THE HUMAN RIGHTS IMPLICATIONS OF INTELLECTUAL PROPERTY PROTECTION

Audrey R. Chapman*

ABSTRACT
A variety of human rights organizations and agencies have begun to realize that the manner in which creative works, cultural heritage, and scientific knowledge are turned into property has implications for human rights. These concerns have led to a series of initiatives by United Nations human rights institutions, the most significant of which is the November 2001 statement on 'Human Rights and Intellectual Property Issues' adopted by the Committee on Economic, Social and Cultural Rights. Its central theme is that intellectual property protection and international trade regulation must respect and abide by international human rights law. This article outlines the provisions of a human rights perspective on the requirements for intellectual property and then discusses its potential conflicts with current developments in intellectual property law.

INTRODUCTION
It may surprise many in the economics and business community to learn that a variety of human rights organizations and agencies have begun to express interest in intellectual property issues. This involvement reflects a belated realization that the manner in which creative works, cultural heritage, and scientific knowledge are turned into property has implications for human rights as well as economic relationships. Legal regimes defining intellectual property protections affect the realization of the human rights enumerated in the major international human rights instruments. In addition, the existence of universally applicable rules on intellectual property protection, particularly the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS Agreement),1 potentially restricts the kinds of initiatives countries can take to protect and promote human rights. The failure of intellectual property agreements or dispute resolution mechanisms based on these arrangements to recognize explicitly the relevance of a

* PhD, Columbia University. American Association for the Advancement of Science.
country’s human rights commitments also increases the actual or potential likelihood of there being a conflict between the two sets of obligations.

The concerns of various human rights actors with intellectual property issues have led to a series of recent initiatives within UN human rights institutions. To mark the fiftieth anniversary of the Universal Declaration on Human Rights, the World Intellectual Property Organization (WIPO) and the Office of the UN Commissioner for Human Rights held a seminar on Intellectual Property and Human Rights in 1998 and then published a volume on that topic. The UN Sub-Commission for the Promotion and Protection of Human Rights adopted resolutions on intellectual property at its sessions in both 2000 and 2001. At the request of the Sub-Commission, the High Commissioner for Human Rights prepared a report on the human rights impacts of the TRIPS Agreement and other issues related to intellectual property and human rights. Like much of the activism among NGOs related to these issues, the High Commissioner’s report considers ways in which the provisions of the TRIPS Agreement may affect the enjoyment of the right to health, in particular through reducing access to pharmaceuticals and increasing their cost. The UN Committee on Economic, Social and Cultural Rights held a day of general discussion in November 2000 on intellectual property issues and then drafted a statement setting a normative framework for a human rights approach to intellectual property, which was adopted at its November 2001 session.

I. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

In the past half century, the norms and principles of internationally recognized human rights have been set forth in a series of international and regional declarations and treaties viewed as setting minimal standards of decent social and governmental practice. The Universal Declaration of Human Rights, adopted unanimously by the UN General Assembly in 1948, provides the single most authoritative statement of human rights. Described in the preamble as providing 'a common standard of achievement for all peoples and

2 Sub-Commission for the Promotion of Human Rights, resolution 2000/7 and resolution 2001/21.
5 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res217A (III), 3 UN GAOR (Resolutions, part 1) at 71, UN Doc A/810 (1948).
nations, the Universal Declaration enumerates a comprehensive list of rights. The first twenty-one articles present a series of civil and political rights akin to an updated version of those listed in the Bill of Rights of the US Constitution, such as rights to life, liberty, and security of person; freedom from torture and cruel punishment; equality before the law and nondiscrimination; freedom of peaceful assembly and association; and freedom of thought, conscience, and religion. In addition to these traditional civil and political rights, the Universal Declaration recognizes a series of economic and social rights. These include rights to just and favourable conditions of work, to free choice of employment; and to form trade unions; to a standard of living adequate for health and well-being; to education, with its being free at least in the elementary and fundamental stages; to participate in the cultural life of the community; to share in the benefits of scientific advancement; and, relevant to this discussion, ‘to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’.8

While many equate civil and political rights with human rights, there is an international consensus that all human rights, civil and political rights on the one side and economic, social, and cultural rights on the other, are of equal status and interdependent. To quote the language used in the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights, ‘All human rights are universal, indivisible and interdependent and interrelated’.9 This statement refers to the intrinsic linkages among the rights. It recognizes that it is not possible to realize any one right without also promoting and protecting other rights as well. The Vienna Declaration goes on to comment that ‘The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’.10

Far from merely being vague statements of aspiration, internationally recognized human rights have the status of international law. As a declaration of the General Assembly, the Universal Declaration is not strictly legally binding on member nations, although many experts consider it to be internationally accepted common law. To translate the provisions of the Universal Declaration into legally binding human rights obligations, the UN drafted a series of human rights instruments which further develop and refine the formulation of the rights enumerated therein, the two most important of

7 Ibid, Preamble.
8 Ibid, Article 27.
10 Ibid.
which are the International Covenant on Civil and Political Rights\textsuperscript{11} and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{12} Countries which ratify or accede to these and other international human rights instruments become states parties legally bound by their requirements. Nearly all UN member nations have ratified some of the human rights instruments, and several human rights conventions have been ratified by the overwhelming majority of member nations. Of these, the Convention on the Rights of the Child has the greatest number of states parties. The International Covenant on Economic, Social and Cultural Rights, which is the instrument most relevant to the discussion of the implications of intellectual property law, has some 145 states parties,\textsuperscript{13} including all of the major western democracies – with one exception – the USA, which has signed but not ratified this treaty.\textsuperscript{14}

All human rights imply duties for both individuals and governments. Under international human rights law, states and their governments are assigned the primary responsibility to assure implementation. They assume three kinds of legal obligations relative to the provisions of specific instruments they ratify. These are first to \textit{respect} the right by refraining from undertaking legal or policy measures that would violate its specific provisions; secondly, to \textit{protect} the right through legislative and other measures in order to prevent other parties from violating its provisions; and thirdly, to \textit{fulfil} the right by implementing positive measures that enable and assist individuals and communities to enjoy the right.

It may be helpful here to outline the provisions of some of the rights incorporated in the International Covenant on Economic, Social and Cultural Rights (hereinafter the Covenant):

- The right of all peoples to self-determination is interpreted to include their ability to freely pursue their economic, social and cultural development (Article 1.1) and to freely dispose of their natural wealth and resources (Article 1.2). The Covenant also states that in no case may a people be deprived of its own means of subsistence (Article 1.2).
- The right of everyone to the enjoyment of just and favourable condi-

\textsuperscript{11} International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), GA Res 2200 (XXI), 21 UN GAOR, Supp (No 16) at 52, UN Doc A/6316 (1966).


\textsuperscript{13} This was the number as of June 2002.

\textsuperscript{14} The US Government has been reluctant to ratify any of the major international human rights instruments just as it has historically been reluctant to become a party to all kinds of international treaties. The USA has therefore ratified only three – the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. In contrast with other major democracies, most US administrations have not accorded equal status to economic and social rights with civil and political rights.
tions of work (Article 7) specifies fair wages and equal remuneration for work of equal value, safe and healthy working conditions, and equal opportunity for promotion. A related provision (Article 8) enumerates the right to form and join trade unions and for these trade unions to have the freedom to strike, provided that it is exercised in conformity with the laws of the particular country.

- The right of everyone to be free from hunger (Article 11.2) directs states parties to improve methods of production, conservation, and distribution of food by making the full use of technical and scientific knowledge; reforming agrarian systems; and ensuring an equitable distribution of world food supplies in relationship to need.

- The right to enjoyment of the highest attainable standards of physical and mental health (Article 12) mandates that states parties take measures to provide for the reduction of infant mortality; the prevention, treatment, and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical services and medical attention in the event of sickness.

- The right to education (Article 13) states that primary education shall be compulsory and available free to all and that secondary education in its different forms shall be made generally available and accessible. It also requires states parties to respect the liberty of parents and legal guardians to choose for their children schools other than those established by the public authorities.

Acknowledging that it may not be possible for all countries to realize immediately the full provisions of all of these rights, the Covenant directs states parties to take steps, individually and through international assistance and cooperation, ‘to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means’. This is a different standard from the International Covenant on Civil and Political Rights which mandates that each state party undertake to adopt the legislative or other measures as may be necessary to give effect immediately to the rights recognized in the instrument. Nevertheless, progressive realization over a period of time does not eliminate states parties’ obligations. The UN Committee on Economic, Social and Cultural Rights (hereafter the Committee), an expert body which reviews the performance of states parties to the Covenant, interprets its provisions to require all states parties to move expeditiously and effectively towards full realization of all the rights enumerated in the Covenant. Its general comments (documents which provide authoritative interpretations) also specify that the Covenant imposes some obligations which have immediate effect,

---

15 Ibid, Article 2.1.
16 International Covenant on Civil and Political Rights, Article 2.2.
including ensuring nondiscrimination and the equal rights of men and women. The Committee places the core or key obligations related to each specific right in this category as well.\(^{17}\)

Clearly, though, we live in a world where human rights violations are still rampant, and this situation in part reflects the lack of effective human rights enforcement mechanisms. The UN is a club of member nations, and just like any such organization, its members determine the rules under which it operates. Although the UN has established a series of institutions to oversee and help implement international human rights law, which currently operate under the Office of the High Commissioner for Human Rights, these bodies only have sufficient power and resources to undertake the normative development of human rights and publish reports, but they do not have the means to penalize those states which choose to ignore their obligations. The Office of the High Commissioner for Human Rights typically receives less funding than the annual budget of major US human rights organizations. Citing the rationale of the need to protect the sovereignty of member nations, the UN human rights machinery does not have power beyond the relatively weak sanctions of publishing critical reports about abuses of human rights and embarrassing violators with appeals to world opinion. Somewhat ironically, the same scrupulous concerns with the prerogatives of sovereignty do not seem to concern the member nations of the WTO.

Complicating the matter of human rights implementation, the countries which have become states parties to one or more major international human rights instruments have other treaty obligations as well. The overwhelming majority of states parties to the Covenant, for example, are also members of the World Trade Organization and thereby bound by the provisions of TRIPS. In a situation of potential or actual conflict, where one set of obligations is tied to an effective enforcement mechanism and sanctions, and the other is not, it is easy to anticipate the outcome. And this situation, of course, frames current human rights concerns regarding the implications of the TRIPS Agreement.

II. THE HUMAN RIGHT TO INTELLECTUAL PROPERTY

It would be erroneous to assume that human rights advocates necessarily reject the value of intellectual property protections. As briefly noted above, several human rights instruments recognize a human right to one’s own intellectual products. Beginning with the provisions of the American Declaration

\(^{17}\) See the Committee’s General Comments No 3 (on the nature of states parties’ obligations, article 2.1 of the Covenant) and No 9 (on the domestic application of the Covenant) in HRI/GEN/1/Rev5, 26 April 2001.
on the Rights and Duties of Man in 1948, key international human rights instruments have acknowledged that intellectual products have an intrinsic value as an expression of human creativity and dignity. Several enumerate the right of an author, creator, and inventor to some form of recognition and benefit from their intellectual products. Article 27 of the Universal Declaration of Human Rights 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”. This right is linked to another provision of Article 27: “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”.

Building on Article 27 of the Universal Declaration, the Covenant has similar provisions. Article 15.1 (c) requires states parties to 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”. Also like the Universal Declaration, other components of Article 15 link this obligation to the rights “to take part in cultural life” and “to enjoy the benefits of scientific progress and its applications”. To achieve these goals, the Covenant mandates that states parties undertake a series of steps. These include “those necessary for the conservation, development, and diffusion of science and culture”. States parties are also directed to “undertake to respect the freedom indispensable for scientific research and creative activity”.

Nevertheless, intellectual property conceptualized as a universal human right differs in fundamental ways from its treatment as an economic interest under intellectual property law. A human rights approach 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 approach is predicated on the centrality of protecting and nurturing human dignity and the common good. The goal is to improve human welfare and not to maximize economic benefits. Or to put the matter another way, from a human rights perspective, intellectual property protection is understood more as a social product with a social function and not primarily as an economic relationship.

While the language of the Covenant stipulates a right to benefit from the protection of the moral and material interests of the author, artist, inventor,

18 American Declaration of the Rights and Duties of Man, approved by the Ninth International Conference of American States, Bogota, Columbia, 30 March–19 May 1948, Resolution XXX, Pan American Union, Final Act of the Ninth Conference, Washington, DC.
19 Ibid, Article 15.1 (a).
20 Ibid, Article 15.1 (b).
21 Ibid, Article 15.2.
22 Ibid, Article 15.3.
or creator, from a human rights perspective the rights of the creator are not absolute. In order for intellectual property to fulfil the conditions necessary to be recognized as a universal human right, intellectual property regimes and the manner in which they are implemented first and foremost must be consistent with the realization of all other internationally recognized human rights. Given their linkage in Article 15 of the Covenant, a human rights approach must be particularly sensitive to the interconnections between intellectual property and the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications. To be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must therefore facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level.

III. STATEMENT BY THE COMMITTEE ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY

As a follow-up to its November 2000 day of general discussion on intellectual property issues, the Committee on Economic, Social and Cultural Rights began work on a statement on human rights and intellectual property that was adopted a year later. This is only the second general statement ever issued by the Committee. Its purpose is ‘to identify some of the key human rights principles deriving from the Covenant that are required to be taken into account in the development, interpretation and implementation of contemporary intellectual property regimes’.

The central theme in the statement is that international trade and intellectual property protection regulations must respect and abide by international human rights law. The Committee understands this principle to apply equally to national legislation and international rules and policies concerning intellectual property protection, including the TRIPS Agreement. From the Committee’s perspective, ‘the realms of trade, finance and investment are in no way exempt from human rights principles’. Accordingly it observes that, ‘international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights’. The statement also instructs states to consider how negotiating and adhering to inter-

23 ‘Human rights and intellectual property: Statement by the Committee on Economic, Social and Cultural Rights’, Follow-up to the day of general discussion on Article 15.1(c ), 26 November 2001, E/C.12/2001/15, 14 December 2001. This author served as a consultant to the Committee to assist with the drafting process.

24 Ibid, para 2.

25 Ibid, para 3.

26 Ibid.

27 Ibid.
national treaties on intellectual property protection will affect their sovereignty over wealth and resources and their capacity to ensure the rights recognized in the Covenant.\textsuperscript{28} To put the matter another way, the statement emphasizes that the human rights obligations of state parties cannot be subordinated in the formulation of trade agreements or intellectual property regimes.

The statement offers a very different perspective on the requirements for intellectual property from the considerations that generally guide intellectual property law. According to the Committee, "The end which intellectual property protection should serve is the objective of human well-being, to which international human rights instruments give legal expression".\textsuperscript{29} To be consistent with this goal, the statement stresses that intellectual property regimes must promote and protect all human rights, including the rights guaranteed in the Covenant.\textsuperscript{30} It also mentions the requirement that intellectual property regimes not interfere with the ability of states to fulfil the core obligations related to each of the rights enumerated in the Covenant: "The Committee wishes to emphasize that any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party".\textsuperscript{31}

In addition, the statement underscores the need of intellectual property regimes to respect fundamental human rights principles. Those identified in the statement include the equality of all persons and their equal standing before the law,\textsuperscript{32} the right of everyone to be consulted and participate in significant decision-making processes that affect them,\textsuperscript{33} and the need for accessible, transparent, and effective accountability mechanisms.\textsuperscript{34} The statement also mentions the importance of respecting the principle of self-determination, particularly national sovereignty over wealth and resources.\textsuperscript{35} Furthermore, it comments that a human rights approach focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities. Therefore it draws the conclusion that in adopting intellectual property regimes, states and other actors must give particular attention at the national and international levels to making certain that these systems will be consistent with protecting the human rights of the disadvantaged.\textsuperscript{36}

\textsuperscript{28} Ibid, para 16.
\textsuperscript{29} Ibid, para 4.
\textsuperscript{30} Ibid, para 5.
\textsuperscript{31} Ibid, para 12.
\textsuperscript{32} Ibid, para 7.
\textsuperscript{33} Ibid, para 9.
\textsuperscript{34} Ibid, para 10.
\textsuperscript{35} Ibid, para 16.
\textsuperscript{36} Ibid, para 8.
The statement also sets out the need to balance the protection of public and private interests in knowledge. Accordingly, the Committee recommends that in providing incentives for creation and innovation, ‘private interests should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration’.

The statement contrasts human rights, including the right of authors to moral and material interests in their work, with legal rights recognized in intellectual property systems. It characterizes human rights as fundamental, as they derive from the dignity of the human person, and intellectual property rights as instrumental, a means by which states seek to provide incentives for inventiveness and creativity. While human rights are considered to be fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities, intellectual property rights are characterized as primarily protecting business and corporate interests and investments and therefore may be allocated, traded, amended, and even forfeited. The statement also notes that the scope of protection of the moral and material interests of the author provided for under Article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements.

The statement includes a discussion about the importance of international assistance and cooperation within the UN system. In those paragraphs the Committee observes that countries at different levels of development have different technological needs. As a result, some countries may focus on the protection of technology while for others the key issue is facilitating access. For this reason, the Committee indicates that international rules concerning intellectual property should not necessarily be uniform. It also recommends the adoption and implementation of international mechanisms for intellectual property protection that accord special and differential treatment for developing countries.

IV. CONFLICT BETWEEN INTELLECTUAL PROPERTY SYSTEMS AND HUMAN RIGHTS
Given the orientation delineated above, it is not surprising that many in the human rights community are concerned about the impact of intellectual property developments on human rights. Noting that actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, the Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on this topic.

---

37 Ibid, para 17.
38 Ibid, para 6.
39 Ibid, para 15.
at its August 2000 session.40 The resolution affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right, subject to limitations in the public interest. It goes on to state that: ‘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’.41

The background paper for the Committee’s November 2000 day of general discussion, drafted by this author at the request of the Committee,42 and the contributions of other experts who participated in this event highlighted a series of potential or actual problems related to specific rights as well as a number of more generic concerns with current intellectual property developments. In terms of the latter, one of the issues which was raised was that the provisions of the TRIPS Agreement make it far more difficult for countries to set intellectual property standards and policies to fit domestic economic conditions and to protect human rights and the environment.43 Inadequate protection of the public interest constituted another topic. There was a sense that the traditional balance that intellectual property regimes sought between the rights of creators and the benefits to the public had been skewed in favour of a narrow range of economic interests.44 The expansion of private intellectual property claims into areas that formerly were part of the public domain, such as the privatization of works of cultural heritage and the biological and ecological knowledge of traditional peoples was also noted.45 Another issue mentioned by many participants was that strict intellectual property models appropriate for advanced market economies are likely to disadvantage less developed countries by increasing the costs of development, especially since industrial countries currently hold the overwhelming majority of the patents registered worldwide.46 On a related matter, several participants expressed the view that current intellectual property

41 Ibid.
42 Audrey R. Chapman, ‘Intellectual Property and Human Rights’, a background resource for the 27 November 2000 Day of General Discussion on ‘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 (Article 15.1(c) of the Covenant’, E/C.12/2000/12.
43 Ibid, para 16.
44 Ibid, paras 45 and 46.
46 Ibid, para 48.
trends tended to favour major economic interests, particularly large multinational firms, to the detriment of protecting public access and benefits and promoting development in countries in the South.47 The lack of democratic participation in the formulation of intellectual property regimes and policies both at national and international levels was identified as yet another problem for the human rights community.48

Just as at the day of general discussion, various human rights forums have noted problems that intellectual property developments impose on the realization of particular economic, social and cultural rights. It is not possible here to do more than to provide a very brief overview of the dilemmas noted for a few of these rights:

- Rights to scientific progress and access to its benefits: increasing intellectual property protection has imposed constraints on the scientific tradition of open publication. In many scientific fields, particularly the life sciences, some scientists are delaying publication and withholding data so as to secure intellectual property rights. Rather than stimulating research and applications, intellectual property claims can have negative effects and significantly increase costs. One example is the proliferation of biotechnology patents, termed by some to be ‘the tragedy of the anticommons’. This refers to a situation where the fragmentation of property rights among many owners makes the development of new product applications far more difficult and expensive because it requires researchers to negotiate a series of intellectual property agreements with different rights holders before proceeding.49

- Rights to food and food security: the extension of very broad patents for specific plant varieties has meant that a few agricultural corporations have virtual monopolies on the genome of important global crops. The patenting of plants, as stipulated under Article 27.3b of TRIPS, can interfere with the conservation of biological resources and the preservation of indigenous methods of production as called for under the 1992 Convention on Biological Diversity (Articles 8j, 10c, 17.2, and 18.4). Corporations selling patented high technology seeds require farmers to relinquish the right to save or replant seed from a harvest or to sell or trade that seed to other persons. Moreover, these companies sometimes encourage farmers to shift to single crops threatening agricultural diversity.50

- Right to cultural participation: at present, traditional and indigenous knowledge and artistic works rarely qualify for intellectual property pro-

48 Ibid, paras 50 and 51.
tection and for that reason are vulnerable to expropriation and inappropriate utilization by persons outside the group. It is difficult to use copyright laws because copyright standards recognize only a single owner; indigenous cultural motifs and folklore are not the sole property of individual artists to sell or withhold freely, but are subject to layers of group rights. Additionally, copyright protections are of limited duration while indigenous people regard cultural rights as perpetual. To be eligible for patenting, knowledge or an invention must be novel and innovative; while indigenous knowledge and art have innovative elements, they are based on continuity with tradition. Moreover, patent rights are ordinarily granted to individuals or corporations rather than to cultures or peoples, and like copyrights have time limitations. This has led to a situation termed ‘biopiracy’ whereby traditional knowledge is expropriated and patented by outsiders without the indigenous sources receiving any benefit.51

V. TRIPS AND THE RIGHT TO HEALTH

Because much of the discussion in public fora has focused on problems that the TRIPS Agreement imposes for protection of health, it will be appropriate here to cite some of the relevant issues related to realization of the right to health. Perhaps it will be helpful to begin by explaining what the right to health encompasses. It obviously does not refer to a right to be healthy. No government could assure good health to its citizens. Drafters of the provision on the right to health in the Covenant framed the right as the ‘highest attainable standard of physical and mental health’.52 To that end, Article 12 mandates that states parties to the Covenant undertake the following steps to achieve its full realization:

(a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.53

There are related provisions in other international human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) (1966)

51 Ibid, para 33.
53 Ibid.
recognizes an inherent right to life.\textsuperscript{54} The Human Rights Committee, which monitors compliance with this Covenant, has defined the role of the state in protecting human life to include obligations to undertake measures to eliminate epidemics.\textsuperscript{55} In response to the Nazi medical experiments with human subjects,\textsuperscript{56} ICCPR also seeks to protect human subjects by affirming that no one shall be subjected without his (or her) free consent to medical or scientific experimentation.\textsuperscript{57} Under the International Convention on the Elimination of All Forms of Racial Discrimination (1965), states parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin, the enjoyment of the right to public health and medical care.\textsuperscript{58} The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) directs state parties to take all appropriate measures to eliminate discrimination against women in the field of health care. It also mandates that states parties ensure equality of access to health care services, including those related to family planning, pregnancy, confinement, and the post-natal period, granting free services where necessary.\textsuperscript{59} The Convention on the Rights of the Child (1989) extends provisions of the right to health enumerated in ICESCR to the child; the responsibilities of states parties under this instrument are to take appropriate measures to diminish infant and child mortality, ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary care, combat disease and malnutrition, provide clean drinking water, and combat the dangers and risks of environmental pollution.\textsuperscript{60}

Because these provisions are written in broad brush strokes and some of the instruments reflect dated approaches to health, in May 2000 the Committee on Economic, Social and Cultural Rights adopted a general comment providing a more comprehensive and updated interpretation of the require-

\textsuperscript{54} Art 6, International Covenant on Civil and Political Rights.
\textsuperscript{55} Para 5, General Comment No. 6: The Right to Life, Human Rights Committee, UN Doc. A/37/40.
\textsuperscript{57} Art 7, International Covenant on Civil and Political Rights.
ments of the right to health. The document views the right to health as a fundamental human right indispensable for the exercise of other human rights. The general comment specifies the right as including the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of health, but it also understands the right as incorporating underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, healthy occupational and environmental conditions, and access to health-related education and information. In addition, the general comment emphasizes the importance of the participation of the population in all health-related decision-making at the community, national, and international levels.

The general comment sets four standards or criteria—availability, accessibility, acceptability, and quality—by which to evaluate the attainment of the various dimensions of the right to health. Availability measures whether public health and health-care facilities, goods, services, personnel, and programmes exist in sufficient quantity. As conceptualized, accessibility has four overlapping dimensions—nondiscrimination; safe physical reach of all sections of the population, especially vulnerable or marginalized groups; affordability; and information accessibility, the right to seek, receive and impart information and ideas concerning health issues. Acceptability refers to the requirement that all health facilities, goods, and services be respectful of medical ethics and culturally appropriate. Quality is the parallel need for health facilities, goods and services to be scientifically and medically appropriate and of good quality.

The general comment also defines the core obligations related to the right to health. In the terminology used by the Committee, fulfilment of minimum core obligations is a requirement applicable to all states parties irrespective of their level of development, the availability of resources, or any other factors and difficulties. In its third general comment, the Committee declared itself to be ‘of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party’. It went on to state that ‘the obligations to monitor the extent of

---

62 Ibid, para 1.
63 Ibid, para 9.
64 Ibid, paras 4 and 11.
65 Ibid, para 11.
66 Para 12, General Comment No 14.
the realization, or more especially of the non-realization of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.\(^6\) The Committee underscored that, even in times of severe resource constraints, the vulnerable members of society ‘can and indeed must be protected by the adoption of relatively low-cost targeted programs’.\(^6\)

According to the Committee’s view, core obligations related to the right to health include at least the following:

1. to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
2. to ensure for everyone access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger;
3. to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
4. to provide essential drugs, as from time to time defined by WHO’s Action Programme on Essential Drugs;
5. to ensure equitable distribution of all health facilities, goods, and services;
6. to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.\(^7\)

The general comment then goes on to add another series of obligations, which it characterizes as of comparable priority. These requirements include:

7. to ensure reproductive, maternal, and child health;
8. to provide immunization against the major infectious diseases occurring in the community; and
9. to take measures to prevent, treat, and control epidemic and endemic diseases.\(^7\)

To facilitate the ability of poor countries to meet these requirements, the Committee emphasizes the responsibility of states parties and other actors to provide international assistance and cooperation, especially economic and technical.\(^7\)

Like many other public interest actors, the human rights community has

\(^{6}\) General Comment 3, para 11.
\(^{6}\) Ibid, para 12.
\(^{7}\) Ibid, para 43.
\(^{7}\) Ibid, para 44.
\(^{7}\) Ibid, para 45.
been concerned about the potential detrimental impacts of drug patents and other intellectual property restrictions on access to affordable medicines and treatments. As noted above, the provision of essential drugs, equitable distribution of all health facilities, goods, and services, and measures to prevent, treat, and control epidemic and endemic diseases are considered to be core human rights obligations for all countries, rich and poor. Just as in the case of health activists, much of this attention in the human rights community has centred on the HIV/AIDS pandemic and efforts to increase the availability of appropriate drugs to treat persons in poor countries, where up to 95% of those infected reside. The various discussions and reports have relied on research and data compiled elsewhere to draw human rights conclusions.

The report of the High Commissioner for Human Rights on the impact of the TRIPS Agreement on human rights, for example, acknowledges that the protection and enforcement of intellectual property rights can in theory provide a more secure environment for the transfer of technology to developing countries, but it also notes that intellectual property protections result in higher prices for drugs which then restrict access for the poor. The report cites data in the World Bank’s *World Development Report 2000/2001* showing increases in the cost of various goods making them too expensive for poor countries. It also utilizes data from UN/AIDS and the United Nations Development Programme on the cost of specific HIV treatments under patent protection and contrasts them with the far lower cost of equivalent generics. Like many other critics of the high cost of patented drugs, the report suggests using differential pricing keyed to the purchasing power of consumers in different countries, parallel importation, and generics as measures to improve access to cheaper drugs. It uses the experience of Brazil as a case study where the government has successfully expanded access to AIDS treatments utilizing these strategies, along with the threat of issuing compulsory licences.

There has also been concern with ways in which TRIPS-related requirements complicate medical research into health-related problems prevalent in poor countries. In theory, intellectual property rights act as an incentive for the innovation of new technology, including pharmaceuticals by providing protection for investors, but a system based on commercial motivation does not necessarily work well in producing medicines appropriate for the needs of poor countries. Using World Health Organization data, the High Commissioner’s report points out that the pharmaceutical industry directs its research first and foremost towards ‘profitable’ diseases in markets where the return is

---

74 Ibid, para 43–44.
75 Ibid, paras 47–49.
76 Ibid, paras 51–58.
likely to be greatest. As a result, diseases that predominantly affect people in poorer countries, even when the numbers are very high, such as tuberculosis and malaria, are considered to be bad investments and therefore remain neglected. It cites the fact that of the 1,223 new chemical entities developed between 1975 and 1996, only 11 of them were directed to the treatment of tropical diseases. Given this situation, the report suggests that states implementing the articles of the Covenant related to the right to health and the right to the benefits of science may need to use alternative mechanisms to relying on patents to provide incentives.77

The High Commissioner’s report discusses several other problems related to the patenting of pharmaceuticals. One is the tendency of patents to encourage the development of ‘me-too’ drugs, products that are sufficiently different to be considered novel for the purposes of patent protection but have similar effects as previously patented drugs. The report is concerned that a reliance on patents may result in a concentration of some kinds of essential products and their dissemination in the hands of a few corporations.78 It also mentions that the grant and exercise of intellectual property rights, particularly the practice of granting broad patents, can block future research and resulting innovations. Here the report comments that this situation could have implications for states' human rights responsibilities to undertake to respect the freedom indispensable for scientific research and creative activity (Article 15.3 of the Covenant).79 Yet another issue detailed in the report is the potentially negative effect of intellectual property protections on the use of traditional medicines within indigenous and local communities; the report notes that up to 80% of the world’s population still depends on traditional medications for its health care needs.80

In its section on conclusions and recommendations, the report reminds member states of the WTO of the priority of their human rights obligations. It also suggests a series of initiatives to enable states, particularly those which are states parties to the Covenant and members of WTO, to be in compliance with their obligations. As an example, the report mentions the possibility of utilizing the flexibility inherent in the TRIPS Agreement to protect human rights.81 In this regard, the report identifies specific provisions of TRIPS that could be useful in promoting access to affordable essential drugs, particularly sections of Articles 6 and 31, and recommends that states implement these provisions in national legislation as safeguards to protect access to essential drugs as a component of the right to health.82 The report also encourages

77 Ibid, para 38.
78 Ibid, para 39.
79 Ibid, para 40.
80 Ibid, para 41.
81 Ibid, para 61.
82 Ibid.
states to monitor the implementation of the TRIPS Agreement for the purpose of achieving a balance between the interests of the general public in a wide dissemination of knowledge and the proprietary interests of intellectual property holders.\textsuperscript{83} The High Commissioner supports WHO’s call that ‘when establishing standards of patentability for pharmaceuticals, countries should consider the implications for health of those standards’.\textsuperscript{84} In order to prevent the abuse of intellectual property rights, the report recommends that states consider the modification of laws that lead to violations of the right to health, particularly restrictive licensing practices or the setting of high prices for essential drugs.\textsuperscript{85} To protect traditional medicine knowledge from biopiracy, the High Commissioner encourages the adaptation of intellectual property systems to take the cultural and other rights of indigenous and local communities into account.\textsuperscript{86} Noting the provisions of Article 66 (2) of the TRIPS Agreement related to technology transfer to least developed countries, the report emphasizes the importance of developed countries establishing clear incentives to promote technology transfer and the supply of affordable drugs to developing countries.\textsuperscript{87}

Beyond these specific measures, the report deals with the fundamental issue of the future of intellectual property protections. In anticipating the Fourth Ministerial Meeting of the WTO in Qatar in November 2001, the High Commissioner encouraged participants to consider establishing closer links between the promotion and protection of human rights and the TRIPS Agreement. In the event of the renegotiation of the Agreement, it suggests that this could be achieved through an express reference to human rights in Article 7.\textsuperscript{88} The High Commissioner also joined WHO in recommending that developing countries be cautious about enacting ‘TRIPS plus’ legislation that imposes more stringent standards than present requirements under the TRIPS Agreement without first assessing the impact of such legislation on the protection of human rights.\textsuperscript{89}

CONCLUSION

A human rights approach offers an alternative vision of the purpose and requirements of intellectual property as well as a set of obligations that places intellectual property law in a wider context. The November 2001 statement

\textsuperscript{83} Ibid, para 61.
\textsuperscript{85} Ibid, para 64.
\textsuperscript{86} Ibid, para 65.
\textsuperscript{87} Ibid, para 67.
\textsuperscript{88} Ibid, para 68.
\textsuperscript{89} Ibid, para 69.
by the Committee on Economic, Social and Cultural Rights characterizes intellectual property as a social product with the social function to serve the objective of human well-being. This is a very different perspective from the usual assumption that intellectual property issues should be governed by economic goals such as improved competitiveness or profitability. The statement sets forth the human rights provisions and principles to which intellectual property law on both a national and international level must conform. It views the entire range of civil, cultural, economic, political, and social rights, as well as the right to development, as relevant to intellectual property systems and makes the claim that intellectual property regimes must promote and protect all human rights.90

While developed in somewhat greater detail, the Committee’s basic perspective parallels the view of other UN human rights bodies. Both the Sub-Commission on the Promotion and Protection of Human Rights91 and the Office of the High Commissioner for Human Rights92 have also claimed the primacy of human rights obligations under international law over economic policies and agreements and urged all governments to ensure that the implementation of the TRIPS Agreement does not negatively impact the enjoyment of human rights.

Recent initiatives by UN human rights institutions are likely to mark the inception of a long-term process of monitoring intellectual property to attempt to influence its course of development. The Committee is embarking on the drafting of a general comment to provide a legal interpretation of the relevant provisions in the Covenant related to intellectual property. The Sub-Commission has requested the High Commissioner for Human Rights to seek observer status with the WTO for the ongoing review of the TRIPS Agreement.93 It has also asked the High Commissioner to undertake an analysis of the impact of the TRIPS Agreement on the rights of indigenous peoples94 and encouraged the Special Rapporteurs (investigators) on the rights to food, education, and adequate housing to include in their reports a review of the implications of the TRIPS Agreement for the realization of their respective rights.95 In addition, the Sub-Commission has called upon the High Commissioner to convene an expert seminar to consider the human rights dimension of the TRIPS Agreement and issue a report.96

90 Committee on Economic, Social and Cultural Rights, Human rights and intellectual property, para 5.
93 Ibid, para 9.
94 Ibid, para 11.
95 Ibid, para 12.
96 Ibid, para 13.
At present human rights actors have less technical knowledge of intellectual property law and the intricacies of the WTO process than some other critics and public interest constituencies, but this is a limitation for which they can compensate. Indeed there are already intensive courses being organized and offered to human rights groups. There is also expertise about intellectual property issues within the staff of the Office of the High Commissioner for Human Rights, and other human rights bodies have access to consultants and the expert knowledge within other UN related institutions.

The human rights community brings many assets to future public-interest initiatives. It is a relatively well-connected global movement with networks linking activists both globally and locally. The moral authority of human rights gives advocates something of a bully pulpit and access to the media. The UN system offers a set of treaty monitoring bodies and other UN and regional human rights institutions able to monitor and raise issues on an ongoing basis related to the impact of intellectual property on human rights and the well-being of the disadvantaged. Moreover, human rights institutions can command respect within other institutions in the UN system. As one indication of such, both WIPO and the WTO had representatives observing and/or participating in the drafting process of the Committee’s statement. While they sometimes took issue with specific wording, they did not contest the philosophy or major points in the document.

Of course, the major question is whether this interest on the part of the human rights community will influence the development of intellectual property systems. In some ways it already has. Human rights actors were part of the coalition, albeit not playing a leadership role, which lobbied at the fourth WTO ministerial meeting in Doha for addressing the needs of developing and least-developed countries and reinterpreting of the TRIPS Agreement in a manner supportive of the protection of public health. The Ministerial Declaration issued at this November 2001 meeting does not resolve these issues, but it at least acknowledges these concerns. In addition, UN resources on intellectual property are already beginning to be used by the human rights community in efforts to influence the policies of their governments. The Treatment Action Campaign, which is a broad coalition of South African activists, which successfully sued the South African Government over its policies on the availability and distribution of antiretroviral drugs for AIDS, also plans to use the Committee’s statement on intellectual property

---

97 Ministerial Declaration, World Trade Organization, 4th Ministerial, Doha, Qatar, adopted on 14 November 2001, WT/MIN(01)/DEC/1.

98 The original case is Treatment Action Campaign et al. v Minister of Health et al., High Court of South Africa, Transvaal Provincial Division, Case No 21182/2001. As this paper is being written, an appeal against a judgment favorable to the petition of the Treatment Action Campaign which was initiated by the Government is under consideration in South Africa’s Constitutional Court.
and human rights in their future initiatives.99 The general comment that the Committee is drafting will have legal standing in many of the countries that are states parties to the Covenant. Thus many of the various initiatives and concerns outlined in this paper may have long-term impact.

99 May 2002 email communication between this author and leaders of the Treatment Action Campaign.