



## International Law

*Elixir Inter. Law* 36 (2011) 3015-3019

*Elixir*  
ISSN: 2229-712X

# Interface between Intellectual Property Rights and Human Rights

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### ARTICLE INFO

#### Article history:

Received: 18 April 2011;

Received in revised form:

15 June 2011;

Accepted: 24 June 2011;

#### Keywords

IPRs,  
Human rights,  
Indigenous people.

### ABSTRACT

As per the positivist economic approach, development is only an economic issue and it excludes the social and cultural aspects of the concept. This is the reason that they have been undermining the significance of human rights friendly definition of IPRs. According to Article 1 of International Covenant on Civil and Political Rights 1966 "Self Determination is the right to freely determine Political status and to freely pursue... economic, social & cultural development." The western approach concentrates more on progress of science and ignores totally the existence of science. So the study of IPRs without human rights approach is not complete in itself. As the new IP regimes will have wide ranging socio-economic, technological and political impact, so the study of IPRs in human rights context is inevitable. The paper concentrates on this very aspect while highlighting the human right to health and IPR related human rights aspects of indigenous communities including right to culture, self determination, food and subsistence etc.

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### Introduction

As we all know, today's economy is knowledge based economy. The creation of knowledge and its protection is one of the major concerns of today's legislators. Similarly, assuring every member of the society a dignified life and an equitable share in resources of the society is pivotal to every policy of the state. Any system to be fair and just has to work with the notion of universal equalities with fair distribution of resources immaterial of the birth and power of the people in the society. To protect the rights of the weaker segments becomes the responsibility of the mightier one. This is true whether the case is of a particular nation or one nation and other nation inter se. These inequalities give rise to different conflicts regarding IPRs also as we have the examples of the technologically rich countries' colonialist policies towards the developing countries. Issues of generation, protection and exploitation of intellectual property (IP) are assuming increasing importance. The new IP regimes will have wide ranging socio-economic, technological and political impact. As per the obligations under the Trade Related Intellectual Property Systems (TRIPS), all the members of World Trade Organization (WTO) are supposed to implement national systems of intellectual property rights following an agreed set of minimum standards. However, there is an increasing feeling that harmonization is demanded from those that are not equal, either economically or institutionally.

The anxiety of man to lead happy and prosperous life plays a vital role in the course of development. Hon'ble Mr. Justice Markanday Katju in a speech observed that law came into existence when private property came into existence. So law as to private property is ancient in its origin. But in modern sense it is of recent origin, especially in the case of intellectual property. The scientists invent new technology, the researchers are engaged in searching new things, the authors are producing new literature and industrialists are producing new products by newly invented techniques. The things that man presents for the use of society can be originated only through the use of skill, labour, intellect and endeavour of his own. Every creation or

performance takes its first shape in the mind of a human being and acquires a physical status on the execution of idea so conceived. Therefore, what is produced or originated by human skill, intellect, labour and effort is called the intellectual property.

Intellectual property, however, is not only about property. Intellectual property is a comprehensive term. It involves the whole field of creativity. It is also about recognition of and respect for the contributions of identifiable human creators. However, this is the approach of one school of IPR jurisprudence.

The other school of jurisprudence considers exclusionary model of IPR's as more correct; in the context it is being exercised and implemented. According to this model IP rights are economic in nature.

They assure wealth generation in favour of wealth holder by excluding others from enjoying the subject matter. As such there is no morality attached to IPRs. Where the proponents of creativity approach rely more upon natural law aspect, the exclusionary approach is positivist in its perspective.

The Human Rights Jurisprudence, on the other hand emphasizes more upon human welfare while assuring social well being. The United Nations adopted the Universal Declaration of Human Rights, in which human rights are clearly and unambiguously conceptualised as being inherent to humans and not as the product of social cooperation.

As a society, our goals should be looking at development that sustains values reflecting progress in our relationships with one another as human beings. The broader aspect of development needs a set-up where IPR rights are compatible with Human rights. Thus, the thesis, antithesis and synthesis of the concept of IPRs and Human Rights are a pre-requisite of overall development.

### Legal Provisions Promoting Human Rights and IPRs

The most common categorization of human rights is to split them into civil and political rights, and economic, social and cultural rights.

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Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The UDHR included economic, social and cultural rights and civil and political rights because it was based on the principle that the different rights could only successfully exist in combination:

“The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his social, economic and cultural rights.”

This is held to be true because without civil and political rights the public cannot assert their economic, social and cultural rights. Similarly, without livelihoods and a working society, the public cannot assert or make use of civil or political rights.

The indivisibility and interdependence of all human rights has been confirmed by the 1993 Vienna Declaration and Programme of Action:

All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis

**This statement was again endorsed at the 2005 World Summit in New York (paragraph 121).**

Although accepted by the signatories to the UDHR, most do not in practice give equal weight to the different types of rights. Some Western cultures have often given priority to civil and political rights, sometimes at the expense of economic and social rights such as the right to work, to education, health and housing.

Universal Declaration of Human Rights (1948): The relevant provisions are incorporated in Article 26 which declares that:

“All people have the right to freely participate in the cultural life of the community to enjoy the arts and to share in the scientific advancement of its benefits. Everyone had the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of when he is the author.”

Then the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was adopted on October, 2005, by the UNESCO General Conference.

Globalisation and technological advances have opened up new opportunities for IPR holders across the globe. At the same time the growing trend towards homogenisation and commercialisation puts pressure on many cultures. Minority languages and cultures, and developing countries with weak cultural institutions, are particularly vulnerable. So there is a need to have a close examination of these issues as they are related to their Human Rights.

The first step towards the protection of most of the part of intellectual property was Berne Convention for the Protection of Literary and Artistic works, 1886. Then WIPO was set up in 1967. The most significant and controversial provision in this regard was TRIPS which came in 1993.

Art. 1.1 UN Declaration on the Right to Development says:

All peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in

which all human rights and fundamental freedoms can be realized.

So the basis of IPRs should be for personal and societal development.

**Art. 19 ICCPR prescribes:**

Everyone shall have ...freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or, through any other media of his choice.

**Much like UDHR, Article 15 (1) (c) of ICESCR provides:**

[States parties recognize the right of everyone] to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Art. 15 (2) obliges the states to take steps towards the realization of the rights mentioned in Art. 15 (1). With regard to normative contents, it requires protection of:

1. Author- individual person as author and inventor;
2. Scientific productions- link to personal creator is required, not all objects of industrial property;
3. Moral interests- author and inventor may claim attribution to their products;
4. Material interests- author and inventor need protection.

States are under obligation to implement and enforce Art. 15(1) (c) under their domestic law. But obligations under ICESCR are essentially programmatic and promotional. State may take steps within its available resources individually and through international cooperation, especially economic and technical (Art. 2).

WIPO's mandate is “to encourage creativity, to promote the protection of IP throughout the world”, including all sections of human society. And WIPO's current strategy is “journey to developing to developed” in compliance with UN Millennium Development Goals.

Although there is a long list of such instruments, but the fundamentals are listed here.

**Gaps between IPR system and human rights regime**

TRIPs has globalized the IPRs and it has triggered the debate between human rights and IPRs. Many countries are unable to implement TRIPs standards without compromising development at the cost of human rights. Human rights include cultural heritage, TK, the right to health, science and technology, access to knowledge in works of literature and art, and non-discrimination – interface with IPRs. Human rights play role in promoting economic prosperity and social equity.

“Universalization” of both human rights and IP has prompted negotiations at various UN bodies, including WTO on the clarification of the complex relationship between the two. The interpretational problem is with both of them. To find out the universal definition of both the concepts is inviting great complexity. In case of human rights it is interesting to note that in the world today the discrepancy germinate between the Universalist and cultural relativist school of thought. The Universalist approach has the result that human rights provide a vehicle for hegemonial intervention and the manipulation of political systems within states. Similarly the TRIPs endeavour of harmonization of IPR laws ignores the culturally relative perspectives of IPRs as well as human rights. TRIPs wishes to represent a compromise that may have been honestly conceived as such in that it leaves some flexibility for developing countries, but as it is modeled on Western intellectual property legislation, it is nevertheless in effect slanted in favour of

western interests. With its traditional bias in favour of innovation as delimited by western views of individuality and technological progress, intellectual property is not only an imperfect measure, but also one that has contributed to the undervaluing of non- western innovation and creativity.

In 2001, sub-commission considered two reports on relationship between human rights and IPRs in general. It emphasised upon the removal of actual and potential conflict between the implementation of the TRIPS and the realization of economic, social and cultural rights particularly the rights to self determination, food, housing, work, health and education, and in relation to transfer of technology to developing countries. It also stressed the need for the protection of TK and cultural values of indigenous people.

If seen from a broader perspective the IPRs and Human Rights interact in three different ways, namely

- IPRs assert some Human Rights;
- IPRs are silent as to some Human Rights.
- IPRs confront some Human Rights;

Here, the human rights in question are the human rights of the IPR holders as well as of the members of the society.

As regards the first category, where IPRs assert human rights are the IPRs of the holders. As the Universal Declaration of Human Rights itself lays down that everyone has a right to free expression, the very essence of all the IPRs is that only because they protect and encourage the creativity of ideas with their expression. Secondly, everyone has a right to be paid for his skill and labour, is the spirit of IPRs.

In the second category, fall those aspects of human rights which have no connection with IPRs. Neither IPRs support them or have any confrontation. The example of this type of human rights is right to education. This category is however not relevant to the present study.

Now comes the third category, where there are various controversies. The Sub-Commission on Human Rights has, come to the conclusion that Since the implementation of TRIPS agreement does not adequately identifies 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 IPR regime embodied in the TRIPs agreement, on the one hand, and international human rights law, on the other.

In this category, the human rights of some holders and members of society are to be discussed under the following heads.

#### **The implications of IPRs on right to health**

Article 25 of the Universal Declaration of Human Rights 1948 states that “Everyone has the right to a standard of living adequate for the health, and wellbeing of himself and his family....”

The Preamble to the World Health Organization’s (WHO) constitution also declares that it is one of the fundamental rights of every human being to enjoy “The highest attainable standard of health”. Inherent in the right to health is the right to the underlying conditions of health as well as medical care.

The United Nations further defined the right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights in 1966. The Covenant guarantees the “right of everyone to the enjoyment of the highest attainable standard of health”, and calls for the “provision for the reductions of . . . infant mortality and for the healthy development of the child; the

improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational, and other diseases; and the creation of conditions which could assure to all medical service and medical attention in the event of sickness.”

In 2000, the United Nations issued the General Comment No.14 “Right to Health” which expands upon the original ideas from 1966 by exploring the historical context of this right, further defining the meaning of an adequate health care system, detailing obligations of states and NGO’s, defining violations, and discussing the basics of implementation.

Also the ICESCR (Arts. 7, 11 and 12); CEDAW (Arts. 10, 12 and 14), convention on the Rights of the Child (Art. 24) have recognized human right to health. General Comment No. 14 (2000) - In the context of Art. 2 of the ICESCR, Comment provides:

“State parties have immediate obligations in relation to right to health...(Art. 2.2) and the obligation to take steps (2.1) towards the full realization of Art. 2. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.”

It cannot be stated that IPRs per se conflict with human rights, but few important areas have been highlighted which are of special concern. The important yardstick for the balance sought between the interests of the authors/inventors and certain societal objectives have to be found in the IPR system. In case of healthcare, they are alleged to be in conflict. While inventions, for pharmaceutical patents, promote progress and development, the drugs under patents normally priced high and thus out of the reach of poor people. Less R&D of developing nations results in their dependence on developing countries, for specific diseases, leading thereby to no cure for their diseases.

#### **Issues Related To the Human Rights of Indigenous People**

There are various human rights aspects which are more relevant in the case of Indigenous people. These rights may be classified in two main categories-

(a) *Right to language, culture and religion*- the following stand out in light of the present discussion:

- the right to protection of artistic, literary and scientific works;
- the right to develop a culture;
- the right of minority peoples to respect for identity, traditions, language, and cultural heritage;
- the right of a people to its own artistic, historical, and cultural wealth;
- the right of a people not to have an alien culture imposed on it;
- right to self-determination;
- right of minorities against racial and ethnic discrimination;
- self-governance;

(b) *Right to food and means of subsistence*- this right includes the following

- access to and use of natural resources,
- ownership of land,
- sustainable economic development,
- adequate housing and access to health care
- the right against destruction of the environment,

#### **Right to language, culture and religion**

Human rights to culture may be involved e.g. when indigenous communities oppose to the reproduction of sacred paintings or the inclusion of a ceremonial dance into a modern choreography because they perceive such practices as a violation of their religious freedom. Other aspects of human rights

become salient when one starts to conceive linkages between expressions of traditional knowledge and freedom of expression and information or the protection of cultural heritage as a requirement of the obligation of States to protect the right to participate in cultural life of the arts and sciences.

Research should be engaged in reflections on how the protection of collective moral rights of indigenous communities could be realized within the existing human rights doctrine. Here it seems very important to include recent developments in modern legal doctrine recognizing that human rights are not only individual defences against State interference but enshrine a collective aspect.

Hence, with regard to freedom of expression and information, it is necessary to distinguish an individual aspect of this freedom from an institutional aspect. Whereas the former stresses the rights of individual persons, the later puts its emphasis on the general interest to freely exchange opinions and information in the public discourse as an institution.

Cultural rights must be seen as a collective right rather than those of individuals, to maintain cultural integrity.

According to the IUCN Inter-Commission Task Force on Indigenous Peoples:

Cultures are dying out faster than the peoples associated with them. It has been estimated that half the world's languages the storehouses of peoples' intellectual heritages and the framework for their unique understandings of life will disappear within a century.

According to the Task Force, the main threats include genocide, uncontrolled frontier aggression, military intimidation, and extension of government control, unjust land policies, cultural modification policies, and inappropriate conservation management. Yet this tragedy is not inevitable.

Indigenous Peoples' heritage is not a commodity, nor the property of the nation-state. The material and intellectual heritage of each Indigenous People is a sacred gift and a responsibility that must be honoured and held for the benefit of future generations.

#### **Right to food and means of subsistence**

The denial of one human right such as the right to food and means of subsistence, particularly for indigenous peoples, is the denial of all human rights including the rights to culture, development, identity and survival - the collective right to life as peoples. Indigenous peoples and their lands, territories, resources and the environment are inextricably linked both spiritually and culturally. The environment is an essential part of their culture and spirituality. The environment brings together all the elements of indigenous peoples' cultural and spiritual references. Indigenous peoples have for centuries maintained a very unique relationship with their environment including the protection of the environment which is essential for their food sovereignty and food security.

As discussed above, in August 2000, the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations Commission on Human Rights adopted a resolution on "Intellectual Property Rights and Human Rights". While the resolution has no legal status it has attracted a great deal of attention to this issue. The resolution referred to a number of 'actual or potential conflicts' between IPRs and human rights including the consequences of plant breeder's rights and the patenting of genetically modified organisms for the enjoyment of the basic right to food, and the reduction of control by communities (especially indigenous communities) over their

own genetic and natural resources and cultural values, leading to accusations of 'biopiracy'. The resolution requested that the WTO should take fully into account the obligations of member states under the international human rights conventions to which they are parties during its ongoing review of TRIPS. In August 2001, the Sub-Commission considered two official reports on the relationship between intellectual property rights and human rights in general, and on the impact of TRIPS on human rights. In response, another resolution was adopted which essentially reiterated the Sub-Commission's view that actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights. It requested that the UN High Commissioner for Human Rights seek observer status with the WTO for the ongoing review of TRIPS. The resolution also stressed the need for adequate protection of the traditional knowledge and cultural values of indigenous peoples, and emphasized the Sub-Commission's concern for the protection of the heritage of indigenous peoples.

There are certain factors that contributed to alienation of indigenous people from their own tradition and culture. The indigenous people lived and worked with the soil. It was the soil that gave them not only identity and culture but also sustenance. However, through the introduction of money economy, people were forced to opt for the non-traditional avenues of work, that is work unrelated to the soil, and to work for money in all sorts of employment. This new economy introduced the concept of time as a commodity to be sold and bought; it also involved earning and spending money with all the inherent dangers, temptations, difficulties and risks that go with it. Through this new money economy system, the indigenous people gradually alienated themselves from their soil and community centred way of life, tradition and culture.

#### **Conclusion**

A human rights approach differs from a narrowly legal or economic interpretation of IPRs in various ways and asks for the respect for moral and material interests of the author and inventor. IPRs are not foremost economic commodities but have an intrinsic value as an expression of human dignity and creativity as well. At the same time, human rights instruments inherently create a balance by giving full exposition to the individual's and society's rights. As a consequence States are under an obligation to develop IPR regimes that have an explicit human rights orientation. In this sense, human rights can override the IPRs' obligations.

#### **The Way Ahead**

But it will not be the correct approach to criticize the IPRs on the ground that they confront certain aspects of human rights. We may say, to some extent, that they are necessary evil and not dispensable at all. So there is a need of a harmonious construction of these two. So here are suggested some measures which may lessen the gap between the two. Firstly, the representation of developing world in the international forums needs to be increased both quantitatively and qualitatively. This will help in reaching a "homogeneous" and "harmonized" definition of IPRs and human rights. Secondly, the very idea of TRIPS needs a little amendment because it is meant for the trade related aspects of IPRs. Although it talks about the social and cultural aspects, but that is only as the supplementary issues. These matters need a priority or at least a parity of status with the economic ones. So it should be DRIPs i.e., development related aspects of IPRs; so that the development is sustainable

incorporating social, cultural aspects along with economic issues. Thirdly, to safeguard the interests of holders of traditional knowledge some culture specific definition need to be formulated. For example, the law should contain certain principles that allow a researcher from outside to get the knowhow of traditional knowledge only when he pursues certain cultural and social rules of the community. In addition to that, some mechanism of engaging some members of the community during research and the implementation of such research in an industrial application may serve the purpose to some extent. Fourthly, it is generally argued that TK is a community right and it is difficult to identify to whom the rights will go. But this matter may be resolved by providing community privileges only. For example, by building schools, laboratories, hospitals and training the local people to use their knowledge in a technological manner but without disturbing their social values; they can be compensated in an efficient manner. Fifthly, as it has been evident from the recent researches that Indigenous communities have their own human rights mechanism which protects the individual IPRs also; the policy makers may make use of that mechanism while formulating policies for them. Lastly, regarding the protection of right to health in developing countries the rigour of patent laws need be a reduced. If the argument is that it will reduce the incentive to inventions and creativity, the answer is that if the value of one's work is same globally; he will not stop working. The reason is that in addition to money recognition for the work is also a consideration for most of the innovations and inventions. We have the examples of Edison and Newton who didn't have such type of pecuniary considerations but created history.

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