application. The definitional dimensions of intellectual property are further complicated by the fact that intellectual property regimes are the products of different philosophical and legal traditions.

³² Audrey R. Chapman, ‘A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to the Benefits of Science’, available at: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/chapman.pdf>

³³ Dr. P. Drahos, The Universality of Intellectual Property Rights: Origins and Development; available at: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>

³⁴ William Fisher, ‘Theories of Intellectual Property’, available at: <http://cyber.law.harvard.edu/people/ffisher/iptheory.pdf>

³⁵ Dr. P. Drahos, loc. Cit. n. 33.

Intellectual property law³⁶ rests on an elegant model that divides the fields into three principal subfields – copyright, patent and trademark – each protecting a distinct subject matter and promoting a unique social goal. The law of copyright protects various “original forms of expression,”³⁷ including novels, movies, musical compositions, and computer software programs. Patent law protects inventions, functional products, processes and designs. Trademark law protects words and symbols that identify for consumers the goods and services manufactured or supplied by particular persons or firms. The separation among these three subfields is reinforced by the different prerequisites necessary for securing each mode of protection³⁸. Copyright protection requires works to be creative, incrementally creative and fixed in a tangible medium of expression. Patent protection extends to inventions that are new, useful and non-obvious to a person skilled in the relevant field. Trademark protection is sparked by the use of a mark in trade. Furthermore, the three subfields differ in the duration of the protection they afford.

Most of the recent theoretical writings³⁹ on intellectual property consist of struggles among and within four approaches. Utilitarian theorists⁴⁰ generally endorsed the creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation. On this view, a necessary condition for promoting the creation of valuable intellectual works is granting limited rights of ownership to authors and inventors⁴¹. Absent certain guarantees, authors and inventors might not engage in producing intellectual property. Thus control is granted to authors and inventors of intellectual property, because granting such control provides incentives necessary for social progress. Although success is not ensured by granting these rights, failure is inevitable if those who incur no investment costs can seize and reproduce the intellectual effort of others.

³⁶ G. Parchomovsky and P. Siegelman, ‘Towards an Integrated Theory of Intellectual Property’, *Virginia Law Review*, Vol. 88:2 (2002), pages. 1465-1466.

³⁷ William Fisher, loc. Cit. n. 34.

³⁸ G. Parchomovsky and P. Siegelman, loc. Cit. n. 36.

³⁹ William Fisher, loc. Cit. n. 34.

⁴⁰ Peter S. Menell, ‘Intellectual Property: General Theories’, available at: <http://encyclo.findlaw.com/1600book.pdf>

⁴¹ Stanford Encyclopedia of Philosophy, ‘Intellectual Property’, available at: <http://plato.stanford.edu/entries/intellectual-property/>

The second approach springs from the proposition⁴² that a person who labours upon resources that are either unowned or “held in common” has a natural property rights to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. These ideas originated in the writings of John Locke. Locke⁴³ described a state of nature in which goods are held in common through a grant from God. God grants this bounty to humanity for its enjoyment but these goods cannot be enjoyed in their natural state. The individual must convert these goods into private property by exerting labour upon them. This labour adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being.

Personality theorists such as Hegel⁴⁴ maintain that individuals have moral claims to their own talents, feelings, character traits, and experiences. Connection to physical objects is a necessary part of human self-realization⁴⁵ and that this connection gives rise to property rights. Property provides⁴⁶ a unique or especially suitable mechanism for self-actualization, for personal expression and for dignity and recognition as an individual person. Policymakers⁴⁷ should thus strive to create and allocate entitlements to resources in the fashion that best enables people to fulfill those needs. Property rights are important in two ways according to this view⁴⁸. First, by controlling and manipulating objects, both tangible and intangible, our will takes form in the world and we obtain a measure of freedom. Individuals may use their physical and intellectual property rights, for example, to shield their private lives from public scrutiny and to facilitate life-long project pursuit. Second, in some cases our personality becomes fused with an object—thus moral claims to control feelings, character traits, and experiences may be expanded to intangible works.

The last of the four approaches is rooted in the proposition that property rights in general – and intellectual property rights in particular – can and should be shaped so as to help foster the

⁴² William Fisher, loc. Cit. n. 34.

⁴³ Justin Hughes, ‘The Philosophy of Intellectual Property’, *Georgetown Law Journal*, Vol. 77:2 (1988), page. 297.

⁴⁴ *Stanford Encyclopedia of Philosophy*, loc. Cit. n. 41.

⁴⁵ Richard T. Ford, ‘Facts and Values in Pragmatism and Personhood’, *Standard Law Review*, Vol.48:1 (1995), page. 221.

⁴⁶ Justin Hughes, loc. Cit. n. 43, page. 330.

⁴⁷ William Fisher, loc. Cit. n. 34.

⁴⁸ *Stanford Encyclopedia of Philosophy*, loc. Cit. n. 41.

achievement of a just and attractive culture⁴⁹. Theorists who work this vein typically draw inspiration from an eclectic cluster of political and legal theorists, including Jefferson, the early Marx, the Legal Realists, and the various proponents (ancient and modern) of classical republicanism. This approach is similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of “social welfare” deployed by utilitarians. However, this fourth approach is less well established and recognized than the other three. It does not even have a commonly accepted label. Greg Alexander suggests the terms “Proprietarian” theory while William Fisher terms it as “Social Planning Theory”.

3.2.1. The importance of Intellectual Property

Ideas and knowledge are an increasingly important part of trade⁵⁰. Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Creators can be given the right to prevent others from using their inventions, designs or other creations — and to use that right to negotiate payment in return for others using them. The legal devices that provide such control are called intellectual property rights (ipr).

Intellectual property protection is critical to fostering innovation⁵¹. Without protection of ideas, businesses would not reap the full benefits of their inventions and would focus less on research and development. Similarly, artists would not be fully compensated for their creations and cultural vitality would suffer as a result. Intellectual property⁵² may be non-excludable through private means. That is, it may not be possible to exclude others from using the information without authorization. If an intellectual effort is potentially valuable but easily copied or used by

⁴⁹ William Fisher, loc. Cit. n. 34.

⁵⁰ World Trade Organization, ‘Intellectual Property: Protection and Enforcement’, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

⁵¹ Stopfakes.Gov, ‘Protecting Intellectual Property Rights’, available at: http://www.stopfakes.gov/sf_why.asp

⁵² Keith E. Maskus, ‘The Economics of Intellectual Property Rights And Globalization: Dancing the Dual Distortion’, *Intellectual Property Rights in the Global Economy* (2000).

others, there will be free riding by second comers. In turn, there may be no incentive to incur the cost of creating it. Thus, society has a dynamic interest in avoiding this outcome by providing defined property rights.

Intellectual property rights⁵³ are therefore gaining ground as the principal means of protecting ideas: they have taken command and dominate contemporary markets because they have become increasingly important in the production, distribution and consumption of goods, culture and technological know-how.

Patents provide an incentive to undertake the research effort and costs required to invent new technologies⁵⁴ and bring them to market; it serve to expand the public stock of technical knowledge; it facilitates the establishment of markets for developing and disseminating knowledge; and encourages the orderly development of follow-on innovation. Creative works provide social, cultural and economic benefits that society wishes to secure. Trademarks indicate the inherent quality or other distinguishing features of identified products, the consumer's cost of searching for the preferred quality characteristics are lowered; and also raises the average quality of products on the market and generates further product differentiation.

The current global economic crisis⁵⁵ is focusing renewed attention on the urgent need to incentivize and protect innovation to both solve the world's most challenging problems and to generate jobs and economic growth. Intellectual property is seen as a key resource for the European Union⁵⁶, and crucial to its position in the global economy. The Commission repeatedly emphasised the importance of intellectual property rights for innovation, employment, competition, and economic growth. Intellectual assets are regarded as central to success in the new 'knowledge economy'⁵⁷. Excessively weak property rights⁵⁸ would produce insufficient

⁵³ Walter Santagata, 'Intellectual Property Right Take Command', The Culture Factory (2010), page. 66

⁵⁴ Keith E. Maskus, op. cit. n. 52.

⁵⁵ Global Intellectual Property Center, 'Why Are Intellectual Property Rights Important?', available at: <http://gipcdev.blackbarn.net/sites/default/files/documents/iparguments.pdf>

⁵⁶ Catherine Seville, 'Intellectual Property', International and Comparative Law Quarterly, Vol. 60:4 (2011), page. 1039.

⁵⁷ "The knowledge based economy" is an expression coined to describe trends in advanced economies towards greater dependence on knowledge, information and high skill levels, and the increasing need for ready access to all of these by the business and public sectors; available at: <http://stats.oecd.org/glossary/detail.asp?ID=6864>

incentives to create intellectual property. The economy would suffer slower growth, more limited culture and lower product quality.

Intellectual property⁵⁹, which refers to everything from inventions to the creative arts, drives innovation and improves our lives—generating life saving devices and medicines, discovering new energy and climate-saving technologies, finding novel ways to create and deliver information, and generating consumer goods of all types. Thus, intellectual property encourages innovation and rewards entrepreneurs, drives economic growth and competitiveness, creates and supports good jobs, protects consumers and families, and helps generate breakthrough solutions to global challenges.

3.2.2. Critique of Intellectual Property

Intellectual works are not limited in their enjoyment, and thus not subject to ownership⁶⁰. Intellectual works, abstracted from the material in which they subsist, can be enjoyed by two men at the same time without diminishing the enjoyment of either. It is non-rival⁶¹ because one person's use of it does not diminish another's use. Many have argued⁶² that the non-rivalrous nature of intellectual works grounds a prima facie case against rights to restrict access.

In the context of intellectual property⁶³, the subject to be controlled is information: expression in the case of copyright, (applied) idea in the case of patents. Critically, information is both an output and an input of intellectual development. If intellectual property rules limit access to information, as a consequence of conferring control, then intellectual property rights is self-defeating. Without access to information (inputs), development (outputs) will suffer. Thus, the

⁵⁸ Keith E. Maskus, op. cit. n. 52.

⁵⁹ Global Intellectual Property Center, loc. Cit. n. 54.

⁶⁰ D. J. Weber, 'A Critique of Intellectual Property Rights' (2002), available at: <http://dane.weber.org/concept/thesis.html#owner>

⁶¹ Keith E. Maskus, op. cit. n. 52.

⁶² Stanford Encyclopedia of Philosophy, loc. Cit. n. 41.

⁶³ Wagner R. Polk, 'Information Wants to be Free: Intellectual Property and the Mythologies of Control', Columbia Law Review, Vol. 103 Issue 4 (2003), page. 998.

control-critics emphasize the existence of the “public domain” or “open” information⁶⁴ as a critical source of the informational inputs necessary for creative and technological progress.

With the sophistication of networks and growing adoption of the Internet⁶⁵ (especially broadband), the content layer has become particularly “dense” and mixed. Essentially, everything is online and some things are only online. Different media, such as video gaming, music, radio and newspapers are widely accepted as substitutes for traditional analogue media. The digital processes have not however stopped with the mere creation of parallel communication and information channels but have led (and continue to lead) to the emergence of new types of communication modes among users, new types of creativity and content production. Digital technology induced changes that go beyond the mere creation of new distribution channels that exist in parallel to “old” media.

The communications technology possessed by millions of citizens has capacities for reproduction and distribution that were once reserved to the giants of industry⁶⁶. It presents a risk, i.e. that the intellectual property rules actually hamper the ability of the internet to generate intellectual activity, encourage new methods of innovation, and distribute culture and education worldwide. The internet is the most democratic speech technology yet invented; one with the greatest potential of allowing freedom of expression to those who do not own a printing press or a television station. It allows everyone to dream of offering, to a truly global audience, access to the educational, cultural and scientific materials of the world.

According to some⁶⁷, permitting intellectual property rights are inconsistent with our commitment to freedom of thought and speech (Nimmer 1970; Hettinger 1989; Waldron 1993). Hettinger argues that intellectual property “restricts methods of acquiring ideas, it restricts the use of ideas (as do patents), and it restricts the expression of ideas (as do copyrights)”.

⁶⁴ Information that is not subject to proprietary rights, offering anyone access, anytime, for no cost or low cost.

⁶⁵ Mira Burri-Nenova, *Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, NCCR Trade Regulation, Swiss National Centre of Competence in Research (2008/ 17), pages. 17-19.

⁶⁶ James Boyle, ‘A Manifesto On WIPO And the Future of Intellectual Property’, *Duke Law and Technology Review*, No. 9 (2004); available at: <http://people.ffii.org/~rmages/swpat/manifesto-boyle-WIPO.pdf>

⁶⁷ Stanford Encyclopedia of Philosophy, loc. Cit. n. 41.

As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years⁶⁸, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. James Boyle in his “Manifesto On WIPO And the Future of Intellectual Property” has stated that the assumptions in relation to promoting intellectual property is automatically to promoting innovation and, in that process, the more rights the better are false. Excessively strong protection⁶⁹ of intellectual property rights generates distortion of insufficient access and the economy suffers from inadequate dissemination of new information.

3.3. Relationship between Intellectual Property and Human Rights

The terrain of international intellectual property law was the first to emerge⁷⁰. Initially, the subject of discrete bilateral agreements between sovereign nations, its modern form came to be established with the two great multilateral intellectual property treaties from the end of the 19th century: the Paris Convention on industrial property (1883) and the Berne Convention on literary and artistic works (1886). The international human rights regime emerged more recently, with the founding of the United Nations after World War II, and in particular, the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.

From these beginnings, the terrain occupied by both issue areas has expanded significantly in substantive reach, in prescriptive detail, and in geographic scope.

The territorial period⁷¹ of intellectual property rights ran from the end of the 18th century and during the greater half of the 19th century⁷². It is marked by bilateralism, i.e. the conclusion of

⁶⁸ James Boyle, see supra 66.

⁶⁹ Keith E. Maskus, op. cit. n. 52.

⁷⁰ L. R. Helfer and G. W. Austin, *Human Rights and Intellectual Property, Mapping the Global Interface*; (USA, Cambridge University Press, 2011), page. Xi.

⁷¹ The principle of territoriality: intellectual property rights do not extend beyond the national territory where the rights have been granted in the first place.

⁷² Williëm Grosheide, *Intellectual Property and Human Rights: A Paradox*, UK, Edward Elgar Publishing Limited (2010), page. 7.

bilateral agreements between national states. Since its inception in the late 19th century, the development of intellectual property protection rules occurred in a uni-modal international regime confined to intellectual property-specific diplomatic conferences and conventions⁷³. The focus of treaty-making during this formative period was the gradual expansion of protected subject matters and exclusive rights through periodic revisions to the Berne, Paris, Rome and other conventions. With the advent of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994, the regime entered into a bi-modal phase in which rule-making competencies were shared between two intergovernmental organizations; World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). By 2005, however the international intellectual property system had morphed again, this time into a “conglomerate regime” or a “regime complex” – a multi-issue, multi-venue, mega-regime in which governments and NGOs shift norm creating initiatives from one venue to another within the conglomerate, selecting the forum in which they are most likely to achieve their objectives.

The international human rights regime has exhibited similar expansion tendencies. Broadly speaking human rights⁷⁴ mean “the freedoms, immunities and benefits that, according to modern values, all human beings should be able to claim as a matter of right in the societies in which they live.” Essentially, they speak to the fundamental freedoms inherent to and essential for human life, dignity, development and achievement and are recognized as such and in major international legal instruments.

Although the roots of human rights law date back to the inter-war years, its full flowering first occurred in the years following World War II⁷⁵. During this gestational period, government officials, international bureaucrats, NGOs, and scholars were occupied with foundational issues. Their most pressing goal was to elaborate and codify legal norms and enhance international mechanisms for monitoring compliance by nation states. As treaties, institutions and jurisprudence evolved, the regime developed a de facto separation of human rights into

⁷³ L. R. Helfer, ‘Towards a Human Rights Framework for Intellectual Property’, 40 *HeinOnline – 40 U.C.Davis L. Rev* 975 (2006-2007), page. 980 – 981.

⁷⁴ Mary Wong, ‘Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights’, *Cardozo Arts & Entertainment Law Journal*, Vol. 26 Issue. 3 (2009), page. 806.

⁷⁵ L. R. Helfer, loc. Cit. n. 73.

categories. These categories ranged from a core set of peremptory norms for the most egregious forms of misconduct, to civil and political rights, to economic, social and cultural rights.

Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows⁷⁶.

It is something of a mystery why intellectual property and human rights have remained strangers for so long. No less than human rights laws foundational document – Universal Declaration of Human Rights (UDHR)⁷⁷ protects authors “moral and material interests” in their “scientific literary or artistic production(s)” as part of a catalogue of international liberties. A similar clause Art.15.1(c) was included in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁸. Yet for years, intellectual property remained a normative backwater in the human rights pantheon, neglected by treaty bodies, experts, and commentators while other rights emerged from the jurisprudential shadows.

Nor was human rights law’s nominal interest in intellectual property reciprocated by the intellectual property regime. No references to human rights appear in the major intellectual property treaties. The treaties do refer to the protections granted to authors and inventors as ‘right’. But the principal justification for these agreements lies not in deontological claims about inalienable liberties, but rather in economic and instrumental benefits that flow from protecting intellectual property products across national borders.

For decades the two subjects developed in virtual isolation from each other⁷⁹. But in the last few years, international standard setting activities have begun to map previously uncharted

⁷⁶ Laurence R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence’, 5 *Minn. Intell. Prop. Rev. I* (2003), page. 47, 49-50.

⁷⁷ Article 27(2) of UDHR states that “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”. United Nations website; available at: <http://www.un.org/en/documents/udhr/>

⁷⁸ Article 15.1(c) of ICESCR states that “The States Parties to the present Covenant recognize 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.” Office of the United Nations High Commissioner of Human Rights website; available at: <http://www2.ohchr.org/english/law/cescr.htm>

⁷⁹ Laurence R. Helfer, loc. Cit. n. 76.

intersections between intellectual property law on the one hand and human rights law on the other.

As a result of these developments⁸⁰, the respective terrains of both the human rights and intellectual property regimes have grown significantly and the intersections between them have expanded. There now exists a broad range of legal, social, economic, political, practical and philosophical issues that straddle both field; and are creating new and as yet unresolved, tensions between the two regimes. For eg., most countries must protect pharmaceutical patents; yet they are also required to protect the rights to life and health; copyright laws have the potential to implicate rights to freedom of expression and education; some indigenous communities invoke intellectual property to protect their cultural heritage, which is also regulated by international human rights instrument. These intersections are evolving rapidly, and thus requiring a new conceptual cartography to help map the changing landscape.

3.3.1. Intellectual Property Right as Human Right

“Intellectual property”⁸¹ is a concept that - be it in respect of its nature or for argumentative purposes – is closely associated with the general concept of property. Intellectual property, it is argued by many, is essentially the same as property in tangible assets and must therefore be secured by the same legal guarantees.

Some documents specifically mention intellectual property as a matter of protection. For example, Article 17.1 of UDHR⁸² states that “everyone has the right to own property”, and Article. 17.2 states that “no one shall be arbitrarily deprived of his property”. The implication of Article 17.2 is that states do have a right to regulate the property rights of individuals, but they must do so according to the rule of law. The rights of the Declaration are further developed in ICESCR (Article 15.1). The African Charter on Human and Peoples’ Rights in Article 14 does

⁸⁰ Helfer and Austin, op. cit. n. 70, page. Xii and 2.

⁸¹ Jakob Cornides, ‘Human Rights and Intellectual Property, Conflict or Convergence?’, Vol. 7 Issue 2, *The Journal of World Intellectual Property* (2005), page. 139.

⁸² Peter Drahos, ‘Intellectual Property and Human Rights’, *Intellectual Property Quarterly* (2006), page. 6; available at: <http://www.anu.edu.au/fellows/pdrahos/articles/pdfs/1999iPandhumanrights.pdf>

guarantee the right to property, although it then goes on to recognize that right may be encroached upon “in the interest of public need or in the general interest of the community”. The American Convention on Human Rights of 1969 in Article 21(1) recognizes a right of property, a right which no one is to be deprived of “except upon payment of just compensation”. A right to property was not included in the European Convention on Human Rights because of controversy over its drafting, but a right to peaceful enjoyment of one’s possession was included in Article 1 of the Protocol 1. That Article then goes on to recognize the right of a “State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest”.

The issue whether intellectual property rights are a form of property right recognized by international human rights instruments is a contentious one⁸³. It has been argued by some commentators that intellectual property rights do not belong to the category of fundamental human right, because human rights are of such importance that their international protection includes the right or even an obligation for international enforcement. For that reason, intellectual property rights as well as most of the other property rights, the argument continues, cannot be considered within this category. Moreover, it has been noted, there is a conceptual problem to including property rights within the category of fundamental human rights. This is because under private and public international law, states can regulate property rights, to adjust them to meet social and economic needs. However, fundamental human rights cannot be adjusted on the basis of particular needs of the states.

In addition, the statements contained in Article 27.2 of the UDHR and Article 15.1 of the ICESCR, which recognize intellectual contributions in general without making any specific reference to existing intellectual property rights, have raised two opposing views. On the one hand, it is argued that intellectual property rights are implicit in the right to the protection of moral and material interest of authors and the right of property in the UDHR and ICESCR. On the other hand, it is argued that protection of the moral and material interest of authors granted by these provisions cannot be equated with intellectual property protection. This is because human rights are deemed to be fundamental, inalienable and universal entitlements, while

⁸³ Mpazi Sinjela, *Human Rights and Intellectual Property: Tensions and Convergences*, Vol. 2, Martinus Nijhoff Publishers, Leiden/Boston (2007), page. Viii.

intellectual property rights are statutory rights granted by the state which are temporary, can be traded or revoked. Therefore, the argument concludes that intellectual property rights lack the fundamental characteristics of human rights and cannot be regarded as such.

Property is not an end in itself⁸⁴. Obviously, it must be used in a way that contributes to the realization of the higher objectives of human society: the protection of freedom, human life and human dignity.

3.3.2. Knowledge economy and globalization

In an agricultural economy, land is the key resource⁸⁵. In an industrial economy, natural resources such as coal and ore, and labour are the main resources. A knowledge economy is the one in which knowledge is the key resource: one in which the generation and exploitation of knowledge has come to play the predominant part in the creation of wealth. It is not simply about pushing back the frontiers of knowledge; it is also about the more effective use and exploitation of all types of knowledge in all manner of economic activity.

Capitalism⁸⁶ is undergoing an epochal transformation from a mass production system where the principal source of value was human labour to a new era of ‘innovation-mediated production’ where the principal component of value creation, productivity and economic growth is knowledge. The Knowledge Economy is emerging from two defining forces: the rise in knowledge intensity of economic activities, and the increasing globalization of economic affairs. The rise in knowledge intensity is being driven by the combined forces of the information technology revolution and the increasing pace of technological change. Globalization is being driven by national and international deregulation, and by the IT related communications revolution. The knowledge economy increasingly relies on the diffusion and use of knowledge, as well as its creation. Hence the success of enterprises, and of national economies as a whole,

⁸⁴ Jakob Cornides, loc. cit. n. 81.

⁸⁵ John Houghton and Peter Sheehan, *A Primer on the Knowledge Economy*, Australia, Centre for Strategic Economic Studies, Victoria University (2000), page. 1; available at: <http://www.cfses.com/documents/knowledgeeconprimer.pdf>

⁸⁶ Mihaela-Carmen Muntean, Costel Nistor and Ludmila Daniela Manea, *The Knowledge Economy*, Issue 1, Annals of Dunărea de Jos University. Fascicle I : Economics and Applied Informatics (2009), pages. 141 and 145.

will become more reliant upon their effectiveness in gathering, absorbing and utilising knowledge, as well as in its creation.

3.3.3. Access to knowledge

The right to Access to Knowledge (A2K)⁸⁷ covers a variety of human rights and even though A2K is not yet recognized as a human right, there is global consensus that it is a right that should be respected. Access to knowledge⁸⁸ is increasingly recognized as the central human development issue of our time. A2K remains a young concept, and there is currently no single authoritative explanation of what the term encompasses.

However, this theory of access to knowledge is grounded in the capabilities tradition of development economics. First articulated by Indian economist Amartya Sen in 1985, the capabilities approach defines the end goal of economic development as assuring that all human beings enjoy certain important capabilities, such as the ability to live a long and healthy life, to be literate and numerate, and to enjoy political participation and freedoms. This perspective, which became known as human development, departed from traditional development economics by advocating a focus on measures of success beyond national competitiveness and gross domestic product, to place the emphasis on human welfare and quality of life. The United Nations Development Programme has since popularized this approach, in part through the construction and annual updates of its human development index (HDI), which tracks indicators of health, education, and poverty.

Building on this tradition, the A2K perspective focuses on one particular capability: the ability to access, utilize, and contribute to knowledge. Like the many capabilities more traditionally associated with the human development paradigm, access to knowledge is considered a universal good, although different cultures and individuals may value different types of knowledge and wish to access, utilize, and contribute to it in different ways. In the terminology of moral

⁸⁷ Lida Ayoubi, 'Human Rights Perspective on access of the blind, visually impaired and other reading disabled persons to copyrighted materials', Master Thesis, Faculty of Law, Lund University, page. 41.

⁸⁸ Lea B. Shaver, 'Defining and Measuring A2K: A Blueprint for an Index to Access to Knowledge', 4:2 A Journal to Law and Policy (2008), pages. 4-6.

philosopher John Rawls, access to knowledge would be considered a primary good, valuable, or at least not harmful to everyone, regardless of their particular lifestyle preferences or moral viewpoint. The A2K perspective emphasizes access to knowledge as a human capability of central importance, because knowledge is a resource of unique importance to human welfare. The emphasis on access is equally motivated by a concern for equity: an ethical commitment to the proposition that the world's poor and vulnerable populations should not be excluded from sharing in the benefits of advances in human knowledge. The A2K perspective's concern with access is thus central to the overall efficiency of knowledge, innovation, and diffusion.

Access⁸⁹ has been defined by international human rights law to have multiple dimensions. The requisite access is satisfied only when the good is physically accessible to all (geographic availability and accommodations of disability), affordable, of acceptable quality, culturally appropriate, and adaptable to the particular needs of the community and individual. "Access" should be understood in terms of access to scientific and cultural materials, tools, and information; access to opportunities to create as well as to consume; and to share in the senses of both taking and giving. Thus, everyone is meant to enjoy access to and benefit from new technological discoveries.

3.3.4. The adverse effect of intellectual property rights on human rights

Just as raw materials and labour were the key resources in the first industrial revolution⁹⁰, intellectual property is a central asset in an information or knowledge based economy. Knowledge has been identified as a corporation's most valuable resource, the ultimate substitute for raw materials, labour, capital and inputs. In the new global economy of ideas, ownership, control, and access to creative works and scientific knowledge have considerable economic import, give rise to fierce competition over intellectual and creative works, or what one analyst describes as the 'knowledge wars'.

⁸⁹ Lea B. Shaver, 'The Right to Science and Culture', 2010: 120 Wisconsin Law Review, page. 171.

⁹⁰ Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations related to Article 15(1)(c)*, UNESCO PUBLISHING, Copyright Bulletin July-September 2001, page. 5.

People now live in an era when capitalist economies⁹¹, led by the United States, have progressively become information economies. Intellectual property regimes have moved to the centre stage of trade regulation and global markets. The old capitalism was a capitalism of goods, factories and labour. These days factories and labour, even skilled labour are in abundant supply. The new capitalism is at its core about the control of information and knowledge. It is for this reason that issues concerning the design of intellectual property rights have become so important and pressing.

Within information societies, societies where more and more individuals make their living through the production, processing and transfer of information, the paradox of property intensifies. The manner in which creative works, cultural heritage, and scientific knowledge are turned into property has significant human right implications⁹². Key international human – rights instruments have acknowledged that intellectual products have an intrinsic value as an expression of human creativity and dignity.

Keith Aolu⁹³ speaks of an “unprecedented grab” by intellectual property owners of what should be common resources, and of a “vicious circle of increasingly strong (and virtually automatic) intellectual property protection coming with some serious costs at both the local and the global levels”. Peter Drahos has warned against what he calls “Information Feudalism” and suggested that “intellectual property rights should serve the interests and needs that citizens identify, through the language of human rights, as fundamental”.

The centrality of intellectual property⁹⁴ to almost every sphere of economic life means that international treaties, national legal codes, and judicial decisions about intellectual property can have significant ramifications for the protection and promotion of human rights. This is particularly the case for the economic, social, and cultural rights enumerated in the ICESCR. Thus, as various economic actors rush to stake claims over creative works and forms of

⁹¹ Peter Drahos, loc. cit. n. 82.

⁹² Audrey R. Chapman, loc. cit. n. 87.

⁹³ Jakob Cornides, loc. cit. n. 81.

⁹⁴ Audrey R. Chapman, loc. cit. n. 87.

knowledge, human rights are being trampled. Creators risk losing control of their works. The free exchange of information so vital to scientific discovery is being constrained, and publicly held resources, including the cultural and biological heritage of groups, privatized.

In the last section of this chapter, I would now highlight the detrimental effect of intellectual property rights on human rights; namely on the right to health, the right to cultural participation and the right to development.

3.3.4.1. Right to Health

Article 25 of the UDHR⁹⁵ states explicitly that: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care”. This principle of the right to health is underpinned by Article 12 of the United Nations ICESCR⁹⁶, which states that: “(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

UN Committee on Economic, Social and Cultural Rights has also elaborated, in General Comment 14, on the concept of the highest attainable standard of health⁹⁷. General Comment 14 also makes clear that the reference to Article 12(1) of the Covenant to ‘the highest attainable standard of physical and mental health’ is not confined to the right to health care and that, on the contrary, the wording of Article 12.1 acknowledges that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. In this regard, General Comment 14 makes specific reference to the promotion of research, access to affordable treatments, in particular essential drugs; HIV/AIDS;

⁹⁵ Article 25, UDHR; available at: <http://www.un.org/en/documents/udhr/>

⁹⁶ Article 12, ICESCR; available at: <http://www2.ohchr.org/english/law/cescr.htm>

⁹⁷ Duncan Matthews, ‘Intellectual Property Rights, human rights and the right to health’, Williem Grosheide ed., *Intellectual Property and Human Rights: A Paradox*, UK, Edward Elgar Publishing Limited (2010), page. 125.

national measures for the promotion of the right to health; clarification of international obligations; and acts that constitute violations of the right to health.

The right to health includes access to appropriate health care⁹⁸. The present intellectual property system reduces the availability of pharmaceuticals in a variety of ways. By increasing development costs, intellectual property protection may hinder research and development of new drugs and technologies appropriate to smaller markets, such as the needs of developing countries.

Pharmaceutical drugs are an essential component in the treatment of many of the world's most serious health care problems⁹⁹, including treatment of HIV/AIDS. But at the heart of the recent debate over pharmaceutical drugs have been their prices. The price of many drugs is greatly increased by the intellectual property protection that is granted to their inventors, allowing pharmaceutical companies a number of years in which they have exclusive rights to market and sell their products.

In terms of international trade law this argument has become particularly acute with regard to developing countries. While most developed countries have already instituted relatively strong systems of intellectual property protection as a result of domestic policy choices, many developing countries are only now establishing systems of intellectual property protection as a result of international trade law obligations. These obligations arise from the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and bilateral and regional trade agreements, often containing stronger forms of intellectual property protection than that found in the TRIPS Agreement.

Furthermore, supported by their own governments¹⁰⁰, multinational corporations have also sought to block governments in poor countries from exercising their legal rights to undertake

⁹⁸ Audrey R. Chapman, loc. cit. n. 87.

⁹⁹ James Harrison, 'Trade Agreements, Intellectual Property and Access to Essential Medicines: What Future Role for Right to Health', *GLOBAL GOVERNANCE OF HIV/AIDS*, Aginam & Harrington, eds., Edward Elgar, Warwick School of Law Research (2010), page. 1; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493309

¹⁰⁰ Audrey R. Chapman, loc. cit. n. 87.

parallel importing of drugs from cheaper sources of origin or to engage in compulsory licensing so that their people can have access to modern essential treatments.

3.3.4.2. Right to take part in Cultural life

Article 15(1)(a) of the ICESCR recognizes “the right of everyone to take part in cultural life.” First and foremost, “the right to take part in cultural life” must be understood within the broader human rights framework¹⁰¹. In the various international human rights instruments recognizing the right to take part in cultural life, it always appears alongside two additional components. These three provisions address (a) cultural participation, (b) access to science and technology, and (c) protection of authorship. Although listed distinctly, these three are identified by the treaty as interrelated aspects of a single human right. Lea Shaver suggest that the three-part framework is best understood as recognizing a universal human right to science and culture, in which access and participation are touchstone concepts.

As used by United Nations documents, the term “science and culture” broadly includes all fields of human knowledge including technology, arts and crafts, science and social science, folk wisdom etc. The right to science and culture thus recognizes and protects the right of everyone to participate in the advancement and share in the benefits of human knowledge—both scientific and cultural.

Intellectual property rights can restrict the ability of individuals to participate in cultural life by limiting their access to cultural goods¹⁰². The participatory dimension of the right to take part in cultural life requires the ability to share and transform culture. Individuals “take part” in cultural life as both consumers and creators of culture. Exclusive rights under intellectual property can limit access to cultural goods. Cultural goods under copyright might be unavailable if the copyright owners decide not to disseminate particular works. Further, access might be limited if

¹⁰¹ Lea Shaver and Caterina Sganga, ‘The Right to Take Part in Cultural Life: On Copyright and Human Rights’, Vol. 27, *Wisconsin International Law Journal* (2009), pages. 640 – 642.

¹⁰² Molly Beutz Land, *Intellectual Property Rights and the Right to Participate in Cultural Life*, Institute for Information Law & Policy at New York Law School (2008), pages. 2-5; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475430

authors take advantage of exclusive rights to charge prices that make the works unaffordable and thus effectively unavailable. Access can also become prohibitively expensive if users are required to obtain multiple licenses in order to use a particular work. States have also implemented measures to protect intellectual property that have a significant impact on the ability of individuals to share and engage in transformative use. Although there are a variety of barriers that inhibit the dissemination of cultural goods, copyright as a barrier is likely to assume increasing importance in light of the ease with which digital content can be distributed via information and communication technologies. The overly restrictive enforcement of copyright in digital works thus poses the risk of undermining the potential of new technologies to contribute to the dissemination of cultural goods.

3.3.4.3. Right to development

The UN General Assembly adopted the Declaration on the Right to Development, by Resolution 41/128, in its 41st Session, 1986. Article 1.1¹⁰³ declares the right to development to be an inalienable human right: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

In effect, the fulfillment of the right to development¹⁰⁴ necessarily addresses the life chances of all citizens and provides for opportunities for all individuals to these fundamental human rights. As such, the Declaration also provides that the right to development necessarily supports the right to self-determination in Article 1.2.

¹⁰³ Article 1.1, Declaration on the Right to Development; available at: <http://www.un.org/documents/ga/res/41/a41r128.htm>

¹⁰⁴ Johanna Gibson, ‘Access to Medicines and the Right to (Cultural) Life’, *THE RIGHT TO LIFE AND THE VALUE OF LIFE: ORIENTATIONS IN LAW, POLITICS AND ETHICS*, Yorke, J., ed., Farnham: Ashgate Publishing (2010); available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1460825

Development is a comprehensive economic, social, cultural and political process¹⁰⁵, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom ... everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized.

In 1993, the World Conference on Human Rights¹⁰⁶ considered the right to development at length and adopted by consensus of the 171 Member States the Vienna Declaration and Programme of Action. Paragraph 10 of the Declaration “reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.” Indeed, the right to development is inextricably and necessarily implicated in the realisation of fundamental human rights, including the human right to health and freedoms and entitlements contained within that human right. This includes access to benefits of scientific research and development as part of the meaningful fulfillment of the right to development.

There is considerable tension between intellectual property rights and the right to development¹⁰⁷. Patent systems, for example, restrict access to life-saving drugs, by raising the price of those drugs. Raising drug prices globally will, all else being equal, generally adversely affect the health of the populations of poorer states. The preventable death of large numbers of a state's population lowers its stock of human capital thereby interfering in its development prospects. The argument also has a particular bite in the context of information, since information once in existence can be made available at zero or little cost.

Intellectual property rights are intended to play an important role in enhancing development¹⁰⁸. However, as discussed before, both too-strong and too-weak intellectual property rights can have a negative impact on development. The right to development thus puts an obligation on all States to foresee intellectual property protection at a level that best fits the purpose.

¹⁰⁵ UN General Assembly. Resolution 41/128 Declaration on the Right to Development. A/RES/41/128. 4 December 1986. Preamble.

¹⁰⁶ Johanna Gibso, *loc. cit.* n. 104.

¹⁰⁷ Peter Drahos, *loc. cit.* n. 82.

¹⁰⁸ Jakob Cornides, *loc. cit.* n. 81.

TREATIES OF WIPO AND ITS DEVELOPMENT AGENDA

Behind many extraordinary innovations there are extraordinary human stories. We are dependent upon innovation to move forward. Without innovation we would remain in the same condition as a human species that we are in now. Yet inventions or innovations are of relatively little value to society unless they can be used and shared.

‘Francis Gurry’¹⁰⁹

4.1. The Paris Convention

During the last century, before the existence of any international convention in the field of industrial property, it was difficult to obtain protection for industrial property rights in the various countries of the world because of the diversity of their laws¹¹⁰. Moreover, patent applications had to be made roughly at the same time in all countries in order to avoid a publication in one country destroying the novelty of the invention in the other countries. These practical problems created a strong desire to overcome such difficulties.

When the Government of the Empire of Austria-Hungary invited the other countries to participate in an international exhibition of inventions held in 1873 at Vienna, participation was hampered by the fact that many foreign visitors were not willing to exhibit their inventions at that exhibition in view of the inadequate legal protection offered to exhibited inventions. This led

¹⁰⁹ Message from the Director General Francis Gurry on World Intellectual Property Day – April 26, 2012; available at: http://www.wipo.int/ip-outreach/en/ipday/2012/dg_message.html

¹¹⁰ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, page. 241.

to two developments: firstly, a special Austrian law secured temporary protection to all foreigners participating in the exhibition for their inventions, trademarks and industrial designs. Secondly, the Congress of Vienna for Patent Reform was convened during the same year, 1873. As a follow-up to the Vienna Congress, an International Congress on Industrial Property was convened at Paris in 1878. Following that Congress, a final draft proposing an international “union” for the protection of industrial property was prepared in France and was sent by the French Government to a number of other countries, together with an invitation to attend the 1880 International Conference in Paris. That Conference adopted a draft convention which contained in essence the substantive provisions that today are still the main features of the Paris Convention. A Diplomatic Conference was convened in Paris in 1883, which ended with final approval and signature of the Paris Convention for the Protection of Industrial Property.

The Convention applies to industrial property¹¹¹ in the widest sense, including patents, marks, industrial designs, utility models (a kind of “small patent” provided for by the laws of some countries), trade names (designations under which an industrial or commercial activity is carried on), geographical indications (indications of source and appellations of origin) and the repression of unfair competition. The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.

Under the provisions on national treatment, the Convention provides that, as regards the protection of industrial property, each contracting State must grant the same protection to nationals of the other contracting States as it grants to its own nationals. According to the Paris Convention¹¹², the countries of the Union are bound to ensure that their nationals have effective protection against unfair competition. They are also bound to ensure that nationals of other countries of the Union have appropriate legal remedies to effectively repress all acts of unfair competition and infringement.

¹¹¹ Summary of the Paris Convention for the Protection of Industrial Property; available at: http://www.wipo.int/treaties/en/ip/paris/summary_paris.html

¹¹² Ituku Elangi Botoy, ‘From the Paris Convention to the Trips Agreement’, Vol. 7 Issue 1, *The Journal of World Intellectual Property* (2004), page. 119.

The Convention provides for the right of priority in the case of patents (and utility models, where they exist), marks and industrial designs¹¹³. This right means that, on the basis of a regular first application filed in one of the contracting States, the applicant may, within a certain period of time, apply for protection in any of the other contracting States; these later applications will then be regarded as if they had been filed on the same day as the first application.

Patents¹¹⁴ granted in different contracting States for the same invention are independent of each other: the granting of a patent in one contracting State does not oblige the other contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any contracting State on the ground that it has been refused or annulled or has terminated in any other contracting State. The inventor has the right to be named as such in the patent. The grant of a patent may not be refused, and a patent may not be invalidated, on the ground that the sale of the patented product, or of a product obtained by means of the patented process, is subject to restrictions or limitations resulting from the domestic law.

4.2. The Berne Convention

Copyright protection on the international level began by the middle of the nineteenth century on the basis of bilateral treaties¹¹⁵. A number of such treaties providing for mutual recognition of rights were concluded but they were neither comprehensive enough nor of a uniform pattern. The need for a uniform system led to the formulation and adoption on September 9, 1886, of “the Berne Convention for the Protection of Literary and Artistic Works”.

The seed of the *Berne Convention*¹¹⁶ was sown by the *Association littéraire internationale*, the predecessor of the present-day *Association littéraire et artistique internationale* (ALAI). Its first president was the famous French author and human rights campaigner Victor Hugo, perhaps the

¹¹³ Summary of the Paris Convention for the Protection of Industrial Property; See Supra 111.

¹¹⁴ Paris Convention for the Protection of Industrial Property; available at: http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

¹¹⁵ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, pages. 262.

¹¹⁶ Daniel J. Gervais, ‘Making copyright whole: A principal approach to Copyright exceptions and limitations’, 5: 1&2 UOLTJ 1 (2008), page. 5.

best known advocate for the Romantic Movement so closely associated with the natural rights foundation of authors' rights. Romantics saw creative works as extensions of their authors. But they also believed in the power of individuals to influence and shape events. Victor Hugo wrote "literature was the government of humankind by the human spirit." The sole preoccupation in protecting the author was and is the public interest. Hugo also wrote that if a conflict should arise between the rights of the author and those of "the human spirit," the latter should prevail. This means that copyright protection should cease to apply once the goal of maximizing welfare by ensuring that new works are created without stifling the potential for new ones. The translation of this foundational role of the public interest thus was to protect authors for the personal contribution that they make to humankind and the development of human "intelligence," while putting limits on such protection when so required in the public interest, that is, when the public interest (the sole consideration) no longer dictates protecting a writer's rights. The 1886 text of the Convention arguably met this objective.

The Berne Convention is the oldest international treaty in the field of copyright¹¹⁷. The Berne Convention has been revised several times in order to improve the international system of protection which the Convention provides. The aim of the Berne Convention, as indicated in its preamble, is "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."

Article 2¹¹⁸ contains a non-limitative (illustrative and not exhaustive) list of protected works, which include any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. The exclusive rights granted to authors under the Convention include the right of translation (Article 8), the right of reproduction in any manner or form, which includes any sound or visual recording, (Article 9), the right to perform dramatic, dramatico-musical and musical works (Article 11), the right to broadcast and communicate to the public (Article 11*bis*), the right of public recitation (Article 11*ter*), the right to make adaptations, arrangements or other alterations of a work (Article 12) and the right to make cinematographic

¹¹⁷ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, pages. 263.

¹¹⁸ Berne Convention for the Protection of Literary and Artistic Works; available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

adaptations and reproductions of a work (Article 14). Independently of the author's economic rights, Article 6*bis* provides for "moral rights", that is, the right of the author to claim authorship of his work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his honor or reputation.

As a sort of counterbalance to the minimum standards of protection there are also other provisions in the Berne Convention limiting the strict application of the rules regarding exclusive right¹¹⁹. It provides for the possibility of using protected works in particular cases without having to obtain the authorization of the owner of the copyright and without having to pay any remuneration for such use. Such exceptions, which are commonly referred to as free use of protected works, are included in Articles 9(2)¹²⁰ (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11*bis*(3) (ephemeral recordings).

4.3. Patent Law Treaty

The Patent Law Treaty (PLT) was adopted on June 1, 2000, at a Diplomatic Conference in Geneva¹²¹. The purpose of the PLT is to harmonize and streamline formal procedures in respect of national and regional patent applications and patents. Any State which is party to the Paris Convention for the Protection of Industrial Property or which is a member of WIPO may become party to the PLT.

The aim of the PLT is to harmonize and streamline formal procedures in respect of national and regional patent applications and patents, and thus to make such procedures more user-friendly¹²².

¹¹⁹ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, page. 264.

¹²⁰ Articles 9 and 10; available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350

¹²¹ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, page. 301.

¹²² Summary of the Patent Law Treaty; available at: http://www.wipo.int/treaties/en/ip/plt/summary_plt.html

With the significant exception of the filing date requirements, the PLT provides maximum sets of requirements, which the Office of a Contracting Party may apply.

The Treaty contains, in particular, provisions on the following issues: requirements for obtaining a filing date were standardized in order for applicants to minimize the loss of the filing date, which is of utmost importance in the entire procedure; the establishment of standardized Model International Forms was agreed upon, which will have to be accepted by the Offices of all Contracting Parties; number of procedures before the patent Offices were simplified, which will contribute to a reduction of costs for applicants as well as for the Offices; the PLT provides procedures for the avoidance of unintentional loss of substantive rights as a result of the failure to comply with formality requirements or time limits; and the implementation of electronic filing is facilitated, while ensuring the co-existence of both paper and electronic communications.

4.4. The WIPO Copyright Treaty

During the last decade of the twentieth century¹²³, copyright holders and managers argued that the international copyright laws had to be revised to accommodate new technologies and to incorporate a “digital agenda”.

It became clear that the most important and most urgent task was to clarify existing norms and, where necessary, create new norms to respond to the problems raised by digital technology, and particularly by the Internet. The issues addressed in this context were referred to as the “digital agenda”¹²⁴ In 1996 the WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions adopted two treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In the current thesis, I would be discussing mainly about the provisions of WCT.

¹²³ Uma Suthersanen, *The Future of Copyright Reform in Developing Countries: Teleological Interpretation, localized globalism and the “Public Interest” Rule*, UNCTAD-ICTSD Dialogue on IPRs and Sustainable Development: Intellectual Property And Sustainable Development: Revising the Agenda in a New Context, Bellagio Italy (2005).

¹²⁴ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3, page. 271.

The preamble¹²⁵ of WCT recognized that there is a need to maintain balance between rights of authors and the large public interest, particularly education, research and access to information. The provisions of the WCT relating to the “digital agenda” covered the following issues — the rights applicable to the storage and transmission of works in digital systems, the limitations on and exceptions to rights in a digital environment, technological measures of protection and rights management information.

In June 1982¹²⁶, a WIPO/UNESCO Committee of Governmental Experts clarified that storage of works in an electronic medium is reproduction. The Diplomatic Conference adopted an agreed statement which reads as follows: “The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”

It follows that Article 9(1) of the Convention is fully applicable. This means that the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction “in any manner or form” irrespective of the duration of the reproduction, must not be restricted merely because a reproduction is in digital form through storage in an electronic memory, and just because a reproduction is of a temporary nature.

A new communication right has been introduced under Article 8 of WCT, which allows the author to control whether his works can be made available over the Internet¹²⁷. The treaties require that an exclusive right be granted to control such acts of “making available,” while leaving it to individual countries to decide how to categorize this right under national law.

The copyright system has traditionally maintained a balance between protecting creators’ property rights and the exclusive right to control use of copies of their work, and the public good

¹²⁵Preamble, WIPO Copyright Treaty; available at:

http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#preamble

¹²⁶ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, op. cit. n. 3.

¹²⁷ Uma Suthersanen, loc. Cit. n. 123.

in fair access to and use of such materials¹²⁸. Copyright laws permit exceptions to copyright, in order to maintain this balance. The general ‘three-step’ test applied to the reproduction right in the Berne Convention is extended to apply to all rights in the Berne Convention and in the WCT (Article 10). This test permits countries to extend existing exceptions and limitations into the digital environment, or to add new ones, as appropriate.

There are new rights for authors to protect their technological protection measure (TPM)¹²⁹ and to prevent any modification of rights management information contained in works¹³⁰. Of particular concern with the new provision on TPM¹³¹ is that if unchecked, they may overprotect works by being employed to work against other copyright principles such as the private copying, fair use or fair dealing defences. Thus, TPMs may not only prevent copying or downloading of copyrighted works, but they can also prevent access to works which are excepted under general copyright principles.

The WCT does not reflect the complexity of creative endeavor in an online environment¹³², nor, as increasingly dynamic uses of social networking sites show, do the agreement even portend the myriad of ways users interact with and within digital space.

4.5. The WIPO Development Agenda

The WIPO Development Agenda¹³³ is part of a growing international effort that began nearly ten years ago to focus on economic and human development issues stemming from globalization, international trade, and the emergence of the global information society. The WIPO Development Agenda aims to ensure¹³⁴ that development considerations form an integral part of

¹²⁸ WIPO, ‘Intellectual Property on the Internet: A Survey of Issues’, Geneva (December, 2002), page. 41; available at: <http://www.wipo.int/copyright/en/ecommerce/pdf/survey.pdf>

¹²⁹ Article 11, WCT; available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240

¹³⁰ Article 12, WCT; available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P89_12682

¹³¹ Uma Suthersanen, loc. Cit. n. 123.

¹³² Ruth L. Okediji, ‘The Regulation of Creativity under the WIPO Internet Treaties’, 77:5 Fordham Law Review (2009), page. 2392.

¹³³ Janice T. Pilch, *The WIPO Development Agenda*, Library Copyright Alliance (September, 2009); available at: <http://www.librarycopyrightalliance.org/bm~doc/issuebriefdevagenda090109-2.pdf>

¹³⁴ Development Agenda for WIPO; available at: <http://www.wipo.int/ip-development/en/agenda/>

WIPO's work. As such, it is a cross-cutting issue which touches upon all sectors of the Organization.

The WIPO Development Agenda is a set of 45 recommendations adopted by the WIPO General Assembly¹³⁵, intended to address the interests and needs of developing and least developed countries within the international intellectual property system. It originated in an effort to ensure that intellectual property law and policy continue to serve the public good by encouraging and rewarding innovation and creativity in a balanced and effective manner in all parts of the world, and that intellectual property serve all sectors of society. The WIPO Development Agenda is viewed by many as being a major historical shift in the direction of WIPO, because it addressed the knowledge gap and the digital divide that separate wealthy nations from poor nations.

4.5.1. The history of the WIPO Development Agenda

The establishment of a WIPO Development Agenda¹³⁶ was formally approved by the 184 member states of WIPO in September 2007 after three years of discussion. The initial proposal was presented by Brazil and Argentina at the September–October 2004 session of the WIPO General Assembly. The proposal was then cosponsored by twelve other countries known as the “Friends of Development” (FOD) and strongly supported by all developing countries. A wide range of public-interest groups and other civil-society stakeholders also backed the development agenda initiative and actively lobbied government representatives to support the proposal.

The proposal that was submitted by FOD¹³⁷ called for WIPO to integrate the development dimension more explicitly and broadly into its work, in areas ranging from norm-setting and research and impact assessments, to the provision of technical assistance and technology transfer. Because one of WIPO's primary objectives is to “promote the protection of intellectual property throughout the world”, certain developing countries, civil society groups and the FOD thought that the word “promote” meant that WIPO, far from being a member driven (meaning both

¹³⁵ Janice T. Pilch, loc. cit. n. 133.

¹³⁶ M. V. Tellez and S. F. Musungu, ‘A2K at WIPO: The Development Agenda and the Proposed Broadcasting Treaty’, 2010 Zone Books, pages. 177-185.

¹³⁷ Mary Wong, loc. Cit. n. 74, page. 67.

developed and developing country member states) organization working in tandem with other UN organizations to facilitate overall UN goals of economic and social development, has in fact aligned its activities with the economic interests of many developed nations, leading to an expansion of copyright to a “maximalist” IP regime.

In the proposal put forward by FOD, it was argued¹³⁸ that “under no circumstances can human rights – which are inalienable and universal – be subordinated to intellectual property protection, as otherwise States’ ability to comply with their development and human rights commitments would be compromised”. This view was also supported by non-governmental organizations (NGOs) concerned about the effect of high intellectual property standards on health, food, education, culture and access to knowledge.

The WIPO Development Agenda initiative was groundbreaking in several ways¹³⁹. For the first time in recent history, developing countries presented an encompassing, alternative agenda to guide international policy making at WIPO. The development agenda proposal asserted that the work of WIPO as a specialized agency of the UN needed to follow the UN-wide broad development objectives such as those elaborated in the Millennium Declaration adopted in 2000 and affirming the overall goals of the UN. It sought to reestablish the role and responsibility of WIPO as a member of the UN family, which until then was seen as a technical agency that should be concerned only with uncritically promoting global intellectual property protection. On the premise that WIPO had not systematically incorporated the development dimension into all of its activities, the proponents of the development agenda called for various internal structural and substantive reforms.

4.5.2. Necessity for Development Agenda in WIPO

The ideas and proposals suggested for the WIPO Development Agenda largely stem from the international debate on the current functioning and evolution of the intellectual property system

¹³⁸ 3D, *Intellectual Property and Human Rights: Is the Distinction Clear Now?*, Policy Brief (2006); available at: http://www.3dthree.org/pdf_3D/3D_GC17_IPHR.pdf

¹³⁹ M. V. Tellez and S. F. Musungu, loc. Cit. n. 136.

in both developed and developing countries and the impact of that debate on different stakeholders. It is for this reason that the development agenda gathered significant momentum and the necessary political and technical support.

Two key questions are at the center of the current global intellectual property debate. The first concerns the costs and benefits of intellectual property protection in light of changing patterns of innovation and creative activity. The second concerns the impact of intellectual property rights on development and public-interest concerns such as access to medicines, access to knowledge, sustainable agriculture, nutrition, and the protection of biodiversity. The far-reaching impact of the intellectual property system brought to the debate voices of a wide range of nontraditional stakeholders, including farmers, students, scientists, consumers, people suffering from life-threatening diseases, software developers, and innovative and creative businesses making use of alternative models of innovation.

4.5.3. Formal Process of the WIPO Development Agenda

The September 2005 WIPO General Assembly (GA)¹⁴⁰ agreed to set up a Provisional Committee (PCDA) to consider the proposal in greater detail. At the first PCDA meeting in February 2006, the FOD highlighted the “growing importance of access to knowledge, of protecting and promoting access to the cultural heritage of peoples, countries and humanity, and the need to maintain a robust public domain through norm-setting activities and enforcement of exceptions and limitations to intellectual property rights” as one of the five core issues that WIPO should address as part of a broader Development Agenda. The PCDA’s mandate was extended by the GA for a further two meetings, with explicit admonitions to streamline the proposals. They were divided accordingly into five main “Clusters”¹⁴¹: Cluster A (Technical Assistance and Capacity Building), Cluster B (Norm-setting, Flexibilities, Public Policy and the Public Domain), Cluster C (Technology Transfer, Information and Communication Technology (ICT) and A2K), Cluster D (Assessments, Evaluation and Impact Studies), and Cluster E (Institutional Matters Including

¹⁴⁰ Mary Wong, loc. Cit. n. 74, page. 68.

¹⁴¹ The 45 Adopted Recommendations under the WIPO Development Agenda; available at: <http://www.wipo.int/ip-development/en/agenda/recommendations.html>

Mandate and Governance). There was also Cluster F, dealing with other issues related to enforcement of IPRs.

By the conclusion of the third PCDA meeting in February 2007¹⁴², negotiators had successfully agreed on 24 proposals for submission to the September 2007 GA. These included Cluster B recommendations to “[c]onsider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain”; and under Cluster C for “assisting Member States to identify practical IP-related strategies to use ICT for economic, social and cultural development”. Other proposals called for the enhancement of civil society participation in WIPO processes, and greater cooperation between WIPO and other UN organizations.

The final PCDA meeting in June 2007, at which member states agreed on a further set of 21 proposals to be presented to the GA, was hailed by the WIPO Director-General as a significant breakthrough. In addition to those development and A2K-related proposals, the final list of 45 proposals, read together, highlight the need for WIPO and its activities to be “development-oriented”, “demand-driven” and transparent. The list included proposals relating to technical assistance and capacity building projects that “promote fair balance between IP protection and the public interest”, and norm-setting activities that facilitate a “robust”, “rich and accessible” public domain and that support the UN Millennium Development Goals. In addition to yearly review and evaluation mechanisms for its development activities, WIPO is also to undertake, at Member States’ request, studies “to assess the economic, social and cultural impact of the use of intellectual property systems” and “on the protection of intellectual property, to identify the possible links and impacts between IP and development.”

4.5.4. A2K and the WIPO Development Agenda

One of the important inputs to the development agenda¹⁴³ process was the September 2004 “Geneva Declaration on the Future of WIPO.” The declaration was drafted after a meeting in

¹⁴² Mary Wong, loc. Cit. n. 74, pages. 69-70.

¹⁴³ M. V. Tellez and S. F. Musungu, loc. Cit. N. 136.

Geneva organized by the Trans Atlantic Consumer Dialogue (TACD) that brought together various stakeholders from civil society, including nongovernmental organizations, public-health activists, consumer groups, academics, scientists, Nobel Prize laureates, and businesses. The declaration argued, among other things, that the WIPO Development Agenda created the first real opportunity to debate the future of WIPO. Important collaboration established among developing countries, particularly the “Friends of Development,” and civil-society stakeholders ensured that the concerns of civil-society groups found their way into the specific proposals of the WIPO Development Agenda, such as the initiative for a treaty on A2K and commitments to increase efforts to bring civil-society groups into the WIPO discussions and to more open consultations and events in which civil-society groups could present their views to member states.

4.5.5. Still a long way to go: the WIPO Development Agenda

The International Centre for Trade and Sustainable Development organised a dialogue on “Future Directions for IP Reform”¹⁴⁴ on 04.05.2011 and a representative of the Indian mission presented an assessment of the achievements and shortcomings of the WIPO Development Agenda, and the need for WIPO reforms.

Following a presentation of a book on proposed amendments to the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, Nandini Kotthapally from the permanent mission of India said that the Development Agenda is a good example of soft law that has brought many positive changes. The Development Agenda is not a treaty, but in the short period of three years since its adoption, significant changes have occurred in WIPO.

Among the positive achievements of the Development Agenda, according to Kotthapally, is the fact that it transformed the organisation “from an exclusive rich man’s club into becoming a United Nations agency where developing countries are finding their voice.” The Development Agenda also initiated a conceptual shift, where the previous notion that “IP is good and more IP

¹⁴⁴ Reforms needed to open WIPO’s Door wider to development, Diplomat says; available at: <http://www.ip-watch.org/weblog/2011/05/11/reforms-needed-to-open-wipo%E2%80%99s-door-wider-to-development-diplomat-says/>

is even better” has been countered by the idea that IP is only good if it contributes to the overall national development. The “one-size-fits-all” approach has changed at least in conceptual terms to a tailor-made approach to specific needs of countries, she said, and there also was a shift towards the larger public objective of IP through the promotion of innovation instead of a limited focus on IP protection. All these are steps in the right direction, she said, but a lot more can be done, changes are needed and there is still a long road ahead.

NORMATIVE CONTENT OF HUMAN RIGHTS IN UNITED NATIONS AND WORLD TRADE ORGANIZATION

The Universal Declaration of Human Rights was born of an increased sense of responsibility by the international community for the promotion and protection of man's basic rights and freedoms. The world has come to a clear realization of the fact that freedom, justice and world peace can only be assured through the international promotion and protection of these rights and freedoms.

*'U Thant'*¹⁴⁵

5.1. Article 27, Universal Declaration of Human Rights

Universal Declaration of Human Rights (UDHR) - protects authors “moral and material interests” in their “scientific literary or artistic production(s).” The first paragraph of Article 27¹⁴⁶ of the UDHR states that “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.” The second paragraph of Article 27 adds a second provision: “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.”

This Article suggests that the benefits of intellectual works and products should be accessible to society¹⁴⁷. The Universal Declaration of Human Rights was intended and designed to recognize

¹⁴⁵ U Thant, the Third Secretary-General of the United Nations (1961-1971) from the UN Quotable; available at: <http://www.un.org.ua/en/information-centre/un-quotable>

¹⁴⁶ Article 27, UDHR; available at: <http://www.un.org/en/documents/udhr/>

¹⁴⁷ Uma Suthersanen, loc. Cit. n. 123.

rights “universally” held by “everyone”¹⁴⁸. The framers of UDHR were primarily concerned with ensuring universal access to the fruits of science and technology, as well as to the realm of cultural and artistic life. They observed that technological innovations did not inevitably make their way to the masses, even in the world’s most advanced economies. They realized that access to essential determinants of quality of life—from electricity to vaccines to books—was crucially shaped by law and policy. And so, from the very first draft of the proposed international bill of rights to the very last, they included language declaring access to science and culture not to be a privilege of the wealthy few, as in the past, but a right to be assured to all.

The UDHR was adopted unanimously by the General Assembly on December 10, 1948¹⁴⁹. As a General Assembly action, the UDHR is aspirational or advisory in nature. It does not legally bind member states of the UN to implement it. Over time, however, the UDHR has gradually assumed the status of customary international law. It is considered to be the single most authoritative source of human rights norms. Nevertheless, some provisions, particularly those dealing with basic civil and political rights, have gained more recognition than the provisions dealing with economic, social and cultural rights. Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community has consistently treated civil and political rights as more significant than economic, social and cultural rights.

5.2. TRIPS Agreement and Human Rights

While the link between intellectual property rights and human rights has been made, it has been discussed almost exclusively in human rights forums¹⁵⁰. In other words, there remains to date a visible imbalance insofar as the language of human rights has not penetrated intellectual property rights institutions, while the language of intellectual property rights is now regularly addressed in human rights institutions.

¹⁴⁸ Lea B. Shaver, ‘The Right to Science and Culture’, loc. Cit. n. 89.

¹⁴⁹ Audrey R. Chapman, loc. Cit. n. 32.

¹⁵⁰ Philippe Cullet, ‘Human Rights and Intellectual Property Protection in the TRIPS Era’, 29 Human Rights Quarterly (2007), pages. 413-415.

The adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization and its implications for developing countries have fundamentally changed the nature of the debate concerning intellectual property rights and human rights. Nation states¹⁵¹ linked intellectual property rights to the world trading system, creating new and robust enforcement opportunities at the international and national levels. These interrelated developments have made intellectual property rights relevant to a value laden economic, social and political issues with important human rights implications, including public health, education, food and agriculture, privacy and free expression.

At the UN level¹⁵², the Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) adopted Resolution 2000/7 on “Intellectual Property Rights and Human Rights”. The resolution, which was highly critical of intellectual property protection, stated that “actual or potential conflict exists between the implementation of the TRIPS Agreement and the economic, social and cultural rights”. The Sub-Commission specifically debated the question of the impact of intellectual property rights on the realization of human rights. It indicated in a strongly worded statement:

[T]hat 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.

The Resolution¹⁵³ called for the participation not just of governments, but also intergovernmental organizations and civil society groups, to better integrate human rights considerations into international IP policymaking. One of the specific concerns highlighted by the Sub-Commission was the fact that while the TRIPS Agreement identifies the need to balance the rights and interests of all concerned actors, it provided no guidance on how to achieve this balance.

¹⁵¹ L. R. Helfer, ‘Towards a Human Rights Framework for Intellectual Property’, loc. cit. n. 73, page. 985.

¹⁵² Philippe Cullet, ‘Human Rights and Intellectual Property Protection in the TRIPS Era’, 29 *Human Rights Quarterly* (2007), loc. Cit. n. 150.

¹⁵³ Mary Wong, ‘Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights’, loc. Cit. n. 74.

The Committee on Economic, Social and Cultural Rights (CESCR) argued that intellectual property protection must serve the objective of human well-being, which is primarily given legal expression through human rights. It intimated that intellectual property regimes should promote and protect all human rights.

5.3. Article 15, the International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force in 1976. The language in Article 15 (1) of the ICESCR¹⁵⁴ builds on but also differs from the UDHR in a number of ways. It recognizes three rights — 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.

The clauses in both UDHR and ICESCR offer protection¹⁵⁵ to creators and innovators, and the fruits of their intellectual endeavours. But they also recognize the public's right to benefit from the cultural and scientific progress that intellectual property products can engender.

From a contemporary point of view¹⁵⁶, the first general characteristic of Article 15(1) is that it recognizes a number of distinct rights: everyone's cultural rights, everyone's right to benefit from scientific and technological development and everyone's right to benefit from individual contributions they make. In other words, it provides a framework within which the development of science and culture is undertaken for the greater good of society while recognizing the need to provide specific incentives to authors for this to happen. Article 15(1) is more specifically concerned with the balance between individual and collective rights of all individuals to take part in culture and enjoy the fruits of scientific development, as well as the rights of individuals and

¹⁵⁴ Audrey R. Chapman, 'A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science', loc. Cit. n. 32.

¹⁵⁵ L. R. Helfer, 'Towards a Human Rights Framework for Intellectual Property', loc. Cit. n. 73.

¹⁵⁶ Philippe Cullet, loc. Cit. n. 150.

groups making specific contributions to the development of science or culture. In this sense, Article 15(1) focuses on society's interest in culture and the development of science while providing recognition for the rights of specific individual or collective contributions to the development of a science, arts or, culture.

5.4. Legal Interpretations by the United Nations Committee on Economic, Social and Cultural Rights (CESCR)

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) which oversees¹⁵⁷ the implementation of the Covenant decided to examine in more detail the relationship between contributions to knowledge and human rights several years ago. CESCR started by focusing on the impacts of existing intellectual property rights on the realization of human rights. This culminated in the adoption of a Statement issued in 2001. Subsequently, CESCR undertook the preparation of a politically and legally more significant document in the form of a General Comment.

5.4.1. General Comment No. 17 of CESCR

Only in the last decade have economic, social and cultural rights received sustained jurisprudential attention¹⁵⁸. In November, 2005, CESCR published the General Comment No. 17 on Article 15(1)(c) of the Covenant: 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.

¹⁵⁷ Philippe Cullet, *Human Rights and Intellectual Property Rights: Need for a new Perspective*, Switzerland, International Environment Law Research Centre (2004), page. 1; available at:

<http://www.ielrc.org/content/w0404.pdf>

¹⁵⁸ L. R. Helfer, 'Towards a Human Rights Framework for Intellectual Property', loc. Cit. n. 73.

The Committee¹⁵⁹ noted that “human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity...for the benefit of society as whole.” Because intellectual property rights are granted by the State, they may also be taken away by the State. They are temporary, not permanent; they may be revoked, licensed or assigned, and they may be traded, amended and even forfeited, commensurate with the regulation of a “social product that has social function.” By contrast, human rights are enduring, “fundamental, inalienable and universal entitlements.” These statements reflect a vision of authors’ rights as human rights that exist independently of the vagaries of state approval, recognition, or regulation.

With regard to the scope of protection afforded under Article 15(1)(c)¹⁶⁰, the Committee reads the words “any scientific, literary or artistic production” as including scientific publications and innovations, including knowledge, innovations, and practices of indigenous and local communities”. In other words, even though the formulation of Article 15(1)(c) which refers to authors would have provided the Committee scope to restrict the ambit of this provision to authors in a narrow sense, it has chosen to provide a broad interpretation. This provides scope for rewarding most if not all types of contributions to knowledge. The Committee introduces an important restriction to the scope of the notion of author under the general comment. It makes it clear that no legal entity can be deemed to be an author.

The general comment provides that the protection afforded must be effective, but that it need not reflect levels of protection found in existing intellectual property rights regimes. In other words, the only thing that the general comment seems to advocate is that the protection should be less than a monopoly right.

According to the Committee¹⁶¹, rights of authors serve two essential functions. First, they “safeguard the personal link between authors and their creations and between peoples,

¹⁵⁹ General Comment No. 17 by CESCR; available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/400/60/PDF/G0640060.pdf?OpenElement>

¹⁶⁰ Philippe Cullet, ‘Human Rights and Intellectual Property Protection in the TRIPS Era’, loc. Cit. n. 150.

¹⁶¹ L. R. Helfer, ‘Towards a Human Rights Framework for Intellectual Property’, loc. Cit. n. 73.

communities, or other groups and their collective cultural heritage.” And second, they protect “basic material interests which are necessary to enable authors to enjoy an adequate standard of living.” Thus, once a country guarantees authors and creators these two core rights – one moral, the other material- any additional intellectual property protections the country provides “must be balanced with the other rights recognized in the Covenant,” and must give “due consideration” to “the public interest in enjoying broad access to” authors productions. The ICESCR thus gives each of its member states the discretion to eschew these additional protections altogether or alternatively, to shape them to the particular economic, social and cultural conditions within their borders.

In discussing the obligations of actors other than states parties, the Committee¹⁶² declared that “as members of international organization such as WIPO, UNESCO, FAO, WHO and WTO, states parties have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant”. It also called on these organizations, as independent actors, “to intensify their efforts to take into account human rights principles and obligations in their work concerning” author’s rights.

However, the General Comment’s detailed list of violations of article 15(1)(c) by acts of commission and omission introduces a “violations approach”¹⁶³ to author’s rights that could be misinterpreted by intellectual property lawyers. Indeed, as the General Comment promotes intellectual property protection as the preferred method of protection of the “moral and material interests of authors”, there is a danger that this will lead to a system of protection that will be even stricter than the present copyright or patent systems, which currently benefit corporate actors. Furthermore, this could have adverse consequences on the realization of development commitments and human rights, including the rights to food, health, education, the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its applications.

¹⁶² Paragraphs 56 and 57, General Comment No. 17 of CESCR.

¹⁶³ 3D, *Intellectual Property and Human Rights: Is the Distinction Clear Now?*, loc. cit. no. 138.

5.4.2. General Comment No. 21 of CESCR

The Committee's first attempt to grapple with cultural rights dates back to the early 1990's¹⁶⁴. At its request a study was prepared in 1992 by one of its members, Samba Cor Konate of Senegal, who had a special interest in cultural rights. In the same year the Committee held a day of general discussion on the subject. Konate was requested by the Committee to draft recommendations on the obligations of states concerning the right to participate in cultural life that the Committee would study in 1993, but the death of Konate halted this effort of the Committee for years to come. It was only in 2001 that the Committee decided to embark on the preparation of a general comment on the right to participate in cultural life and its work was successfully completed in 2010 by the adoption of General Comment 21 on the right to participate in cultural life.

The General Comment explores what is meant by the right of everyone to 'participate' or 'take part'¹⁶⁵ in cultural life. As the CESCR recognizes, 'the term "everyone" in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

Regarding the understanding of "culture"¹⁶⁶, the Committee adopted a broad and inclusive concept, encompassing all manifestations of human existence. The expression —cultural life is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

In General Comment No. 21, the CESCR suggests that '[t]here are, among others, three interrelated main components of the right to participate or take part in cultural life: (a)

¹⁶⁴ Elsa Stamatopoulou, *Monitoring of Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Human Rights*, The Center for International Human Rights, John Jay College of Criminal Justice, Human Rights Seminar (November, 2011); available at:

http://www.jjay.cuny.edu/Monitoring_of_cultural_human_rights_CUNY_Nov_2011.pdf

¹⁶⁵ Paragraph 9, General Comment no. 21 of CESCR.

¹⁶⁶ Paragraphs 11 and 13, General Comment no. 21 of CESCR.

participation in, (b) access to, and (c) contribution to cultural life'¹⁶⁷. In relation to 'participation', the CESCR suggests that: 'Everyone...has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity'. Among other things, 'access' covers the right of everyone to 'follow a way of life associated with the use of cultural goods...and to benefit from the cultural heritage and the creation of other individuals and communities'. 'Contribution to cultural life' includes the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.

While the CESCR does not explicitly mention intellectual property in General Comment No. 21, Beutz Land¹⁶⁸ has suggested that the right to take part in cultural life ought to extend not only to the right of access to cultural goods but also to the right to share and transform cultural works. This echoes Donder's observation that: 'Culture is no longer seen as a consumer product, but as an expression of the identity of an individual or a community. Cultural rights should accordingly be considered as more than merely rights to enjoy a cultural product'.

On the issue of universality vs. particularity¹⁶⁹, the Committee recalls the well-known UN position that emerged at the 1993 World Conference on Human Rights that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

¹⁶⁷ Paragraph 15, General Comment no. 21 of CESCR.

¹⁶⁸ Tzen Wong and Graham Dutfield, *Intellectual Property and Human Development: Current Trends and Future Scenarios*, Cambridge University Press (2011), page. 285.

¹⁶⁹ Elsa Stamatopoulou, loc. cit. n. 164.

The right to impart information and cultural exchanges at national and international level is recognized in the General Comment as part of the normative content of cultural rights¹⁷⁰. To enjoy freedom of opinion, freedom of expression in the language or languages of one's choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind. This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning. The Committee rightly attributes moral and ethical meaning¹⁷¹ to cultural expressions, beyond only material and commercial ones, which has often been the case in a number of international debates.

The Committee brings out the importance of international cooperation for development for the right to take part in cultural life, especially as an obligation of those States that are in a position to provide assistance. This is especially significant given the considerable neglect of cultural rights within development cooperation.

¹⁷⁰ Paragraph 49, General Comment no. 21 of CESCR.

¹⁷¹ Elsa Stamatopoulou, loc. cit. n. 164.

BUILDING TOWARDS A HUMAN RIGHTS FRAMEWORK FOR WIPO

Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights and keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.

'Franklin D. Roosevelt'¹⁷²

6.1. Human Rights Based Approach to Intellectual Property

The relationship between human rights and intellectual property rights has been a subject of intense discussion during the last two decades among various stakeholders around the globe¹⁷³. We have already seen earlier in the thesis the immediate relevance of existing intellectual property rights to human rights and the impact that intellectual property rights may have on the realization of human rights.

The above issues have developed two schools of thought¹⁷⁴. The first school maintains that human rights and intellectual property rights are in fundamental conflict. Strong protection of intellectual property is incompatible to human rights obligations. Thus, for resolving the conflict between the two, it is suggested that human rights should always prevail over intellectual property rights. Whereas, the second school of thought asserts that human rights and intellectual property rights pursue the same aim; that is to define the appropriate scope of private monopoly

¹⁷² The Four Freedoms delivered by Franklin D. Roosevelt on January 6, 1941; available at: <http://usinfo.org/enus/government/overview/fdr.html>

¹⁷³ Mpazi Sinjela, *Human Rights and Intellectual Property: Tensions and Convergences*, op. cit. n. 83, page. Viii.

¹⁷⁴ See supra 83, page. Ix.

power to create incentives for authors and inventors, while ensuring that the public has adequate access to the fruits of their efforts. Accordingly, they argue, human rights and intellectual property are compatible. However, what is needed is to strike a balance between the provision of incentives to innovate and public access to products of that innovation.

In recent years, scholars have begun to advocate the development of a comprehensive and coherent “human rights framework”¹⁷⁵ for intellectual property law and policy. Such a framework would not only be socially beneficial, but would also enable countries to develop a balanced intellectual property system that takes into consideration their international human rights obligations.

It is argued by Audrey Chapman¹⁷⁶ in a series of articles that Article 27(2) and Article 15.1 recognize the intellectual property claims of inventors and authors, linking them to the right to participate in cultural life and to the enjoyment of the benefits of scientific progress. In her analysis, a human rights approach¹⁷⁷ to intellectual property takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. A human-rights orientation¹⁷⁸ is predicated on the centrality of protecting and nurturing human dignity and the common good. By extension, the rights of the creator or the author are conditional on contributing to the common good and welfare of the society.

In contrast to the individualism of intellectual property law, a human-rights approach also recognizes that an author, artist, inventor, or creator can be a group or a community as well as an individual. A human-rights orientation acknowledges that intellectual products have an intrinsic value as an expression of human dignity and creativity and are not first and foremost economic commodities.

¹⁷⁵ Peter K. Yu, ‘Challenges to the Development of a Human Rights Framework for Intellectual Property’; available at: <http://www.peteryu.com/torremans.pdf>

¹⁷⁶ Williem Grosheide, *Intellectual Property and Human Rights: A Paradox*, op. cit. n. 72, page. 23.

¹⁷⁷ Audrey R. Chapman, ‘A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to the Benefits of Science’, loc. Cit. n. 32.

¹⁷⁸ Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations related to Article 15(1)(c)*, loc. cit. n. 90, page. 14.

To be consistent with the norms in the ICESCR, a human rights approach differs in a number of regards from the standards set by intellectual property law. In brief, it requires that the type and level of protection afforded under any intellectual property regime directly facilitate and promote cultural participation and scientific progress¹⁷⁹ and do so in a manner that will broadly benefit members of society on an individual, as well as collective level; and assumes that both individuals and communities will have easy access. Human rights implementation should be measured particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and vulnerable. The human rights principle that every citizen shall have the right and opportunity to take part in the conduct of public affairs mandates a right of choice for members of society to be able to discuss, assess, and have a role¹⁸⁰ in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the development of intellectual property regimes. And finally, a human rights approach entails a right of protection from possible harmful effects of scientific and technological development, again on both individual and collective levels. These considerations go well beyond a simple economic calculus.

Taking account of the two opposing views (conflict approach and a co-existence approach), Professor Helfer states that the tension between them is not likely to be resolved at any time soon¹⁸¹. On the contrary, since in his view this tension is likely to have at least the following four distinct consequences for the international legal system: an increased incentive to develop soft law human rights norms (a), a paradigm shift granting to users a status conceptually equal to that of owners and producers of intellectual property (b), the articulation of the ‘maximum standards’ of intellectual property protection (c), an articulation which will depend on how human rights norms are received in established intellectual property lawmaking venues such as the WIPO and the WTO (d). From this Helfer concludes¹⁸² as follows: ‘Although the debates within the WTO and WIPO will surely be contentious, trade and intellectual property negotiators should embrace

¹⁷⁹ Audrey R. Chapman, ‘A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to the Benefits of Science’, loc. Cit. n. 32.

¹⁸⁰ Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations related to Article 15(1)(c)*, loc. cit. n. 90, page. 15.

¹⁸¹ Williem Grosheide, *Intellectual Property and Human Rights: A Paradox*, op. cit. n. 72, pages. 24-25.

¹⁸² Laurence R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence’, loc. cit. n. 76.

rather than resist opening up these organizations to human rights influences. Allowing greater opportunities for airing a human rights perspective on intellectual property issues will strengthen the legitimacy of these organizations and promote the integration of an increasingly dense thicket of legal rules governing the same broad subject matter.’ In a later publication Helfer offers to that aim a – what he calls – human rights framework for intellectual property¹⁸³. Such a framework in his view can be built upon the human rights approach of intellectual property rights. Professor Helfer suggest three possible versions of a human rights framework for intellectual property¹⁸⁴, viz.: (1) using human rights to justify expanding intellectual property rights (2) using human rights to justify strengthening limitations and exceptions to intellectual property rights (from permissive to mandatory); or (3) focusing on defining minimum outcomes defined by human rights-based needs and then either adopting, revising or rejecting intellectual property rights (as appropriate) to achieve those outcomes. It remains to be seen which of Professor Helfer’s three possible versions of a human rights framework for intellectual property will be the one that eventually develops.

Professor Peter Yu also takes as his starting point¹⁸⁵ the juxtaposition of the two views on the relationship between intellectual property law and human rights law, and aim to introduce a human rights framework for intellectual property rights. According to Yu, to the extent that human rights and intellectual property rights are in conflict, the framework is urgent and necessary. Yu adds that conflicts can possibly be avoided by taking a non-uniform view of intellectual property rights. In doing so, first, one should accept that not all intellectual property rights can be considered as human rights. For example, trademarks, works made for hire, employee inventions, neighbouring rights, and database rights should not be acknowledged as human rights. The same is true for intellectual property rights held by corporate identities. Secondly, one should make a distinction between – what Yu calls – the human rights attributes and the non-human rights attributes of intellectual property rights. Only *some* attributes of

¹⁸³ L. R. Helfer, ‘Towards a Human Rights Framework for Intellectual Property’, 40 *HeinOnline – 40 U.C.Davis L. Rev*975 (2006-2007), loc.cit. n. 73.

¹⁸⁴ Mary Wong, ‘Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights’, loc. cit. n. 74, page. 829.

¹⁸⁵ Williem Grosheide, *Intellectual Property and Human Rights: A Paradox*, op. cit. n. 72, pages. 25-26.

intellectual property rights¹⁸⁶ can be considered human rights, international human rights treaties do not protect the remaining non-human-rights attributes of intellectual property rights or those forms of intellectual property rights that have no human rights basis. As the CESCR reminded governments in its Statement on Intellectual Property Rights and Human Rights, they have a duty to take into consideration their human rights obligations in the implementation of intellectual property policies and agreements and to subordinate these policies and agreements to human rights protection in the event of a conflict between the two.

While the resolution technique advanced by Professor Yu concededly does not resolve the dilemma, the main attraction of the technique is not to resolve all of the conflicts between human rights and intellectual property rights¹⁸⁷. Rather, this technique aims to ensure that the human rights attributes of intellectual property rights receive their well-deserved recognition. In doing so, States will be able to fully discharge their human rights obligations concerning the right to the protection of interests in intellectual creations, while individual authors and inventors will be able to obtain protection the human rights treaties afforded to them. Moreover, once States identify the human rights attributes of intellectual property rights, they no longer need to inquire whether human rights and intellectual property rights coexist or conflict with one another. Instead, they explore whether the nonhuman- rights aspects of intellectual property protection coexist or conflict with human rights — a question that is more consistent with their human rights commitments.

6.2. Integration of Human Rights into Intellectual Property Policies

The Sub-Commission Resolution on “Intellectual Property Rights and Human Rights”¹⁸⁸ made a number of specific recommendations that are important to implement which pertain to

¹⁸⁶ Peter K. Yu, ‘Challenges to the Development of a Human Rights Framework for Intellectual Property’, loc. cit. n. 175.

¹⁸⁷ Peter K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’, Vol. 40 Issue. 3, U.C. Davis Law Review (2007), page. 1093.

¹⁸⁸ Sub-Commission on Human Rights Resolution 2000/7, ‘Intellectual Property Rights and Human Rights’; available at:

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>

Governments and United Nations Bodies. One of them included the request to intergovernmental organizations to integrate into their policies, practices and operations, provisions, in accordance with international human rights obligations and principles.

In the *Delivering as One*¹⁸⁹ report from the high-level panel on UN system-wide coherence, this is said even stronger: “All UN agencies and programmes must further support the development of policies, directives and guidelines to integrate human rights in all aspects of the UN’s work”; and in Vienna Declaration And Programme Of Action¹⁹⁰, the World Conference on Human Rights recommended “increased coordination in support of human rights and fundamental freedoms within the United Nations system” and also “assess the impact of their strategies and policies on the enjoyment of all human rights”.

It seems obvious that the international intellectual property world needs to pay greater attention to human rights norms and values¹⁹¹. Without having to equate intellectual property rights with human rights, it is possible to adopt a policy approach within the intellectual property sphere that is at least oriented toward human rights concerns. Taking a more human rights-oriented approach could also minimize potential distractions and conflicts created by differing national and regional jurisprudential approaches toward intellectual property, in that it will facilitate more flexible implementations of international standards.

6.3. How far are the activities of WIPO oriented towards human rights approach?

WIPO remains the main international intergovernmental organization responsible for the administration and negotiation of new intellectual property treaties and the provision of intellectual property. Moreover, as a specialized agency of UN, WIPO is subject to the UN Charter

¹⁸⁹ Report of the Secretary-General’s High-Level Panel, ‘Delivering as One’; available at: <http://www.un.org/events/panel/resources/pdfs/HLP-SWC-FinalReport.pdf>

¹⁹⁰ Vienna Declaration And Programme Of Action; available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>

¹⁹¹ Mary Wong, ‘Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights’, loc. cit. n. 74, page. 840.

which specifies, *inter alia*, that promotion and protection of human rights is one of the purposes of the UN.

We have already looked at the human rights framework for intellectual property and the recommendations on integrating human rights into intellectual property policies in the previous sections of this chapter. These are the starting points for building towards the human rights based approach for WIPO. Thus, in this section of the chapter, I would evaluate as to how far the activities of WIPO has integrated human rights in its work. In order to do that, I would first analyse the human rights awareness in the workings of WIPO, i.e. as to whether WIPO has integrated human rights in its work, either through substantive human rights provisions or by human rights principles. Secondly, an evaluation of its work with other UN organizations would also be examined to oversee its actual cooperation as well as reference to human rights norms by these organizations in response to the expanding intellectual rights regime. Lastly, the current status of the WIPO Development Agenda would be analysed to assess how much in respect of accessibility and inclusion of civil society have been achieved by the Agenda. The latter sections of the chapter would then contribute towards the development of such human rights framework by analyzing the roles of NGO and the WIPO Development Agenda.

6.3.1. Human Rights Awareness within WIPO

Human rights are not frequently referred to by WIPO. This can be illustrated by the 2009 Conference on Intellectual Property and Public Policy Issues¹⁹², which did not apply a human rights terminology.

The Committee on Development and Intellectual Property (CDIP)¹⁹³ has not been provided with any human rights basis for its work, even if the context of development and intellectual property would be relevant in order to introduce some form of human rights mainstreaming within WIPO.

¹⁹² World Intellectual Property Organization , *Conference on Intellectual Property and Public Policy Issues*, Geneva (2009c); available at http://www.wipo.int/meetings/en/2009/ip_gc_ge/program.html

¹⁹³ World Intellectual Property Organization , *WIPO General Report of the Forty Third Series of Meetings of the WIPO General Assembly* (2007a), paragraph 334; available at: http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf

Human rights have been visualized by WIPO in three ways¹⁹⁴ First, a seminar and subsequent report on intellectual property and human rights was held to commemorate the fiftieth anniversary of the Universal Declaration of Human Rights, held in cooperation with the UN Office of the High Commissioner for Human Rights. WIPO's Deputy Director General Robert Castello's only substantive remark was that the “character of intellectual property rights as human rights, as well as the relationship between intellectual property and other human rights, have not been fully explored”¹⁹⁵.

Second, a short notice is posted on the WIPO homepage. The substantive part of the notice says that: “the relationship between intellectual property systems and human rights is complex¹⁹⁶ and calls for a full understanding of the nature and purposes of the intellectual property system. It is suggested by some that conflicts may exist between the respect for and implementation of current intellectual property systems and other human rights, such as the rights to adequate health care, to education, to share in the benefits of scientific progress, and to participation in cultural life”.

Third, in a reply to the UN's Secretary-General¹⁹⁷, the WIPO secretariat said that “exercise of the latter rights [ICESCR Article 15.1(c)] may, in certain circumstances, appear to hinder or frustrate realization of the former rights [ICESCR Article 15.1(a)]”. This wording is similar to the latter part of the information on WIPO's homepage.

Thus, WIPO does recognize the potential conflicts that exist between the social and cultural human rights and the present intellectual property system.

¹⁹⁴ Hans Morten Haugen, ‘Access Versus Incentives: Analysing Intellectual Property Policies in Four UN Specialized Agencies by Emphasizing the Role of the World Intellectual Property Organization and Human Rights’, *The Journal of World Intellectual Property*, Vol. 13 Issue 6 (2010), page. 701.

¹⁹⁵ Castello, R. (1999) ‘Opening Address’, in WIPO, *Intellectual Property and Human Rights, Proceedings of a Panel to Commemorate the 50th Anniversary of the Proclamation of the Universal Declaration of Human Rights*, WIPO Publication No. 762(E), pages. 1–3.

¹⁹⁶ World Intellectual Property Organization, *Human Rights and Intellectual Property: An Overview*; available at: <http://www.wipo.int/tk/en/hr/>

¹⁹⁷ Hans Morten Haugen, loc. cit. n. 194, page. 702.

It is fair to say that WIPO has not made use of the opportunities that have arisen with the establishments of the CDIP to integrate human rights in its work, either through substantive human rights provisions or by human rights principles. Moreover, the WIPO secretariat has not sought to disseminate the important clarification made in General Comment No. 17 on the requirements for *when* intellectual property rights can be termed human rights.

Nothing in the WIPO mandate prevents WIPO from emphasizing human rights to a greater extent. WIPO's mandate, as identified in the 1974 UN Agreement, does establish a basis for a clearer human rights focus in several of WIPO's activities. Expectations for more explicit human rights references by WIPO are also justified by the simple fact that human rights and intellectual property rights have no other option than “learning to live together”¹⁹⁸, but with an understanding that intellectual property rights are merely tools for the higher purpose of human rights fulfillment.

6.3.2. Cooperation of WIPO with other UN Specialized Agencies

Article 2 of the Agreement between the United Nations¹⁹⁹ and the World Intellectual Property Organization (1974) states that “the Organization agrees to co-operate in whatever measures may be necessary to make co-ordination of the policies and activities of the United Nations and those of the organs and agencies within the United Nations system fully effective”.

Initially, it must be observed that in accordance with article 58 of the UN Charter²⁰⁰, there shall be a “co-ordination of the policies and activities of the specialized agencies”. This provision is referred to in article 5 of the 1974 UN Agreement. Hence, being a specialized agency²⁰¹, WIPO would actually not be complying with the UN Charter if it were to isolate itself from the other UN specialized agencies.

¹⁹⁸ Gervais, D. J, *Intellectual Property and Human Rights: Learning to Live Together*; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283985

¹⁹⁹ Article 2, Agreement between the United Nations and the World Intellectual Property Organization; available at: <http://www.wipo.int/treaties/en/agreement/index.html>

²⁰⁰ Article 58 of the Charter of the UN reads: “The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies”.

²⁰¹ Hans Morten Haugen, loc. cit. n. 194, page. 702.

Cooperation with other international organizations is provided for in Articles 3²⁰² and 13²⁰³ of the 1967 WIPO Convention. Actually, these provide for three levels of cooperation with international organizations²⁰⁴. First, article 3(i) applies the terms “collaboration with” without any explicit formalities. Second, article 13(1) applies the terms “establish working relations and cooperate with”. Third, article 13(2) provides for “arrangements for consultation and cooperation” with international organizations. Both of the two latter make clear that such cooperation has to be approved by WIPO's Coordination Committee, while “collaboration”, in accordance with article 3(i), does not have any such formalities. Hence, there are different forms of cooperation with other organizations.

The cooperation as specified in Article 1 of the 1974 UN Agreement include the United Nations Conference on Trade and Development, the United Nations Development Programme, the United Nations Industrial Development Organization, as well as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and “other agencies within the United Nations system”. Hence, neither World Health Organization (WHO) nor the Food and Agricultural Organization (FAO) are explicitly included. One reason for this is that at the time of the 1974 UN Agreement, intellectual property rights did not have any direct relationship to food, as patents on biological material were not granted before the 1980s.

In the latter part of this section, I would now review the actual cooperation of WIPO with two organizations, namely WHO and UNESCO, and as to how far these organizations are addressing the issue of human rights in their work.

6.3.2.1. World Health Organization (WHO)

There is no formal agreement between WIPO and WHO approved by the WIPO Coordination Committee. When the 2008 World Health Assembly (WHA) received and finalized the “Global

²⁰² Article 3 of the Convention Establishing the World Intellectual Property Organization, reads “The Objectives of the Organization are: (i) to promote the protection of intellectual property throughout the world through cooperation among States, and where appropriate, in collaboration with any other international organization.....”.

²⁰³ Article 13 of the WIPO Convention reads: “The Organization shall, where appropriate, establish working relations and cooperate with other intergovernmental organizations. Any general agreement to such effect entered into with such organizations shall be concluded by the Director General after approval by the Coordination Committee.....”

²⁰⁴ Hans Morten Haugen, loc. cit. n. 194, page. 703.

Strategy on Public Health, Innovation and Intellectual Property” (Global Strategy), the WHA²⁰⁵ said that in the implementation of the Global Strategy, the WHO had to “coordinate with other relevant international intergovernmental organizations, including WIPO, WTO and UNCTAD, to effectively implement the global strategy and plan of action”. WIPO is mentioned explicitly in 18 different action points (elements) in the Global Strategy. This strong emphasis on WHO's cooperation with WIPO is very recent.

The first operative article of the WHO Constitution²⁰⁶ says that “the objective of WHO shall be the attainment by all peoples of the highest possible level of health”. Among the functions of WHO, Article 2(g) says that WHO shall “stimulate and advance work to eradicate epidemic, endemic and other diseases”. To make appropriate medicines effective in order to eradicate diseases, these medicines have to be produced, tested and made accessible.

Moreover, WHO's most recent effort to explore the link between intellectual property rights²⁰⁷ and public health officially began in 2003 with a short report by the Secretariat to the fifty-sixth WHA. The report suggested that "rigorous analysis of the scientific, legal, economic, ethical, and human rights aspects of intellectual property as it relates to public health, and careful monitoring of this relationship in different national contexts could prove invaluable for national and international policies and practices that ensure both innovation to respond to unmet needs and access to existing technologies for health." The global strategy proposed²⁰⁸ that WHO should play a strategic and central role in the relationship between public health and innovation and intellectual property within its mandate. Member States endorsed by consensus a strategy designed to promote new thinking in innovation and access to medicines, which would encourage needs-driven research rather than purely market-driven research to target diseases which disproportionately affect people in developing countries.

²⁰⁵ Paragraph 4(5), Global strategy and plan of action on public health, innovation and intellectual property; available at: http://apps.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf

²⁰⁶ Article 1, WHO Constitution; available at: <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>

²⁰⁷ Jack Lerner, ‘Intellectual Property and Development at WHO and WIPO’, American Journal of Law and Medicine, Vol. 34 (2008), page. 261.

²⁰⁸ Public health, innovation, intellectual property and trade: Global strategy and plan of action on public health, innovation and intellectual property; available at: http://www.who.int/phi/implementation/phi_globstat_action/en/index.html

Human rights were addressed in resolutions adopted by WHA from the late 1980s onwards, in the context of how HIV–positive persons should be treated, *not* in the context of understanding access to medicines as a human right²⁰⁹. The issue of access to drugs as a human rights issue has become somewhat more explicit in the subsequent resolutions, but a stronger emphasis on human rights in WHO in the context of access to medicines is not without objectors. The finalization of the Global Strategy resulted in deletion of paragraphs of the original report which referred to the human right to the highest attainable standard of health, as recognized in Article 12 of the ICESCR, but paragraph 16, which reiterates preambular paragraph 2 of the WHO Constitution²¹⁰, confirming health as one “of the fundamental rights of every human being”, was kept. The fact that the WHA could only agree on a formulation identical to a provision agreed upon in 1945 can, on the one hand, be said not to represent any achievement at all. On the other hand, it is important to acknowledge that the WHO Constitution is indeed a document containing very ambitious formulations.

It is reasonable to state that WHO is a part of UN-wide trend to emphasize human rights²¹¹, but WHO's resolutions and policy document do not contain particularly explicit references to human rights treaties or provisions of those treaties. A recent study comparing human rights approaches of various UN bodies found, however, that in WHO “rhetoric is giving way to a more concrete engagement with human rights only slowly”.

6.3.2.2. United Nations Educational, Scientific and Cultural Organization (UNESCO)

There is a WIPO–UNESCO cooperation agreement²¹², as revised in 1974. However, the WIPO homepage does not refer to relevant UNESCO treaties under “other treaties”, while treaties administered by seven other international organizations are listed²¹³. The Universal Copyrights

²⁰⁹ Hans Morten Haugen, loc. cit. n. 194.

²¹⁰ Preambular paragraph 2 of the WHO Constitution reads: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.

²¹¹ See supra n. 194.

²¹² Paragraph 6.8 (page 39), United Nations Educational, Scientific and Cultural Organization (UNESCO) (1973) *Resolutions and Decisions Adopted by the Executive Board at its 93rd Session*; available at: <http://unesdoc.unesco.org/images/0000/000057/005730e.pdf>

²¹³ Hans Morten Haugen, loc. cit. n. 194.

Convention as revised in 1971 is *not* listed on WIPO's homepage, even if the treaty text mentions WIPO both in the context of “study” (article XI.1(c)) and in the context of “attend meetings”(article XI.4), which WIPO actually does. Finally, there are no references to UNESCO or the UNESCO-administered treaties in those copyright treaties adopted under the auspices of WIPO in the 1990s: the 1996 Performances and Phonograms Treaty and the 1996 Copyright Treaty, and UNESCO is also sidelined in the negotiations on a treaty on the protection of audiovisual performances.

Hence, there is a tendency toward less cooperation between UNESCO and WIPO. The reasons for this are three: first, the entry into force of TRIPS, enhancing the cooperation between WIPO and the WTO; second, the extension of patent protection to biotechnologies in the realm of food plants and medicines; third, UNESCO's own decreased emphasis on copyright in its overall work, while emphasizing the strengthening of protection of cultural expressions that do not enjoy intellectual rights protection, but which nevertheless are found by WIPO to be “cognate policy areas” to intellectual property protection. It has not yet been possible to institutionalize cooperation between UNESCO and WIPO²¹⁴. Today, exchanges between WIPO'S Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Human Rights (ICG) and UNESCO are limited to sending observers to each other's conferences. This fragmentation is particularly deplorable since intellectual property rights are key to “sustaining those involved in cultural creativity”.

UNESCO is the prime international intergovernmental organization dealing with culture. UNESCO was set up in November 1945 as an autonomous UN organization or specialized agency under Article 57 of the UN Charter. Its main purpose is described in Article 1²¹⁵ of its Constitution: ‘...to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms...without distinction of race, sex, language or religion...’ One of the tasks of UNESCO is the promotion and protection of human

²¹⁴ Christopher B. Graber and Martin A. Girsberger, *Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that include Cultural Diversity*; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1606864

²¹⁵ Article 1 UNESCO Constitution; available at: http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html

rights within its sphere of competence²¹⁶. These rights include the right to education, the right to participate freely in cultural life and share in scientific advancement, and the right to freedom of opinion and expression, including the right to seek, receive and impart information.

Article 1.2(a) (functions) of the UNESCO Constitution says that UNESCO shall: “recommend such international agreements as may be necessary to promote the free flow of ideas by word and image”. This must be considered to be a strong emphasis on the access dimension²¹⁷. Nothing is said in the UNESCO Constitution on intellectual property rights, but article 1.2(c) is on encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention) would now be emphasized to highlight the promotion of human rights in its work.

The Cultural Diversity Convention recognizes²¹⁸ cultural diversity as a defining characteristic of humanity that nurtures human capacities and values and is essential to the full realization of human rights. The link between cultural diversity and human rights is clearly established in the Cultural Diversity Convention²¹⁹. In Article 2(1) Cultural Diversity Convention, it is stated that “...cultural diversity can be protected and promoted only if human rights and fundamental freedoms...are guaranteed.” This provision mainly confirms the importance of respect for human rights for the promotion and protection of cultural diversity. Furthermore, paragraph 5 of the preamble celebrates ‘the importance of cultural diversity for the full realization of human rights

²¹⁶ Yvonne Donders, *The Cultural Diversity Convention and Cultural Rights: Included or Ignored?* (2012); available at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2015258&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2015258

²¹⁷ Hans Morten Haugen, loc. cit. n. 194.

²¹⁸ Yvonne Donders, *Do Cultural Diversity and Human Rights make a good match?* International Social Science Journal (2010); available at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715050&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715050

²¹⁹ Yvonne Donders, *The Cultural Diversity Convention and Cultural Rights: Included or Ignored?*, loc. cit. n. 216

and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments'. These two quotations²²⁰ indicate an interpretation of the Convention in the sense of a *contribution*, rather than a limitation of freedom of expression and information.

The Convention reaffirms states' "sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions" within its territory²²¹. A series of "guiding principles" informs how states are to achieve this objective. These principles include refraining from actions that "hinder respect for human rights," such as "freedom of expression, information and communication," and a "principle of openness and balance," which seeks an accommodation between protecting local culture and "promoting, in an appropriate manner, openness to other cultures of the world."

The Cultural Diversity Convention does not address intellectual property in any of the substantive articles, but intellectual property is referred to in the preambular paragraphs²²². First, preambular paragraph 17 reads: "*Recognizing* the importance of intellectual property rights in sustaining those involved in cultural creativity". Moreover, preambular paragraph 8 reads: "*Recognizing* the importance of traditional knowledge as a source of intangible and material wealth, ... as well as the need for its adequate protection and promotion". The Cultural Diversity Convention cannot be said to affect the functioning of the intellectual property regime, and should not negatively affect the incentives for the creation of new knowledge, arts and expressions. Thus, there is an emphasis on the compliance with both intellectual property rights and human rights, and on cultural preservation in the Cultural Diversity Convention.

6.3.3. Implementation of the Development Agenda of WIPO

Intellectual Property for Development is an emphatic articulation of the notion that intellectual property is not an end in itself but rather is a tool that could power countries' growth and

²²⁰ Christoph Beat Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?', *Journal of International Economic Law*, Vol. 9(3) (2006), page. 560.

²²¹ L. R. Helfer, 'Towards a Human Rights Framework for Intellectual Property', loc. cit. n. 73, page. 1003.

²²² Hans Morten Haugen, loc. cit. n. 194.

development²²³. WIPO, as the lead United Nations agency mandated to promote the protection of intellectual property through cooperation among states and in collaboration with other international organizations, is committed to ensuring that all countries are able to benefit from the use of intellectual property for economic, social and cultural development. Implied in this are the notions of balance, accessibility and reward for creativity and innovation. Intellectual Property for Development is a goal that drives not only WIPO's development-specific programs, but all of its substantive areas of work, based on principles made clear under the WIPO Development Agenda.

In the "Director General's Report On Implementation Of The Development Agenda" (Ninth Session Geneva, May 7 to 11, 2012) by the Committee on Development and Intellectual Property (CDIP)²²⁴, it was stated that Development Agenda principles continue to guide WIPO technical assistance activities aimed at greater empowerment of developing countries and least developed countries (LDCs) in using intellectual property for development. Generally, this objective is being achieved by assisting countries in developing: country-specific intellectual property strategies and policies aligned with national development goals; balanced and tailored intellectual property regulatory frameworks that promote creativity and innovation; intellectual property institutional and technical infrastructure to support creators and innovators; and enhanced human and professional capacity to support countries in benefiting from the knowledge economy through the use of intellectual property. The national intellectual property strategy and Country Plan approaches are aimed at ensuring that the Organization's technical assistance is development-oriented, demand-driven and transparent, based on country needs and level of development, and country-specific with respect to design, delivery and evaluation. Both are interlinked, as one informs the other.

²²³ WIPO, 'Intellectual Property for Development'; available at: <http://www.wipo.int/ip-development/en/>

²²⁴ Committee on Development and Intellectual Property, 'Director General's Report On Implementation Of The Development Agenda', (Ninth Session Geneva, May 7 to 11, 2012); available at: http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_summary.pdf

Furthermore, in line with a number of Development Agenda recommendations, notably recommendations 30²²⁵ and 42²²⁶, WIPO continued throughout 2011, to strengthen its cooperation with other inter-governmental organizations, particularly in the United Nations system. The focus of this collaboration has primarily been the interface between intellectual property and economic, social and cultural development. A number of joint activities were organized as part of WIPO's trilateral cooperation with WHO and WTO for the implementation of the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property. On public health issues WIPO contributed to the UN inter-agency process on non-communicable diseases, led by the WHO.

The WIPO Re:Search project also benefits greatly through its partnership with the WHO. WIPO Re:Search provides access to intellectual property²²⁷ for pharmaceutical compounds, technologies, and – most importantly – know-how and data available for research and development for neglected tropical diseases, tuberculosis, and malaria. By providing a searchable, public database of available intellectual property assets and resources, WIPO Re:Search facilitates new partnerships to support organizations that conduct research on treatments for neglected tropical diseases, ultimately improving the lives of those most in need.

The Member States have approved 23 projects addressing 29 Development Agenda recommendations²²⁸. Under the project, “Specialized Databases’ Access and Support”, WIPO’s Access to Research for Development and Innovation (ARDI) program was included as the fourth program in the Research4Life (R4L) partnership. The R4L partnership provides researchers in developing countries with free or low cost online access to vital scientific research. ARDI program²²⁹ is coordinated by the WIPO together with its partners in the publishing industry with the aim to increase the availability of scientific and technical information in developing

²²⁵ Development Agenda Recommendation 30 reads: “WIPO should cooperate with other IGOs to provide to developing countries, including LDCs, upon request, advice on how to gain access to and make use of intellectual property-related information on technology, particularly in areas of special interest to the requesting parties.”

²²⁶ Development Agenda Recommendation 42 reads: “To enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.”

²²⁷ WIPO Re: Search: Sharing Innovation in the Fight Against Neglected Tropical Diseases; available at: <http://www.wipo.int/research/en/>

²²⁸ Committee on Development and Intellectual Property, loc. cit. n. 224.

²²⁹ WIPO ARDI: Research for Innovation; available at: <http://www.wipo.int/ardi/en/>

countries. By improving access to scholarly literature from diverse fields of science and technology, the ARDI program seeks to: reinforce the capacity of developing countries to participate in the global knowledge economy; and support researchers in developing countries in creating and developing new solutions to technical challenges faced on a local and global level. Within ARDI, agreement was also reached with partners in the publishing community to extend the number of countries eligible for free access to scientific and technical journals from 49 to 77. A further 150 scientific and technical journals were also added to ARDI. Over 200 journals with a combined regular subscription value exceeding 500,000 United States dollars per year are now included in ARDI.

Ensuring civil society's engagement and participation in WIPO's work remains a critical objective²³⁰. In 2011, the Assemblies of the Member States of WIPO decided to grant observer status to five international non-governmental organizations (NGOs) and to five national NGOs. Moreover, representatives from NGOs have increasingly been invited to participate in a wide range of WIPO activities, including, in particular, activities relating to the WIPO Development Agenda and briefings on WIPO activities.

6.4. The role of NGO/Civil Society towards the development of Human Rights Framework for WIPO

Civil society has been defined by “**Report of the Panel of Eminent Persons on United Nations–Civil Society Relations**”²³¹ as referring to the associations of citizens (outside their families, friends and businesses) entered into voluntarily to advance their interests, ideas and ideologies. The term does not include profit-making activity (the private sector) or governing (the public sector). Of particular relevance to the United Nations are mass organizations (such as organizations of peasants, women or retired people), trade unions, professional associations, social movements, indigenous people's organizations, religious and spiritual organizations, academe and public benefit non-governmental organizations.

²³⁰ Paragraph 23, Committee on Development and Intellectual Property, loc. cit. n. 224.

²³¹ We the peoples: civil society, the United Nations and global governance, 'Report of the Panel of Eminent Persons on United Nations – Civil Society Relations'. A/58/817 (2004); available at: www.un-ngls.org/orf/Final%20report%20-%20HLP.doc

Non-governmental organization (NGO) has been described as all organizations of relevance to the United Nations that are not central Governments and were not created by intergovernmental decision, including associations of businesses, parliamentarians and local authorities. There is considerable confusion surrounding this term in United Nations circles. Elsewhere, NGO has become shorthand for public-benefit NGOs — a type of civil society organization that is formally constituted to provide a benefit to the general public or the world at large through the provision of advocacy or services. They include organizations devoted to environment, development, human rights and peace and their international networks.

Human rights NGOs have grown in influence, both nationally and internationally²³². As Korey explains, NGOs "played a decisive role in transforming the phrase ['human rights'] from but a Charter provision or a Declaration article into a critical element of foreign policy discussions in and out of governmental or intergovernmental circles." NGOs play a crucial role in enabling people to recognize, articulate, and struggle to realize human rights²³³ within their own governments and societies. Nobel Laureate Amartya Sen has said that NGOs²³⁴ are one of the active components that have been active in enforcement of universal human rights values through their actions of advocating and criticism of policies.

Non-governmental organizations (NGOs)²³⁵, also known as civil society organizations (CSOs), have existed for hundreds of years, but since the mid-nineteenth century they have been increasing in number and gaining international recognition, particularly among intergovernmental organizations (IGOs). NGOs were accepted and consulted with by the League of Nations during its existence, and were often able to participate in the League's meetings and committees. Due to this recognition, when the United Nations was created in 1945, NGO participation was included in the UN Charter under Article 71 of Chapter 10. Article 71

²³² The Advocates for Human Rights, *NGOs and the Human Rights Movement*, available at: http://www.stopvaw.org/ngos_and_the_human_rights_movement.html

²³³ William W. Clohesy, *Realizing Rights: A Reaffirmation of Human Rights and Their Vital Grounding in NGOs*, Ireland (2000); available at: http://www.istr.org/resource/resmgr/working_papers_dublin/clohesy.pdf

²³⁴ Indian Express, 'NGOs play critical role in ensuring human rights'; available at: <http://www.indianexpress.com/news/ngos-play-critical-role-in-ensuring-human-rights/18976/>

²³⁵ Angela Zettler, 'NGO Participation at the United Nations: Barriers and Solutions', (2009); available at: <http://csonet.org/content/documents/BarriersSolutions.pdf>

provides²³⁶ the Economic and Social Council (ECOSOC) of the United Nations with the power to "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."

Over the years, participation of NGOs in the UN has ebbed and flowed²³⁷. However, in the last fifteen years the UN has been working to enhance collaboration with NGOs across the entire UN system and in all areas of its activity. The UN and its agencies have grown increasingly dependent on NGOs to carry out field services, as well as implement UN resolutions and goals. This reliance on NGOs has helped them to gain influence and importance in the international community. Many UN agencies hold regular meetings with NGOs, and new forms of NGO involvement are emerging across the UN system. Some of the activities NGOs engage in include disseminating information, raising awareness, policy advocacy, joint operational projects, and providing technical expertise. Consultative status is an additional mechanism of involvement that grants NGOs physical access to the UN and the possibility of speaking at meetings.

Nongovernmental players have had a major effect on global affairs²³⁸. International organizations and movements have been very influential in shaping the discourse within which international decision making and action occurs. The civil society has supported a "quiet revolution" in the UN system. It has enabled nongovernmental input to enrich the soft law processes of the General Assembly, to contribute informally to areas within the responsibility of the Security Council, and to influence international legislative processes, particularly in the area of human rights.

In a 2002 report to the United Nations, the Secretary General²³⁹ emphasized the importance of the role played by NGOs in the United Nations system, noting that the "formal deliberations and decisions of many such meetings of intergovernmental organizations are now often enriched by the debates carried out in non-governmental forums and events held in parallel with the official

²³⁶ Arrangements and Practices for the Interaction of Non-Governmental Organizations in All Activities of the United Nations System: Report of the Secretary-General, A/53/170 (10 July 1998); available at: <http://www.un.org/documents/ga/docs/53/plenary/a53-170.htm>

²³⁷ See Supra n. 235.

²³⁸ Otto, D., 'Nongovernmental Organizations in the United Nations System: The emerging role of the international civil society'. Human Rights Quarterly, Vol. 18 Issue 1 (1996), p 127.

²³⁹ The Advocates for Human Rights, loc. cit. n. 232.

conferences." He has referred to NGOs as "indispensable partners"²⁴⁰ of the UN, whose role is more important than ever in helping the organization to reach its goals. He has affirmed that NGOs are partners in "the process of policy formation" as well as in "the execution of policies."

In the **"Report of the Panel of Eminent Persons on United Nations–Civil Society Relations"**, it was affirmed²⁴¹ that the most powerful case for reaching out beyond its constituency of central Governments and enhancing dialogue and cooperation with civil society is that doing so will make the United Nations more effective. An enhanced engagement could help the United Nations do a better job, further its global goals, become more attuned and responsive to citizens' concerns and enlist greater public support. Engaging with civil society, parliaments and other actors would help the United Nations to identify global priorities, become more responsive and accountable and strengthen its support base — making it more able to tackle those challenges. It would help the United Nations to become an organization belonging to "We the peoples".

The above discussion has illustrated the growing role that NGOs can play in formulating human rights based policy in the international arena, ie. specially with intellectual property policies in WIPO. According to a study on the role of NGOs in intellectual property policymaking²⁴² within multilateral fora, on a number of intellectual property -related matters, "international NGOs have established close links with developing country delegates in a way that has not been seen in the context of other issues, such as environmental issues or human rights, where [they] have historically been perceived as critical of developing countries." They have also been fairly successful in capacity-building, awareness-raising and facilitating coordination across organizations. Being an specialized Agency of UN, WIPO could facilitate further positive contributions by NGOs. If and when, WIPO, through the Development Agenda, begins to more fully integrate human rights based policy into its norm-setting and other activities, there will be a greater role for those stakeholders and communities that have not traditionally been well-represented on the international intellectual property policy stage.

²⁴⁰ Global Policy Forum, *NGOs and the United Nations: Comments for the Report of the Secretary General*, (1999); available at: <http://www.globalpolicy.org/component/content/article/176/31440.html>

²⁴¹ We the peoples: civil society, the United Nations and global governance, 'Report of the Panel of Eminent Persons on United Nations – Civil Society Relations', loc. cit. n. 231.

²⁴² Mary Wong, loc. cit. n. 74.

6.5. The WIPO Development Agenda and its contribution in fostering Human Rights Framework for WIPO

Economic growth remains an essential indicator of development; however, it is no longer accepted as the only relevant metric for measuring progress²⁴³. Nobel laureate Amartya Sen and renowned philosopher Martha Nussbaum, among others, have helped to usher in a framework in which development is linked to freedom and the realization of basic human capabilities (Sen 1999; Nussbaum 2000). Thus, the concept of development, as accepted and implemented by the UN Development Programme through the human development indices, for example, “is about much more than economic growth.” It is about “expanding the choices people have to lead lives that they value.” Of course, GDP is still a very important indicator of development, especially as a per capita figure. Sen, Nussbaum, and others would not dispute that. The key, though, is not to lose sight of the instrumental utility of economic growth for facilitating people’s freedom to choose how they live their lives. But it seemed that WIPO was yet to abandon its view of development as solely, or at least primarily, economic growth and embrace the concept of development as freedom. The proposal for a development agenda may, however, have marked a turning point for the organization.

The Development Agenda emerged as a response to what Peter Drahos and John Braithwaite have aptly described as “an agenda of underdevelopment” that dominated global intellectual property law throughout the twentieth century. A great deal of optimism surrounds the progress made on the Development Agenda over the past several years²⁴⁴. According to many observers, the very fact that WIPO has established the Development Agenda indicates that change is taking place at WIPO. Some believe that a paradigm shift has occurred, one that is reflected in the language now used at WIPO and the priority given to developing countries’ concerns. The extent to which the Development Agenda is “mainstreamed” has become an important indicator of its success. Mainstreaming involves not just implementation of the various Development Agenda

²⁴³ Jeremy D. Beer, *Implementing the World Intellectual Property Organization’s Development Agenda*, Canada, The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press (2009), page. 5.

²⁴⁴ Jeremy De Beer and Sara Bannerman, ‘Foresight into the Future of WIPO’s Development Agenda’, *World Intellectual Property Organization Journal*, Vol. 1 Issue 2 (2010), pages. 214 - 215.

recommendations, but also the diffusion of the constructively ambiguous principles embedded in the Development Agenda throughout WIPO as an organisation.

Despite some people's optimism, other stakeholders are skeptical about whether a transformation of WIPO's culture has been achieved, whether a "paradigm shift" has occurred at WIPO, and about the extent to which such a shift can be evidenced. It is hard for WIPO to evidence, and for outsiders to see, whether a real change has taken place. There is a danger, or a potential perception, that WIPO activities are now simply being relabelled as "development-related". It is conceivable that the progress of the Development Agenda may have actually weakened WIPO's position as a forum for intellectual property norm-setting. The changes taking place at WIPO may have reduced the organisation's ability to prioritise developed countries' concerns, and the ability of Member States to discuss those concerns in a frank and open manner.

Notwithstanding its progress and criticisms, the proposals of the Development Agenda aimed²⁴⁵ to ensure that international intellectual property policy within WIPO takes into account development goals and is coherent with the international obligations of States, including obligations under human rights treaties. Human rights law and mechanisms can support this push for greater development consistency of the international intellectual property regime, and accountability in intellectual property decision making. The language in these proposals, while not explicitly that of human rights, can be unpacked and interpreted to uphold and promote human rights²⁴⁶. Importantly, these norms are the first set of standards brought in from outside the organization, to which WIPO can now be held accountable. The Development Agenda describes several duties which can be understood in terms of human rights. For example, technical assistance that must be "development-oriented" and "transparent" implies the right to information and the right to development. Bringing a human rights perspective to WIPO negotiations can help ensure that intellectual property systems are consistent with human dignity and development.

²⁴⁵ Relfi Paul, *Negotiations for WIPO Development Agenda: A Human Rights Perspective* (2008); available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310685

²⁴⁶ 3D, *Tackling the Negative Impacts of Intellectual Property Systems: A Human Rights Approach* (2008); available at: http://www.3dthree.org/pdf_3D/3DHRIPPanel.pdf

Since the adoption of the Development Agenda, human rights agencies within the United Nations have offered to assist WIPO in the interpretation of the “development orientated” norm-setting referred to in the Agenda.²⁴⁷ The UN Working Group on the Right to Development, for example, has met with WIPO to highlight the importance of ensuring that intellectual property rules are human rights-compliant and that Development Agenda work is informed by a human rights approach. In recent years the United Nations has adopted an explicitly “rights-based approach to development”, defined as “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights”. There are many benefits to linking “development” to the norms set out in international human rights documents; key among them is that human rights norms are specific, measurable, often binding, and have already been formally adopted by most states. Furthermore, the human rights system focuses attention on the needs of the poor, thus promoting an understanding of “development” which is directed at improving the quality of life for everyone and at increasing human capabilities and freedom.

Professor Margaret Chon suggests that international intellectual property policymakers²⁴⁸; consider adopting a “substantive equality norm” that would require the decision-maker to strike down a rule that interferes with the achievement of a basic human need. Professor Chon also addresses the relationship between public international law (of which, of course, human rights is a part) and development issues in international intellectual property lawmaking and norm-setting; she notes that in addition to rules of treaty interpretation and existing practices by (*inter alia*) international dispute settlement bodies, the major human rights treaties, by dealing with intellectual property, already incorporate a substantive equality norm, and that a good way to achieve policy integration between the human rights and intellectual property fields is to incorporate the former, via the language of development, as just such a norm into the latter.

Adopting a human rights approach to development policy has clear parallel implications for intellectual property policymaking that aims to facilitate consideration of more varied public

²⁴⁷ Amanda Barratt, ‘The curious absence of human rights: Can the WIPO Development Agenda transform the intellectual property negotiation’, *Law, Democracy and Development*, Vol. 14 (2010), pages. 44 - 45; available at: http://www.idd.org.za/images/stories/Ready_for_publication/barratt-doi-new.pdf

²⁴⁸ Mary Wong, loc. cit. n. 74.

interest factors for example, values and norms centered on access rather than ownership, cultural and social norms rather than market efficiencies, and achieving human rights objectives rather than purely utilitarian goals.

United Nations human rights experts have used binding human rights documents, particularly the ICESCR, to develop clear benchmarks²⁴⁹ against which the human rights impact of intellectual property rules may be measured. These benchmarks could also be used to measure the extent to which intellectual property rules promote the public good and actually achieve a balance between the right holders and the broader public interest. Human rights standards provide specific limitations on what is negotiable, while identifying precise minimum conditions that are beyond negotiation. They provide “a solid normative basis for values and policy choices which otherwise are more readily negotiable”.

It is to be hoped that the Committee for Development and IP (CDIP) of WIPO Development Agenda will commit itself to integrating human rights into intellectual property policies in its future implementation of the Development Agenda, and this will go towards advancing a human rights framework for WIPO. International intellectual property norms and standards have to be developed²⁵⁰ according to needs and values that go beyond economic dictates or the balance of international power. To this end, the ability of the international intellectual property framework to be sufficiently flexible so as to accommodate social and cultural diversity and other human rights concerns is to be viewed as a positive rather than a negative trait. As James Boyle²⁵¹ has said, “WIPO has a uniquely influential role to play in setting innovation policy worldwide. Intellectual property rights are tools, and WIPO needs to respond creatively and flexibly to the new ways, in which those tools can be used.....”

Moreover, WIPO could also intensify its cooperation on intellectual property related issues with United Nations agencies. Such partnerships²⁵² could strengthen WIPO’s ability to undertake development programmes and bring in development expertise, and could help WIPO in

²⁴⁹ Amanda Barratt, loc. Cit. N. 247.

²⁵⁰ Mary Wong, loc. cit. n. 74.

²⁵¹ James Boyle, *A Manifesto of WIPO and the Future of Intellectual Property*, loc. cit. n.66.

²⁵² Jeremy De Beer and Sara Bannerman, loc. cit. n. 244.

addressing broader issues such as the relationship between IP and health, IP and human rights, or IP and cultural participation. To a certain extent, such linkages are already being made. However, appropriate stakeholders must be chosen with which to partner, and care must be taken not to partner with just the most vocal NGOs. Care must also be taken not to overburden the Development Agenda or WIPO with too great a focus on “IP and ...” agendas.

Until the conflict/coexistence issue between IPRs and human rights is settled²⁵³, adopting a very broad normative (integration of human rights into intellectual property policies) approach may be the best course in the future implementation of the WIPO Development Agenda. From this broad perspective, human rights are purely a general framework that allows for a wider diversity of public interest values and factors to be considered and weighed in the development and enunciation of legal standards, norms and rules. Such a human rights oriented approach need not definitively address the conflict/coexistence question; rather, it could simply allow human rights norms and values to be called upon when the age-old policy-balancing question in intellectual property – weighing the needs of users and authors against each other – falls to be determined.

²⁵³ Mary Wong, loc. cit. n. 74.

CONCLUSIONS:-

The present thesis looked at the important role that WIPO has in the international intellectual property arena and how much it can contribute to promoting intellectual creativity, specially in relation to accessibility of creative works by the larger public. However, it has shown the reluctance on the part of WIPO to apply a human rights based approach to its work and treaties.

In formulating on how to develop a human rights based approach to its work, the WIPO Development Agenda have been examined in detail starting from its formation to its implementation till date. The thesis illustrated that to build such a human rights framework for WIPO, integration of human rights into intellectual property policies would be a positive step towards its achievement. Furthermore, the NGO/ Civil society has a great role to play in formulating the framework. And WIPO could integrate such policies in its work by the future implementation of the WIPO Development Agenda and use binding human rights documents as its benchmark. Having this framework would also enable WIPO to carry out its work as an specialized agency of UN and fulfill the UN Charter i.e. promotion and protection of human rights, more efficiently.

Implementing human rights based policy and regulations within WIPO could afford protection under intellectual property regime, and this would directly facilitate and promote scientific and cultural progress and would do so in a manner that would broadly benefit members of society on an individual, corporate, and international level. It also implies a right of access to the benefits of science and culture, again on both an individual and collective level.

It is not possible at this stage to find a solution to the conflict raging between intellectual property and human rights. However, this framework would be a workable and acceptable solution. This would provide a change of perspective from only focusing on intellectual property and ownership to participation by the members of the society in the creation, enjoyment and accessibility of the creative work in the human rights context. It would also allow intellectual property to become a constructive tool for the betterment of human existence.

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