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**INVENTORS' AND CREATOR'S RIGHTS AS BASIC HUMAN RIGHTS -
INTELLECTUAL PROPERTY AND HUMAN RIGHTS**

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INTELLECTUAL PROPERTY AND HUMAN RIGHTS ¹

1. Let us start at the end of the story - with the resolution from August of this year of the Sub-Commission on the Promotion and Protection of Human Rights of the UN Economic and Social Council. It reads in part as follows:

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

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, in accordance with article 27(2) of the Universal Declaration of Human Rights and article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, a human right.

Declares, however, 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.

2. This came as an unpleasant surprise to many of us in the intellectual property field - that our work to promote intellectual property protection (in particular to implement the TRIPS Agreement) may offend fundamental human rights.

3. I am heretofore to refute the notion that intellectual property rights offends fundamental human rights. Quite to the contrary, intellectual property figures in the basic instruments dealing with intellectual property and can further fundamental human rights such as the right to education and healthcare. Increasingly, traditional knowledge figures in this debate - as indicated in the Sub-Commission's resolution quoted above. I am pleased with the establishment in WIPO of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore. This will provide a forum - alone and in conjunction with other intergovernmental organizations - to conduct a thorough and scientific study on the intellectual property implications to traditional knowledge.

4. As simple refutation is not enough, however, as concerns about human rights cannot be dismissed out of hand. Such concerns are at least indicative of larger concerns about globalization as captured in an editorial in the International Herald Tribune earlier this year:

¹The views expressed in this paper are those of the author and should not be imputed to Powell, Goldstein, Frazer & Murphy or any of its clients.

Advocates of globalization are now increasingly inclined to accept that it creates losers as well as winners, and to concede that some provision must be made for its victims. Opponents are beginning to accept that globalization has some benefits - a conclusion hard to deny in the face of statistics showing huge gains in world prosperity and living standards during the wave of economic liberalization over the past half - century.

We now, in fact, have the makings of a great political debate between the modern equivalents of the right and the left at the international level. On the right are those who believe that liberalization should continue because on balance it has done so much good and can do still more.

On the left are those who believe that something is going very wrong, that globalization must not only proceed, if at all, under a set of restrictive new rules on issues such as labor and environmental standards and human rights, as demanded by some of the demonstrators in Seattle [and, I would add, Washington and Prague]².

5. The field of intellectual property is right in the middle of this "great political debate." Discussion on intellectual property and its role is not only human rights, but also the fields of healthcare, the protection of biological diversity, and traditional knowledge are often confused and incomplete. At least part of the reason is that the constituencies at the national and international level that are affected by the outcome do not yet effectively communicate with one another. To put it bluntly, the people responsible for health, environment, indigenous people's issues, and human rights do not talk at all or well to the intellectual property people and vice versa.

6. This problem of a lack of mutual understanding was well stated by Professor Peter Drahos of Queen Mary College as follows:

The problem we face in the present time is that the institution of intellectual property has globalized without some set of shared understanding concerning the role that that institution is to play in the employment, health, education and culture of citizens around the world. Linking intellectual property to human rights discourse is a crucial step in the project of articulating the theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offers us at least a common vocabulary with which to begin this project, even if, for the time being, not a common language.

7. Let's see what that common vocabulary or language might be.

8. Given the level of sophistication of this audience, I will presume a good understanding of intellectual property - including requirements for and scope of protection of patents, trademarks, and copyright. I will give a short background on human rights.

9. The international document that can perhaps be said to form the basic constitution on human rights is the Universal Declaration of Human Rights - dating from 1948. The rights in the Universal Declaration of Human Rights are further developed in the International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights - both

²Reginald Dale, *Globalization Debate Getting Focused*, International Herald Tribune, January 14, 2000.

dating from 1966 – the bifurcation being a product of the “cold war.” The Declaration on the Right to Development – dating from 1986 – aims to close the split between civil, cultural, economic, political and social rights caused through the formulation of the two foregoing Covenants.

10. These instruments were referred to in the resolution of the ECOSOC Sub-Commission on the Promotion and Protection of Human Rights. Let’s examine the relevant provisions in those instruments – in particular those referred to in the resolution:

The Universal Declaration of Human Rights states, in Article 27:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits;

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

11. Similar language is found in Article 15 of the International Covenant on Economic, Social, and Cultural Rights.

12. There is a tension between the first and second paragraphs that is quite familiar to those of us in the intellectual property field. The tension is between rules that ensure the use and diffusion of information – the freedom “to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” – and rules to protect the creators of information – the “moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

13. Resolution of this tension within intellectual property is an ever-ending challenge in the face of changing technology and economic and social conditions. By constant adjustment, tugging and pulling at both the national and international levels, we have managed to keep that tension under control.

14. For example, there is an obligation in all patent laws to describe the inventions so that, following the expiry of the patent anyone is free to use the invention. Copyright protection is similarly time-limited and is subject to fair use limitations. Indeed, in December there will be a diplomatic conference to conclude an instrument dealing with rights in performances in videogames. The chairman of this panel, Mr. Jukka Liedes is all too familiar with the tensions in Article 27 of the Universal Declaration on Human Rights. Most of his professional life is spent in resolving those tensions – though he probably does not think about it as a human rights issue.

15. This perhaps gives us a conceptual framework – well understood and developed in intellectual property law – to resolve tensions that arise at the interface between intellectual property and human rights.

16. The conceptual framework is this – intellectual property rights are constructed to induce certain behavior, which behavior can be viewed as enhancing human rights such as the right to health care or education. Intellectual property rights – or controlling competition laws – come with built-in limitations to ensure creators are not “overrewarded.” These limitations can resolve tensions internally to intellectual property and externally to other systems – such as human rights. Resolving this tension requires a deep understanding of the content of the

human rights implicated and that a comparison be made to relevant intellectual property rights. Put another way, we need to set the good that human rights are intended to lead to better than, for example - along side the behavior that intellectual property is intended to induce - inventions in the field of medicine, for example - and identify the matches or mismatches as the case may be. I am not aware of work being done along these lines in a serious or systematic way.

17. There is a more fundamental point to be made, however. That is on the question of whether intellectual property is itself a fundamental human right or an instrument to promote human rights or both.

18. As noted above, the Sub -Commission on the Promotion and Protection of Human Rights affirmed that the right to protection of moral and material interests resulting from many scientific, literary or artistic production is a human right. On property rights broadly, the Universal Declaration of Human Rights states in Article 17 that "Everyone has the right to own property" and "no one shall be arbitrarily deprived of his property." Thus property, including intellectual property, figure in the firmament of human rights.

19. I must admit, however, to having some difficulty seeing how this is so. Without going into a detailed argument, one need only set fundamental human rights norms on genocide, torture and slavery alongside plant variety protection to see where I am headed. The former derive from "the inherent dignity of the human person"³, are inalienable and subsist for the life of the person whereas the latter is a creature of statute, can be bought and sold, and subsists for a set term of years.

20. No one - least of all me - doubts the importance of property rights. Government provision of efficient property rights lead to growth and economic power. It is now axiomatic that the importance of intellectual property rights is growing as the knowledge - based economy grows. Property, however, including intellectual property, is mutable. It is constantly adjusted in response to changing economic, technological, and social circumstances.

21. It is the fact that governments can and should regulate property rights to adjust to a changing world - versus, say, the unchanging and inalienable prohibition against slavery - that gives me the greatest pause.

22. That said, there is a powerful line of reasoning that holds that certain rights - including human rights - require other kinds of rights for their exercise. The right to education rests on the right to share in scientific advancement; the right to food, clothing, and medical care rests on the right to work to afford a sufficient standard of living; the right to development rests on a panoply of rights, and freedom of expression rests - at least to be meaningful - on the right to education.

23. Intellectual property rights figure strongly in this instrumentalist view of human rights.

³Preamble, International Covenant on Civil and Political Rights

24. Take copyright for example. Thirty years ago, the then Register of Copyright in the United States, Barbara Ringer observed that copyright protection in the United Kingdom and the United States took publishing out of the hands of the government or monarch and placed in the hands of authors and publishers - thus ensuring freedom of expression:

[Copyright protection gives authors freedom] to write and live by writing if they can manage to command the attention of a large enough segment of the populace to make the dissemination of their work even marginally profitable.

25. There are clear examples in the field of patents, in particular in the interplay between intellectual property rights and the right to healthcare. New pharmaceutical products improve healthcare - the right to which is a fundamental human right.

26. The World Health Organization (WHO) supports the need for intellectual property to encourage private investment in research and development. For example, WHO Director General, Dr. Gro Harlem Brundtland, has stated that “[t]o develop new drugs we need an innovative pharmaceutical industry, with appropriate incentives for innovation and protection of intellectual property rights. Experience demonstrates that protection of intellectual property rights goes hand-in-hand with successful research and development.”

27. *Medecin sans frontieres* has stated that it “is not questioning the importance of patents in stimulating research and development, but rather is insisting that a balance be founded between protecting intellectual property and assuring individuals’ access to medicines.”⁴

28. Again, we see here the tension between the rights of inventors and the dissemination of benefits of scientific advancement captured so well in the first and second paragraphs of Article 27 of the Universal Declaration of Human Rights.

29. What I propose in this section that follows is a way forward that builds on a solid foundation - the work done by WIPO and other states to improve intellectual property laws at the national level - and which moves forward in a rational, scientific, and nationally focussed fashion. While the source of the anxiety may be global - the TRIPS Agreement for example - the solutions depend on an inclusive, scientific, rigorous, and very local approach, having the following three elements:

First, the discussion should take place at the country level. The work should be practical, scientific, and tailored to the needs of individual countries that provide protection for intellectual property (including that called for under the TRIPS Agreement) and ensuring respect for fundamental human rights (including in respect of health, education, and development). A local approach is essential since intellectual property and human rights instruments are largely implemented at the local level.

Second, the discussion must include all stakeholders, including ministries responsible for health, development, education, and intellectual property as well as the rights holders and representatives of affected groups (such as the medical community in the case of healthcare).

⁴<http://www.msf.org/advocacy/accessmed/press/1999/12/pr-seattle.htm>

Third, the discussion should proceed on the basis of an understanding of (i) the wide range of activities carried out by holders of intellectual property rights in a given country, (ii) the way in which those activities support needs of the government and people in that country, and (iii) the connection between those activities and furtherance of human rights in that country.

30. When crafting solutions, we in the intellectual property community must be open to a greater range of influences than has been the case in the past. Resolving intellectual property problems that arise in areas as diverse as access to pharmaceuticals or access to books through the Internet or the protection of biodiversity or traditional knowledge has significantly increased the scope of our work and its complexity.

31. Lasting solutions are not found in simple answers or fuzzy thinking, but in developing a clear, common understanding. A kind heart, but an empty head is not sufficient. Solutions can be found only through a careful, structured, and scientific process. I submit that the process in the ECOSOC Sub-Commission on the Promotion and Protection of Human Rights was not such a process. It is more a statement of supposition or conclusion than a careful analysis of the linkages I outlined above between intellectual property and human rights. In this context, I would urge WIPO to carry on with its important work in this area - began in November 1998, in a panel discussion convened with the UN High Commissioner for Human Rights.

32. In conclusion, I would like to pay homage to Arnarya Sen - as so many others involved in development work have done before me. In his Development as Freedom he claims that "poverty must be seen as deprivation of basic capabilities rather than merely as low incomes, which is the standard criterion of poverty." Capabilities are essentially related to human rights - giving individuals expanded choice or freedom to be and do things they value.

33. Intellectual property exists to create a dynamic economy - at the national and international levels. It exists to expand choices in products, services, and literary and artistic works. It exists to recognize and reward human creativity. Intellectual property empowers people by giving them freedom of choice to be and do things they value.

34. In short, intellectual property rights support those rights that "derive from the inherent dignity of the human person." That, I submit, is the very essence of human rights.

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