

# Intellectual Property—Rights or Privileges?

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## I. INTRODUCTION

In a short, but forceful reply to the United Nations High Commissioner for Human Rights,<sup>1</sup> the Quaker United Nations Office/Friends World Committee for Consultation ended with the following statement:

“Indeed it might be helpful to rethink the language used to describe IPRs and call them instead intellectual property privileges, which is what they are, and thus remove the possible confusion with human rights.”<sup>2</sup>

The IPR Commission, established by the U.K. Department for International Development, also states:

“... we prefer to regard IPRs as instruments of public policy which confer economic *privileges* on individuals solely for the purpose of contributing to the greater public good. The *privilege* is therefore a means to an end, and not an end in itself.” (emphases added).<sup>3</sup>

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<sup>1</sup> After the adoption of the resolution *Intellectual Property Rights and Human Rights*, 17 August 2000, E/CN.4/Sub.2/RES/2000/7, in which para. 15 requested the United Nations Secretary-General to submit a report, a letter was sent from the Secretary-General on 6 March 2001 in which States, international organizations and non-governmental organizations were requested to provide information that would be relevant to the report. The information provided is made available in two reports: E/CN.4/Sub.2/2001/12 of 14 June 2001; and E/CN.4/Sub.2/2001/12/Add.1 of 3 July 2001. The information from the Quaker United Nations Office is included in the latter report. The reports, together with the report of the High Commissioner (requested in para. 10 of Resolution 2000/7), provided the basis for a new resolution by the Sub-Commission at that year's session, *Intellectual Property and Human Rights*, 16 August 2001, E/CN.4/Sub.2/RES/2001/21. That resolution also contained specific requests to the High Commissioner for Human Rights regarding intellectual property and human rights (para. 10, on an examination of compatibility between patents and the protection and promotion of human rights; para. 11, on an analysis of the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) on the rights of indigenous peoples; and para. 13, on an expert seminar to consider the human rights dimension of the TRIPS Agreement). However, these requests have not been fully implemented, as is explained in the document *Intellectual Property and Human Rights*, 7 June 2002, E/CN.4/Sub.2/2002/41. There have been no subsequent resolutions adopted by the Sub-Commission on Human Rights, but the Committee on Economic, Social and Cultural Rights has adopted a statement (E/C.12/2001/15 of 14 December 2001; hereinafter, *Statement*) and is in the process of adopting a General Comment (No. 18) on intellectual property and human rights.

<sup>2</sup> *Intellectual Property Rights and Human Rights*, 3 July 2001, E/CN.4/Sub.2/2001/12/Add.1, p. 17.

<sup>3</sup> *Integrating Intellectual Property and Development Policy*, Report of the Commission on Intellectual Property Rights, Department for International Development, London, September 2002, p. 6; available at: [www.iprcommission.org](http://www.iprcommission.org). The Commission, moreover, writes with regard to the nature of intellectual property rights (IPRs) on p. 6: “In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection.” See also R.S. Crespi, *Patents: A Basic Guide to Patenting in Biotechnology*, Cambridge Studies in Biotechnology, Vol. 6, Cambridge University Press, Cambridge, U.K., 1988, p. 21: “The concept is that the grant of a patent is a privilege rather than a basic right, and it must therefore be conformed to certain rules which are believed to be in the public interest.”

The present article will discuss this distinction between privileges and property rights, based on the evolving concepts of “privileges”, “property rights” and “human rights”. Based on an elaboration of these terms, it will analyse whether the term “privilege” is more appropriate than the term “right” in relation to intellectual property. Among the various categories of intellectual property rights (IPRs), it will particularly assess the role of patents.

## II. PRIVILEGES

Initially, certain activities which also represented intellectual efforts were rewarded by privileges granted by the State. These privileges granted permission to conduct a certain activity. What these privileges actually constituted is subject to much debate. One author finds that the granting of privileges did not imply any possibility for the holder of the privilege to exclude others.<sup>4</sup> However, in 1577, the Canton of Berne in Switzerland granted a “permanent exclusive privilege” to the inventor Zobell.<sup>5</sup> This must be understood as the possibility to exclude others through administrative and legal means.

Machlup finds that the privileges served different functions:

“Some privileges granted protection against imitation and ... thus created monopoly rights. Others, however, granted protection from the restrictive regulations of guilds, and thus were designed to increase competition. In view of the latter type of privilege, patents have occasionally been credited with liberating industry from restrictive regulations by guilds ... Royal patent privileges were sometimes conferred, not to grant exclusive rights, but to grant permission to do what was prohibited under existing rules.”<sup>6</sup>

Therefore, privileges comprised both exclusive and permissive elements. While the privileges were obviously subject to instrumentalist concerns and not necessarily based on objective criteria, as is the case for current patent protection,<sup>7</sup> the notion that privileges are “primitive”<sup>8</sup> is a view that deserves at least more consideration.

The English Statute of Monopolies of 1623 provides one example of how privileges were justified only if certain conditions were met.<sup>9</sup> Article 1 states that “all grants of monopolies ... are contrary to your majesty’s law”. However, Article 6(a) and (c) states that “the declaration before mentioned shall not extend to any letters patents

<sup>4</sup> See N. Pires de Carvalho, *The TRIPS Regime of Patent Rights*, 2nd edition, Kluwer Law International, The Hague, 2005.

<sup>5</sup> F. Machlup, *An Economic Review of the Patent System: Patent Background A. Economic and Historical Perspectives*, Subcommittee on Patents, Trademarks and Copyrights of the U.S. Senate Judiciary Committee, 1958, Study No. 15, pp. 1–2, 20–21, 44–45 and 76–80, at 1; available at: <www.ipmall.info/hosted\_resources/unit1.doc> (last accessed 15 June 2005).

<sup>6</sup> *Ibid.*, at pp. 1–2.

<sup>7</sup> The eligibility criteria for a grant of patent protection are novelty, inventive step (non-obviousness) and industrial application (usefulness).

<sup>8</sup> Pires de Carvalho, *supra*, footnote 4, at p. 195.

<sup>9</sup> *The English Statute of Monopolies of 1623*, available at: <www.ipmall.info/hosted\_resources/lipa/patents/English\_Statute1623.pdf> (last accessed 9 July 2004). For the pre-1623 legislation in England, see S. Thorney *et al.*, *Terrell on the Law of Patents*, 15th edition, Sweet & Maxwell, London, 2000, pp. 2–4; and F. Machlup and E. Penrose, *The Patent Controversy of the Nineteenth Century*, *Journal of Economic History*, Vol. 10, 1950, p. 2 (finding that the 1623 Statute “grew directly out of the system of royal privileges”).

[and] to the true and first inventor”. As mentioned above, there were no listed criteria to identify the “true and first inventor”.

The Constitution of the United States used the term “rights”: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respectful Writings and Discoveries.”<sup>10</sup> However, these were not rights in the modern understanding of IPRs. First, this right represented no transferable right over the intellectual property. Second, this right did not imply that the right holder could freely choose not to exercise his/her right; rather, there was a strong presumption that this right should be exercised. In modern patent law, there are no obligations to “work” a patent. The original justification for granting exclusive rights implied that rights were given in order to “promote the progress”, not in order to restrict activities for this progress.

While the distinction between a right and a privilege can be held to be fundamental, there are authors who have discussed the boundaries between rights and privileges and have found that rights can also be referred to as privileges.<sup>11</sup> This distinction between privileges and rights will not be pursued here but, as will be argued in Section IV, a right can only be understood in relation to a corresponding obligation.

In summary, we see that privileges were granted by the State in order to serve given purposes. The privileges were upheld as long as it was felt that the original motivation was appropriately served. In other words, there was no “natural law” justification for these privileges but rather a strong instrumentalist purpose. In the field of copyrights, the justification was based more on moral arguments—in line with the principle later developed by Hegel regarding the expression of the Self—and was less instrumentalist.<sup>12</sup>

### III. PROPERTY RIGHTS

Machlup and Penrose have noted:

“... those who started to use the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, ‘property’, for a word that had an unpleasant ring, ‘privilege’.”<sup>13</sup>

Intellectual property is an intangible category of property with boundaries that are not always clear cut and which must be actively defended by the holder against infringements. The basis for constituting a property right in the field of patents is that

<sup>10</sup> *The Constitution of the United States*, adopted 1787, U.S. Government Printing Office, Washington, D.C., 1985, Article 1, Paragraph 8, Section 8.

<sup>11</sup> See D. Campbell and P. Thomas (eds.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld*, Ashgate, Aldershot, U.K., 2001 (original edition: Yale University Press, New Haven, 1919); and J. Waldron, *Introduction*, in J. Waldron (ed.), *Theories of Rights*, Oxford University Press, Oxford, U.K., 1984.

<sup>12</sup> See P. Drahos, *A Philosophy of Intellectual Property*, Applied Legal Philosophy Series, Ashgate, Dartmouth, U.K., 1996.

<sup>13</sup> Machlup and Penrose, *supra*, footnote 9, at p. 16. They refer particularly to the French debate, in which the spirit was “against privileges and monopolies of any sort”.

one can describe a new and applicable knowledge of a technological nature, not merely a new idea. Tangible property is visible and documented, and the boundaries are more easily given than for intellectual property.

A person who holds certain intellectual property will be able to defend this property only if he/she is granted a particular right over this property. In the field of patents, the rights are defined by the patent authorities based on what is defined in the patent claims. As with other property, one has to pay certain fees in order to have the property claim examined and determined. Unlike with other property rights, there is also an obligation to pay an annual maintenance fee in order to have a continuation of the right. Moreover, property rights over tangible property are indefinite, while IPRs are time-limited.

In order to gain a proper understanding of this particular category of property rights, it is crucial to bear in mind that it involves a right over an abstract object—a right which extends to embodiments of this new knowledge in a physical object.<sup>14</sup>

The development of the concept of property rights is not parallel for tangible property rights and for intangible property rights. The most important philosopher in the establishment and development of property rights is John Locke.<sup>15</sup> At the time when Locke developed his well-known defense of the labour theory to justify that man could claim property, there was no perception that the rights generated by patents actually constituted property rights.<sup>16</sup> Therefore, the justification that Locke developed with regard to tangible property rights cannot be applied with regard to intangible property rights. However, contrary to this, Hughes finds that the justification of the labour theory applies particularly well to intellectual property.<sup>17</sup>

Property rights developed in the 18th century as one of the core civil rights parallel to—and mutually reinforcing—the right to life and the right to liberty.<sup>18</sup> However, it can be argued that property is not a natural right but rather a deliberate construction by society in order to secure protection against pressure from the collective.<sup>19</sup>

Hence, property is justified as a foundation for liberty. As clearly proven by the Peruvian economist de Soto, property is an important asset for personal security, providing incentives for long-term investments, which are presumed to lead to

<sup>14</sup> P. Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, in World Intellectual Property Organization, *Intellectual Property and Human Rights*, WIPO, Geneva, 1999, Publication No. 762(E).

<sup>15</sup> J. Locke, *Two Treatises of Civil Government, Book II*, 1690, Chapter 5 on “Property”, in particular, paras. 25 through 32. In brief, he argued that labour alters nature, and what has been taken out of nature through one’s labour must therefore lead to title, but with two important exceptions (“provisos”): first, there shall be enough left in the common; second, one can only claim so much property as one can make use of.

<sup>16</sup> Pires de Carvalho, *supra*, footnote 4, at pp. 14–15 writes: “This dramatic change [that rights could be transferred to third parties] can be detected in England and in France in the 1700s, probably inspired by the revolutionary notion that patents were property rights.”

<sup>17</sup> J. Hughes, *The Philosophy of Intellectual Property*, 77 *Georgetown L.J.* 287, 1988, pp. 297–300.

<sup>18</sup> C.A. Reich, *The New Property*, Yale L.J., Vol. 73, 1964, p. 772.

<sup>19</sup> *Ibid.*, at pp. 771 and 778–779.

economic growth and poverty reduction.<sup>20</sup> Unpredictable property relationships impede economic growth.

A problem related to unpredictable property rights is the competition of property rights. It has been argued that, while tangible property rights easily cause conflict, as one person's property claim may conflict with another person's property claim, the same does not apply with regard to intangible property rights. It is held that "no patent can stop a person from continuing something he has done before".<sup>21</sup> In an ideal world, where patent claims only cover what is actually new and invented, this observation might be true. Thus, all known and existing processes and products would (in this ideal world) not infringe the patent. However, it seems too naïve to believe that all activities can continue as before.

At the least, the patent as an IPR may create some uncertainty with regard to which activities are acceptable and which activities might infringe the patent. Most actors will have neither the insight to know nor the resources available to clarify—through administrative or judicial means—the boundaries between the intellectual property of the right holder and the public domain that is free for everyone to use.

A granted patent right is considered to fall within the scope of "possessions" in Article 1 of Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms. However, the European Court of Human Rights declined to give an opinion on whether a patent application constituted a possession within the meaning of Article 1 of Protocol No. 1. The European Commission of Human Rights had already made a distinction between a patent application, on the one hand, and a valid patent, on the other hand, and the Court summarized the findings of the Commission by stating that "the company was denied a protected intellectual property right but was not deprived of its existing property".<sup>22</sup> Therefore, it seems reasonable to conclude that an intellectual property is not recognized as human rights-protected property *per se* before it is recognized through a grant by an administrative decision. This must be presumed to apply particularly to inventive intellectual efforts that are thought to be eligible for patent protection.

#### IV. HUMAN RIGHTS

There is no generally agreed definition of human rights. One could attempt to define the term as follows: "The freedoms, immunities and benefits that, according to modern values, all human beings should be able to claim as a matter of right in the societies in which they live."

<sup>20</sup> H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, New York, 2000.

<sup>21</sup> D.L. Richer and E. Simon, *AgriEvo*, in U. Lele, W. Lesser and G. Horstkotte-Wesseler (eds.), *Intellectual Property Rights in Agriculture*, World Bank, Washington, D.C., 2000, p. 38, at p. 39.

<sup>22</sup> *British American Tobacco Ltd. v. The Netherlands*, Application No. 19589/92, Decision of 20 November 1995, Series A, No. 331-A, para. 73.

Human rights are universal, and the individual, alone or in community with others, should enjoy the same rights. However, as not all States are parties to all human rights conventions, in practice an individual in a State which has ratified all human rights conventions can claim more rights than an individual in a State which has not ratified the same conventions.<sup>23</sup>

Human rights evolved from natural law and gradually became recognized nationally and then internationally, the latter in the second half of the 20th century.<sup>24</sup> Human rights have been given a high normative status, as agreed in the Vienna Declaration: "All human rights are universal, indivisible and interdependent and interrelated."<sup>25</sup>

It was seen above that the right to property is generally recognized as a human right,<sup>26</sup> despite the fact that East–West tensions made it impossible to include a provision on property rights in either of the main human rights treaties from 1966: the International Covenant on Civil and Political Rights<sup>27</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>28</sup>

However, authors' rights—as a kind of intellectual property right—are recognized in Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights:

"The States Parties to the present Covenant recognize the right of everyone: ... (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."<sup>29</sup>

This right must be understood in relation to all other recognized human rights and cannot be exercised to the detriment of other human rights. The balancing of the rights is very evident in the Statement adopted by the Committee on Economic, Social and

<sup>23</sup> However, it is also possible to claim that all recognized human rights are part of customary law and therefore applicable also in those States where the specific human rights treaty has not been ratified.

<sup>24</sup> The establishment of the International Labour Organization in 1919 led to a substantial strengthening of economic rights internationally through the adoption of conventions in the 1920s and 1930s. These conventions were arguably important for the strengthening of economic human rights, but it is not obvious that they actually are human rights conventions.

<sup>25</sup> *Vienna Declaration and Programme of Action*, adopted 25 June 1993, A/CONF.157/23, 12 July 1993, para. 5.

<sup>26</sup> The Universal Declaration on Human Rights, adopted 10 December 1948, recognizes the human right to property in Article 17: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

<sup>27</sup> U.N. Doc. A/RES/2200A (XXI), Annex of 16 December 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 United Nations Treaty Series 171, entered into force 23 March 1976.

<sup>28</sup> U.N. Doc. A/RES/2200 (XXI), Annex of 16 December 1966; 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 United Nations Treaty Series 3, entered into force 3 January 1976.

<sup>29</sup> Moreover, Article 27.2 of the Universal Declaration of Human Rights recognizes authors' rights: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." P. Buck, *Geistiges Eigentum und Völkerrecht: Beiträge des Völkerrecht zur Fortentwicklung des Schutzes von geistigem Eigentum*, Duncker & Humblot, Berlin, 1994, p. 242, finds that the different wording of Articles 15.1(c) and 27.2 ("right to benefit from the protection" versus "right to the protection") implies that the scope of the right is different. The latter is more explicit in stating that protection is the only way in which the authors can be ensured their moral and material interests. Hence, it can be said that the primary right under Article 15.1(c) is to enjoy the benefits, not to be granted protection. This difference in wording should not be exaggerated.

Cultural Rights in 2001.<sup>30</sup> In a general observation on the relationship between intellectual property and human rights, the Committee states:

“... any intellectual property regime that makes it more difficult for a State to comply with its core obligations in relation to health, food, education ... is inconsistent with the legally binding obligations of the State party.”<sup>31</sup>

Moreover, the Committee has sought to clarify the relationship between authors’ rights and IPRs:

“... the scope of protection of the moral and material interests of the author provided for under Article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights ...”<sup>32</sup>

However, some find that human rights provisions actually imply that IPRs are recognized as human rights—even with fewer conditions than under standard patent law.<sup>33</sup> It is reasoned here that this cannot be true and that the sparse wording of the human rights provisions cannot be used as an argument for any strengthening of IPRs. Rather, the International Covenant on Economic, Social and Cultural Rights provides a delicate balance, implying that the moral and material interests of the author, as recognized in Article 15.1(c), are legitimate human rights only under certain specific conditions.<sup>34</sup>

There are four arguments why authors of copyright-eligible productions, more than inventors of patent-eligible productions, should be considered to be protected by human rights:

- (i) the wording of Article 15.1(c) is taken from the Berne Convention for the Protection of Literary and Artistic Works, Article 2(1), applying the term “production in the literary, scientific and artistic domain”;
- (ii) the life-long protection of copyrights (Article 7(1) of the Berne Convention sets the term at “the life of the author and fifty years after his death”) is much more compatible with human rights than the instrumental period of patent protection of twenty years;

<sup>30</sup> The Committee was established in accordance with resolution E/RES/1985/17 and consists of eighteen members, acting independently of governments. The members are elected for four years and can be re-elected once. The examination of reports of State parties is the main activity of the Committee, and the adoption of statements and general comments serves “to suggest improvements in the reporting procedures and to stimulate the activities of the State parties, international organizations and specialized agencies”; U.N. Doc. E/1989/22, General Comment No. 1 (Introduction), para. 3, 87.

<sup>31</sup> See *Statement, supra*, footnote 1, para. 6.

<sup>32</sup> *Ibid.*, para. 12.

<sup>33</sup> Pires de Carvalho, *supra*, footnote 4, at p. 242, Note 654, writes the following regarding Article 27.2 of the Universal Declaration of Human Rights: “... protection is to be made available to creations (and discoveries in the sense of the Universal Declaration) without any discrimination as to the field of technology and science.” Based on this wrongful assumption, he also concludes, at p. 243: “... to protect the rights of inventors and authors is at least as relevant as to protect biodiversity.” For similar conclusions that IPRs are human rights, see K. Idris, *Intellectual Property: A Power Tool for Economic Growth*, WIPO Publication 888, 2004, p. 241; see also Dieng, *Introductory Remarks*, in WIPO, *supra*, footnote 14.

<sup>34</sup> The relevant rights recognized in the Covenant against which Article 15.1(c) must be balanced are Article 2.2 (prohibition against discrimination), Article 7(a) (the right to remuneration for workers), Article 11 (the right to adequate food), Article 12 (the right to the highest attainable standard of health), Article 15.1(a) (the right to take part in cultural life) and Article 15.1(b) (the right to enjoy the benefits of scientific progress and its applications).

- (iii) only those “intellectual rights” which have their content close to human dignity should be recognized as human rights;<sup>35</sup> and
- (iv) the *travaux préparatoires* of the International Covenant on Economic, Social and Cultural Rights indicate that the drafters primarily thought of copyright-related work as falling within human rights protection; the term “patent” is used only once during the negotiations in the Third Committee of the General Assembly.<sup>36</sup>

In conclusion, IPRs could constitute human rights in so far as the enjoyment of these rights contributes to secure the moral and/or material interests of the author (copyrights) or inventor (patents or industrial property rights).<sup>37</sup>

## V. DISTINCTIONS AMONG HUMAN RIGHTS

The third objection against considering patents as human rights, referred to in the previous Section, will now be analysed in more detail. As a basis for this analysis, it must be stressed that while IPRs might constitute human rights there is a distinction that must be made between rights linked directly to the human person and rights which contribute to the realization of other human rights.

This analysis is not an attempt to build a hierarchy among different human rights. All human rights must be based on the principles established at the World Conference of Human Rights: “All human rights are universal, indivisible and interdependent and interrelated.”<sup>38</sup> Moreover, it is obvious that, particularly among the human rights recognized in the International Covenant on Economic, Social and Cultural Rights, the realization of one right contributes directly to the realization of other human rights. This is especially so with the right to health, a right which is made more difficult to enjoy if the right to adequate food or adequate housing is not realized.<sup>39</sup>

<sup>35</sup> See Preambular para. (b)(cc) of the German International Law Association’s Draft Declaration of 1993, *Existing and Evolving Principles and Rules on Freedom of Knowledge, International Protection of Intellectual Property and Transfer of Achievements of Science and Technology*, presented through the International Law Association’s International Trade Law Committee but withdrawn in 1995. The full text of the Draft can be found in T. Oppermann, *Geistiges Eigentum: Ein “Basic Human Right” des Allgemeinen Völkerrechts*, in A. Weber (ed.), *Währung und Wirtschaft—Das Geld im Recht. Festschrift Prof. Dr. Hugo J. Hahn zum 70. Geburtstag*, Nomos, Baden-Baden, Germany, 1997, at p. 455. The German Draft stated: “The texts [the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights], however, do not refer to the protection of industrial property.” (emphasis added). This writer disagrees that industrial property *per se* is excluded from the scope of Article 15.1(c).

<sup>36</sup> See Official Records of the 1957 negotiations in the General Assembly’s Third Committee, A/C.3/SR.798, para. 44, 184, when the USSR talked about “copyrights and patents” as not appropriate for inclusion in the paragraph.

<sup>37</sup> Whether Article 15.1(c) says that the protection of the rights of the inventor—through patents—should be considered less important than the protection of the rights of the author—through copyrights—is an unresolved issue. The Sub-Commission on the Promotion and Protection of Human Rights seems to indicate that there is a distinction but does not make this distinction explicit. However, note para. 10 of Resolution E/CN.4/Sub.2/RES/2001/2, calling for an examination of the compatibility between patents and the protection and promotion of human rights. The Committee on Economic, Social and Cultural Rights does not indicate that there is such a distinction in its *Statement*, *supra*, footnote 1.

<sup>38</sup> *Vienna Declaration*, *supra*, footnote 25.

<sup>39</sup> The former Director-General of the World Health Organization, Gro Harlem Brundtland, stated in 1998: “The major determinants of better health lie outside of the health system.” *Health and Human Rights*, Vol. 3, No. 21, p. 22.



There are certain human rights which should be valued precisely because they contribute to the enjoyment of—and form an integral part of—an adequate standard of living. These rights are the right of workers to adequate remuneration, as recognized in Article 7(a) of the International Covenant on Economic, Social and Cultural Rights; the right to property, as recognized in Article 17 of the Universal Declaration of Human Rights; and the material aspect of authors' rights, as recognized in Article 15.1(c) of the Covenant. These rights are not directly linked to the human person but are nonetheless of value, as they could form a necessary basis for the realization of other human rights.<sup>40</sup>

The moral and material interests of the authors of literary, artistic and scientific productions should therefore be recognized as human rights. However, the caution expressed in the (now withdrawn) German Draft on IPRs, saying that IPRs do not *per se* represent human rights, merits more attention.<sup>41</sup> The following sentence therein was put in brackets: "Intellectual property rights are basic human property rights."<sup>42</sup> However, neither the Committee on Economic, Social and Cultural Rights nor the Sub-Commission on the Promotion and Protection of Human Rights has substantively challenged the perception that IPRs are human rights.<sup>43</sup>

Concerning the enjoyment of the recognized human rights, it is an established principle that the enjoyment of one human right shall not negatively affect the enjoyment of other human rights.<sup>44</sup> The challenge is to identify under what circumstances the inconsistency principle of the Committee applies with regard to IPRs.<sup>45</sup>

It is presumed that two conditions must be met if intellectual property protection is found to be inconsistent with human rights protection. Under such circumstances, authors' rights—as rights which should be assessed based on the extent to which they contribute to the fulfillment of other human rights—should be enjoyed only so long as other basic human rights are not further impeded.<sup>46</sup>

The first condition is that those primarily benefiting from the protection of moral and material interests are not human persons but, rather, corporate entities. The second condition is that those who are primarily bearing the burden of stronger protection of

<sup>40</sup> This is also the argument put forth by the Quakers; see *supra*, footnote 2: "The means of fulfilling human rights obligations should not be confused with the human rights themselves."

<sup>41</sup> German International Law Association, *supra*, footnote 35.

<sup>42</sup> *Ibid.* The non-bracketed proposal of Part II, Article 3, para. 1 of the Draft reads: "Results of intellectual activities give rise to basic human property rights."

<sup>43</sup> Both have some reservations, however. The Sub-Commission states in para. 1 of resolution E/CN.4/Sub.2/RES/2000/7, *supra*, footnote 1, that Article 15.1(c) is a human right "subject to limitations in the public interests". The Committee states, *supra*, footnote 1, that the scope of Article 15.1(c) "does not necessarily coincide with what is termed intellectual property rights".

<sup>44</sup> On this balance and the consistency between Article 15.1(c) and the other rights recognized in the International Covenant on Economic, Social and Cultural Rights, see A. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. Int'l Econ. L. 861, 2002, pp. 867–868.

<sup>45</sup> Refer to para. 6 of the *Statement*, *supra*, footnote 1, saying that "any intellectual property regime that makes it more difficult for a State to comply with its core obligations in relation to health, food, education ... is inconsistent with the legally binding obligations of the State party."

<sup>46</sup> A problem with this approach is that the potentially positive impacts of intellectual property protection are not usually seen immediately but only after some period of time, resulting in increased creativity and innovation. These dynamic effects should also be considered, but this is not easy in a human rights assessment.

moral and material interests are the less affluent segments of society. This is because the most vulnerable and disadvantaged segments of society are given particular attention in the supervision of the implementation of the International Covenant on Economic, Social and Cultural Rights.<sup>47</sup>

Authors' rights, as recognized in Article 15.1(c) of the Covenant, can therefore be considered to be human rights, but only if the recognition, promotion and protection of these rights actually contribute to a better enjoyment of human rights, both for the author and for those enjoying the productions of the author. If social human rights, such as the right to food or health, are impeded as a result of the enjoyment of authors' rights, the rights which are related to the protection of the human person *per se* must be considered more important than the rights which are related to the moral and material interests of that person.<sup>48</sup>

Thus, there is a distinction among human rights, more specifically between those rights which contribute to the realization of other rights and the rights which directly relate to the protection of the human person. While authors' rights as recognized in Article 15.1(c) of the Covenant belong to the former category, it is obvious that any restriction of this right should only be made after careful consideration. In particular, the basic principle of non-discrimination, as well as the principles of participation, transparency and accountability, should be carefully observed.

Finally, it cannot be excluded that the survival of a person may directly depend upon receiving benefits from his/her writing or inventions. In such situations, human rights protection of the author of artistic or scientific work is of crucial importance.

## VI. DISTINCTIONS BETWEEN IPRS AND HUMAN RIGHTS

Based on the arguments above, the notion that IPRS are human rights should be qualified. The instrumental, short-term character of patent rights, in particular, implies that these rights are fundamentally different from the rights which all human beings are entitled to by birth and which are not granted by a public authority.

Does this then justify the notion that patent rights first and foremost should be understood as privileges? The main difference in presenting the term "privileges" is that this was an instrument that was applied in the pre-capitalist era of mercantilism. During this period, the instrumental policy of the competing European States was to secure

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<sup>47</sup> See *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/1991/23, 88-110, para. 2(a) under Article 11 of the Covenant, listing ten vulnerable groups.

<sup>48</sup> Article 60.5 of the Vienna Convention of the Law of Treaties implies that certain treaties are of a particular kind. The paragraph reads: "Paragraphs 1 to 3 [regarding termination or suspension of the operation of a treaty as a consequence of its breach] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." From the *travaux préparatoires*, it is clear that the term "treaties of a humanitarian character" also refers to human rights treaties.

certain benefits *vis-à-vis* other States. One such policy was the granting of privileges. In the modern era, the patent right is a right that a person is entitled to if certain objective criteria are met. However, there is no doubt that State authorities decide upon their patent laws based upon subjective assessments of what is most beneficial to them in social and economical terms. Hence, this modern patent system is based on certain standards of objectivity.

It can easily be shown that patent rights are subject to specific conditions and limitations. As already mentioned, the term of protection is limited and subject to the annual payment of fees. Moreover, the rights are not absolute, as the State authorities can decide to issue a compulsory licence, allowing a person other than the patent holder to produce the patented product.<sup>49</sup> The fact that a patent right is granted does not prevent the issue of a compulsory licence, provided that certain conditions, such as the payment of remuneration to the patent holder, are met.

On the other hand, if the discussion is at a higher level, the procedure for the grant and enforcement of patents indicates that patent rights are of a particular kind. First, the right is granted by a public authority, such as a Patent Office. The Patent Office issues patents based only on those patent claims which are found to fulfil the eligibility criteria. Second, the issuance of a compulsory licence implies that the rights might be subordinate to specific public interests. Third, the patent does not entail full ownership of the invention, but is limited to its commercial exploitation. Anyone can undertake research on the patented invention. Fourth, a right is commonly perceived as a claim that one can make on the holder of the corresponding obligation, most commonly the State. However, it is the patent holder—and not the authorities—which is responsible for enforcing the rights in a situation of alleged infringement. State authorities are only responsible for making available the mechanisms and institutions necessary for effective enforcement.

Based on the arguments above, it is found that neither the “privilege” concept nor the “rights” concept is fully appropriate to describe the particular nature of a patent. The objective character of a patent clearly conflicts with the subjective character of a privilege. Moreover, at a more practical level, the older perception of patents in the form of privileges is not likely to be welcomed by the central actors; it is highly unlikely that any attempt to replace the term “intellectual property right” by “intellectual property privilege” will succeed.

<sup>49</sup> On the question as to whether compulsory licences are compatible with human rights even if the patent is recognized as a “possession” (Article 1 of Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms), see *Smith Kline and French Laboratories Ltd v. The Netherlands*, Application No. 12633/87, Decision of 4 October 1990, in *European Commission of Human Rights Decision and Reports No. 66*, 70–81, at 79–80. The European Commission of Human Rights applied the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in a dispute regarding the granting of a compulsory licence. The Commission asked whether the control of the use of the property that the compulsory licence represented was “lawful, in accordance with the general interest and pursues a legitimate aim in a proportionate manner”. The Commission concluded that the compulsory licence pursued a legitimate aim of encouraging technological and economic development and that the part of the application referring to Article 1 of Protocol No. 1 was “manifestly ill-founded within the meaning of Article 27 para. 2 of the [European] Convention”.

There are also certain common characteristics of a “right” which do not apply to the particular characteristics of a patent right, as shown above. While the patent right *per se* has an objective element, the strength of the right is highly subjective. The strength of the patent right is wholly dependent on how the rights of the right holder are exercised. While enjoyment of human rights is to some extent affected by the active involvement of the right holders, this requirement of active involvement applies even more so in the field of patent rights. For the effective exercise of the right, the patent right holder retains the sole responsibility to halt any alleged violation or infringement of this right—by bringing the case before administrative or legal competent bodies, alternatively through bilateral agreements or cross-licensing.

## VII. ANOTHER APPROACH TO PATENT RIGHTS

A more appropriate understanding of what a patent entails comes closer to the perception of rights which involves power.<sup>50</sup> A brief analysis of this concept of power applied to patent rights is the following. A patent right involves the ability to change legal arrangements, including the right to transfer a right to a licensee which operates with the consent of the patent holder. This must be considered as an undisputed characteristic of patent rights.

Hence, the holder of the patent right has the power to define how and in relation to whom to exercise this right. The patent holder can freely decide that public non-commercial use or use by small-holders will not be subject to accusations of infringement, unlike commercial use by other corporate actors. The patent right holder can also decide to exercise the rights in a strict manner, filing court cases for alleged infringements based on available evidence.

Therefore, it seems that power is heavily involved in the exercise of patent rights. Without power, including legal and financial capabilities, the patent holder would have difficulties in exercising the granted rights, defending these rights from infringements.

Based on this perception, the understanding that patents primarily belong to international economic law and not to international human rights law is also more evident. This perception would probably be a better way forward to identify the potential threats of an excessive reliance upon patent rights, discussing the conditions under which the granting of patent rights could lead to abuse of power.

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<sup>50</sup> See Campbell and Thomas, *supra*, footnote 11, pp. 12–31; see also Waldron, *supra*, footnote 11, p. 7. According to Hohfeld, there are four different categories of rights: rights as unrestricted actions (liberty, privilege or freedom); rights as claim-rights *vis-à-vis* the holder of the obligation; rights as power to alter existing legal arrangements (ability); and rights as immunity from legal change. This fourth category is not considered in detail here, but the following should be observed: A new patent granted must be considered as a legal change if this patent affects an original patent; however, no patent holder is immune from the grant of a patent for any subsequent invention which fulfils the eligibility requirements—even if the results are that the first patent loses its commercial value.

### VIII. CONCLUSIONS

This article has demonstrated that no conceptual amendment can be expected where the term “privilege” is preferred to the term “right” in relation to intellectual property. The term “privilege” has too many negative connotations, which the advocates for intellectual property protection would be careful to avoid.

At the same time, the term “right” as it is applied in the field of intellectual property is substantially different from the term “right” as applied in the field of human rights. The unfortunate attempts by the World Intellectual Property Organization to equate IPRs and human rights must be challenged. The nature of human rights is substantially different from the nature of IPRs—the former emphasizing provision and access, the latter emphasizing exclusion and control.

The Committee on Economic, Social and Cultural Rights has taken upon itself this task of distinguishing human rights from IPRs in the drafting of a General Comment on Article 15.1(c) of the Covenant regarding 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”. However, it remains to be seen whether the Committee decides to present other distinctions, in line with the Draft proposed by the German Chapter of the International Law Association.