International Journal of Law, Humanities & Social Science ©
Volume 3, Issue 5 (August 2019), P.P. 56-84, ISSN: 2521-0793

RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS

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Abstract: *Intellectual property (hereinafter IP) is a legal field that refers to creations of the mind such as musical, literary, and artistic works; inventions; and symbols, names, images, and designs used in commerce, including copyrights, trademarks, patents, and related rights. Intellectual Property Rights is a right that is had by a person or by a company to have exclusive rights to use its own plans, ideas, or other intangible assets without the worry of competition, at least for a specific period of time. The general objective of this research is to understand the relations between human rights and intellectual property rights. Secondary sources have been used in the research. The article is mainly based on UDHR, ICESCR, TRIPS agreement and other legal instruments, books, articles of prominent researches, newspaper reports and websites. The study revealed some issues such as; for decades' human rights and IP rights developed in virtual isolation from each other; human rights are one kind of rights also Intellectual Property rights are another one. Establishment of both rights basically depends upon the recognition of these rights by the various legal instrument which is recognized internationally or nationally; both rights are interrelated etc. Additionally, this paper also tries to give some suggestions to dissolve the confusion regarding the relationship between human rights and intellectual property rights.*

Keywords: Human Rights, IP Rights, UDHR, ICESCR, TRIPS Agreement
Research Area: Law
Paper Type: Research Paper

1. INTRODUCTION

Intellectual property (IP) is a legal field that refers to creations of the mind such as musical, literary, and artistic works; inventions; and symbols, names, images, and designs used in commerce, including copyrights, trademarks, patents, and related rights. Under intellectual property law, the holder of one of these abstract "properties" has certain exclusive rights to the creative work, commercial symbol, or invention by which it is covered. Intellectual property rights are a bundle of exclusive rights over creations of the mind, both artistic and commercial. The former is covered by copyright laws, which protect creative works such as books, movies, music, paintings, photographs, and software and gives the copyright holder exclusive right to control reproduction or adaptation of such works for a certain period of time. The second category is collectively known as "industrial properties" as they are typically created and used for industrial or commercial purposes. A patent may be granted for a new, useful, and non-obvious invention, and gives the patent holder a right to prevent others from practicing the invention without a license from the inventor for a certain period of time. A trademark is a distinctive sign which is used to prevent confusion among products in the marketplace. Intellectual property rights, such as patents are near-monopoly rights. This monopoly is offered by society in return for certain concessions such as information disclosure and limited duration of the rights granted. On the other hand, human rights are fundamental rights, which are recognized by the state but are inherent rights linked to human dignity. Different kinds of links between intellectual property rights and human rights can be identified. For example, patent laws recognize that there is a socioeconomic dimension to the rights granted and that a balance

must be struck between the interests of the patent holder and the broader interests of society. Intellectual property rights also have direct and indirect impacts on the realization of human rights. For example, intellectual property rights include economic and moral elements. The latter can be linked to certain aspects of human rights. Finally, human rights treaties recognize certain rights pertaining to science and technology. The links between intellectual property rights and human rights have been acknowledged for many decades, as exemplified in the science and technology-related provisions of the Universal Declaration of Human Rights (Universal Declaration).[1] Nevertheless, the main debates concerning the links between human rights and property rights focused for a long time on real property rights rather than intellectual property rights. The adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its implications for developing countries have fundamentally changed the nature of the debate concerning intellectual property rights and human rights. This shift is demonstrated in three ways. First, the possible impacts of the introduction or strengthening of intellectual property rights standards on the realization of human rights have been exemplified by the crisis over access to HIV/AIDS medicines (in sub-Saharan African countries in particular). Second, there has been renewed debate over the introduction of intellectual property in fundamental bills of rights at the national or regional level. Third, at the UN level, there has been renewed interest in the science-related provisions of Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] This article analyzes a number of issues arising in the context of the direct and indirect relationships between human rights and intellectual property rights, as well as the broader issue of the possible future role of knowledge related human rights provisions.

2. OBJECTIVES OF THE STUDY

Objectives of this research have been divided into general and specific objectives. The general objective of this research is to understand the relations between human rights and intellectual property rights. The specific objectives are:

a. To identify the real problems of recognition of intellectual property rights as human rights.
b. To explore the challenges for recognition of intellectual property rights as human rights.
c. To find out the way of recognition of intellectual property rights as human rights.

3. METHODOLOGY

The paper shows the relationship between human rights and intellectual property rights. Qualitative research methodology has been adopted in this research. The study is basically literary-based on an overall combination of analytical reasoning. Secondary sources have been used in the research. The article is mainly based on UDHR, ICESCR, TRIPS Agreement and other legal instruments, books, articles of prominent researches, newspaper reports and websites.

4. CONCEPT of INTELLECTUAL PROPERTY RIGHTS

Intellectual Property Rights is a right that is had by a person or by a company to have exclusive rights to use its own plans, ideas, or other intangible assets without the worry of competition, at least for a specific period of time. These rights can include copyrights, patents, trademarks, and trade secrets. These rights may be enforced by a court via a lawsuit. The reasoning for intellectual property is to encourage innovation without the fear that a competitor will steal the idea and / or take the credit for it. In other words**,** Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or

copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. The importance of intellectual property was first recognized in the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO).

5. DIFFERENT TYPES OF INTELLECTUAL PROPERTY

Originally, only patent, trademarks, and industrial designs were protected as 'Intellectual Property', but now the term 'Intellectual Property' has a much wider meaning. IPR enhances technology advancement in the following ways:[3]

a. It provides a mechanism of handling infringement, piracy, and unauthorized use
b. It provides a pool of information to the general public since all forms of IP are published except in case of trade secrets.

In a broad sense, Intellectual Property is usually divided into two branches, namely industrial property and copyright. So it can be said that Intellectual Property Rights signifies to the bundle of exclusionary rights which can be further categorized into the following heads;

1. Copyright.
2. Patent.
3. Trademark & service mark.
4. Trade Secrets.
5. Commercial names and designations.
6. Protection against unfair competition.
7. Industrial designs.
8. Performances of performing artists, phonograms.

9. NEED FOR PROTECTION TO INTELLECTUAL PROPERTY RIGHT

First of all, there are several compelling reasons to protect Intellectual Property Rights;

First, the progress and well-being of humanity rest on its capacity to create and invent new works in the areas of technology and culture.

Second, the legal protection of new creations encourages the commitment of additional resources for further innovation.

Third, the promotion and protection of intellectual property spurs economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life.

The protection of intellectual property rights is an essential element of economic policy for any country. Only such protection can stimulate research, creativity and technological innovations by giving freedom to individual inventors and companies to gain the benefits of their creative efforts.

10. CONCEPT OF HUMAN RIGHTS

Human rights are those moral rights that are morally important and basic and that are held by every human being because they are possessed in virtue of the universal moral status

of human beings. Human rights are one of the significant aspects of human political reality. It is the moral rights of highest order. Human Rights are evolved out of self-respect. It is intrinsic to all humans without any discrimination of race, sex, nationality, ethnicity, language, religion and colour etc. Human rights comprise of civil and political rights, such as the right to life, liberty and freedom of expression; and social, cultural and economic rights including the right to participate in culture, the right to food, and the right to work and receive an education. Human rights are protected and supported by international and national laws and treaties. The UDHR was the first international document that spelt out the "basic civil, political, economic, social and cultural rights that all human beings should enjoy." The declaration was ratified without opposition by the UN General Assembly on December 10, 1948. Under human rights treaties, governments have the prime responsibility for proto shield and promote human rights. However, governments are not solely responsible for ensuring human rights. The UDHR states:

> "Every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."

11. CHARACTERISTICS OF HUMAN RIGHTS

11.1 Inalienable

Human rights are deliberated on an individual due to the very nature of his existence. They are innate in all individuals irrespective of their caste, creed, religion, sex and nationality. Human rights are conferred to an individual even after his death. The different rituals in different religions bear testimony to this fact.

11.2 Essential and Necessary

Human rights are needed to maintain the moral, physical, social and spiritual welfare of an individual. Human rights are also essential as they provide suitable conditions for material and moral upliftment of the people.

11.3 Associated with Human Dignity

To treat another individual with dignity regardless of the fact that the person is a male or female, rich or poor is concerned with human dignity.

11.4 Irrevocable

Human rights are irrevocable as they cannot be taken away by any power or authority because these rights originate with the social nature of man in the society of human beings and they belong to a person simply because he is a human being. As such human rights have similarities to moral rights.

11.5 Essential for the Fulfillment of Purpose of Life

Human life has a purpose. The phrase "human right" is applied to those conditions which are essential for the fulfillment of this purpose. No government has the power to curtail or take away the rights which are sacrosanct, inviolable and immutable.

11.6 Universal

Human rights are not a domination of any privileged class of people. Human rights are universal in nature, without consideration and without exception. The values such as divinity, dignity and equality which form the basis of these rights are inherent in human nature.

11.7 *Absoluteness*

Man is a social animal and he lives in a civic society, which always put certain limitations on the enjoyment of his rights and freedoms. Human rights as such are those limited powers or claims, which are contributory to the common good and which are recognized and guaranteed by the State, through its laws to the individuals. As such each right has certain limitations.

11.8 Dynamic

Human rights are not stationary, they are dynamic. Human rights go on expanding with socio-eco-cultural and political developments within the State. Judges have to construe laws in such ways as are in tune with the changed social values.

11.9 Limits to State Power

Human rights infer that every individual has legitimate claims upon his or her society for certain freedom and benefits. So human rights limit the state's power. These may be in the form of negative restrictions, on the powers of the State, from violating the inalienable freedoms of the individuals, or in the nature of demands on the State, i.e. positive obligations of the State.

11.10 Principles of Human Rights:

- Universality
- Inviolable
- Inalienable
- Indivisible
- Interdependent
- Inter-related
- Equality
- Non-discriminatory

11.11 Categories of Human Rights:

Human rights can be grouped into following categories:

- Civil Human Rights
- Political Human Rights
- Economic Human Rights
- Social and Cultural Human Rights
- Development Oriented Human Rights

12. **RECOGNITION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL LEGAL INSTRUMENTS**

12.1 The U.S. Constitution

> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;" (Art. 1, Section 8, Clause 8)

The U.S. Constitution contains both specific protections for and limitations on intellectual property. These protections were not placed there by multinational corporations.

Rather, the protections of intellectual property in the Constitution were a logical extension of the protection of property and were designed to protect the rights of creators and inventors.

12.2 The American Declaration on the Rights and Duties of Man

> "He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author." (Article 13) The Declaration (1948) was the "first international human rights instrument,"

And this language has been reused repeatedly in international human rights documents to secure the right of creators to own and profit from their creations.

12.3 The Universal Declaration of Human Rights:

> "Everyone has the right to the protection and material interests resulting from any scientific, literary, or artistic production of which he is the author." (Article 27) The 1948 Declaration clearly asserts that the right to intellectual property protection is a human right.

12.4 International Covenant on Economic, Social and Cultural Rights:

(Article 15, ratified by the UN General Assembly on December 16, 1966): The States Parties to the present Covenant recognize the right of everyone:

i. To take part in cultural life;
ii. To enjoy the benefits of scientific progress and its applications;
iii. 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.

Note that while everyone has the general right to benefit from innovation, those who create innovations have a specific right to the "protection" of "material interests" resulting from their own innovations. This can mean nothing other than ownership of intellectual property, despite the absence of that legal term. An IP regime that provides the general public access to and benefits from innovative works while also protecting the ownership of those works meets the criteria of these instruments.

12.5 Universal Declaration on the Human Genome:

> "States should take appropriate measures to foster intellectual and material conditions favorable to freedom in the conduct of research." (Article 14)

Interestingly, the Universal Declaration on the Human Genome goes beyond the protection of intellectual property and insists that states have an active obligation to create climates that reward creativity and encourage innovation.

Finally, given the debate this past year over a proposed "Development Agenda" for the World Intellectual Property Organization (WIPO), the following international agreement should be of particular interest:

12.6 Vienna Declaration and Programme of Action:

> "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." (1993, Part One, Paragraph 10)

The right to the ownership of one's discoveries and creations is a human right under the agreements we've cited. So according to the Vienna Declaration, intellectual property protection may not be infringed because of a lack of development.

13. INTELLECTUAL PROPERTY RELATED HUMAN RIGHTS LAWS

The International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights(ICESCR) which were adopted in 1966, 1948 and 1966 respectively, from the International Bill of Human Rights. These instruments have always been used to argue that human rights covenants identify intellectual property rights as human rights.

As it is stated above Article 15(1)(c) of the ICESCR is related to the intellectual property and it recognises the right of everyone to benefit from both moral and material interests resulting from any literary, scientific or artistic production of which he is the author. Moreover, Article 15 (1) does not only talks about the protection of the material benefits of the author but also recognizes the right of people to take part in cultural life, enjoy the benefits of scientific progress and its applications which means that article 15 impliedly mentions the need of balance between the rights of the author, who makes a specific contribution, with the individual and collective rights of society to benefit from this contribution. According to some people, this reading of the law is proof that intellectual property rights are human rights.

Similarly, as it is stated above Article 27(2) of UDHR is related to the intellectual property and intellectual property rights are enshrined as human rights in the UDHR under that article which states that everyone has the right to protection of moral and material interests resulting from any scientific, literary or artistic work of which he is the author. However, Article 27 of UDHR and Article 15 of ICESCR lead to some questions such as all intellectual property rights are human rights (Instead of saying lead to some questions and giving only one example, say emphases that question whether intellectual property rights human rights?).

According to the intellectual property right advocates, these articles show that all intellectual property rights such as patents, trademarks, plant breeders rights are human rights. In order to give a reasonable answer to this question, these provisions have to be examined closely in terms of the meaning of the term 'author'. According to the majority of specialists in both areas, the term 'author' does not contain only the word 'writer' but also the breeder and inventor. In my point of view, these provisions refer to the word author and it covers the copyright protection due to the usage of term 'author' in copyright.(so from your point of view what is author containing and why? Only saying due to it covers protection of copyright is not enough. Make more comment) However, the word 'authors' has to be interpreted narrowly according to the VCLT rules. Therefore, for instance, the protection of moral and material benefits of authors cannot include the meaning of protection of the benefits of a patent. In other words, when we take into consideration of Article 27(2) of UDHR and article 15(1)(c) of ICESCR it is concluded from the interpretation of these two articles that all intellectual property rights are not accepted as human rights under these provisions.

At that point, General Comment No 17 which was adopted by the ECSR Committee has to be pointed out regarding the question whether Article 15(1) (c) refers to the protection of intellectual property. According to the General Comment on Article 15(1) (c) of ICESCR, it is not possible to conclude that article 15(1)(c) protects intellectual property rights or lift up intellectual property to the human rights stratosphere. This case is mentioned in some paragraphs of General Comment such as paragraph 1 saying that 'it is important not to equate intellectual property rights with the human right recognized in article 15, paragrap1 (c)' by showing the reasons stated in paragraph 1 and 2 where it generally stresses the difference

between human rights and intellectual property rights and paragraph 7 noting that '...intellectual property rights' entitlements, because of their different nature, are not protected at the level of human rights.'

Furthermore, the committee limits the scope of the author term by stating that no legal entity can be deemed to be an author through implementing the words 'everyone', 'he' and 'she' by indicating the drafter's belief that authors of scientific, literary or artistic productions can only be natural persons. This interpretation shows that intellectual property rights are neither recognized as human rights nor mentioned in that article. For, intellectual property right holders in most cases are legal entities such as the large companies holding patents that can have a potential to affect the medicine attainability and exempting these companies is against its nature. On the other hand, in the light of general comment no 17, it can also be construed that not all intellectual property rights but only the natural owners' intellectual property rights are recognized as human rights.

Besides, article 12 of UDHR, which provides protection against arbitrary interference with privacy, family, home or correspondence and against attacks upon honour and reputation, is also accepted within the wider intellectual property framework, such as an action for violation of confidence, trade secrets, moral rights and even personality rights.

Moreover, the ICCPR does not provide a positive basis for the protection of intellectual property rights, but under article 17 it guarantees, indirectly, the protection of moral rights that there shall not be any unlawful attacks on a person's honour and repudiation and also Article 19 mentions the freedom of expression which contains right to receive and impart information and ideas which shows that there is further indirect protection for reputational rights.

14. INTELLECTUAL PROPERTY AND HUMAN RIGHTS: AN INSTRUMENTAL VIEW

It is now accepted in rights theory that the existence and exercise of some rights presupposes the existence of other rights.[4]Philosophers now agree or concede that the classical negative rights of traditional liberalism require for their exercise other kinds of rights. Rights of freedom need to be accompanied by welfare rights. Rights, as it were, come in clusters. It is also clear that important complementary elements obtain between rights. So, for instance, the right to education on the face of it aids the meaningful exercise of a right of freedom of speech. Some rights, then, are instrumental in securing the feasibility of claiming other types of rights. The central claim made below is that the rights created through the enactment of intellectual property laws are instrumental rights. Ideally, under conditions of democratic sovereignty, such rights should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights. Of course, the history of intellectual property does not square with this ideal. It has as much to do with powerful elites using such privileges to obtain economic rents for themselves as it has to do with parliaments working on behalf of citizens to design rights that maximise social welfare. This should not be surprising. The economic theory of legislation, the theory of public choice argues that legislation is essentially a market process in which legislators and interest groups transact business in a way that sees the public interest subordinated to private interest.[5]

Yet the ugly truths that public choice scholars reveal about this or that bit of legislation should not obscure a broader historical truth concerning the way in which property rights have in the long sweep of the history of western states come to serve humanist values. Moving across

a history that begins roughly in the fifteenth century three generalizations may be advanced.[6] States have made increasing use of property rules, both civil and criminal, for a variety of purposes. Property rights have become progressively more secure, progressively more immune from arbitrary confiscation by the ruling power. The evolution of the law of contract has made it more possible to negotiate transfers of property with certainty of effect. These trends towards the expansion, security and negotiability of property have been more or less universal. States which did not guarantee property and contract did not flourish economically compared to states that did. Those states that failed to pursue the goal of efficient property rights paid the price in terms of reduced growth and loss of hegemony.[7] Property and contract law have indeed been foundational in enabling capitalism to take off. While some states were slow to learn this, today there is no national regime on the globe that has not accepted it as a lesson of history. (Although it should be said that, while the formal law of every state stands behind secure property rights and the enforcement of contracts by courts that are independent of the state, in many parts of the world the independence of the judiciary is a fiction.)

The emergence of well-defined, secure property rights was a part of a much broader historical process in which absolute monarchies and their legitimating political philosophies lost their institutional dominance to be replaced by the institution of the modern State and secular political philosophies that recognized the rights of individuals within and against the State.[8] Peasants, serfs and vassals became citizens and citizens came to hold property rights created by the sovereign of the State. Woman stopped being property of their husbands and became property owners. In all this the creation of secure, well-defined property rights that citizens could trade gave expression to a deeper philosophy of the equality and freedom of man. The idea of a natural right of property was one crucial premise in John Locke's rejection of the absolute authority of Kings. Redefining, rethinking, redistributing property has always been one way, perhaps the most important way, in which political ideas and philosophies have made themselves concrete in the world. People now live in an era when capitalist economies, led by the United States, have progressively become information economies. Intellectual property regimes have moved to the center 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 and contract have become so important and pressing.

The institutional design issues raised by intellectual property (and contract) are not simply issues of a legal technicality or even economic ones. The property, as argued above, is an instrument on which the deeper notes of political philosophies are to be sounded. Property regimes should serve those values, those needs and interests that individuals identify as fundamental to their moral and political philosophies.[9]The problem faced in the present time is that the institution of intellectual property has globalized without some set of shared understandings 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 theories and policies that will provide guidance in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offer at least a common vocabulary with which to begin this project, even if, for the time being, not a common language.

Generally speaking, those thinkers who are regarded as having an important role in the formation of modern political thought said nothing or very little about intellectual property. To illustrate: John Locke's discussion of property in Chapter V of the Second Treatise has inspired discussions of Lockean theories of intellectual property,[10] but there is not one mention of

intellectual property in that chapter. Hegel in his Philosophy of Right (1821) makes some brief passing observations concerning property and products of the mind.[11] Kant, despite being given the credit for inspiring the system of authors' rights, wrote about authors and the nature of genius rather than intellectual property law.[12] The truth is that, at best, intellectual property has been little more than a sideshow in broader intellectual traditions. Even within economics the role of information has, until comparatively recently, been largely ignored.[13]

One factor which helps to explain this neglect is the fact that the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded intellectual property law experts. In their hands intellectual property has grown into highly differentiated and complex systems of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group. Emblematic of this partiality has been the narrow interpretation that has been given to the morality clause in Article 53(a) of the European Patent Convention. The Oncomouse case, for example, reveals a formalistic treatment of the morality criterion that did not really engage with the matters of principle that the opponents in that case were raising.[14] This narrow line of interpretation has persisted despite the fact that there is a strong argument that human rights law operates to affect the interpretation of Article 53(a).[15]

The reasons why a technocratic conception of intellectual property law has flourished are complex and in any case are discussed by the present author elsewhere.[16] In brief, the intellectual property community has functioned both as an interpretive community and an epistemic community. That is to say, that collectively this community has provided the interpretive judgments concerning the scope and meaning of intellectual property law. It is the ideas, values and mores of this community, its ""information ethic" as it were, that are progressively constituting the standards by which the conduct of other communities, such as the artistic community, the library community, computer users and so on, is being judged in the information age. Functioning as an epistemic community, intellectual property experts have been able to persuade governments that their value judgments about the scope of infringement, the size of the public domain, the role of statutory licences and so on represent the right policy settings. The governments of the three lead producers of intellectual property in the global system (the United States, Europe and Japan) have been led by this epistemic community, because these governments see that success within the global economy depends crucially upon knowledge creation. By linking stronger intellectual property protection to global investment flows and knowledge creation intellectual property experts have contributed to a structural situation in which none of the three lead regional economies in the world is prepared to take the risk of weakening or calling a halt to improving intellectual property protection. There is, in the institutional form of the WTO, a global regulatory ratchet in a place for intellectual property, which for the time being is being worked by a technocratic elite.[17]As an anonymous referee of this article observed, the result of this ratchet is that ""IP law is not, in practice, thought of systematically in relation to human rights law". The irony in all this is that knowledge creation depends on the diffusion of information to knowledge workers as much as it does on norms of appropriation. And it is fundamental human rights such as the freedom of communication and the right to education that help to promote this diffusion.

For policy-makers around the world, the challenge of the coming bio-digital millennium will be to define efficient property rights in information. The precise nature and scope of these property rights will affect not only the workings of the intellectual property regime but the trade and competition regimes.[18]And in turn, these regimes will have enormous implications for the welfare of citizens everywhere. No legislature, no policy-maker can, in the

quest for efficient property rights, afford to rely on a narrowly constituted epistemic community. The stakes are too high.

Ideally, the human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the eyes of human rights advocates will encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it currently does not. Intellectual property experts can bring to the aspiration of human rights discourse regulatory specificity. At some point, the diffuse principles that ground human rights claims to new forms of intellectual property will have to be made concrete in the world through models of regulation. These models will have to operate in a world of great cultural diversity. Moreover, the politics of culture is deeply factional, globally, regionally and locally. It is in this world that the practical issues of ownership, use, access, exploitation and duration of new intellectual property forms will have to be decided. It is here that intellectual property experts can make a contribution.

15. THE EUROPEAN COURT OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Furthermore, the European Court of Human Rights has identified intellectual property rights as human rights when interpreting the term 'possession' in Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In Anheuser-Busch Inc v Portugal case which is related to the application of brought by Anheuser-Busch Company to register the 'Budweiser' as a trademark which had already been registered as a designation of origin on behalf of a Czechoslovak Company, the Grand Chamber of ECHR held that IPRs 'undeniably attracted the protection of Article 1 of Protocol No.1 of the ECHR and that it is clear a trademark falls within the scope of the term possession under that article. A similar decision was held for copyrights by ECHR in Basan v Moldova that the protection under article 1 also extends to copyrights. Besides, in Smith Kline and French Laboratories Ltd v the Netherlands the ECHR indicated that patent amounts to a 'possession' within the meaning of that article. Thus, even if the scope of the term possession is not defined explicitly, there is no doubt that the intellectual property rights are protected by article 1 of protocol 1 of the convention. This interpretation is also mentioned by an author that: The concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent of the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.

16. TRIPS AGREEMENT AND REALIZATION OF HUMAN RIGHTS

After analyzing the intellectual property-related human rights instruments, we should also examine the human rights-related intellectual property agreement which is the Agreement on Trade-Related Aspects of Intellectual Property Rights, more commonly known as TRIPS negotiated in 1994 at the Uruguay Round of GATT and the ratification of TRIPS became a compulsory requirement of WTO membership. Any countries willing to enter international

markets facilitated by WTO have to comply with strictly enforced intellectual property law by TRIPS. This makes TRIPS a very critical instrument for maintaining intellectual property laws in the time of globalization.

The TRIPS agreement that has a so-called major aim to enhance the standards of intellectual property rights, particularly in under-developed countries, has huge impacts on the realization of human rights through its implementation. For, under TRIPS the protection of patents is strengthened however this strengthening has started being harmful to fundamental human rights such as the right to health. In other words, the nexus between the intellectual property rights and realization of human rights in under-developed countries occurs with regard to a number of human rights such as rights to health particularly in the context of the HIV/AIDS epidemics in Africa and India. This is due to the fact that medical patents force countries to introduce product patents in pharmaceuticals, thereby not allowing the generic medicines which lead to a dramatic drop in the prices of these drugs, adversely affecting the medicines accessibility and endanger the life of a substantial number of persons, thereby the human rights to health.

In my point of view, TRIPS Agreement fulfils its own obligations partly by emphasising, impliedly under article 7, the need to balance the human rights and intellectual property rights, by not providing any method on how to accomplish this balance. Therefore, the ways of achieving that balance should be inserted by a clause into TRIPS Agreement since in terms of right to health, the affordability and accessibility of medicines, particularly by needy people, are the two major components of right to health. As a result, TRIPS Agreement, contrary to its so-called aim to enhance the standards of intellectual property rights particularly in under-developed countries, has brought benefits only to developed countries and this has done by preventing the development of developing countries. Therefore, TRIPS Agreement should be amended as soon as possible.

The reaction, against the impacts of intellectual property rights on the realization of human rights such as the significant changes in the drug prices, is also taken in hand by the Sub-Commission on the Promotion and Protection of Human Rights which declares that any intellectual property rights regime that which would make it more difficult for a state to comply with its core obligations in relation to the right to health and food would be inconsistent with the legally binding obligations of the concerned state.

Intellectual Property Rights and the realization of Human Rights intellectual property rights largely evolved as a distinct field of law for most of their history. This was due in part to the perception that rights like patents made a specific contribution towards economic and technological development. The links between the incentives granted through the patent system and its broader impacts on society were only superficially addressed. Nevertheless, the basis of patent rights is a balance between the interests of society at large in technological and economic development and the rights granted to individual inventors. This is linked to the fact that there has always been a tension inherent in the patent system between the promotion of competitiveness for economic development in capitalist economies and the introduction of near-monopoly rights to ensure similar aims in certain specific fields.[19] It has therefore always

been recognized that a balance should be struck between the rights granted to patent holders and the broader interests of society. In other words, socioeconomic concerns constitute an integral part of patent laws and treaties. This emphasis on socioeconomic concerns is limited by the context within which they are introduced. Patent laws focus on the rights of patent holders and the interests of everyone else. This has two important implications. First, there is no equality of rights between the different actors in presence. Second, patent laws have only made insignificant contributions to the understanding of the potential impacts that they can have on the realization of human rights. The relative isolation of intellectual property rights from broader debates concerning their impact on the realization of human rights or on environmental conservation has ended following the adoption of the TRIPS Agreement, whose main impact has been to substantially raise intellectual property rights standards in a majority of developing countries.[20] In the context of a majority of developing countries, and probably all least developed countries, the implementation of the TRIPS Agreement has the potential to have significant impacts on the realization of human rights.[21] The link between patent protection and the realization of human rights is not new per se, but it has been made much more palpable following the adoption of the TRIPS Agreement. Most developing countries have had and are having to quickly adopt intellectual property rights standards which have the potential to trigger significant socioeconomic disruption. This was probably never so visible in developed countries, where the strengthening of patent protection has largely been incremental. The links between intellectual property rights and the realization of human rights in developing countries exist with regard to a number of human rights. They are easily visible in the case of the rights to food and to health. With regard to the human right to health, the link has become apparent in the relationship between medical patents and the realization of the right to health, particularly in the context of the HIV/AIDS epidemics. This is due to the fact that a number of drugs used to alleviate HIV/AIDS are protected by patents. There is, therefore, a direct link between patents, the price of drugs, and access to drugs.[22] With regard to the right to food, there are links between patents in the field of genetic engineering, the limitation of farmers' rights, and access to food.[23] While the link between intellectual property rights and human rights has been made, it has been discussed almost exclusively in human rights forums.

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.[24] At the UN level, this has been the case of the Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) and the ESCR Committee. The Sub-Commission specifically debated the question of the impact of intellectual property rights on the realization of human rights.[25] It indicated in a strongly worded statement: 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.[26] The ESCR Committee devoted a day of general discussion to the issue in 2000.[27] Following the public controversy concerning access to drugs, medical patents, and the right to health in the context

of the price of HIV/AIDS drugs in sub-Saharan African countries most affected by the epidemics, the ESCR Committee went further and adopted in 2001 a statement on intellectual property rights and human rights. In this statement, the ESCR Committee argued that intellectual property protection must serve the objective of human well-being, which is primarily given legal expression through human rights.[28] It intimated that intellectual property regimes should promote and protect all human rights.[29] More specifically, the Committee stated that any intellectual property rights regime that would make it more difficult for a state to comply with its core obligations in relation to the right to health and food would be inconsistent with the legally binding obligations of the concerned state.[30] Both the Sub-Commission and the ESCR Committee in its 2001 Statement put the emphasis on the question of the impacts of existing intellectual property on the realization of human rights. 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 provides no guidance on how to achieve this balance.[31]

17. MEDICAL PATENTS AND THE HUMAN RIGHT TO HEALTH

General considerations concerning the impacts of existing intellectual property rights on human rights highlighted above are better analyzed by focusing on specific rights. In recent years, one of the most controversial debates has focused on the impacts of medical patents on the realization of the human right to health in developing countries.[32] The right to the "enjoyment of the highest attainable standard of physical and mental health" is specifically protected under the ICESCR.[33] Core obligations of member states include the necessity to ensure the right of access to health facilities, especially for vulnerable or marginalized groups.[34] In the case of primary health care, this includes the provision of essential drugs.[35] In the case of HIV/AIDS more specific elaborations of these obligations have been given. The UN Human Rights Commission adopted resolutions indicating that access to medication in the context of HIV/AIDS is one fundamental element for achieving the full realization of the right to health.[36]

In other words, accessibility of medicines and their affordability are two central components of the right to health. Medical patents have direct impacts on accessibility and affordability. They have the potential to improve access by providing incentives for the development of new drugs as well as to restrict access because of the comparatively higher prices of patented drugs. In practice, access to drugs is governed by a number of factors. Their price is one important factor. Therefore, the fact that patented drugs are nearly always more expensive than generic drugs is a relevant consideration. Other factors that influence access include situations where there is only limited competition between generic producers, local taxes, and mark-ups for wholesaling, distribution, and dispensing.[37] Improving access can thus not be limited to bringing prices down through competition but must also include further measures such as public subsidies, or price control measures. Fostering better access to drugs can be approached from the point of view of medical patents or the right to health. The dichotomy is unavoidable insofar as each relevant legal framework is largely insulated from the other, but both need to be considered jointly because, in practice, a solution focusing on medical patents that ends up constituting a denial of the right to health would not be acceptable. From the standpoint of the TRIPS Agreement, the question of health is one that can be tackled through some of the exceptions provided in Section 5 of TRIPS or through the two general clauses of Articles 7 and 8. This, however, falls short of providing a reasoned argument concerning the relationship between TRIPS and human rights. From the human rights perspective, the realization of the right to health does not imply an outright rejection of medical

patents. Nevertheless, several points need to be highlighted. Patent protection does not ensure that the most common diseases will attract the greatest amount of research.[38] This implies that even if patent protection can be justified in markets where all consumers can afford to pay directly or indirectly the price of patented drugs, this is not so in other situations. The central issue is that the realization of human rights must be judged according to the level of implementation among the most disadvantaged. The issue is not, therefore, whether certain countries can afford patent rights, but whether the poorest in any given country stand to benefit from the introduction of medical patents. In certain situations, the introduction of medical patents is likely to restrict access to drugs even further than now because price hikes will further limit the number of persons who can afford to purchase medicines.[39] In a situation where compliance with commitments under the TRIPS Agreement leads to reduced access to drugs, this raises the question of a substantive violation of the ICESCR.

Indeed, while Article 2 of the Covenant does not require immediate full implementation of the right to health, it obliges states to take positive measures towards the fulfilment of the right. Thus, the repeal of legislation which is necessary for the continued enjoyment of the right to health, or the adoption of legislation incompatible with pre-existing domestic or international legal obligations in relation to the right to health, would constitute a violation. In this specific case, the introduction of medical patents could be construed as a "deliberately retrogressive" step if no measures are taken to limit the impacts of TRIPS compliance on access to medicines by, for instance, providing that all essential medicines should remain free from patent protection. Where TRIPS compliance leads to a violation of a right under the ICESCR, treaty law provides a number of rules for adjudicating conflicts between conventional norms.[40] While these rules would lead to the resolution of a conflict in favor of one norm or the other, it is unclear whether the solution would be deemed appropriate, equitable, and satisfactory according not only to the specific rules of treaty interpretation but also to broader principles of international law. In the case of trade and environment treaties, debates over potential conflicts have led to the realization that existing rules may not provide effective and satisfactory solutions. This has led to the inclusion of savings clauses in several recent environmental treaties, which does not bring much clarity to the issue but highlights the fact that a solution to conflicts between hierarchically equivalent norms cannot be found exclusively in existing treaty interpretation rules.[41] In the case of a conflict between human rights and other norms of international law, different perspectives might be adopted by different institutions.

In the WTO context, it is unlikely that human rights would be allowed to trump patent rights. In a human rights context, the most specific guidance that exists is provided by the ESCR Committee, which has indicated that a violation of human rights recognized in the Covenant can occur if states agree to international measures which are manifestly incompatible with their previous international legal obligations. This would tend to give priority to human rights norms, at least in the case of direct opposition with the TRIPS Agreement.[42] In the context of conflict of norms involving human rights, the additional factor of a hierarchy of norms needs to be taken into account. While only limited forms of the hierarchy of norms are recognized in international law, there exist peremptory norms (jus cogens) that consist of some fundamental principles and norms that states are not free to modify or abrogate.[43] These include a limited list of some of the most basic principles, accepted by all states today, such as the prohibition of slavery. In practice, one of the main consequences of the existence of peremptory norms is that states are not allowed to adopt treaties which violate them.[44] There are sound arguments that human rights should be recognized as having a peremptory status.[45] This is confirmed by the fact that at the time of the drafting of the Vienna Convention on the Law of Treaties, a number of states mentioned human rights in their enumeration of peremptory norms.

Further, human rights treaties recognize the peremptory status of some specific rights.[46] Nevertheless, the peremptory status of human rights remains controversial and it would be difficult to find a consensus among states on this issue.[47] As a result, an internationally adjudicated conflict might recognize, at best, that human rights take priority over intellectual property rights.

18. RELATIONSHIP BETWEEN HUMAN RIGHTS & IP RIGHTS

Intellectual property rights have spread out through many bilateral, regional and multilateral treaties and the importance of intellectual property is increasing with each passing day. However, the rights originated from intellectual property have started up a stringent discussion with a human rights aspect due to its effects on human rights.

The problems derived from this relation have been developed in-depth. In the first part, intellectual property-related human rights law and human rights-related intellectual property law are discussed. The TRIPS Agreement is analyzed and the discussion of whether intellectual property rights are human rights is examined according to the international instruments when appropriate. One of the more intriguing questions is whether intellectual property rights are human rights; to answer this, we should look at international instruments. In part 2, the European Court of Human Right's decisions concerning whether the term 'possession' in Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms includes intellectual property rights such as trademark, copyright, patent. In part 3, TRIPS agreement and its impacts on the realization of human rights such as the tension between patents and the right to health-related to HIV and AIDS which mostly affects underdeveloped and developing countries are analyzed.

All related subjects concerning the relationship between intellectual property and human rights is not analysed since there are numerous branches stemmed from that relationship. Therefore, it is required to choose the most important and relevant parts of that relationship. For instance, some international instruments which are related to both intellectual property and human rights are not examined. Moreover, TRIPS Agreement does not only have negative effects on the right to health but also on other human rights however only right to life is analyzed due to the same reason.

The relationship between human rights and intellectual property which were formerly strangers are now becoming intimate bedfellows. This case is stated as for decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard-setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.

The interplay of human rights and intellectual property rights has reached new heights since the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which was enacted in 1995 and hereafter states, courts scholar, intergovernmental and nongovernmental organizations (NGOs) such as the World Intellectual Property Organization (WIPO), the World Trade Organisation WTO), the U.N Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, The World Health Organization (WHO) and the Conference of the Parties to the Convention on Biological Diversity (CBD) has drawn more attention to this link.

Moreover, before TRIPs Agreement was entered into effect, there had already been some impacts to create this intimate bedfellow. The first one is the adaptation of non-binding document named UDHR in 1948 by the General Assembly of the United Nations. After the

Second World War, the problem of disregard and contempt for human rights broke out and the declaration arose from these effects of the Second World War which represents the first global expression of right. In the UDHR, the significantly important article in terms of intellectual property is Article 27(2) which is analyzed below.

In the mid-1960s, so as to make the UDHR binding, two covenants which are ICCPR and ICESCR were adopted. Under article 17 of the ICCPR and under article 15(1)(c) of ICESCR the link between intellectual property and human rights is once more stated and more attention is drawn to that relationship and to the debates caused by this relationship.

As a result, the relationship between intellectual property rights and human rights which is quite complicated and controversial has been at the center of the heated debates for both IP and HR specialists for over half a century. The effect of IP rules on the ability of States to comply with their obligations under international human rights such as the duty to guarantee everybody access to affordable medicines is at the core of the debate. Despite the fact that it is commonly known a perfect balance is probably unattainable, some international intellectual property rights such as the TRIPS Agreement recognize that optimal balance has to be created between intellectual property rights and human rights. On the other hand, it is also argued that whether intellectual property rights are human rights.

19. VARIOUS LEGAL INSTRUMENTS ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS & INTELLECTUAL PROPERTY RIGHTS

19.1 Global Instruments

Culture and science-related provisions are found in both the Universal Declaration and the ICESCR. The latter includes such provisions in Article 15, largely derived from Article 27 of the former. Article 15 of the Covenant reads as follows:

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

a. To take part in cultural life;
b. To enjoy the benefits of scientific progress and its applications;
c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The drafting history of Article 15(1) sheds some light on the scope of the rights found in this provision. First, the original draft Covenant of 1954 did not include a sub-paragraph (c). The draft Article 16(1) only included the first two sub-paragraphs. Article 16(1) was thus originally conceived mainly from the point of view of the "end-users" of scientific innovations or cultural development. The original article did not even include an indirect reference to the interests of inventors or authors. The introduction of sub-paragraph (c) was championed by Costa Rica and Uruguay, which sought thereby to protect authors against improper action on the part of publishers. Uruguay argued, for instance, that the lack of international protection allowed the piracy of literary and scientific works by foreign countries, which paid no royalties to authors. From this perspective, the purpose of the amendment was not to qualify the first two sub-paragraphs, but rather to highlight one specific problem within the broader framework of culture and science. From a contemporary point of view, 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 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. The two provisions of Article 15(1) that are of specific importance here are sub-sections (b) and (c). The right to enjoy the benefits of scientific progress and its applications needs to be understood in its national and international dimensions. At the national level, there is a duty for governments to ensure that everyone has access to all technologies that contribute to the fulfilment of human rights. An additional duty of governments is to ensure, as required by Article 2(2), that the benefits of scientific progress and its applications are available to all without any discrimination. Article 15(1) b also has an important international dimension. The right to enjoy the benefits of scientific progress implies that everyone in all countries should be able to benefit from all scientific and technological advances. Given the highly skewed distribution of technology around the world, the realization of this right in most developing countries necessitates international assistance and co-operation. The realization of the right recognized at Article 15(1)(b) therefore necessitates significant technology transfers in favor of, developing countries. In other words, Article 15(1)(b) is a provision that seeks to promote the diffusion of science and technology both at the national the principle of common but differentiated responsibility or more generally differential treatment. Article 15(1)(c) is a more narrowly drafted provision, which focuses on the interests of authors. It emphasizes their moral and material interests in their creations. The recognition of the author's moral interest relates to the idea that authors inherently identify with their creations. The recognition of the material interests of authors fits much less easily in a human rights context. In any case, this provision should not guarantee a monopoly rent, but rather only basic material compensation for effective costs incurred in developing a new scientific, literary, or artistic production and to foster a decent standard of living.

Article 15(1) leaves open a number of important questions. First, it does not indicate how the balance between the enjoyment of the fruits of science and incentives for innovation has to be achieved. Second, sub-section (c), which deals with the reward for individual contributions, does not indicate with any specificity the type of contributions which are covered. Intellectual property rights are based on the premise that there must be a balance between the rights granted to the property rights holder and society's interest in having access to novel developments in the arts, science, and technology. This is related to, but much narrower than, the scope of Article 15(1). While intellectual property rights frameworks introduce rights for individual contributors, they only balance it with a general societal interest in benefitting from artistic or technological advances. Intellectual property rights frameworks do not recognize everyone's right to enjoy the "benefits of scientific progress and its applications" as an individual and/or collective right. While Article 15(1)(c) is sometimes read as referring to existing intellectual property rights, there is nothing that indicates that sub-section (c) is limited to existing categories of intellectual property rights. In fact, Article 15(1)(c) recognizes intellectual contributions in general without making any special reference to one or the other category of existing intellectual property rights and international levels. This is similar, though approached from a different perspective, to technology transfer provisions inserted in many sustainable development law instruments, which contribute to the operationalization of the principle of common but differentiated responsibility or more generally differential treatment.[48] Article 15(1)(c) is a more narrowly drafted provision, which focuses on the interests of authors. It emphasizes their moral and material interests in their

creations. The recognition of the author's moral interest relates to the idea that authors inherently identify with their creations. The recognition of the material interests of authors fits much less easily in a human rights context. In any case, this provision should not guarantee a monopoly rent, but rather only basic material compensation for effective costs incurred in developing a new scientific, literary, or artistic production and to foster a decent standard of living. Article 15(1) leaves open a number of important questions. First, it does not indicate how the balance between the enjoyment of the fruits of science and incentives for innovation has to be achieved. Second, sub-section (c), which deals with the reward for individual contributions, does not indicate with any specificity the type of contributions which are covered. Intellectual property rights are based on the premise that there must be a balance between the rights granted to the property rights holder and society's interest in having access to novel developments in the arts, science, and technology.[49] This is related to, but much narrower than, the scope of Article 15(1). While intellectual property rights frameworks introduce rights for individual contributors, they only balance it with a general societal interest in benefitting from artistic or technological advances. Intellectual property rights frameworks do not recognize everyone's right to enjoy the "benefits of scientific progress and its applications" as an individual and/or collective right. While Article 15(1)(c) is sometimes read as referring to existing intellectual property rights,[50] there is nothing that indicates that sub-section (c) is limited to existing categories of intellectual property rights. In fact, Article 15(1)(c) recognizes intellectual contributions in general without making any special reference to one or the other category of existing intellectual property rights.[51]

20. REGIONAL AND NATIONAL INSTRUMENTS

In view of the underdeveloped jurisprudence on the place of knowledge in the Covenant, this section briefly examines the extent to which a human right to intellectual property has been included in the European region, India, and South Africa.

`In Europe, the right to property has been accepted as a human right since the adoption of the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[52] Article 1 of the first Protocol which provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions" has been analyzed on numerous occasions by the European Court of Human Rights.[53] However, there have been comparatively few cases dealing with intellectual property. In one case, the European Commission of Human Rights specifically indicated that a patent falls within the scope of the term possession.[54] Further, the Court has accepted that the right to a fair trial in the determination of civil rights and obligations covered under Article 6 of the Convention is applicable to proceedings concerning a patent application.[55] Overall, the case law lacks specificity with regard to intellectual property rights. Nevertheless, it is apparent that no in-depth analysis of the place of intellectual property protection in the context of the Convention has been undertaken. This is, for instance, indicated by the fact that the Commission and Court have simply assumed that existing intellectual property rights constitute the property rights over science, technology, and culture (which need to be protected in the context of the Convention) without considering the impacts that this has over the realization of other human rights. The European Union has gone further than the European Convention of Human Rights with the adoption of its Charter of Fundamental Rights. This Charter includes not only a right to property but also specifically provides that" [i]ntellectual property shall be protected."[56]This seems to indicate that there is an increasingly broad consensus in the European region in favor of making an explicit link between intellectual property rights and human rights. Nevertheless, the Charter falls short of introducing a human right to intellectual property rights because it is addressed to institutions of the European Union rather than right holders.[57]The situation in the European region can be

compared with the situation in two individual developing countries that have made their own important contributions in this field. In India, a fundamental right to property was included in the Constitution.[58] This was deemed to include intellectual property rights in some early judgments.[59] The fundamental right to property remained a controversial right in the decades following the adoption of the Constitution. Eventually, in the late 1970s, a constitutional amendment was passed to remove the right from the list of fundamental rights.[60] Today, there is a still a constitutional right to property but it is not part of the basic structure of the Constitution, which implies that the constitutional remedies available under Article 32 to foster enforcement are not available any more.

In practice, the existing concept of property, which is protected in India, is substantially similar to the original notion developed after independence. Nevertheless, the Indian experience is important with regard to the balance between different rights. In India, a decision was taken to provide for a balance between rights, which puts property below inherent rights such as the right to health or food. Another more recent experience with regard to the place of intellectual property rights in a constitution can be gleaned from the experience of South Africa in the context of the adoption of its new Constitution, which does not recognize a right to intellectual property.[61] During certification, this was challenged as not in compliance with the principles outlined in Schedule 4 to the Constitution of the Republic of South Africa Act of 1993[62] Challengers argued that the Interim Constitution called for all universally accepted fundamental rights to be included in the new constitution.[63] The Constitutional Court determined that there is no universally accepted trend towards the protection of intellectual property rights in human rights instruments and bills of rights. The South African Constitutional Court's statement constitutes an apt summary of the situation. Different countries and different regions of the world have different positions on the place of scientific and cultural contributions in human rights frameworks. Most countries protect the economic interests of authors through intellectual property rights such as patents and copyrights. Further, most countries fail to protect the moral and economic interests of intellectual contributions which cannot be protected under existing intellectual property rights. This is, for instance, the case for traditional knowledge.

Overall, there remains uncertainty concerning the place of intellectual contributions in a human rights framework. First, while it can be argued that the material interests of authors have nothing to do with a human rights framework, Article 15(1) (c) of the ICESCR seems to indicate that at least some material interests need to be taken into account in a human rights context. Second, conceptual and practical debates concerning the place of intellectual contributions in a human rights context have usually failed to take into account the multi-dimensional aspects of a provision like an Article 15(1) of the Covenant. The balance between everyone's right to benefit from scientific and technological progress and the interests of authors is an integral part of the overall reflection on the place of intellectual contributions in human rights. Third, the material and moral interests of holders of intellectual property rights such as patent holders are more than adequately covered by intellectual property laws and treaties in place. A human rights approach to intellectual contributions may, in fact, require restrictions on what are today expansive rights. This can be opposed to the absence of protection for traditional knowledge in most countries, which is a shortcoming from the point of view of the implementation of Article 15(1) of the Covenant.

21. COMPARING PROVISIONS OF THE UDHR AND ARTICLE 15 OF THE ICESCR

The language in Article 15 of the ICESCR builds on but also differs from the UDHR in a number of ways. Much like the Universal Declaration, the first paragraph 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.

It is relevant to note that the intellectual property provision in the UDHR was carried over into the ICESCR despite the fact that the article on the right to property was not. The ICESCR has no equivalent to the Universal Declaration's Article 17.1 language that "Everyone has the right to own property alone as well as in association with others."

Nor does it make the commitment found in Article 17.2 that "No one shall be arbitrarily deprived of his property." Most notably, because the ICESCR has the status of a treaty and as such is legally binding on those nations that become States Parties, the text of Article 15 in the ICESCR articulates a series of responsibilities for States Parties that were absent from the Universal Declaration. It uses the format of "steps to be taken." In doing so, the ICESCR translates the aspirational language of the Universal Declaration into specific legal obligations. These are outlined in Paragraphs 2 through 4:

- The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
- The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

22. FINDINGS

- Human rights are one kind of rights also Intellectual Property rights are another one. Establishment of both rights are basically depends upon the recognition of this rights by various legal instrument which is recognized internationally or nationally. In present world Human Rights are recognized in every country because they are the signatories of basic and universally recognized Human Rights Instrument named as… UDHR, ICESCR. On the other hand such Intellectual Property Rights among their different categories are not recognized in different state. For example… some state provides protection for patent and some state provide protection for copyright by legal instrument. This lack of recognition did not match with the one principle of Human Rights name as "Universality".
- Based on the principle of Human Rights it is established that, Human Rights should be inter-related. That means one Human Right must be related with another Human Rights. For example… Right to life is a human right and it is closely related with right to health and right to food. But reality is…the concept of intellectual property right is too vague, it is not clear like the concept of human rights. For this ambiguity we failed to relate intellectual property right to human rights. But they are inter-related because by the recognition and protection of intellectual property right some rights of creator or

inventor are created and after provenance of this right to an author or inventor he has right to enjoy it and this enjoyment is recognized by human rights instrument.

- In ancient period intellectual property rights were not recognized by any acceptable legal instrument but in this era the statesmen of different country agree to recognize it legally and for their positive willingness now intellectual property rights are recognized directly or indirectly by many legal instruments. Such as TRIPS Agreement, Paris Convention etc.
- Intellectual property rights are explicitly recognized in the TRIPS Agreement as private rights and they are now generally recognized as property rights so intellectual property is one kind of property so everyone has right to enjoy this right because Article 42 of The Bangladesh Constitution provide that, "every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property". So everyone can use his patent right or copyright as his property right because those are the part of intellectual property rights.
- The state has such obligations to protect economic and moral rights of the citizen as a signatory state of ICESCR. We know that protection of intellectual property rights protects the economic and moral rights of the creators or inventors. So by providing protection of intellectual property rights we can improve the economic status of creators or inventors or authors. This helps to fulfill such obligations imposed by the ICESCR.
- Intellectual Property Rights are basic not only for the economic development of the country but also to encourage an inventor or creator to create knowledge or something for the benefit of society by giving him an award for his invention or work which is a result of his hard work, precious time and of course his intellect. And obviously the society is benefited by his/her invention.
- Intellectual property rights have direct and indirect impact on the realization of human rights.
- For decades this two subject developed in virtual isolation from each other.
- Human Rights relates with economic, social and cultural issues which recognize by ICESCR 1966. However, there is a great impact of intellectual property rights over economic, social and cultural issues which have been recognized later.
- No preferences to human rights appear in major intellectual property treaties such as Paris Convention and Berne Convention or in TRIPS Agreement.
- Both bodies of law where preoccupied with more important issues and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion.
- Human rights have various issues such as civil, political, economic, social and cultural rights. But only civil and political rights have been developed as human rights but remaining 3 issues one least developed and having received significance jurisprudential attention in the last decade.
- Adopting human rights principles is not a purely theoretical consideration. This framework can have practical implications for intellectual property law. The approach taken to intellectual property, whether trade-based or human rights-oriented, and the terminology used with respect to intellectual property rights can shift our understanding of the nature of the rights.
- Merging intellectual property and international trade has altered our understanding and characterization of intellectual at a global level. In addition, scholars observe that the "propertization" of patent, copyright, and trademark has changed not only the narrative, but also the legal treatment of intangible rights.

- The European Convention on Human Rights recognizes that corporations can assert human rights protection for their intellectual property. But there is no equivalent regime in the United States. However, the United States Supreme Court decision in *Citizens United V. Federal Election Commission*, while not directly applicable to the intellectual property and human rights framework, provides a useful analytical lens. In this case, the Supreme Court considered regarding the right to free speech, which is both a constitutional right and an international human right.

23. RECOMMENDATIONS

In the light of the above discussion following recommendations are proposed for the development f the concept of intellectual property rights as a human right;

- Global recognition is a good factor for exercising a new concept of right with established and recognized rights. So for exercising intellectual property rights as a human rights global and national recognition should need to increase equally like human rights.
- The ambiguity of something's creates complexity and it works as a barrier to establish such rights with another established rights. The ambiguity about the concept of intellectual property rights have played vital role to exercise intellectual property rights as a human rights. So if we want to exercise intellectual property rights as a human rights than we should to remove ambiguity regarding intellectual property rights.
- Existing feature of intellectual property rights proved that, those rights are eligible to be a property rights. So if we want to exercise intellectual property rights as a human rights we have to establish the right to intellectual property as right to property under constitution of Bangladesh with wider explanation.
- Sometimes state take such initiatives to execute or implement the relevant provisions of law but for the loopholes of existing implementation mechanism they fail to implement it properly. So we need to improve implementation mechanism of intellectual property rights in domestic stage for the fulfillment of ICESCR obligations.
- Absence of relevant provisions in legal instrument makes a chance to deny it easily. So the concept of intellectual property rights should include in various human rights legal instruments clearly.
- United Nations and other International organization should include the intellectual property rights and human rights simultaneously in their treaties and conventions. So that this two rights gets equal footing.
- Need to increase the value of economic, social and cultural rights as like civil and political rights. Modern jurist and law experts should contribute in this regard.
- In the course syllabus of human rights, the issues regard intellectual property rights should need to include.

24. CONCLUSION

Human rights instruments have done much more than intellectual property rights instruments to provide a link between science, technology, and human rights since instruments like the ICESCR include specific provisions in this area. Article 15(1) of the ICESCR provides a coherent perspective on the question of the rights and duties of all individuals with regard to the development and the enjoyment of scientific and technological development. One of its central contributions is to provide a framework for delimiting the rights to benefit from scientific and technological development, and the rights of individual contributors to knowledge creation without framing this debate within an intellectual property rights context.

In other words, Article 15(1) provides an appropriate basis for broadening debates concerning knowledge creation beyond the narrow framework provided by intellectual property rights. Two main challenges need to be addressed in coming years at the national and international levels. **First**, the increasingly visible impacts of certain types of intellectual property rights on the realization of human rights needs to be addressed by ensuring that measures are taken to protect everyone who is likely to be negatively affected by strengthened intellectual property rights standards. **Second**, the broader question of the place of science and technology in a human rights framework needs to be further considered. This provides a basis for addressing the question of the protection of all contributions to knowledge, something that the existing intellectual property rights system is struggling to achieve. Framing intellectual property rights as human rights could alter our perception and treatment of these rights. The effect of characterizing patents, trademarks, and copyrights as property rights is indicative of the importance of framing. In light of the global trend towards increased intellectual property rights, it is difficult to separate intellectual property right from human right The concept of a human right to intellectual property protection may facilitate the ability of intellectual property owners the greatest prospect for human rights to have a moderating effect on intellectual property law is in the use of human rights to limit intellectual property protection where intellectual property rules negatively affect human rights interests. Human rights law can counter intellectual property law where the two come into conflict.

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