The Relationship and Conflict between Human Rights and Intellectual Property Rights: A Study

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The relationship between human rights and contributions to knowledge has been at the centre of important debates over the past several years. A human rights approach to intellectual property takes what is often an implicit balance between the rights of the inventors and creators and the interests of the wider society within intellectual property paradigm and makes it far more explicit. While holders of intellectual property must receive an appropriate reward from the society for their efforts by giving them monopoly rights over their creations, the intellectual property rights should also contribute to the scientific, cultural and economic enrichment of society.[2]

I. Nature of Human Rights and Intellectual Property Rights

It is important to understand that human rights and intellectual property rights have very different nature. While human rights are fundamental, intellectual property rights are contractual rights granted to the owners of intellectual property by the society in return of benefits from such invention; while human rights never end, the intellectual property rights are limited in time duration. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which states seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities and preserve the integrity of scientific, literary and artistic productions for the benefit of the society as a whole. Human rights take primacy over the economic interests of intellectual property and human rights protection is the primary obligation of the states[3]

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 inter-sections between intellectual property laws on the one hand and human rights law on the other. These two subjects were never treated together until it became increasingly evident that

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[2] S.K. Verma, 'Intellectual Property and Human Rights', 3 journal of the NHRC, 2004 at pp. 70-71

[3] V.K. Ahuja: *Human Rights and Intellectual Property rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

these two disciplines affect each other. Many scholars have noted the tensions between these two disciplines especially relating to effect of patents on the rights of public health. They argued that there is a need to bridge the gap between them. Some argue that intellectual property rights have been recognized in human rights treaties under Article 27 of the UDHR and Article 15 (1) ICESCR and consider them as the intellectual property provisions in thee treaties. Such arguments make it difficult to strike a balance between the two fields.[4]

International documents on human rights, such as Universal Declaration on Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author, as human rights. This right is however, subject to limitations in the public interest. A similar provision has also been made in Article 15(1) (C) of the ICESCR. This right is more akin to the rights provided under intellectual property laws. Here the question arises whether the intellectual property rights may be recognized as human rights?[5]

It has therefore been argued by the IPRs Advocates that in view of the provisions contained in the UDHR and ICESCR, IPRs should be considered as human rights as the moral and material interests of the author of any scientific, literary or artistic production should be protected. In other words they are of the opinion that IPRs are implicit in the right to the protection of moral and material interests of authors and the right to property in UDHR. It is therefore argued that higher standard of protection should be given to IPRS as they are human rights.[6]

II. Arguments Against Treating IPR as Human Rights

Robert Ostergard argues that traditional theories like John Locke's labour theory of property (objects produced by an individual through the mixing of labour with resources are the property of the individual) and inferences drawn from the utilitarian theory (IPR provide incentives to produce new intellectual objects, and society benefits from these in the long run) fail to offer a rational and adequate theoretical justification for IPR. He

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4 Shashank Sekhar: *Intellectual property rights and Human Rights with special reference to traditional knowledge*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

5 Prabhash Ranjan: *Are Intellectual Property Rights fundamental Human Rights*, infochangeindia.org

6 Neeru Nakra: *Human Rights and Intellectual Porperty Rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

further argues that without a logical foundation justifying IPR, consideration of IPR as human rights is indefensible. Instead, Ostergard says, for a country it is the physical wellbeing of people that should trump protection of IPR; only those IPR that contribute to the physical wellbeing of the people should be protected. In other words there should be a hierarchy of IPR; all IPR cannot be treated the same. What remains unclear in this argument, however, is whether IPR that significantly contribute to the physical wellbeing of people are worthy of being protected as human rights.[7]

Genetic research is another significant contributor to debate on Human rights and Intellectual property Rights, with largely religious overtones. Those in favour of not granting intellectual property rights to investors or scientists on DNA-related research do so largely on religious grounds or on the basis that blood, genes etc as body parts should not have a marketable value put on them.

The questions that arise here—Do religious considerations or market value actually matter to terminally ill patients or those suffering from diseases where only genetic treatment provides a ray of hope towards recovery? Can their human right be violated in favour of right granting freedom for religious practice etc? Which human rights gets higher consideration over intellectual property rights here? As for body parts like blood, skin tissue etc, aren't they the property of the donors? What does right to property say? Can one dispose off one's property the way on wishes to? It all boils down to access again. If a large section of humanity, irrespective of being rich or poor can have to the medical benefits of DNA related research, this debate will automatically be crushed. It is only when the benefits are restricted to a handful – more often to the rich—that human right of others are violated in such cases.[8]

However it should be noted that intellectual property rights lack the fundamental characteristics of human rights as they are not universal, limited in time, created by statutes and are assignable. The majority view is that under no circumstances can human rights –which are alienable and universal- be subordinated to intellectual property protection. Where there is conflict between the obligations of States to protect human rights and Intellectual Property rights, it is the obligation to protect human rights which should be performed.[9]

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7 V.K. Ahuja: *Human Rights and Intellectual Property rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

8 Prabhash Ranjan: Are Intellectual Property Rights fundamental Human Rights, infochangeindia.org

9 ibid

III. Implications of Interpreting IPR as Human Rights

A lot has recently been written on the link between Intellectual Property Rights (IPR) and human rights. One of the more intriguing questions is whether IPR are themselves human rights. In order to answer this, it would be pertinent to look at the relevant international human rights instruments, namely the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 27 (2) of the UDHR 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. Similarly, Article 15.1 (c) of the ICESCR recognizes the right of everyone to benefit from the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. These provisions have been used by many to argue that fundamental human rights covenants recognize IPR as being a human right.

This interpretation raises a couple of issues. Firstly, does it imply that all IPR are human rights? Secondly, what are the implications of construing IPR as human rights? If the answer to this question is yes, then there are two points worth mentioning. First, the argument implies that at least some IPR are human rights. Second, which IPR pass the test of contributing to the physical wellbeing of society?[10]

Classifying IPR as human rights is problematic at the theoretical level because human rights are understood as rights that are inalienable and part of universal entitlements that are not limited by time and cannot be suspended or curtailed. IPR, on the other hand, are limited-duration statutory rights given by the State. They can be curtailed in certain circumstances where they conflict with the larger interests of society. For example, a patent held by a pharmaceutical manufacturer over a medicine can be suspended if the granting of the patent causes the price of the drug to escalate, putting it out of the reach of a large section of society. This highlights a fundamental difference in the very concept of human rights and IPR, making it difficult to treat intellectual property rights on a par with fundamental human rights, such as the right to life.[11]

Construing IPR as human rights implies construing the right to enjoy monopoly right and rent as a human right even if it is at the expense of society at large. This goes against the very basis of Article 15.1 ICESCR that talks of striking a balance. Moreover, there is the dominant view that IPR

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[10] Prabhash Ranjan: Are Intellectual Property Rights fundamental Human Rights, infochangeindia.org

[11] ibid

and human rights are incompatible, ie, that there is a conflict between IPR and human rights as the former comes in the way of countries enforcing the latter.[12]

This view has become dominant after the adoption of the WTO's Trade-Related Aspects of Intellectual Property (TRIPS) agreement. Advocates of this view argue that the obligations imposed by the TRIPS agreement, especially in the form of medical patents, come in the way of countries fulfilling their international obligations towards fulfilling their citizens' right to health, which is a well-recognized human right. Article 25 of the UDHR states that 'everyone has the right to a standard of living adequate for the health and wellbeing of himself... including food, clothing, housing and medical care...'. Similarly, Article 12 of the ICESCR advocates the '...right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Article 12.2 (d) of the ICESCR places an obligation on states to create conditions that ensure medical service and medical attention in the event of sickness. If IPR such as medical patents are recognized as human rights, it would result in absurd outcomes where one human right comes in the way of another human right. Specifically, medical patents obligate a country to introduce product patents in pharmaceuticals, thereby disallowing the generic manufacture of medicines, which, in turn, leads to higher medicine prices, adversely affecting accessibility of medicines by the poor and endangering the human right to health.[13]

This discussion illustrates that IPR are not human rights, essentially because there are certain fundamental differences between the two. Article 15.1 (c) should be narrowly construed in light of the overall balancing principle enunciated in Article 15.1. If we consider IPR as human rights, there could be serious repercussions on the fulfillment and enjoyment of existing human rights.[14]

IV. General Comment no.17 of ICESCR

In this regard, it is important to look at general comment No 17 of the ICESCR committee, on the position of IPR in the covenant. The significance of general comments stems from the fact that they act as important authoritative interpretations of provisions of the covenant. This general comment states that the right of everyone to benefit from moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author is a human right. According to the committee,

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[12] Prabhash Ranjan: Are Intellectual Property Rights fundamental Human Rights, infochangeindia.org

[13] Colston, Catherine, *Principles of Intellectual Property Law*, 1994, p. 236

[14] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

this human right is derived from the inherent dignity and worth of all individuals.[15]

However, the committee distinguishes between the right of the author to benefit from moral and material interests and rights recognized under the IP regime. There is a distinction between beneficiaries of protection from a human right to moral and material benefits resulting from any scientific, literary or artistic production enjoyed by an author, and from the beneficiaries of an IPR regime. Benefits from the former allow the author an adequate standard of living and safeguards the relationship between the author and his creation and the people, community and other groups that benefit from the creation. Benefits from the latter, on the other hand, are enjoyed by corporates and businesses. The committee also states that the right to benefit from the protection of moral and material interests resulting from the scientific, literary or artistic production encourages the active contribution of the creator to society. This argument is similar to the incentive argument made to justify the granting of IPR, and perhaps blurs the distinction that the committee is endeavouring to draw.[16]

The committee's position is slightly confusing. On one hand it distinguishes between the rights given in Article 15.1 (c) and an IP right; on the other hand, it does not elaborate on how these rights are different except for stating that the right under Article 15.1 (c) is not a monopoly right recognized under the IP system, and that it is linked to the author being able to earn an adequate livelihood. The difficulty here is defining 'adequate livelihood'.[17]

IPR advocates often argue that human rights covenants show that all IPR are human rights. This argument implies that any IPR, be it patents, copyright, trademarks, industrial designs or plant breeders' rights, are human rights. Close scrutiny of the two human rights provisions mentioned above suggests that this is not the case. Both Article 27 (2) of the UDHR and Article 15.1 (c) emphasize the moral and material benefits to be derived by the 'author'. The key to understanding these provisions is in the meaning of the word 'author'.

Returning to interpretation of the word 'author' in the two provisions mentioned above, the argument that all IPR are covered under these two provisions implies that 'author' includes not just the writer (which is the ordinary meaning of the word) but also the inventor or breeder. This interpretation is too broad and does not satisfy the basic cannons of treaty interpretation given in Article 31 and 32 of the VCLT. As pointed out earlier, the provisions talk of protecting the moral and material benefits

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15 ibid
16 ibid
17 ibid

arising from the work of an author. Reference to the word 'author' implies a reference to copyright. Protecting the moral and material benefits of authors can certainly not mean protecting the benefits of a patent inventor or plant breeder because the ordinary meaning of the word 'author' does not include an inventor or breeder. Further, the words 'moral and material benefits' do not refer to the kind of monopoly benefits that an IPR holder enjoys in an IP framework.[18]

Moreover, the ordinary meaning of the terms of the treaty needs to be understood in the context of its objective and purpose. In this regard, the overall context of Article 15 (1) of the ICESCR assumes importance. Article 15 (1) talks not just of the material benefits for the author but also recognizes the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. Therefore, Article 15 (1) is concerned with striking a 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. The context is also spelt out in Article 2 that states that countries will take steps towards the progressive realization of the rights given in the covenant. This implies realization of all rights in a harmonious manner.

An important clarification provided by the committee is that the word 'author' means natural persons; legal entities like businesses or corporations are not included. The positive effect of this is in the area of medical patents. Since most medical patents are held by companies, the monopoly right of these companies is not protected as a human right under Article 15.1 (c).[19]

V. Human Rights and Patent Right

Another important right under the intellectual property laws is patents, which are monopoly rights granted under a statute for a limited period of time. Under Indian Patents Act 1970, patents are granted for a period of 20 years from the date of application. Patents are granted for inventions which are new, involve an inventive step and are capable of industrial application. After the expiry of patent it falls into public domain and becomes public property. Anybody can thereafter use the patent freely without taking any prior permission from the patentee. This enables the generic drug industry to market the drugs and pharmaceuticals at much cheaper rates, which ultimately provides the heath cover to public at large. The limited term of patent balances the rights of patentee to recoup his investment and rights of the public to benefit from the invention after the expiry of the patent.

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[18] ibid
[19] ibid

There exists the need to ensure non-discrimination, in all aspects of the discussions on patent and human rights. It is widely accepted that under human rights states have three types of obligations; the obligation to *respect, protect and fulfill* rights, and these pertain also to international assistance and cooperation.[20]

Human rights and Intellectual Property rights, especially patent right regime, are two branches of law that have overcome their initial shyness of each other and are now becoming increasingly intertwined by the day. These two subjects have developed in virtual isolation from each other for several decades. However, during the past few years, there have been a plethora of international standard setting activities, which have begun to explore the nooks and crannies that represent the common haunts of patent law on the one hand and human rights law on the other. Patent rights have now spread throughout the world by virtue of an intrinsic network of bilateral, regional and multilateral treaties like World Trade Organisation etc. and the extensive usage of such rights that resulted from this spread has had an inevitable effect on human rights. Perhaps an appropriate example will be the implications for the right to health.[21]

VI. Medical Patents

Medical patents first arose in Switzerland in late 19th Century, till then there was no patent protection and companies which are behemoth today like Roche till then worked on knockoffs from French or English pharmacists. Given the rise of IPR these companies were forced to start their own R&D to come up with new medical products. The story was entirely different in India where under the colonial regime both product as well as process patent was guaranteed, thus all pharmaceutical product if patented in UK was automatically guaranteed IPR protection in India. This remained so till the mid 1970s when based on Ayyangar committee report India abolished product effectively banning pharmaceutical patent in India. This greatly encouraged generic Indian pharma companies like Cipla which merely reverse engineered all new drugs brought to market by foreign medicine companies and brought out its knock off version at one tenth of the price of the original. During this period India became a hub of medical exporters to many African countries. However in the 1990 decade India became a signatory to WTO and was given a 10 year period to implement product patent regime.

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[20] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

[21] Article 33: Term of Protection : The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date

TRIPS aimed at creating a worldwide uniform rule for IPR, it was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994. Its inclusion was the culmination of a program of intense lobbying by the United States, supported by the European Union, Japan and other developed nations. Campaigns of unilateral economic encouragement under the Generalized System of Preferences and diplomatic coercion by US under its carrot and stick business policy played an important role in defeating competing policy positions that were favored by developing countries, most notably Korea and Brazil, but also including Thailand, India and Caribbean Basin states.[22]

TRIPS mandated that the WTO members have to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the chemical ingredients for a medicine), while allowing certain exceptions.

Exceptions included steps --to protect public order or morality, protect human, animal or plant life or health, and avoid serious prejudice to the environment.

The list of exclusion also included diagnostic, therapeutic and surgical methods for the treatment of humans or animals; plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

Thus in effect states were bound to provide protection to pharmaceutical products under a domestic patent law for 20 years.[23] Under Article 30[24] of the TRIPS however there was a provision to give exceptions to the standard patent regime to give flexibility to the member nations to legislate its own patent rules provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not

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[22] Article 30: Exceptions to Rights Conferred: Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties

[23] Article 33: Term of Protection : The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date

[24] Article 30: Exceptions to Rights Conferred: Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties

unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties[25]

India signed WTO in 1995 and thus automatically became a party to the TRIPS agreement, but by virtue of being a developing country it was given a 10 years period to bring its laws up to the TRIPS standard. Pursuant to this in 2005 India came up with the Patents (Amendment) Act, 2005 which amended the 1970 Patents Act and reintroduced product patent regime in India after a period of 35 years. However banking on the exceptions and rather loose interpretation of article 30, Indian legislators tried to tie both ends, on one hand product patent was introduced, twenty year patent period was guaranteed but under section 3 of the Indian Patents Act, a host of criteria were added which made certain products noon patentable, these provisions especially section 3(d)[26]

This section barred patentability of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. While India claims it to stop patent ever greening the pharma lobby calls it a violation of TRIPS obligation. Madras HC in deciding a case between Roche & Cipla has stated that the section does not violate right to equality on the question of it being violative of international obligation under WTO the court took a rather escapist position stating that it does not have jurisdiction to decide on such issue.

Thus as the position stands today medical product patent is allowable in India if it satisfies the three steps of novelty, inventive step and industrial application[27]

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[25] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

[26] Section 3 (d): the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation to Section 3 (d): "Salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations, and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy)

[27] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

VII. Right to Health and Intellectual Property Rights

The international human rights law and practice emphasize that human rights need to be protected mutually balanced through legislation, administrative and judicial protection. The right to health has always been the core human rights in all international instruments as well as our Indian Constitution. Depending upon the availability of the resources, States should facilitate access to essential health facilities, goods and services worldwide. Since patents are very relevant in the field of drugs and pharmaceutical products, the IP regime becomes relavant in connection with the access to medicines and thereby in the protection and fulfillment of the human right to health. The right to health is closely related to and dependent upon the realization of other human rights including the right to food, shelter, work, education, equality and above all human dignity. As the essential medicines and health services are tradable, TRIPS/WTO rules on access to medicines and health services may be of direct relevance for the protection and fulfillment of the human right health.[28]

VIII. Compulsory Licence

TRIPS Agreement, adopted relatively high minimum standards of protection for all WTO members, nations developing or otherwise. Unlike earlier treaties like Paris convention, Berne convention, non-compliance with this one can be challenged through the WTO's dispute settlement system, in which rulings by WTO panels and Appellate Body are backed up by the threat of trade sanctions. In August, 2000, when the transitional periods of compromise allowed by the treaty were expiring for developing countries, the UN Sub-Commission adopted Resolution 2000/7 on "*Intellectual Property Rights and Human Rights*", saying that "*actual or potential conflicts exist between the implementation of the TRIPs Agreement and the realization of economic, social and cultural rights*." Such conflicts include:

(1) The transfer of technology to developing countries;

(2) The consequences for the right to food of plant breeders' rights and patenting of genetically modified organisms;

(3) Bio-piracy

(4) Control of indigenous communities' natural resources and culture and

(5) The impact on the right to health from restrictions on access to patented pharmaceuticals.

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[28] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

To address these conflicts, the Sub-Commission set out a new agenda for reviewing intellectual property issues within the United Nations, based on the principle that human rights must be given priority over economic policies and agreements. The enthusiastic response of the UN human rights system to this development includes:

(1) 3 resolutions of the Commission on Human Rights on "Access to Medication in the Context of Pandemics such as HIV/AIDS,"

(2) an analysis of TRIPS and public health by the High Commissioner for Human Rights;

(3) an official "statement" by the Committee on Economic, Social and Cultural Rights that "intellectual property regimes must be consistent with" the rights in the Covenant and

(4) a report by the Special Rapporteurs on Globalization, which argues that patent protection has undermined human rights objectives.[29]

The WTO lobby decided to counter it through the compulsory licensing clause provide in TRIPS under article 31. Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. In current public discussion, this is usually associated with pharmaceuticals, but it could also apply to patents in any field. This was touted as the link between TRIPS and HR and was shown to the world that it was not only business but also with a humane face. A closer analysis would show it to be a farce, the conditions are so stringent that it would be impossible to compulsorily license a drug in time of need, also compulsory licensing can be invoked only in time of 'extreme national health emergency', in absence of any guiding principle one fails to understand what would constitute a 'national health emergency'.[30]

On the face of UDHR Art. 25(1), ICESCR Art. 12(1), Declaration of Alma Ata (1978), Ottawa Charter for Health Promotion (1986) and several other Human Rights Instruments for specific groups of people (CERD, CRC, CEDAW) stress the need for Healthcare and Health protection for those particular groups, there is hardly and doubt that Right health has become a non derogable HR. In India, although Right to health was a directive principle of state policy, a duty is cast upon the State to implement adequate healthcare measures by expansion of 21 to include Right to Health.[31]

Thus there was an apparent conflict under Indian constitutional and international commercial obligation. It sought to find a solution in the

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[29] Cullet, Philippe (Dr.), *Human Rights and Intellectual Property Rights: Need for a New Perspective*, IELRC Working paper,2004, http://www.ielrc.org

[30] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

[31] ibid

compulsory licensing escape clause which resulted in the Doha round of ministerial conference ultimately culminating in the Doha declaration where two very important decisions were reached:

(1) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

(2) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

This ended a tumultuous period of interaction between Right to health and Right to seek profit out of ones intellectual creation.

Doha Declaration recognizes the problem of access to healthcare by people from developing countries. Apart from compulsory licenses which can be granted in national emergencies, the countries need to adopt a range of policies to improve access to medicines. Following a highly 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 decided to first adopt a statement on intellectual property rights and human rights in 2001 as a first step towards the adoption of a General Comment. The 2001 Statement was adopted in the wake of collapse of the case filed by pharmaceutical companies against the South African Government for attempting to limit their patent rights and the Doha Health Declaration adopted by the 2001 Ministerial Conference of the WTO. It argued that intellectual property protection must serve the objective of human well-being which is primarily given legal expression through human rights. In other words, intellectual property regime should promote and protect all human rights. The public health also depends upon cost-intensive research which is possible in economically viable conditions. When public funds were largely used for scientific research, it was accepted that while the inventor or discoverer will get the credit, the benefits of the research belonged to the society at large and also involved sharing of the technology or research database. But with private parties becoming major investors in research in any given field today, the debate over intellectual property rights versus human rights have acquired serious tones.[32]

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[32] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

It is pertinent to mention here that private investors want returns on their investments and this involves fixing the prices on the benefits of the inventions, as well as protection of the research databases. For the individual inventor or scientist though, recognition and moral rights have remained priority over material rights. It is however undeniable that their material rights too have been better taken care of –more often than not-within a private funding environment rather than a public funding environment. But in this case, mankind at large is expected to pay a higher price to avail the benefits. Herein lies the real challenge. Working out a scenario where this price does not translate into violation of human rights of the common man. A failure to do so however, should under no circumstances become an excuse to infringe on the intellectual property rights – also granted under human rights—of the inventor or the funding agencies.[33]

IX. Copyright and Human Rights

Article 15 (1)(C) of the ICESCR and Article 27 (2) of the Universal Declaration of Human Rights recognize the right of author of any scientific, literary or artistic production of protection of the moral and material interests which results from such work. The copyright law also confers the economic and moral rights on the author of a 'literary and artistic work'. These rights are exclusive rights but they are subject to certain provisions in the public interest. In India, the term of copyright is normally author's life plus 60 years after his death under the Copyright Act 1957. After the expiry of the copyright in a work, the work falls into public domain and can be used by any person freely. Even during the subsistence of copyright, many free rights are available to the public. They are also called as fair uses. These fair uses are provided in the public interest, so that the further research or study should not be jeopardized due to copyright in the work. In a way, the copyright law protects the human rights of the author as well as the public at large.

The copyright protection is an important means to promote, enrich and disseminate the national cultural heritage. The social, economic and political development of a nation depends, to a great extent, on the creativity of its people. The higher level of protection to these creations leads to greater encouragement for authors to create. It is because of this reason that every nation protects its creative genius by copyright law. It is sine qua non for the copyright system of a country to strike a balance between the interests of the copyright owner and reasonable demands of the organized society. The concept of public interest against the rights of copyright owner has also been

[33] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

recognized by the Universal Declaration of Human Rights under Article 27 (1). There are limitations on copyright such as limited duration of copyright, permitted uses and compulsory licenses which are in conformity with the idea of human rights.[34]

The general philosophy of copyright is that whoever takes the initiative in creating the work by sweat of his brow and makes the investment to produce it and market it taking the financial risks, should be allowed to reap the benefit. It again emphasizes on the point that an individual right has to be balanced with rights of the masses and the limitations on copyright signifies this balance.[35]

X. Traditional Knowledge and Intellectual Property

Traditional knowledge is the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time and continues to develop. This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for the continue survival of the community.

Traditional and indigenous knowledge form the back bone of cultural heritage. This knowledge is usually handed down orally from generation to generations. It is found in community laws, local languages, artistic works, beliefs, rituals and biodiversity. It may include such information as trees and plants that grow well together, and indicator plants, such as plants that show the soil salinity or that are known to flower at the beginning of the rains. It includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting.[36]

Protection of Traditional knowledge is necessary to ward off cases of misappropriation and biopiracy. It is also considered important on the principles of equity and fairness as indigenous people have conserved, preserved their knowledge, innovations and practices. Despite being the true owners of this knowledge, they continue to remain poor, whereas by using

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[34] A.K. Koul and V.K. Ahuja, *"Law of Copyright : From Gutenberg's Invention to Internet"* published in Law of Copyright: From Gutenberg's Invention to Internet, Faculty of Law, University of Delhi, 2001 at p.6

[35] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

[36] Shashank Sekhar: *Intellectual property rights and Human Rights with special reference to traditional knowledge,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

their knowledge multi-national companies get enormous monetary returns without acknowledging or sharing these benefits with these communities.[37]

At present, traditional knowledge is embroiled in various problems and faced with many challenges. It ownership is one such crucial challenge. It is primarily due to no-availability of traditional knowledge in a documented form. Lack of documentary evidence and non-availability of information about existing traditional knowledge across the globe are serious hurdles to check the misappropriation of traditional knowledge. Individual researchers and research institutions, often take advantage of non-availability of records on traditional knowledge by seeking protection for the patens derived from the traditional knowledge thereby depriving the bona fide beneficiaries.[38]

There are no definite international treaties to protect traditional knowledge. International treaties related to the Conservation and Sustainable use of Plant Generic Resources for Food and Agriculture and the WIPO initiations on protection of traditional knowledge and folklore are some of the guiding factors for safeguarding traditional knowledge. The Convention on Biological Diversity is another instrument which strives to safeguard some classes of traditional knowledge. The concept of "sui generis" systems envisaged by the TRIPS Agreement is another tool in the hands of people endorsing the protection of traditional knowledge.

In this context, the UN Draft Declaration on the Rights of Indigenous people 1994 is worth mentioning. It accepts the right of self-determination of indigenous people. It recognized their 'collective right to live in freedom, peace and security as distinct people. The Declaration demands that States abstain from removing them form their lands or territories. Cultural and intellectual property rights are recognized in Article 29 which reads— "Indigenous people are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.[39]

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[37] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

[38] Shashank Sekhar: *Intellectual property rights and Human Rights with special reference to traditional knowledge,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

[39] Neeru Nakra: *Human Rights and Intellectual Porperty Rights,* Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

XI. Trips and Protection of Traditional Knowledge

Article 27 (1) of the TRIPs requires that only those inventions that are new, involve an innovative step, and are capable of industrial application be eligible for patents. This clearly leads us to ask, how can patent be granted to prior existing knowledge? Since traditional knowledge is in the public for centuries, it falls within the public domain. There is no novelty involved as it is already known to public.

However, most of the traditional knowledge in its real form will not be able to qualify for patent protection. Prior existing use has to be proved, as India did in the turmeric case. This is often difficult. Article 27.3 (b) of TRIPs provides that while member countries are not required to patent "plants and animals other than micro-organism", they shall proved for the protection of plant varieties either by patents or by an effective 'sui generis' system. Many developing countries feel that a sue generic system as proposed by TRIPs is very similar to a patent system and thus provides no distinct choice.[40]

XII. Conclusion

Human rights and intellectual property rights are the two most important areas of law. The former upholds human dignity whereas the later encourages and promotes creativity and innovations. The States are obliged to protect the both under various international conventions. It is therefore, the duty of states not to compromise with human dignity and to protect the intellectual property rights in accordance with international human rights obligations. The findings of the Sub-Commission on Human rights in the resolution 2001/21 on Intellectual Property and Human Rights are very important. The Sub-Commission urged all Governments to ensure that the implementation of the TRIPs Agreement should not negatively impact on the enjoyment of human rights. While implementing their obligations under the Convention on Biological diversity of 1992, it is the duty of State parties to ensure the safeguarding of biological diversity and indigenous knowledge relating to biological diversity, and the promotion of the transfer of environmentally sustainable technologies.[41]

The UDHR and ICESCR recognize everyone's right to enjoy the fruits of cultural life and scientific development. This simply means that these documents put the emphasis on societal benefits. This approach is

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[40] Shashank Sekhar: *Intellectual property rights and Human Rights with special reference to traditional knowledge*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

[41] V.K. Ahuja: *Human Rights and Intellectual Property rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

completely opposite to the IPRs instruments as they focus mainly on the rights of authors, inventors and other legal entities. Human rights instruments require the balance to be adopted from the perspective of society at large.

One may venture a concluding opinion that the ongoing debate between advocates of a conflict approach and those asserting a coexistence approach to the intersection of human rights and patent rights is highly unlikely to be resolved in the foreseeable future. Few distinct consequences can be predicted from this ensuing tension.[42]

The first effect will be an increased incentive to develop soft law norms, both in the arenas of patents and human rights. While higher standards of patent protection are advocated by some global giants to promote their technological industries, majority would no doubt benefit from more flexible standards facilitating transfer of technology and allowing the least-developed and developing nations to respond to their economic and socio-cultural development concerns. Therefore a development-oriented approach to patents should be defined by each country according to its own needs.[43]

In the human rights frame, on the other hand, it is essential to identify precisely which rights are being undermined by the current patent regime, something which, in view of the narrow conflict rules of customary international law, is easier said than done. Human rights law also needs to be elastic alongside keeping pace with the changing time and circumstances through the development more precise legal norms and standards. Advocates endorsing a conflict approach to patent rights are likely to press human rights bodies to develop specific interpretations of ambiguous rights to compete with the precise, clearly defined rules in TRIPS, which, in addition to fuelling future conflicts claims, may result in lending speed to the process of jurisprudential evolution of economic and socio-cultural rights.[44]

Moreover, a human rights approach to patents would also grant the user-consumers a status conceptually equal to owners and producers. This may have an interesting impact on state negotiating strategies, for governments will thus be able to produce a more credible argument that a rebalancing of intellectual property standards is actually a part of a rational effort to harmonize two competing regimes of internationally recognized

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[42] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

[43] Alikhan, Shahid, *Intellectual Property, the Developing Countries and Economic Development*, from *Intellectual Property Rights*, edited by Bibek Debroy, 1998, p. 145

[44] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

rights, those of creator and consumer, and not a self-interested attempt to distort trade rules or to free ride on foreign inventors.[45]

Another inevitability is a no-holds barred conflict between the articulation of "maximum standards" of patent protection by TRIPS and the principles of human rights. The U.N. High Commissioner for Human Rights and the WHO have already voiced strong objections to TRIPS on this ground. Together with the particularization of soft law norms discussed above, these objections may result in the curtailment of the rapidly accelerating upward movement of intellectual property standards as a whole.[46]

Yet another important issue is the manner of acceptance of human rights norms in the hallowed chambers of patent legislation, viz. WIPO and WTO. There are mixed news on that front. On the one hand, the High Commissioner for Human Rights, the WHO, and numerous NGOs have already been granted observer status in the discussions of WIPO, so that they can voice human rights concerns there.[47] At the same time the breakdown of trade talks at the Cancun, Mexico ministerial meeting in September 2003 suggests the possibility of new rifts between developed and developing countries that may make such compromises more of a challenge.

Regarding the first two issues, states have an obligation to regulate the policies of their own as well as those of third parties, particularly multinational corporations that their policies do not harm the enjoyment of human rights in other countries. Fulfillment can be achieved through rigorous adherence by developed countries to the obligations to *respect* the exercise of human rights abroad, through the policies and agreements they pursue, and to *protect* human rights from being undermined by third parties who benefit disproportionately from the current patent regime.

One can thus conclude on a note of optimism that trade and patent negotiators will eventually embrace opening up international organizations to human rights influence, thereby promoting the integration of legal rules and allowing lawmakers to turn to the more pressing task of defining the human rights-patent interface with balanced legal norms that enhance both individual rights and global economic welfare.

It becomes necessary for international bodies monitoring the implementation of treaty obligations in the area of economic, social and

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[45] Cullet, Phillippe, *Intellectual Property Protection and Sustainable Development*, 2005, p. 410

[46] Debadyuti Banerjee, *Interrelationship between IPR and Human Rights*, The Student, Journal of Law

[47] Alikhan, Shahid, *Intellectual Property, the Developing Countries and Economic Development*, from *Intellectual Property Rights*, edited by Bibek Debroy, 1998, p. 145

cultural rights including the Committee on Economic, Social and Cultural Rights to explore, in the course of reviewing State Parties' reports, the implications of the TRIPs Agreement for the realization of Human Rights. These bodies must come out with suggestions to the problems being faced by the parties. There needs to be a proper coordination between WTO and UNHCHR, so that there should be no conflict between the human rights obligations and other obligations of the States.[48]

The law related to integrated circuits needs to be protected in favour of the person who is putting all his efforts in research and development, spending the valuable time and money on these creations deserve special protection. Similarly trade secrets are to be protected as the organizations giving impetus to the economy have a right to protect their secrets in this competitive world. The protection to the plant variety has not only been given for commercial purposes but also for the enhancement in the food security which again is a matter of human right. Finally an individual's right is as important as the society's at large. Neither can be denied in anyway, even if they are contradictory to each other. No human is larger than the society but neither can a majority, in this case, the society in general, crush the rights of an individual.[49]

Human rights and intellectual property rights are two distinct areas of law. These areas have evolved separately over the years. The relationship and conflict between the two have become a subject-matter of increasing debate. It is the first and foremost duty of Governments in all the States to promote and protect human rights. The States are under an obligation to provide the rights to food, shelter, work health and education to their people. The effect of intellectual property rights especially patents and copyrights on the ability of states to comply with their obligations under the human rights law, most particularly, the obligation to ensure access to affordable medicines, access to adequate food and access to educational material has been a subject-matter of heated debate during the recent past. Stronger protection to intellectual property rights on one hand may undermine the human rights, where as on the other hand, inadequate or no protection to intellectual property rights may bring creativity and innovations to a halt, which may have adverse impact on the technological, economic , social and cultural development of a nation. A balanced approach is therefore pertinent for the orderly development of the society.[50]

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48 V.K. Ahuja: *Human Rights and Intellectual Property rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

49 Neeru Nakra: *Human Rights and Intellectual Porperty Rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012

50 V.K. Ahuja: *Human Rights and Intellectual Property rights*, Human Rights in the 21st century: Changing dimensions, Universal Law Publishing company, Ed 2012