

Intellectual Property and Human Rights

Towards an authors' rights regime that promotes cultural rights

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This is an English translation of *Propiedad intelectual y derechos humanos* by María Beatriz Busaniche.

“The right to take part in cultural life can be characterized as a freedom”.

Committee on Economic, Social and Cultural Rights, General Comment No. 21, Paragraph 6, 2009

Introduction

The relationship between the cultural rights enshrined in international treaties on human rights and the laws of intellectual property hasn't been appropriately addressed yet. In fact, most modifications to intellectual property laws are made without considering the commitments adopted by party countries regarding human rights, even though the cultural rights included in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights hold constitutional status in a vast majority of the present day states.

In Argentina for example, it is difficult to find an approach towards human rights among the classic theorists of Authors' Rights.

On the one hand, Dr Miguel Ángel Emery¹ contrasts Argentine regulation with the international treaties on trade and their compliance in relation to the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the framework of the World Trade Organization, as well as its relation with the Berne

¹ Emery, Miguel Ángel (2004). *Propiedad Intelectual*. Buenos Aires: Astrea, pp.1-4.

Convention, the authors' rights agreement administered by the World Intellectual Property Organization. However, in this study the conflict related to the application of the law in relation to the fulfillment of cultural rights enshrined in human rights conventions that hold constitutional status in Argentina isn't addressed.

Dr Delia Lipszyc on the other hand, apart from an analysis similar to that of Dr Emery in relation to the TRIPS, the Universal Copyright Convention and the Berne Convention, also mentions the inclusion of authors' rights in the Declaration of Human Rights:

the inclusion of authors' rights among the fundamental rights in national constitutions, in the Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights (ICESCR), acknowledge that those rights are an inherent attribute to the human being and that, as such, their appropriate and effective protection cannot be omitted².

In this regard, she adds that the theoretical foundation of authors' rights "originates from the needs of humanity in terms of access to knowledge and, ultimately, from the need to support the pursuit of knowledge whilst rewarding those who seek it". Lipszyc addresses the provisions referring to authors' rights in the Declaration of Human Rights and ICESCR partially. She prioritizes authors' rights over the whole of the other articles in the international treaties, which also recognize, and with similar degree of importance, the rights to take part of and have access to culture³.

² Lipszyc, Delia (2006). *Derechos de autor y derechos conexos*. Buenos Aires: UNESCO, CERLALC, Zavalía, pp.38-39.

³ Busaniche, Beatriz (2010). *Argentina Copyleft*. Córdoba: Fundación Vía Libre, Fundación Heinrich Böll, pp. 31-34.

In effect, the issue of authors' rights has been included in the field of human rights. However, an in-depth study of this inclusion is essential, particularly considering that the body of the texts of the International Agreements do not explicitly detail the meaning of the different articles and the way in which they should be implemented.

The topic has been treated by the committees that monitor these treaties. For example, the Committee for Economic, Social and Cultural Rights, at its 35th session in Geneva, adopted a general comment about the cultural rights in which it details the reach and characteristics of subsection (c) of article 15 of ICESCR. In this document the committee indicates that

the term of protection of material interests under article 15, paragraph 1 (c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production⁴.

The committee also analyzed the implications of the rest of article 15 of the ICESCR in General Comment No. 21, published in 2009. There, it states and defines the scope of the right of access and participation in the cultural life of the community⁵.

Both the Universal Declaration of Human Rights in Article 27, as well as the International Covenant on Economic, Social and Cultural Rights in Article 15, set authors'

⁴ Committee on Economic, Social and Cultural Rights. Thirty-fifth session Geneva, 7-25 November 2005. 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 or she is the author (article 15, paragraph 1 (c), of the Covenant) General Comment No. 17 (2005). Adopted 21 November, 2005. Available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) (accessed 28 November, 2011).

⁵ The works of the monitoring Committee of ICESCR, the CESCR, are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (Accessed 15 February, 2013)

rights among human rights, but in direct relation to the right to access and participation in culture. The inclusion of the intellectual property rights in the international treaties on human rights was neither obvious nor peaceful, since the topic brought extensive discussions and controversy.⁶

Academics like Dr Carlos Correa attempted to interpret the authors' and inventors' human right in a maximalist form:

In recent year, there have been attempts to interpret subsection (c) of this provision regarding intellectual property as a human right. This interpretation distorts the original meaning of the norm, just like it was clarified by General Comment No. 17 of the Committee on Economic, Social and Cultural Rights⁷.

The committee defined the concept of “author” excluding corporations from the possibility to claim human rights. But this is not the only underlying conflict. The implementation of intellectual property law often hinders the implementation of the other commitments undertaken by the party countries in Article 27 of the Declaration of Human Rights and in Article 15 of the ICESCR, as well as Article 13 of the latter which claims the right to education.

For the case of Argentina for example, these treaties on human rights hold constitutional status after the last revision of the National Constitution in 1994. However, in most of the studies on intellectual property, the experts on authors' rights refer exclusively

⁶ Chapman, “Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))”, XXXV (2001) Copyright Bulletin, No. 3, 4-36.

⁷ Correa, Carlos (2009). “Acceso a la cultura y derecho de propiedad intelectual: la búsqueda de un nuevo equilibrio” in *¿Desea Guardar los Cambios?* Córdoba: Centro Cultural España Córdoba.

to Article 17 and don't analyze the constitutional framework in all its breadth⁸.

Julio Raffo remarks in his book *Derecho Autoral. Hacia un nuevo paradigma*, that the hegemonic paradigm in Argentina fails to see the restrictions projected on this field for the treaties that guarantee access to culture. He also begins to show the existing tension between the rights of people to take part and have access to culture and the perspective constructed by the hegemonic paradigm of authors' rights. Raffo is also concerned about the importance gained by the new information and communication technologies, particularly since mass access to the Internet, and poses the need for a critical analysis of the current paradigm of the Argentine Authors' Right Law⁹. However, even though he extensively criticizes what he calls the hegemonic paradigm, Raffo's work is more focused on the role of the collective managers of authors' rights and some situations related to their abuse of those rights. He also focuses on conceptual errors of the hegemonic paradigm in relation to the definition of the protected objects in the regulatory framework, and the atypical construction of the moral rights. In this context, Raffo critically reflects on the alleged independency of Authors' Rights Law considering that, "the paradigm is reluctant to examine the content of Authors' Rights Law as a part of the legal order as a whole and subject to the general provisions of the customary law in every respect that isn't explicitly modified by the specific regulations"¹⁰. Raffo's work is, without doubt, an excellent starting point to account for a critical perspective on the intellectual property law in Argentina. It is worth mentioning that Julio Raffo is responsible for the proposed amendment of National

⁸ Vidaurreta, Guillermo (2007). *Historia del Sistema Argentino de Patentes de Invención (1580-1863). Propiedad Intelectual en la Constitución Nacional*. Buenos Aires: Editorial La Ley.

⁹ Raffo, Julio (2011). *Derecho autoral. Hacia un nuevo paradigma*. Buenos Aires: Marcial Pons Editores, pp. 201-204.

¹⁰ *Idem*, p. 22.

Law No. 11,723 which seeks to legalize the copy for non-commercial uses on the Internet. Fundamentals of that amendment are deeply rooted in international treaties that enshrine cultural rights, expanding in this way Raffo's contribution in this regard.

On the other hand, Consumers International's annual report shows that Argentina is the second most restrictive country in terms of authors' rights from the consumer's point of view, only behind Jordan, and in a worst situation in relation to other countries of the region as Chile and Brazil¹¹. The report accounts for the reduced number of exceptions and limitations to author's rights and details the most troublesome aspects on the subject, particularly, the lack of exceptions for the work of libraries, the limited exceptions in the field of education and the absence of limitations regarding the copy for private use. It also highlights the lack of a legal system of fair use, as included in the Copyright Law of countries under the Common Law¹².

Dr Carlos Correa has also expressed himself in relation to the tension between intellectual property and human rights in the field of Author's Rights Law.

Public interest, the right to education and to information require in some cases, to restrict the authors' right to commercially exploit their work. For that reason, the exceptions and limitations serve as the levelling bars to establish a balance between the interests of the authors, the industries that exploit those works and the public.

¹¹ Consumers International Annual Report on Access to Knowledge and Laws of Intellectual Property. Available at: <http://a2knetwork.org/sites/default/files/IPWatchlist-2012-ENG.pdf> (accessed 12 February, 2013).

¹² See Consumers International report on Argentina (2012): <http://a2knetwork.org/reports2012/argentina> (accessed 12 February, 2013).

These exceptions and limitations are crucial to the access to knowledge, especially in a developing country like Argentina, with great asymmetries in the distribution of wealth¹³.

In this same line of investigation, there are various international works that address the tension between human rights and the laws of intellectual property, and author's rights in particular. In this regard, we can cite authors like Paul Torremans, Laurence Helfer y Graen Austin, Peter Yu, Daniel Gervais or Lea Shaver, among others.

Laurence Helfer considers two possible analyses in relation to intellectual property and human rights. One, the conflict approach, in which it is understood that an application of high standards of intellectual property as set by the TRIPS Agreement, undermines a broad spectrum of human rights. The other one, called the coexistence approach, notes that both regulatory frameworks should start from the same question: to define which is the appropriate framework of private monopoly rights to give authors and inventors enough incentive to create and innovate, while granting adequate public access to the fruits of those efforts¹⁴. In the USA, the concern for public domain¹⁵ rather than Cultural Rights has been the main focus of the work of many academics involved in this discussion¹⁶.

Just like many theorists and European and American non-governmental organizations approached the conflict between the access to knowledge, public domain,

¹³ Correa, C. *Op. cit.*, p. 142.

¹⁴ Helfer, Laurence R. (2003). "Human Rights and Intellectual Property: Conflict or Coexistence?" *Minnesota Journal of Law, Science & Technology*, Vol. 5, p. 47, Loyola-LA Legal Studies Paper n.º 2003-27. Princeton Law and Public Affairs Working Paper No. 04-003. Available at SSRN: <http://ssrn.com/abstract=459120> or <http://dx.doi.org/10.2139/ssrn.459120>

¹⁵ Work is in the public domain when the rights of exclusiveness over that work have prescribed. That is, when the monopoly rights over it expire, be it in the case of patents as in authors' rights.

¹⁶ Intellectuals like Boyle (2008), Lessig (2005), Litman (1998), Samuelson (2003), among others, ascribe to this line of work.

cultural rights and authors' rights; a detailed analysis of this conflict from a human rights perspective is still missing in other countries. While there are already some early approaches on the subject, we still lack a study that analyzes in depth the international treaties on human rights with constitutional status; in particular, considering the rights of access to culture (Art. 15 of ICESCR) and the right to education (Art. 13 of the same treaty) that enable the establishment of concrete proposals of public policy for a modification of authors' rights in the light of the exercise of cultural rights. That is the objective pursued by this book.

To accomplish this, this study addresses the drafting of the international treaties on human rights from a historical perspective.

The first chapter addresses the drafting history of the articles that contemplate the rights of access to culture and the rights of authors and inventors in the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). This revision of the drafting process of the provisions helps us understand their scope and the extent to which authors' rights must be considered or not within the framework of the human rights. To this end, documents from the ICESCR's monitoring Committee are also taken into account, among others.

The second chapter addresses the question about the conflict or coexistence of intellectual property regimes and the international treaties on human rights. In order to do this, it gathers the academic analyses that deal with the different views in relation to this new field of discussion between human rights and intellectual property, to effectively establish the existence, or not, of an order of primacy; and given the case, the

characteristics of intellectual property that could or couldn't be included within the framework of the human rights.

Finally, this study concludes with a chapter dedicated to establish whether or not it is necessary to make regulatory changes in matters of Authors' Rights and related Law in the legislation on intellectual property. The third and last chapter is of a propositive character, oriented to offering keys and proposals for the drafting of an Authors' Rights Law that promotes the exercise of cultural rights in agreement with international treaties such as the TRIPS Agreement and the commitments adopted in matters of human rights.

Chapter 1. Cultural rights in the framework of human rights

The Universal Declaration of Human Rights and the drafting of Article 27

After the end of World War II in 1945, the United Nations organization was founded. At that time there was great pressure on the delegates at the international conference to include a declaration of rights in the Charter of the United Nations. The first decade after the War was characterized by numerous calls to international peace and respect to the fundamental rights:

- In 1943 Jews, Catholics and Protestants united in a call for peace and human rights. They distributed a pamphlet titled “A Pattern for Peace”, with over 750 thousand copies made.
- In November that year, and as good interpreters of the times they were living, Roosevelt and Stalin presented the matter of the establishment of the United Nations organization in a conference in Tehran.
- In February 1943, the American Institute of Law drafted its own version of an International Bill of Rights, that was later closely considered for the drafting of the Universal Declaration.
- The International Labour Organization also drafted its first bill on workers’ rights, fundamental for the articles related to the rights of workers in the subsequent drafting of the Universal Declaration.
- The construction of an international organization even became a priority for

Roosevelt's administration, who in successive meetings with Stalin finally established a commitment, even on the eve of the Cold War.

- In February 1945, the American Jewish Committee drew up its own version of the international bill of rights. This organization was very active during all the drafting process of the Universal Declaration.

This urge to draft an international bill of rights wasn't exclusive to the USA. By February and March 1945, at the Inter-American Conference on Problems of War and Peace held in Mexico, twenty-one American countries spoke in favor of the drafting of a charter of fundamental rights. Cuba, Chile and Panama were the first to submit drafts to the San Francisco Conference with the purpose of getting a human rights charter included in the founding documents of the United Nations organization. Many of these preliminary documents were analyzed and included in some fashion into the first draft of the Declaration, formulated by the Secretary to the Drafting Committee John P. Humphrey¹⁷.

In 1947, at the first session of the Human Rights Commission, the American Eleanor Roosevelt (widow of former USA president) was unanimously elected as Chair together with Chinese delegate P. C. Chang as Vice-Chair of the Committee. Lebanese Charles Malik served as the Rapporteur of the process and Canadian Professor John Humphrey was appointed as Secretary to the commission, having a key role in the entire drafting process¹⁸.

¹⁷ Morsink, Johannes (1999). *The Universal Declaration of Human Rights. Origins, Drafting and Intent*. Philadelphia: PENN University of Pennsylvania Press.

¹⁸ Report of the first session of the Commission on Human Rights (E/259) submitted to the fourth session of the ECOSOC. Available at <http://daccess-ods.un.org/TMP/7273268.699646.html> (accessed January 3, 2013).

During the first session, the Commission decided that in order to optimize the extensive work process, the Chair, Vice-Chair and Rapporteur – with permanent assistance from the Secretariat – would take it upon themselves to formulate a preliminary draft of the International Charter on Human Rights in accordance with the instructions emitted by the Commission, and present it to the latter at the second session. Hence the importance of the formulated drafts, especially by Prof. Humphrey, one of the people directly responsible for the task.

When the report of the first session of the Commission on Human Rights was considered at the fourth session of the Economic and Social Council (ECOSOC), some members expressed their interest in expanding the drafting group. Consequently, in March 1947, the Chair of the Commission agreed to increase the number of members that would finally include Australia, Chile, China, France, Lebanon, the USSR, the UK and the USA¹⁹.

About the preliminary draft on cultural rights

Contributions related to Article 44

The preliminary draft prepared by the Secretariat contains 48 articles outlining individual human rights²⁰. In this text the cultural rights appear in Article 44: “Every one has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science”.²¹

¹⁹ See *The Universal Declaration of Human Rights. An historical record of the drafting process* at http://www.un.org/Depts/dhl/udhr/meetings_1947_4th_esc.shtml (accessed January 3, 2013)

²⁰ Document E/CN.4/AC.1/3, available at <http://daccess-ods.un.org/TMP/6276080.01232147.html> with the addendum E/CN.4/AC.1/3/Add.1, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/AC.1/3/Add.1&Lang=E>

²¹ Art. 44. Document E/CN.4/AC.1/3, available at <http://daccess-ods.un.org/TMP/6276080.01232147.html>

The addendum to the document E/CH.U/AC.1/3/Add.1 includes the proposals and observations made in relation to the different articles. Article 44 had no observations by members of the Commission on Human Rights, but did receive contributions from countries and international organizations²².

Chile (Inter-American Juridical Committee) presented the following proposal:

Every person has the right to share in the benefits accruing from the discoveries and inventions of science, under conditions which permit a fair return to the industry and skill of those responsible for the discovery of the invention. The state has the duty to encourage the development of the arts and science, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science. It is the duty of the state to protect the citizen against the use of scientific discoveries in a manner to create fear and unrest among the people²³.

For their part, the USA proposed:

Among the categories of right which, the United States suggests should be considered is the right “to enjoy minim standards of economic, social and cultural well-being.”²⁴

The first draft of Article 44 also received contributions from the current Constitutions at the time, of countries such as Bolivia (Constitution of 28 October 1938, Article 163, 164), Brazil (Constitution of 18 September 1946, Article 173, 174), Saudi-Arabia (Constitution 29 August 1926, Article 23, 24), Uruguay (Constitution of 24 March

(accessed January 3, 2013).

²² Document E/CH.U/AC.1/3/Add.1 p. 356-358. Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/AC.1/3/Add.1&Lang=E>

²³ *Idem.* p. 356.

²⁴ *Ibidem.*

1934, amended 1942, Article 62) and Yugoslavia (Article 37, paragraph 2)²⁵.

The discussion on Article 27

The second addendum to the document is divided into four chapters: liberties, social rights, equality and general dispositions. The article regarding the “right to participate in cultural, scientific and artistic life” was included in Chapter II on social rights, together with the recognition of the right to health, to education, to work, to good working conditions, to an equitable share of the national income, to receive compensation for family responsibilities, to social security, to food and housing and the right to rest and leisure.

At this session, the Drafting Committee established a temporary working group consisting of the representatives of France (René Cassin), Lebanon (Charles Malik), the United Kingdom (Geoffrey Wilson) and the Chairperson (Eleanor Roosevelt). The French delegate was responsible for the task of preparing and rewriting the draft document; he presented a text with a preamble and forty-four recommended articles. Cassin’s leading role in the committee was determinant for the ulterior inclusion of the rights of authors and inventors in the definite wording of Article 27. However, this provision was not included until the final drafting of the Declaration. The inclusion of this provision in the Universal Declaration of Human Rights wasn’t pacific nor obvious and had a long period of discussions throughout different sessions.

As stated by Audrey Chapman,

according to Johannes Morsink’s account of the drafting history of Article 27 of the

²⁵ *Idem*, p. 357-358.

UDHR, there was not much disagreement over the notion of the right of everyone to enjoy the benefits of scientific advances and to participate in cultural life. In contrast, the discussion of intellectual property issues evoked considerably more controversy. This pattern was to reoccur when the United Nations Economic and Social Council (ECOSOC) took up the drafting of a covenant on human rights based on the UDHR²⁶.

In fact, in the context of these discussions, and considering that the rights of authors were already considered in the Berne Convention and in the American Declaration of the Rights and Duties of Man²⁷, one of the arguments in favor of excluding authors' rights from Article 27 was that the rights of intellectual property were adequately ruled by the existing provisions in matters of property rights or that they weren't, strictly speaking, a "basic human right"²⁸.

The final version of Article 27 of the Universal Declaration presents an essentially dual wording by acknowledging that:

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

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.

Being responsible for many of the previous drafts, Humphrey didn't have any

²⁶ Chapman, "Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))", XXXV (2001) Copyright Bulletin, No. 3, 4-36, p. 11.

²⁷ American Declaration of the Rights and Duties of Man. Adopted in 1948. See Article 13 at <http://www.cidh.org/Basicos/Basicos1.htm> (accessed 3 January, 2013).

²⁸ Morsink, p. 221, referenced in Green, Maria (2000), "Drafting history of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights," UN Doc. E/C.12/2000/15, 9 October 2000, p. 5.

precedent to support the second clause included in Article 27. The most explicit reference until then had been the contribution of the Chilean delegation, who presented the Inter-American Human Rights Charter, by then, still in a draft version.

The Declaration of Bogota had also been adopted in 1948, only six months before the Universal Declaration of Human Rights. It had certain influence in the drafting of the latter since the majority of the Latin American delegations supported the positions held in the Inter-American Charter²⁹. The Declaration of Bogota had a provision on the rights of authors and inventors that contributed to the drafts formulated by Humphrey for the Universal Declaration. In relation to the benefits from culture, Article 13 states that:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

In the second session of the Drafting Committee convened in New York on May 1948, the provision on cultural rights was included within Article 30 and still didn't contemplate authors' rights. The article stated:

Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits that result from scientific discoveries.

On this second drafting session, France proposed the subsection that would give origin to the second part of Article 27. The French proposal stated that:

²⁹ The American Declaration of the Rights and Duties of Man was adopted at the Ninth International Conference of American States in Bogota, 1948.

authors of creative works and inventors shall retain, apart from financial rights, a moral right over their work or discovery, which shall remain extant after the financial rights have expired³⁰.

On the 28th June 1948, the Drafting Committee published the Report of the Third Session of the Human Rights Commission in Lake Success, New York³¹. The document included two annexes.

Annex A is the draft of the International Declaration of Human Rights, in its Article 25 at the time, it stated:

Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement³².

In the same document the Soviet Union presented a position paper that requested the wording of Article 25 to include

the development of science must serve the interests of progress and democracy and the cause of international peace and co-operation³³.

It becomes clear then that as a result of the working sessions held between the 24th of May and the 18th of June – published on the 28th of June, 1948 – the cultural rights established in Article 25 only included the rights to access, participation and enjoyment of

³⁰ Document E/CN.4/95 p.13. Article 30. Alternative text submitted by France. “Authors of creative works and inventors shall retain, apart from financial rights, a moral right over their work or discovery, which shall remain extant after the financial rights have expired”. Drafting Committee Report, Second Session, New York, May 1948, available at <http://daccess-ods.un.org/TMP/1570073.8132.html> (accessed 3 January, 2013).

³¹ Available at <http://daccess-ods.un.org/TMP/4155121.74367905.html> (accessed 3 January 2013).

³² E/800 Annex A. Article 25: “Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement”. Report of the Third Session of the Drafting Committee. E/800 28 June 1948, p. 13.

³³ E/800 p. 44 Amendment to Article 25. Add to the text adopted. “The development of science must serve the interests of progress and democracy and the cause of international peace and co-operation”.

the arts and the benefits of science, but not the rights of authors and inventors as had been requested by the French delegation.

By this time, there had even been some proposals aiming at plainly eliminating the mention of such rights, and at this point, UNESCO's incidence was most relevant. Jacques Havet on behalf of the United Nations Agency for Education, Science and Culture expressed that it

was necessary to assert that all had the same right to participation in culture and thus to affirm the priority of cultural life over materialistic conceptions³⁴.

The Third Committee made two minor amendments to the wording of the first paragraph. By suggestion of the Peruvian delegation, the word "freely" was placed before the idea of participation in culture. Peruvian delegate José Encinas defended the inclusion by saying that it wasn't enough to recognize that everyone has the right to take part in the cultural, artistic and scientific life of the community, but that it must clearly express that this right should be exercised in complete freedom, without which there would be no worthy creation of man. Encinas proposed then to insert the word "freely", amendment that was accepted with 38 votes to nil, and two abstentions.

Chinese delegate Chang proposed at this stage a change in the wording so that the first part of Article 27 would remain just like in the final version, that is, to "share in scientific advancement", instead of "to share in the benefits that result from scientific discoveries", just as it was in the previous draft³⁵.

Guy Pérez-Cisneros, the Cuban delegate, warned that the elimination of the word

³⁴ Referenced in Morsink, *op. cit.*, p.218.

³⁵ *Idem*, p.218-219.

“benefits” from the text diluted somewhat the egalitarian sense of the declaration and proposed to turn back with the modification. He also warned that not everyone was sufficiently gifted to play a role in scientific advancement and proposed the wording to change to “share the benefits resultant from scientific advancement”. Cassin supported the proposal expressing that while not everyone was in conditions to play a role in the advancement of science, they should undoubtedly have the possibility to participate in the resulting benefits. Chilean delegate Hernán Santa Cruz highlighted the fact that the Cuban proposal didn’t do more than put the terms of the Inter-American Charter back on the table.

The Cuban proposal, supported by France and Chile, was accepted unanimously and contributed to preserve the connection between the right to the full development of the human personality of Articles 22, 26 and 29. To participate in the benefits of science means, among other things, to be able to receive affordable medicine, which is a prerequisite for the development of one’s personality and the dignity of human life³⁶.

Article 27 and the international laws of copyright

The development of the second part of Article 27 was different, since it was debated in the midst of a growing controversy about the international laws of copyright.

By the 1940’s, when the Universal Declaration of Human Rights was discussed and drafted, there still wasn’t any solid international consensus on the matter of authors’ rights. The basic disagreement centered around those for whom copyright was only another form of private property, meaning that they considered exclusively the economic rights in the

³⁶ *Idem*, p. 219.

work, and those who understood that there was a unique attribute to these rights, usually referred to as moral rights, over the use and distribution of the works. Moral rights, from this perspective, continue even after the economic and commercial rights have expired. The complex discussion about the second part of Article 27 denotes the lack of international consensus on the matter.

Revising the first drafts, nothing in Humphrey's texts resembled this second part about the rights of authors and inventors. The Canadian drafter had focused on cultural rights in the first part, that is, on the right to access and participate in culture and the benefits of science. It was Cassin who included the mentioned French proposal. Roosevelt (from USA) and Wilson (from the United Kingdom) objected the inclusion of this clause considering that it belonged more appropriately in the spheres of copyright than that of human rights. However, the French delegation was persistent in its position and achieved its objective in the Third Session of the Commission.

It may just be a coincidence, but it is worth mentioning that the meetings of the Third Session took place between the 28th of May and the 18th of June of 1948, while the International Conference on the Berne Convention took place in Brussels (Belgium) between the 5th and 26th of June of that same year. In effect, the clause on moral rights of the Berne Convention was revised during that conference. Although many Latin American delegations weren't signatories of the famous convention at the time, they saw with favorable eyes the approach oriented to the defense of the reputation and honor of authors.

This same approach had been recently adopted – in April 1948 – in the American Declaration of the Rights and Duties of Man, more specifically in Article 13 of the

Declaration of Bogota. The French delegation barely made some minor stylistic modifications to the text of this article of the Inter American Declaration and proposed it in the Third Session of the Committee as the second part of Article 27. The Chilean delegate Joaquín Larrain presented a solid defense of the French proposal. Fontana, from Uruguay, did as well.

On behalf of the USA delegation, Eleanor Roosevelt emphatically opposed the clause presented by France, particularly because “the declaration was to be brief” and because her delegation considered copyright to “be a matter of International Law”. The Third Session rejected the clause with 6 votes to 5, with 5 abstentions. But this decision was reverted at the Third Committee, with a much larger number of members. There, the votes of the Latin American delegations were determinant, who saw the inclusion of the terms of the Declaration of Bogota with satisfaction. Thus, after many discussions, the delegations of Cuba, Mexico and France unified their proposals in a text that stated:

Everyone has, likewise, the right to the protection of his moral and material interests in any inventions or literary, scientific or artistic work of which he is the author³⁷.

The USA delegation, together with the Ecuadorean delegation, insisted on the fact that intellectual property was already adequately treated in the article on property rights. Some delegations even argued that intellectual property wasn't a human right at all.

That's what the British delegation argued for example, stressing that authors' rights were already covered by treaties and specific regulations of International Law. It also added that since these weren't basic human rights at all, the declaration should keep its universal

³⁷ “Everyone has, likewise, the right to the protection of his moral and material interests in any inventions or literary, scientific or artistic work of which he is the author” referenced in Morsink, *op. cit.*, p. 221.

nature and recognize general principles valid for all people, not just for a specific sector, as in this case, authors and inventors. On their part, the Australian delegation expressed that

the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work.

In spite of all the criticism, Cassin held his position based on the recognition of moral rights and managed the support of a good part of the Latin American delegations. Argentina, Venezuela, Peru, Brazil, Ecuador and particularly Mexico for example, pronounced themselves in favor of the amendment.

Chinese delegate Chang added a comment to the latter position, mentioning that it wasn't only about protecting the interests of artists but of safeguarding the interests of everyone. In this sense Chang argued firmly in favor of the moral right of integrity, saying that the works

should be made available to the people in their original form, and that this can only be done if the moral rights of the artists are protected.

In his work on the drafting of the articles of the Universal Declaration, Johannes Morsink doesn't offer any indication of a discussion following the evident tension between the paragraphs that conform Article 27. The issues involved in balancing the individual creator's rights with those of the community as a whole in relation to access and participation in culture do not appear to have been substantively debated, or at least not in any detail as to be documented by the historians of the drafting process³⁸.

³⁸ Green, Maria (2000), "Drafting history of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights," UN Doc. E/C.12/2000/15, 9 October 2000

The Communist delegations abstained from voting this clause that was favorably supported in the Third Committee by 18 votes, to 13 votes against and 10 abstentions. The 18 favorable votes were from Panama, Peru, Poland, Uruguay, Venezuela, Argentina, Belgium, Brazil, China, Colombia, Cuba, Dominican Republic, France, Greece, Honduras, Luxemburg, Mexico and Holland. The Latin American influence was determinant, particularly in the adoption of the terminology previously adopted in the Declaration of Bogota³⁹. In the last round of general voting of the Declaration, with a fully consolidated draft, Article 27 was adopted with 53 votes in favor and three abstentions⁴⁰.

The Third Committee accomplished a huge task: 81 meetings to consider and discuss the draft of the Declaration prepared by the Commission on Human Rights, and 168 proposed amendments to the different articles presented and evaluated during the drafting process. However, the Committee didn't manage to advance in the task of writing a Convention, or in the measures of implementation of the Declaration⁴¹. These tasks would take some more time after the adoption of the Universal Declaration of Human Rights on the 10th of December 1948. In that same resolution, the General Assembly urged the Economic and Social Council to request the Commission on Human Rights to continue working, as a matter of priority, on a draft covenant on human rights and draft measures of implementation. The Economic and Social Council passed the resolution of the General Assembly to the Commission on Human Rights through resolution 191 (VIII) the 9th of February, 1949⁴².

³⁹ Morsink, p. 222.

⁴⁰ *Yearbook of the United Nations 1947-1948*, p. 534. Available at <http://unyearbook.un.org/unyearbook.html?name=194849index.html> (accessed 3 January, 2013).

⁴¹ *Yearbook of the United Nations 1947-1948*, p. 526-529
<http://unyearbook.un.org/unyearbook.html?name=194849index.html>

⁴² *Audiovisual Library of International Law. International Covenant on Economic, Social and Cultural*

The International Covenant on Economic, Social and Cultural Rights.

The inclusion of Article 15

By 1951, in its 12th period of session, the Economic and Social Council of the United Nations – by order of the General Assembly – requested the Commission on Human Rights to begin working on a draft covenant of human rights that included economic, social and cultural rights.

Between April and May 1951, the Commission examined the text on economic, social and cultural rights, holding the first deliberations about a contractual provision relative to cultural rights with substantial contributions from UNESCO, that had an essential role in the deliberations. Between November 1951 and February 1952 the General Assembly decided to prepare two separate and simultaneous covenants, one on civil and political rights and the other on economic, social and cultural rights⁴³.

The Third Commission worked on both projects at the 10th period of sessions of the General Assembly in 1955. The articles referred to the ICESCR cultural rights weren't on the agenda until the 12th period of session in 1957, when the provision on authors' interests was included. This was the culminate moment of the discussion on cultural rights. The covenant in its final version wasn't adopted until 1966.

Rights. Procedural History. Available at http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr_ph_s.pdf (accessed 4 January, 2013)

⁴³ Documents of the General Assembly, Sixth Session, 543 (VI) *Preparation of Two Drafts International Covenants on Human Rights. 374th. Plenary Meeting. Feb. 5th. 1952.* Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/543%28VI%29 (Accessed 4 January, 2013).

It is worth mentioning that many delegates who participated in the drafting of the Universal Declaration were members of the drafting committee of ICESCR. One of them, USA's representative Eleanor Roosevelt, was very careful at the time of pointing out the differences in the writing and the formulation of the covenant. In this respect, Roosevelt expressed:

It would be well to recall the difference between the Universal Declaration of Human Rights and the draft First International Covenant. The former consisted of a statement of standards which countries were asked to achieve... But... a covenant is a very different kind of document, since it must be capable of legal enforcement. The task of drafting such an instrument was wholly unlike that of setting out hopes and aspirations relating to the rights and freedoms of peoples⁴⁴.

Article 27 of the Universal Declaration of Human Rights reached its final version only at the end of the drafting process and little before its adoption, after which it was established that

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.

With this article as a precedent, the International Covenant on Economic, Social and Cultural Rights contains similar provisions in subsection (c) of Article 15 by stating that every person has the right to

benefit from the protection of the moral and material interests resulting from any scientific,

⁴⁴ E/CN.4/SR.206, párr. 12, citado en Green, María, *op. cit.* ME PARECE QUE ES PAGINA 12 E/CN.4/SR.206, p. 12 referenced in Green, María, *op. cit.*

literary or artistic production of which he is the author⁴⁵.

Article 15 of the ICESCR is certainly similar to Article 27 of the Universal Declaration. However, its drafting wasn't a mere copy from the declaration, neither was its inclusion in the Covenant pacific.

The ICESCR text states that:

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

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

It is important to mention that during the drafting of the Covenant, it was subsection (c) that generated the most controversy and debate. Just like in the drafting of the Universal Declaration, the clauses on participation in cultural life and the enjoyment of the benefits of scientific progress and its applications were debated only in minor and formal aspects. This wasn't the case of subsection 2 of the Universal Declaration that watches over the rights of authors and inventors, and suffered the same fate as subsection (c) of Article 15, that is, they were extensively discussed and included in the adopted final versions only at the end of the debates.

A particular problem: subsection (c)

⁴⁵ International Covenant on Economic, Social and Cultural Rights, art. 15, subsection (c). Available at <http://www.cinu.org.mx/onu/documentos/pidesc.htm> (Accessed 4 January, 2013).

On her work about the inclusion of subsection (c) of Article 15 in the ICESCR, Maria Green explains that this provision was expressly excluded from the document in the multiple drafting sessions held by the United Nations Commission on Human Rights. Green indicates that subsection (c) was only included in the Covenant during a remarkably inconsequential debate on the Third Commission of the General Assembly in 1957, three years after the Commission had completed its work and five years after having discussed the provisions on cultural rights for the last time⁴⁶.

Since 1951, UNESCO had presented at least two draft provisions on cultural rights. A long one and another, shorter and more concise version. The initial draft of UNESCO, the longest and more detailed, included the following provisions:

The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:

(a) By facilitating for all access to manifestations of national and international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;

(b) By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;

(c) By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;

(d) By guaranteeing the free cultural development of racial and linguistic minorities.

⁴⁶ Green, María, *op. cit.*

The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author⁴⁷.

On the other hand, the shorter version of the provision presented by UNESCO stipulated that:

The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture. They recognize that it is one of their principal aims to ensure conditions which will permit every one:

- a) To take part in cultural life;
- b) To enjoy the benefits resulting from scientific progress and its applications;
- c) To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author⁴⁸.

This proposal, was in effect the one that had more incidence in the final drafting of Article 15 of the ICESCR.

The Third Commission treated the article related to Cultural Rights of the International Covenant on Economic, Social and Cultural Rights in its 12th period of sessions (1957), when the provision on authors' interests was introduced. The debate held by the Third Commission was actually the definitive discussion about the provision on cultural rights, even though the General Assembly treated the International Covenant on Economic, Social and Cultural Rights twice in the following years (in 1962 for the revision

⁴⁷ E/CN.4/AC.14/2, pág. 3. Referenced in Green, María, *op. cit.*

⁴⁸ E/CN.4/AC.14/2, pág. 3. Referenced in Green, María, *op. cit.*

of articles 2 to 5, and in 1963 to include the right to be protected against hunger), before adopting the full text of the Covenant in 1966⁴⁹.

Just like in the discussions of the Universal Declaration, the recognition of the rights of access and participation were quickly agreed on. Havet, representative of UNESCO, declared that

the right of everyone to enjoy his share of the benefits of science was to a great extent the determining factor for the exercise by mankind as a whole of many other rights⁵⁰.

He later added that

enjoyment of the benefits of scientific progress implied the dissemination of basic scientific knowledge, especially knowledge best calculated to enlighten men's minds and combat prejudices, coordinated efforts on the part of States, in conjunction with the competent specialized agencies, to raise standards of living, and a wider dissemination of culture through the processes and apparatus created by science⁵¹.

In effect, subsections (a) about participation in culture, and (b) about the enjoyment of the benefits of scientific progress and its applications of Article 15 were adopted with 15 votes in favor, no votes against, and only 3 abstentions⁵².

On the other hand, the discussion about the right to obtain protection for the moral and material interests of authors was, at least, controversial. Just like it happened in the

⁴⁹ UN General Assembly. 21st. Session. 16 December, 1966. [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200\(XXI\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200(XXI)) (Accessed 4 January, 2013).

⁵⁰ E/CN.4/AC.14/2, pág. 3. Referenced in Green, María, *op. cit.*

⁵¹ E/CN.4/SR.228, p. 12. *Idem.*

⁵² E/CN.4/SR.230, p. 7. *Idem.*

Universal Declaration, the French delegation and UNESCO were the firmest defenders of the inclusion of subsection (c), while the United States delegation opposed firmly once again⁵³. Speaking for the United States delegation, Roosevelt stated that:

In her delegation's opinion the subject of copyright should not be dealt with in the Covenant, because it was already under study by UNESCO which ... was engaged on the collation of copyright laws with the object of building up a corpus of doctrine and in due course drafting a convention. Until all the complexities of that subject had been exhaustively studied, it would be impossible to lay down a general principle concerning it for inclusion in the Covenant⁵⁴.

Indeed, UNESCO's representative himself had also stated that the organism was working on the international harmonization of authors' right legislation. Havet stated that:

With regard to the protection of the moral and material interests of authors and artists, UNESCO was proceeding with the task of harmonizing national and international legislation and practice in that field. It was hoped that a convention would be submitted to Governments, for signature in 1952, relative to the interests of artists and writers, including scientific writers, but excluding the question of scientific discovery in the strict sense of the term, and of patents, in connection with which special studies were being made by the UNESCO Secretariat⁵⁵.

Santa Cruz, who represented Chile in the Universal Declaration as well as in the

⁵³ Yu, Peter K (2007). "Reconceptualizing intellectual property interests in a human rights framework". *Legal Studies Research Paper Series*. Research Paper n.º 04-01. Michigan: University College of Law.

⁵⁴ E/CN.4/SR.229, p. 10. Referenced in Green, María, *op. cit.*

⁵⁵ E/CN.4/SR.228, pág. 12. UNESCO distinguished between "the interests of artists and writers, including scientific writers" and "the question of scientific Discovery in the strict sense of the term, and of patents". Mentioned in Green, María, *op. cit.*

drafting of the ICESCR, said that

while the protection ... was useful in certain circumstances and at certain periods in the life of nations, the question was not one involving a fundamental human right⁵⁶.

Initially, the proposal of subsection (c) on the rights of authors was rejected. The rest of the article was accepted by 14 votes to nil, with the abstention of 4 delegations (the French delegation among them). There were many debates with the intervention of Chile and the United Kingdom against the article, and insistence from France for its inclusion.

At this stage of the drafting process the wording of the provisions was defined in the following way:

Article 16

Rights relating to culture and science

1. The States Parties to the Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications.

2. The steps to be taken by the States Parties to this Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the Covenant undertake to respect the freedom indispensable

⁵⁶ E/CN.4/SR.230, p. 8. Referenced in Green, María, *op. cit.*

for scientific research and creative activity⁵⁷.

1957: Another turn on Article 15

However, the discussion was far from concluding at that point. The Third Commission examined the article on cultural rights again in its 12th period of sessions at the end of October and beginning of November, 1957. Once again, the clauses relative to access to culture and enjoyment of the benefits of scientific progress didn't raise any objections, but – once again – the clauses on authors' and inventors' rights generated controversy.

This time the French delegation was led by Pierre Juvigny, who emphatically requested the inclusion of the proposal about authors' and inventors' rights in the final document, but refrained from proposing the text.

It was the delegation of Uruguay, led by Tejera, that stated that a reference to authors' rights was mandatory, and proposed the article on the subject arguing that in his country the rights of authors and those of the public didn't oppose each other but were complementary. Over this last period, some delegations, like Chile, decided to accompany the Uruguayan proposal, essentially because they had already signed international commitments on the subject, and consequently the inclusion wouldn't change at all the situation in their country. Other delegations wondered why it hadn't been included before, since there already was a clause in the Universal Declaration in that regard and attributed

⁵⁷ “Draft International Covenants on Human Rights”. Annotation prepared by the Secretary General to the 10th period of sessions of the General Assembly, 1 July 1955. *United Nations Document A/2929*, p. 329 of the text in English.

the shortfall to an oversight.

Indonesia, for their part, presented a few objections recalling the same positions for the rejection during the debate of the Universal Declaration, with the concern that the issue shouldn't be resolved in a short text, but that it had to be examined taking into account the public's rights in every country. In turn, the USSR delegation recalled the arguments that had also been used in the Declaration of 1948, by expressing that the inclusion of these rights broke the balance of the covenant, since this instrument watches over the rights of all people and not of a specific group, as stated by the proposal referred to the authors. This is how the Soviet delegate expressed it:

El hecho de que la Declaración Universal de Derechos Humanos enuncie un principio no significa que automáticamente deba repetirlo el pacto.FALTA CITA, GREEN

The fact that a principle was enunciated in the Universal Declaration of Human Rights does not mean that it should be repeated automatically in the Covenant.FALTA CITA, GREEN

In this respect Indonesia and the Eastern European bloc raised their concern that the clause should strengthen the protection of private property and even offer potential interference to government control over science and art, and scientists and artists⁵⁸.

The USSR delegate drew a distinction between a provision mandating national-level protection of authors' rights, which he would favour "on condition that the words 'in accordance with the laws of the States concerned' or some similar formula was added," and one mandating international obligations, which he would not. He stated that

⁵⁸ Yu, Peter K (2007). "Reconceptualizing Intellectual Property Interests in a Human Rights Framework". *Legal Studies Research Paper Series*. Research Paper n.º 04-01. Michigan: University College of Law.

if it was a question of relations between States in regard to copyright and patents, Mr. Morozov considered that such relations should be governed by special agreements outside the scope of the covenants on human rights⁵⁹.

In her full historical analysis of the drafting of Article 15 of the ICESCR, Maria Green establishes that

the provision on authors' rights, judging from the exchanges between the USSR, Czechoslovakia, and Uruguay, became associated with protection for authors' freedom from state intervention⁶⁰.

Finally, the provision regarding authors' rights was adopted with 39 votes in favor, 9 against and 24 abstentions⁶¹. Just like with the drafting of the Universal Declaration, there was practically no debate on the underlying issues relative to the internal tension resulting from articles 27 and 15. It also remains unclear from the two documents, if the conflict between both rights was ever manifested, and which would be the adequate way to resolve the relationship between participation, benefits and the provision on the authors.

Green concludes that

by raising both the right to "benefit from the advances of science" and the right to "material and moral interests resulting" from one's work to the level of human rights, the drafters set up a tension that must be resolved if article 15 is to be made effective.

and adds that

⁵⁹ A/C.3/SR.798, párr. 44. Referenced in Green, María, *op. cit.*

⁶⁰ Green, María, *op. cit.*

⁶¹ A/C.3/SR.799, párr. 35. Reference in Green, María, *op. cit.*

primarily, (the drafters) seem to have assumed that the goals of 15 (1) (b) were obvious and beyond discussion, the benefits of science being a fundamental human right that belongs to everyone. They seem to have seen article 15 (1) (c), however, as a smaller thing, one that served to protect several different potential interests, according to the views of the drafter: some delegates were concerned to entrench in international law the author's individual rights to control the "moral" aspects of his or her work; some were concerned to confirm that "moral" right as a means of protecting the public interest in the integrity of a published creation; some were probably guided by a simple desire to reinforce the existing international copyrights laws. In all cases, however, it is noticeable that the drafters appeared to be thinking almost exclusively of authors as individuals. Perhaps it was obvious from the fact that this was a "human rights" treaty, but the drafters do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that holds the patent or the copyright.

Finally, the definite version of Article 15 of the ICESCR was:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields⁶².

In that way, almost two decades after the 1948 Declaration, the ICESCR was finally adopted. However, it would take another ten years to enter into force, that is, to obtain the 35 ratifications required.

The ICESCR finally entered into force the 3rd of January of 1976, although some countries still haven't signed and/or ratified the Covenant. Such is the case of the United States, that actively participated in the drafting and signed the Covenant, but never formally ratified it in Congress, and so, were never included in the obligations emanating from it.

With the passing of decades, the inclusion of intellectual property in trade treaties like the TRIPS⁶³ Agreement makes us revisit the drafter's perspective when they considered subsection (c) of Article 15 of the ICESCR, since the problems and dilemmas that put much stress on the rights to participate in culture, the access to the benefits of scientific progress

⁶² See: <http://www.cinu.org.mx/onu/documentos/pidesc.htm> (Accessed 8 January, 2013).

⁶³ *Agreement on Trade-related Aspects of Intellectual Property Rights*, signed in the framework of the Agreement Establishing the World Trade Organization. Available at http://www.wto.org/spanish/tratop_s/trips_s/trips_s.htm (Accessed 8 January, 2013).

and the rights of authors and inventors today, surely didn't exist then.

Other rights related to intellectual property: freedom of expression and the right to education

On authors' rights and freedom of expression

Both the Universal Declaration and the ICESCR contemplate other rights that are closely related to the article regarding the rights of authors and inventors. The commitments adopted regarding freedom of expression and the right to education are also related to the levels of protection that the countries define over the rights of authors and inventors in relation to the works they created.

The debate about freedom of expression during the drafting of the Declaration of 1948 was especially tainted by the limitation to exercise this freedom. We should recall that the UDHR was drafted soon after the end of World War II, when the Nazi spirit and its consequences were very recent. The horrors of war made the free flow of information one of the priorities on the agenda of the recently formed United Nations organization. The Commission on Human Rights then created a Sub-Commission on freedom of information, to work on the rights, obligations and practices that should be included in the concept of freedom of information. All these matters were then passed on to the World Conference on Freedom of Information held in those years⁶⁴.

⁶⁴ Morsink, *op. cit.*, p. 66.

In spite of the proposals to limit any expressions that would make reference to hatred or despise for the human rights – as proposed by the Soviet Union delegation, who raised the issue of the Nazis being able to enjoy the right of freedom of expression and freedom of association in a country bound by the Universal Declaration of Human Rights⁶⁵ – the Drafting Committee finally adopted two articles on freedom of opinion and expression, neither of which included provisions with limitations or restrictions. These were the articles adopted:

Everyone is free to express and impart opinions, or to receive and seek information and the opinion of others from sources wherever situated

and

there shall be freedom of expression either by word, in writing, in the press, in books or by visual, auditory or other means. There shall be equal access to all channels of communication.

The words “from sources wherever situated” and “to all channels of communication” are the origin of the final wording of Article 19 which states “through any media and regardless of frontiers”.

The British delegation proposed to merge these articles, which led to the adoption of the following text:

Everyone shall have the right to freedom of thought and communication. This shall include freedom to hold opinions without interference; and to seek, receive and impart information and ideas by any means regardless of frontiers.

⁶⁵ *Idem.*

There were some alternatives added to this proposal that aimed to include limitations as “having regard to the rights of others” and “being liable only for the abuses of this freedom in the cases determined by the law of nations”.

The Czechoslovakia and USSR delegates were the only ones to object that these limitations were not enough. The latter explained that the world was emerging of a great war and that it was necessary to limit the press if it was used as a vehicle of “war propaganda and exhortation to revenge⁶⁶”. The proposed limitations were eliminated during the voting session, despite which the USSR recurrently insisted on including them during the process.

Bolivia provided a blunt answer to the fears of the USSR. The delegate of that country, Eduardo Anze Matienzo, expressed that “the surest way to cure those evils [referring to Nazism and Fascism] was to ensure basic freedoms”⁶⁷.

Ultimately, Article 19 took the following wording:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers⁶⁸.

Of the covenants subsequent to the Universal Declaration, freedom of expression is also part of the International Covenant on Civil and Political Rights, drafted at the same time as the ICESCR. Article 19 of that Covenant states:

⁶⁶ *Ibidem*.

⁶⁷ *Idem*, p. 69.

⁶⁸ *Universal Declaration of Human Rights*, Article 19, available at <http://www.un.org/es/documents/udhr/index.shtml> (Accessed 8 January, 2013).

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals⁶⁹.

This covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966, and finally entered into force 23 March, 1976.

On the right to education and authors' rights

Another right directly related to authors' rights is the right to education, enshrined in both the Universal Declaration and the ICESCR.

⁶⁹ International Covenant on Civil and Political Rights : <http://www2.ohchr.org/spanish/law/ccpr.htm> (Accessed 8 January 2013)

In the framework of human rights, the right to development is associated many times with the right to self-determination, considered in the UDHR, as in the ICESCR and the ICCPR. These rights are catalogued as collective rights, however it is also possible to find recognition of the individual rights of self-determination and personal development, in texts that state that in no case can an individual be deprived of his means of subsistence. Beyond mere subsistence, the right to free and full development of one's personality includes work rights, the right of free choice of vocation and employment, and the protection against unemployment. These ideas are stated in the first drafts presented by the American Federation of Labor, among other documents that contributed to the design and drafting of the UDHR.

Cassin, the French delegate, was responsible for including in the declaration the importance of the full development of the personality of individuals. The Cuban delegation, on their part, presented a proposal that recognizes the right to the realization of the “economic, social and cultural rights indispensable for his dignity and the free development of his personality”⁷⁰. A key part to the exercise of the right to full development of one's personality is found in Article 26, that enshrines the right to education. In fact, Brazilian delegate Luiz Fernando Gouvêa de Athayde, expressed in the meeting of the Third Committee that “the right of all to education is indisputable”⁷¹.

But beyond individual development, some delegates justified the right to education in collective terms. The Philippine delegate Melchor Aquinos stated, in light of the events of recent years (in reference to World War II and the barbarity of Nazism), that “an

⁷⁰ Morsink, *op. cit.*, p. 211.

⁷¹ *Idem*, p.212

enlightened and well-informed public constituted the best defense of democracy and progress”, and added that because states want their citizens to have an education, “they make it both compulsory and free”. At least one-third of the constitutions cited in the debate of this right, consider compulsory education a central issue for the states to promote a civic-minded attitude in its citizens.

For example, the second paragraph of an Argentine amendment in the Third Committee stated that “every person has the right to an education that will prepare him [among other things] to be a useful member of society”. The term *useful* can be read in different ways since there is a close link in almost all societies between the right to education and the needs of society for certain types of work or employment⁷². Corominas, the Argentine delegate, was responsible for promoting the inclusion of a provision directed at promoting technical training, thus extending the idea of usefulness in education. Other American delegations emphasized usefulness beyond the skills for employment to include public service and civic education. Ecuador, for example, proposed the idea that education should be compatible with the moral values and the republican institutions; Haiti, on their part, stressed the duty of citizens; and Brazil put the focus on the principles of liberty and the ideals of human solidarity.

También fue Cassin quien propuso que la frase “desarrollo pleno de la personalidad humana” fuera reemplazada por “el pleno desarrollo de las aptitudes físicas, espirituales y morales de los individuos”.

It was also Cassin who proposed that the phrase “full development of the human

⁷² *Idem*, p. 213-214.

personality” was replaced by “full development of the physical, spiritual and moral powers of the individual”.

Article 26 was finally written in this way:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children⁷³.

For its part, the ICESCR also recognizes and outlines the right to education already enshrined in the UDHR. Article 13 of the Covenant, states the obligations of each State in relation to education by expressing:

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights

⁷³ *Universal Declaration of Human Rights*. Article 26.

and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools,

other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Let us recall that the State Parties of the ICESCR, that is, those who signed and ratified the acceptance of its terms, accept voluntarily the obligations of the Covenant in order to promote the full realization of the Economic, Social and Cultural Rights emanating from it. In this way, the country that ratifies these treaties is subject to the watch of the international committee of independent experts that work based on those norms and standards.

Interpretation of articles of the ICESCR. Scope and limitations of Articles 13 and 15

The monitoring Committee of the ICESCR is in charge of interpreting the text, the scope and the limitations of the different articles of the International Covenant. Clearly the brief articles of a covenant of this nature cannot convey, at first glance, its scope and meaning. Therefore, it is the task of the monitoring Committee to interpret the treaty point-by-point, and to establish application guidelines for the people responsible for their

implementation in the countries bound by the Covenant. These interpretations are fundamental as well for the assessment of the implementation and compliance of the obligations contracted by the States at the time of signature and ratification of the terms of the ICESCR.

In this respect, the monitoring Committee of the ICESCR has formulated a series of specific comments on each article, in which the scope and the obligations emanating from each of them is interpreted⁷⁴. These instruments help to understand the scope of the commitments. Therefore, it is essential to examine the comments on Article 13 of 1999, subsection (c) of Article 15 of 2005, and subsections (a) and (b) of Article 15 of 2009.

The interpretation of subsection (c) of Article 15 of the ICESCR received special attention in the General Comment No. 17 (2005) of the 35th Period of Sessions of the Committee on Economic, Social and Cultural Rights held in Geneva (Switzerland) from the 7th to the 25th of November, 2005. The General Comment analyzes 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 or she is the author (article 15, paragraph 1 (c), of the Covenant).

In the first paragraph the Committee states an essential premise: it makes a distinction between the right enshrined in subsection (c) of Article 15 – and other human rights – from the legal rights recognized in the regulations on intellectual property. The first are fundamental rights, inalienable and universal – to individuals and in certain

⁷⁴ The full list of comments of the Committee is available at <http://www2.ohchr.org/english/bodies/cescr/comments.html> (Accessed 8 January, 2013).

circumstances to groups or communities – that arise from the dignity and value inherent to every person.

The intellectual property rights are, above all, means by which States seek to encourage inventiveness and creativity, and encourage the spread of creative and innovative productions for the benefit of society. The rights of intellectual property are of temporary nature and can be revoked, their exercise can be authorized and they can be transferred to a third party. The intellectual property rights, with the exception of some aspects of the moral rights, are susceptible to transaction, amendment or even resignation, and can be in turn limited in time and scope. That is not the case with human rights, which are the very expression of the dignity of the human person.

The Committee is clear in its distinction by stating that

Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements⁷⁵.

The Committee draws the attention on the importance of not comparing intellectual

⁷⁵ *General Comment No. 17 of the CESCR. 2005.* Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/C.12/GC/17&Lang=S> (accessed 8 January, 2013)

rights with the human right recognized in the ICESCR, as well as subsection (2) of Article 27 of the UDHR.

Subsection (c) of Article 15 is intimately related to the other rights recognized in the article, that is, the right to take part in cultural life (paragraph 1 (a), Article 15), the right to enjoy the benefits of scientific progress and its benefits (paragraph 1 (b), Article 15) and the freedom indispensable for scientific research and creative activity (paragraph 3, Article 15). The Committee understands that all subsections and paragraphs reinforce each other mutually and reciprocally.

In addition, the Committee makes a detailed analysis of subsection (c) and explains the meaning of each of its parts. In this respect the Committee considers that only the author, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, can be the beneficiary of the protection of article 15, paragraph 1 (c). This follows from the words “everyone”, “he” and “author”, which indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without realizing at that time that they could also be groups of individuals. Under the existing intellectual property systems, legal entities are included among the holders of intellectual property rights. However, their entitlements, because of their different nature, are not protected at the level of human rights⁷⁶.

⁷⁶ Committee on Economic, Social and Cultural Rights, twenty-seventh session (2001), “Human Rights and Intellectual Property”, Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at paragraph 6, referenced by the Committee in General Comment No. 17.

Another aspect that requires clarification by the Committee is the one referring to the right to benefit from the protection enshrined in Article 15, paragraph 1 (c). The wording of the ICESCR doesn't specify the modalities of such protection. While the spirit of the whole article points to recognize the right of authors to benefit from some kind of protection of the moral and material interests, the Committee interprets that this subsection doesn't reflect nor should it necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes. The Committee also recognizes the right of States parties to adopt higher protection standards in international treaties on the protection of the moral and material interests of authors or in their domestic laws, provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant, and considered specifically in Article 15.

In relation to moral interest and in line with the drafting history of both the UDHR and the ICESCR, the Committee considers that moral interests include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of such productions, which would be prejudicial to their honor and reputation.

On the other hand, the protection of material interests of authors links Article 15 with Article 17 of the UDHR that recognizes the right to own property, as well as the right of any worker to adequate remuneration. These comments of the Committee refloat the discussions held during the drafting process in which some delegations objected to the inclusion of subsection (c), pleading that these rights were already considered in the property rights and within the right to just remuneration for their work. Unlike moral

interests, the case of material rights holds a close relation to the right to enjoy an adequate standard of living. Therefore, the Committee continues with this perspective, and with that objective in mind, states that the period of protection of the material interests “needs not to extend over the entire lifespan of an author”. In paragraph 16 of the General Comment, it adds that

the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production.

This statement reinforces, as mentioned above, that the authors’ rights regime within the framework of the human rights shouldn’t be assimilated to the existing intellectual property regulations.

These rights recognized in subsection (c) are subject to limitations that aim at balancing them with the other rights recognized in the Covenant. These limitations must be determined by law and in a manner compatible with the nature of these rights, they must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society. Moreover, in some cases, the possibility of compensatory measures is considered, such as the payment of an adequate compensation for the use of the productions for the public’s good. In this respect, ensuring an adequate standard of living should be the aim to consider.

As with all the rights included in the ICESCR, these authors’ rights are of a progressive nature. Meanwhile, the States parties have the obligation

to *respect, protect* and *fulfil* these rights within their possibilities. The obligation to *respect* requires States parties to refrain from interfering directly or indirectly with the enjoyment of this right. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires States parties to adopt appropriate legislative, administrative, budgetary and judicial measures towards the full realization of article 15.

Paragraph 35 states:

The right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant. States parties are therefore obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant. In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.

The claim that “intellectual property is a social product and has a social function” is stressed.

States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education.

Thus the Committee recommends that

States parties should also consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions.

Among the core obligations, apart from the duty to protect the moral and material interests of authors, ensuring their recognition as creators of their productions and the integrity of their creations against any action that would be prejudicial to their honor or reputation; protecting the material interests of authors necessary to enable them to enjoy an adequate standard of living; and ensuring equal access to administrative and judicial remedies to protect those rights; the Committee urges to strike an adequate balance between the effective protection of the moral and material interests of authors and States parties' obligations in relation to the rights to food, health and education, as well as the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right recognized in the Covenant.

In General Comment No. 13, relating to the implementation of Article 13 of the ICESCR that enshrines the right to education, it is stated that:

Education is both a human right in itself and an indispensable means of realizing other

human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

In this regard, the Committee stresses the importance of the exercise of this right by stating the following:

While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

(a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, **teaching materials**, and so on; while some will also require facilities such as **a library, computer facilities and information technology**⁷⁷;

⁷⁷ The highlighting is mine.

(b)Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme)⁷⁸;

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education;

(c)Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

⁷⁸ *Idem.*

(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings⁷⁹.

In November 2009, the Committee on Economic, Social and Cultural Rights worked on General Comment No. 21 during its 43rd Period of Sessions that was published in May 2010. It treated Article 15, this time subsection (a) of paragraph 1, that establishes the right to take part in the cultural life of the community.

The document is based on the assumption that cultural rights are an integral part of human rights and, like them, are universal, indivisible and interdependent. In this regard, the right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15, like the right to enjoy the benefits of scientific progress and its applications; the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author; and the right to freedom indispensable for scientific research and creative activity.

The right of everyone to take part in cultural life is also intrinsically linked to the right to education, through which individuals and communities pass on their values, religion, customs, language and other cultural references, as well as the right of all peoples to self-determination and the right to an adequate standard of living. This right has its direct parallelism in subsection (a) of Article 27 of the Universal Declaration which states that everyone has the right freely to participate in the cultural life of the community:

⁷⁹ *General Comments No. 13: The Right to Education (Article 13 of the Covenant)*. Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/C.12/1999/10&Lang=S> (Accessed 8 January, 2013).

The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods⁸⁰).

In this context, it is hard to define the scope of the idea of participation in cultural life. Therefore, the Committee makes an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. It thus considers that culture encompasses

ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.⁸¹

Other documents that aided the work of the CESCR, were UNESCO's Universal Declaration on Cultural Diversity and the Fribourg Declaration on Cultural Rights.

In this respect, UNESCO's Declaration on Cultural Diversity states in Article 5:

cultural rights are an integral part of human rights, which are universal, indivisible and

⁸⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 21. Paragraph 6. 2009. Available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.21.Rev.1-SPA.doc> (Accessed 8 January 2013)

⁸¹ *Idem*, paragraph 13.

interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms⁸².

The Fribourg Declaration on Cultural Rights, defines participation in Article 5 (Access to and participation in cultural life):

a. Everyone, alone or in community with others, has the right to access and participate freely in cultural life through the activities of one's choice, regardless of frontiers.

b. This right includes in particular:

- The freedom to express oneself, in public or in private in the language(s) of one's choice;

- The freedom to exercise, in conformity with the rights recognised in the present Declaration, one's own cultural practices and to follow a way of life associated with the promotion of one's cultural resources, notably in the area of the use of and in the production of goods and services;

⁸² *UNESCO Declaration on Cultural Diversity* (2002). Available at http://portal.unesco.org/es/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (Accessed 8 January, 2013).

- The freedom to develop and share knowledge and cultural expressions, to conduct research and to participate in different forms of creation as well as to benefit from these;
- The right to the protection of the moral and material interests linked to the works that result from one's cultural activity⁸³.

Among the key elements for the exercise of the right to take part in cultural life, the CESCR states in paragraph 16 of General Comment No. 21:

16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.

(a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;

(b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban

⁸³ *Fribourg Declaration on Cultural Rights* (2007). Available at http://www.culturalrights.net/descargas/drets_culturals239.pdf (Accessed 8 January, 2013).

and rural areas, without discrimination. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.

(c)*Acceptability* entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;

(d)*Adaptability* refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;

(e)*Appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples. The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural val-

ues attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed⁸⁴.

In line with Article 5 of the ICESCR, all interpretations agree on one central feature: none of the rights recognized can be interpreted so as to prevent the exercise of other rights recognized in the ICESCR⁸⁵.

Historical records and their interpretations account for a solid consensus of the drafters of the declarations in relation to the rights of access and participation, although there were substantial differences in relation to the rights of authors and inventors. However, in the absence of any better precisions, the lack of a deep discussion about the internal tension of the studied articles doesn't cast any light on how the States should balance that tension between both trends⁸⁶.

Chapter 2: Conflict or Coexistence. Human Rights and Authors' Rights.

Human rights and the intellectual property agenda

The relationship between human rights and authors' rights has been the center of many controversies in the last years. The Universal Declaration of Human Rights of 1948

⁸⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 21. Paragraph 16. 2009. Available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.21.Rev.1-SPA.doc> (Accessed 8 January, 2013)

⁸⁵ "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant." Article 5, ICESCR. Available at <http://www.cinu.org.mx/onu/documentos/pidesc.htm> (Accessed 8 January, 2013).

⁸⁶ Helfer and Austin, *op. cit.*, p. 507.

and the International Covenant of Economic, Social and Cultural Rights of 1966 are the main instruments that provide a basis for this discussion. However, the historical analysis of the drafting process of both documents doesn't give an explicit explanation on how to conceive the relationship between the different aspects included in the articles regarding cultural rights. The drafters conveyed texts that considered the rights of access and participation in culture, as well as the rights to enjoy the moral and material benefits resulting from the productions of which a person is author, without, apparently, documenting any concern for the conflict between them.

At least that is how it appears to be from the detailed history of the drafting process of the Universal Declaration written by Johannes Morsink, who gives no clear indication of the breadth of the discussions following the possible conflict between subsections 1 and 2 of Article 27. Morsink's text doesn't account for the issues arising from the potential search of a balance between the authors' and inventors' rights, and those of the community as a whole or the rights of access and participation. Consequently, we can conclude that this conflict wasn't discussed, or at least not in detail, during the drafting of the Universal Declaration.

However, during the drafting of the ICESCR the matter about the relation between authors' and inventors' rights and rights of access and participation was discussed, but not extensively or sufficiently as to convey a clear orientation of the thoughts of the drafters. Valenzuela, one of the delegates from Chile during the drafting of the ICESCR, raised his concern in relation to the link between the right of access and the intellectual property rights, when he explained that

he fully sympathized with the praiseworthy intentions of the French delegation and agreed that intellectual production should be protected; but there was also need to protect the under-developed countries, which had greatly suffered in the past from their inability to compete in scientific research and to take out their own patents. As a result, they were in thrall to the technical knowledge held exclusively by a few monopolies. As the French amendment would perpetuate that situation, he would have to vote against it. In general, the subject was so complex that it would have to be dealt with in a separate convention than in a single article of the covenant on human rights⁸⁷.

Such concern was shared both by the Egyptian and Australian delegations. In this regard, the latter stated that “it was inadvisable to provide for the protection of the author without also considering the rights of the community”⁸⁸. On their part, the French insisted on their position by saying that patents didn’t represent such a grave danger; moreover, the absence of protection would even be worse in under-developed countries⁸⁹. There are few indications that account for an in-depth discussion. Truth is, that on the verge of the end of the twentieth century and the beginning of the twenty first, elucidating and accounting for the conflict between these rights is still a pending issue.

In the last decades of the 20th century, the link between human rights and authors’ rights came to be a key issue on the agendas of the United Nations organisms, as well as of many human rights NGO’s and developing countries. The inclusion of the Trade Related Aspects of Intellectual Property Rights in the framework of the World Trade Organization

⁸⁷ Green, María, *op. cit.*, paragraph 29.

⁸⁸ *Idem*, paragraph 30.

⁸⁹ *Idem*, paragraph 31.

and the resulting harmonization of global regulations, put on the table the need to account for the relationship between these international treaties and the commitments made by the countries regarding human rights treaties. Particularly in the case of the International Covenant on Economic, Social and Cultural Rights, which is mandatory for the signatory countries and holds constitutional status in Argentina since 1994.

In this way, several organisms had to work on the interpretation of these documents, particularly the High Commissioner of the United Nations on Human Rights and the monitoring Committee of the ICESCR, both organisms responsible for giving practical and concrete content to the texts of the treaties.

The 17th of August of 2000, the High Commissioner of the United Nations on Human Rights issued the Resolution of the Sub-Commission of Human Rights 2000/7 on Intellectual Property Rights and Human Rights⁹⁰. This document describes the international treaties on intellectual property within the WTO, as well as the progress on the matter in the WIPO, a specialized organization on intellectual property that had already started a series of debates and panel discussions on the link between human rights and intellectual property. In an eloquent and direct manner, the High Commissioner notes that

actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms,

⁹⁰ Available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/bc9bae19229eadabc1256970004cde3f?Opendocument> (Accessed 11 February, 2013).

“bio-piracy” and the reduction of communities’ (especially indigenous communities’) control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health⁹¹.

The High Commissioner affirms that

the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest.

and declares, however, that

since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other⁹².

The resolution goes even further and reminds all governments of the primacy of human rights obligations over economic policies and agreements, as well as of the need for actors on every level – national, regional, international – working on the subject, to screen economic policy negotiations through the human rights perspective, in order to allow the

⁹¹ *Ibidem.*

⁹² *Ibidem.*

countries to fulfil their obligations and commitments of fundamental principles⁹³. In another section of the document, it even urges governments to

integrate into their national and local legislations and policies, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property.

It requests the same to international organisms and urges countries to fully comply with the ICESCR and to establish international cooperation to that end, even in the context of the international intellectual property regimes.

The request extends explicitly to the World Trade Organization, in general, and the Council on TRIPS in particular, “to take fully into account the existing State obligations under international human rights instruments”⁹⁴.

In the same way, the Sub-Commission on Human Rights ruled Resolution 2001/21 issued by the High Commissioner the following year, accounting for a continuity of work on the matter.⁹⁵

This resolution mentions articles 7 and 8 of the TRIPS Agreement, remarking the need to clarify the scope and meaning of several provisions of the TRIPS Agreement, in particular of articles 7 and 8 on the objectives and principles underlying the Agreement in order to ensure that States' obligations under the Agreement do not contradict their binding

⁹³ *Ibidem*.

⁹⁴ *Ibidem*.

⁹⁵ See Resolution of the Sub-Commission on Human Rights 2001/21 available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.2001.21.Sp?Opendocument> (Accessed 11 February, 2013).

human rights obligations⁹⁶.

Several official United Nations documents account for the conflict.

On the other hand, two reports produced for the High Commissioner in the 2001 Resolution are especially highlighted: the report on “Globalization and its impact on the full enjoyment of human rights” submitted by J. Oloka-Onyango and Deepika Udagama⁹⁷; and the report on “The impact of the Agreement on TRIPS on human rights”⁹⁸.

The document on globalization focuses on the need to pay special attention to the market liberalization processes in the framework of the human rights, emphasizing the importance of balancing the interests and needs of the countries of the Global South, as well as the need for the WTO to reform its processes and mechanisms of deliberation so as to be more inclusive, especially, for the inclusion of multiple interested actors, such as social organizations. As Joseph Stiglitz sustains, the document stresses that trade liberalization must be balanced in its agenda, its process and outcomes, and it must reflect the concerns of the developing world. It must not only include the interests of the developed countries in matters of intellectual property protection, but also, and especially, the issues of current or potential concern for developing countries, such as the private appropriation of traditional knowledge, or the high prices of pharmaceuticals in developing

⁹⁶ *Idem*.

⁹⁷ See <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2000.13.En?Opendocument> (Accessed 11 February, 2013).

⁹⁸ See <http://www.unhcr.ch/Huridocda/Huridoca.nsf/Symbol/E.CN.4.Sub.2.2001.13.En?Opendocument> (Accessed 11 February, 2013).

country markets⁹⁹. It is clear that the conflict between human rights and intellectual property in particular, is framed in an even bigger context related to the trade agenda in general and countries' commitments with human rights.

Meanwhile, the report of the High Commissioner on The impact of the Agreement on TRIPS on human rights of June 2001 focuses especially on matters related to access to medicines and public health, setting an immediate precedent of the renowned Doha Declaration and Public Health adopted in the context of the Doha Development Agenda of the WTO in 2001¹⁰⁰.

The balance between the minimum requirements and the objectives of the TRIPS Agreement

A central question to address the TRIPS Agreement from a human rights perspective involves analyzing if the framework of minimum requirements and aims of the TRIPS Agreement is sufficiently balanced with the framework of the ICESCR.

Article 7 of the TRIPS states that

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations¹⁰¹.

⁹⁹ Cited in J.Oloka-Onyango y Deepika Udagama, *op. cit.*, paragraph 19

¹⁰⁰ Declaration on the TRIPS Agreement and public health. Doha Declaration. 14 November, 2001. Available at http://www.wto.org/spanish/thewto_s/minist_s/min01_s/mindecl_trips_s.htm (Accessed 11 February, 2013).

¹⁰¹ TRIPS Agreement, Art. 7. Available at http://www.wto.org/spanish/docs_s/legal_s/27-trips_03_s.htm (Accessed 11 February, 2013).

This statement could, at least theoretically, be understood as a recognition of the balance of the human rights included in Article 15 of the ICESCR. However, this recognition does not mean that the TRIPS have a clear approach in favor of human rights. It even begs the question if the TRIPS reach a fair balance in accordance with international agreements, and if the implementation of the well-known flexibilities of the TRIPS in the framework of national legislations, allows the States to guarantee the compliance of the treaties on human rights.

The High Commissioner questions these premises. In the first place, the promotion of public health, development, nutrition and the promotion of the environment, as well as the provisions on access and participation in culture contemplated in the human rights treaties, would be addressed in the framework of TRIPS only as exceptions and limitations to the exercise of the rights of intellectual property, in a position of clear disadvantage and imbalance against these.

The provisions that watch out for the access and participation are not always implemented in the signatory countries, while the expected minimum standards of the TRIPS Agreement necessarily are. These are even strengthened by the commitments made under the threat of intervention of the dispute settlement organism of the WTO. An approach from the human rights perspective should put these rights first, and make an explicit promotion and protection of the rights conceived in the ICESCR at the very core of a treaty on intellectual property, and not as exceptions and subordinate limitations to other rights (thereby enshrining them as of higher nature).

This is not to say that the protection of commercial objectives is necessarily incompatible with the promotion of human rights. Nonetheless, if we truly wish to factor the promotion and protection of human rights into the objectives of the TRIPS Agreement, different ways and strategies of promoting and protecting scientific progress and its results should be explored¹⁰².

While the Agreement identifies the need to balance rights with obligations, it gives no guidance on how to achieve this balance. In this way, the Agreement sets out in considerable detail the content of intellectual property rights - the requirements for the grant of rights, the duration of protection, the modes of enforcement. On the other hand, the Agreement only alludes to the responsibilities of Intellectual Property holders that should balance those rights in accordance with its own objectives. The prevention of anti-competitive practices and the abuse of rights, the promotion of technology transfer, special and differential treatment for least developed countries are merely referred to - but unlike the rights it sets out, the Agreement does not establish the content of these responsibilities, or how they should be implemented. The minimum requirements for intellectual property are specific and compulsory, while the exceptions and the limitations are vague and optional. Consequently, the balance identified in the TRIPS Agreement might not equate with the balance required under article 15 of ICESCR¹⁰³.

A third problem identified by the High Commissioner is that among the minimum requirement implemented by the TRIPS Agreement are some measures as providing patent protection to cover all forms of technology, including pharmaceuticals. This provision

¹⁰² E/CN.4/Sub.2/2001/13, paragraph 22.

¹⁰³ *Idem*, paragraph 23.

advances over the autonomy of national States in relation to the policies and the right to development of each country. Where a country had the power to set public policies regarding access to medicines, the TRIPS Agreement cancelled the possibility that these decisions were still to remain in the hands of the States in their exercise of the right to development.¹⁰⁴

The successive inclusion of provisions called “TRIPS plus” in national legislations is also a matter of concern. Trade pressure, among other strategies, has been used by developed countries for other WTO members to include provisions that override the safeguards included under the TRIPS Agreement, and that can be inconsistent with States’ responsibilities under human rights law¹⁰⁵.

Even given these problems within the TRIPS Agreement, much still depends on how the TRIPS Agreement is actually implemented. In the same document, the High Commissioner urges WTO member States to use the operational flexibility offered by the Agreement in ways that would be fully compatible with the promotion and protection of human rights. It is also important to note that out of 141 States members of WTO, 111 have ratified the ICESCR.¹⁰⁶

Therefore, regarding the TRIPS Agreement, the High Commissioner

urges all Governments to ensure that the implementation of the TRIPS Agreement does not negatively impact on the enjoyment of human rights as provided for in international human

¹⁰⁴ Idem, paragraph 24.

¹⁰⁵ Idem, paragraph 27.

¹⁰⁶ Idem, paragraph 28.

rights instruments by which they are bound.¹⁰⁷

Coexistence or Conflict

For decades intellectual property and human rights were in separated compartments and very few experts of each of the fields established points of contact or dialogue. While the rights of authors and inventors are included in the Declaration of Human Rights, the experts and activists in this field historically paid little attention to these rights. The same happened with the regulations on intellectual property.

Few or no mention is made of human rights in the negotiations of international treaties of intellectual property, even in present documents such as the WIPO Internet Treaties of 1996¹⁰⁸ or in the trade negotiations that include entire chapters dedicated to intellectual property. Human rights activists are increasingly starting to recognize and work on the intersection of both systems, especially, taking into account the significant influence of trade treaties and the harmonization and growing expansion of the intellectual property systems. These have particularly increased as a consequence of the signing of the TRIPS Agreement and the resulting TRIPS Plus treaties and legislations, promoted from the trade agenda and with the drive of developed countries to sign bilateral and regional treaties of free trade, with entire chapters dedicated to intellectual property¹⁰⁹.

“Intellectual rights and human rights must learn to live together” states Daniel J.

¹⁰⁷ Intellectual Property Rights and Human Rights. Sub-Commission on Human Rights resolution 2001/21. Available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.2001.21.Sp?Opendocument> (Accessed 11 February, 2013).

¹⁰⁸ The Internet Treaties are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

¹⁰⁹ As an example, it is worth mentioning the current Trans Pacific Partnership negotiation.

Gervais when he introduces his work on the topic. Traditionally, there have been two dominant views of this “cohabitation,” namely a conflict view, which emphasizes the negative impacts of intellectual property on rights such as freedom of expression or the right to health and education; and a view based on coexistence, which emphasizes that both sets of rights strive towards the same fundamental equilibrium¹¹⁰. These two theories are what we will call, following Laurence Helfer, the conflict approach or the coexistence approach¹¹¹.

The first approach views human rights and intellectual property as being in fundamental conflict. This framing sees strong intellectual property protection as undermining the exercise of a broad spectrum of human rights, especially in the area of economic, social, and cultural rights. Therefore, what proponents of this approach advocate for resolving this conflict is that the States recognize the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict¹¹². This is the position of the High Commissioner on Human Rights in his analysis of the relation between both systems of rights¹¹³.

While the conflict approach seems very clear, especially in United Nations documents, Helfer remarks that this approach has a series of problems and ambiguities. In the first place, he mentions the difficulty to identify the exact nature of the conflict before

¹¹⁰ Gervais, Daniel J. (2008). “Intellectual Property and Human Rights: learning to live together” in Torremans, Paul L. C. *Intellectual Property and Human Rights*, pp. 3-23.

¹¹¹ Helfer, Laurence R., “Human Rights and Intellectual Property: Conflict or Coexistence?”. *Minnesota Journal of Law, Science & Technology*, Vol. 5, p. 47, 2003, Loyola-LA Legal Studies Paper No. 2003-27; Princeton Law and Public Affairs Working Paper No. 04-003. Available at SSRN: <http://ssrn.com/abstract=459120> or <http://dx.doi.org/10.2139/ssrn.459120>

¹¹² *Idem*, p. 48.

¹¹³ Torremans, Paul L. C. (2008). “Copyright (and other intellectual property rights) as human rights” in *Intellectual Property and Human Rights*, pp. 195-196.

going on to establish the primacy of human rights. In many public affairs the identification of a clear conflict is key when the matter involves confronting two, presumably opposing or mutually inconsistent, legal systems. In fact, if we analyze the framing of the human rights in itself, issues such as the prohibition of genocide, slavery or torture have definitions that brought forward certainties that made a definition of preeminence unequivocal.

However, when it comes to evaluating the exercise of cultural rights, or the right to health, or the right to food and education, as well as the right to freedom of expression, the definitions become sufficiently ambiguous as to establish in what measure the current intellectual property rights system prevents their full exercise. It is possible to identify some tension but, what is the limiting point imposed by intellectual property that allows us to invoke the primacy principle? The theories on international treaties presume that when two treaties relate on the same subject matter, they must be interpreted in a compatible way and in the light of other treaties. From this perspective, we can interpret that treaties on human rights serve as corrective when intellectual property rights are used excessively and contrary to their functions¹¹⁴.

The second problem in the framework of the conflict approach, is the fact that authors' and inventors' rights are included in the framework of the human rights. Therefore, they are subsumed in its protective provisions. The ICESCR expresses it eloquently in its articles by stating that

Nothing in the present Covenant may be interpreted as implying for any State,

¹¹⁴ Helfer, Laurence (2011). "Mapping the interface of human rights" in Helfer, Laurence y Austin, Graem. *Human rights and intellectual property. Mapping the global interface*. Cambridge: Cambridge University Press, pp. 66-67.

group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant¹¹⁵t.

Article 5 continues with another subsection that states:

no restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Therefore, the conflict approach and the solution of invoking the primacy principle of human rights is not necessarily clear at the moment of resolving specific cases.

The coexistence approach aims at seeing the intersection of human rights and intellectual property as concerned with the same fundamental question: how to strike the appropriate balance in which the protection system gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts¹¹⁶? This approach understands that intellectual property rights and rights of access are essential parts of the very framework of the human rights. Consequently, the differences within this approach are only found in the search of the balance point for the fulfilment of both rights. Therefore, a key question raised by the coexistence approach is, how should intellectual property rights be modified in light of the human rights framework¹¹⁷.

¹¹⁵ ICESCR, Art 5, subsections 1 and 2.

¹¹⁶ Helfer (2003), *op. cit.*, p. 48.

¹¹⁷ Helfer and Austin, *op. cit.*, p. 73.

Intellectual property rights in the human rights perspective

An approach from the human rights can help to compensate the strong economic and commercial tendency in the evolution of *copyright*,

dominated by an epistemic community comprised largely of technically minded lawyers. In their hands intellectual property has grown into highly differentiated and complex systems of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group¹¹⁸.

Given the degree of specialization and considering the importance of the topics, no decision maker working on the subject should rely solely on the visions of the experts on intellectual property:

Ideally the human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not. Intellectual property experts can bring to the aspiration of human rights discourse regulatory specificity. At some point the diffuse principles that ground human rights claims to new forms of intellectual property will have to be made concrete in the world through models of regulation. These models will have to operate in a world of great cultural diversity. Moreover, the politics of culture is deeply factional, globally,

¹¹⁸ Drahos, Peter (1998). "The Universality of Intellectual Property Rights. Origins and development". Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (Accessed 12 February, 2013).

regionally and locally. It is in this world that the practical issues of ownership, use, access, exploitation and duration of new intellectual property forms will have to be decided. It is here that intellectual property experts can make a contribution.¹¹⁹

The human rights approach can also bring some values back to the intellectual property system. The emphasis on culture in the human rights instruments allows, among other things, to understand the limits of an essentially commercial view of the matter. This would favor a perspective in which the authors' rights systems would not only have an economic objective, but it would enable it to regain its mission of promoting culture, in order to fulfil the mandates of promoting access and participation in cultural life¹²⁰.

From this perspective, *copyright* can coexist with human rights and even justify its existence in them, but this is only possible if it can change its rhetoric based on property and the idea that any unpaid use of the productions is "piracy". If this view changes, *copyright* could transcend this merely commercial debate towards the establishment of a system in which protection and access are seen as complementary objectives¹²¹.

In turn, Lea Shaver proposes to surpass the dual analysis of coexistence and conflict. She considers that there are at least four possible approaches to the matter of intellectual property and human rights. Up until now, explains Shaver, the interaction between human rights and intellectual property has considered three possibilities. The first approach considers intellectual property rights as human rights and raises few or no conflict

¹¹⁹ *Ibidem*.

¹²⁰ Gervais, *op. cit.*, p. 15.

¹²¹ *Idem*, p. 19.

between both systems. A second approach narrows down the existence of conflict to specific areas such as the right to health, food and education, and requires to unravel the tension in each of the affected areas. Recently, a third approach has come into scene, it is related to the idea that the right to development is under threat by the harmonization and deepening tendencies of the intellectual property systems, specifically affecting the transfer of technology and the emergence of young industries. This approach suggest that strong intellectual property regulation systems are useful for the developed countries but require limitations and exceptions for developing ones.

Shaver proposes a fourth approach – which she subscribes to – to analyze the interaction between human rights and intellectual property: the recognition that intellectual property laws are in tension with human rights not only on certain specific instances but systematically, since these systems transform creativity, information, science and technology; public goods, into privatized goods.

In this way, she argues that the intellectual property systems are in direct conflict with the right to science and culture. This premise does not sustain that private property regimes should be abolished, rather, that they are required to be carefully considered and justified, with special attention to the negative impacts on the access to knowledge¹²².

Regardless of the chosen approach, the enormous potential of the human rights framework to set limits to an unjustified expansion of the intellectual property systems, becomes clear:

¹²² Shaver, Lea Bishop (2010). “The Right to Science and Culture”. *Wisconsin Law Review*, Vol. 2010, p. 121. Available at <http://ssrn.com/abstract=1354788> or <http://dx.doi.org/10.2139/ssrn.1354788>

A human-rights approach also takes the implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. A human-rights orientation is predicated on the centrality of protecting and nurturing human dignity and the common good. By extension, the rights of the creator or the author are conditional on contributing to the common good and welfare of the society.¹²³

Beyond the unquestionable link between human rights and intellectual property rights, Laurence Helfer identifies sectors that are still reluctant to the construction of an interface that unites both frameworks of rights. For different reasons, there are those who are against building bridges between the human rights discourse and that of intellectual property.

A first explanation for resistance is related to the use of different languages by the communities of human rights and the experts on intellectual property. While the latter, especially in Common Law, work on economic aspects, the assessment of incentives and interests linked to *copyright*, the former feature a discourse of fundamental rights and thus fear to include intellectual property in that context. Human rights activists fear on their part, that corporations and copyright holders will invoke the framework of fundamental rights to sustain a maximalist vision on authors' rights.

Another explanation for resistance comes from those who fear that both systems of law, so complex and different, will end up overlapping institutional competencies at the international level. In this regard, there is added concern that many of the critical issues

¹²³ Chapman, "Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))", XXXV (2001) Copyright Bulletin, No. 3, p. 14.

related to intellectual property have been resolved in the framework of trade negotiations, particularly in the World Trade Organization, after the global harmonization installed as a result of the adoption of the TRIPS Agreement. This concern has led to unresolved discussions on the normative primacy and the application of clear rules in essentially different legal frameworks. Still, starting a dialogue between both legal systems seems inevitable, for which a constructive view is needed to analyze the tension and coexistence between the human rights and the intellectual property regimes¹²⁴.

The link from the perspective of the monitoring Committee of the ICESCR

The Committee on Economic, Social and Cultural Rights is the organism of independent experts that monitors the application of the International Covenant on Economic, Social and Cultural Rights on behalf of the States Parties. It is in charge of providing content for the texts in the treaty and of assessing its fulfilment by the signatory countries. The Committee is composed of 18 members from all regions of the globe, who act in their personal capacity, and have a remarkable career and competence in the field of human rights. The Committee publishes its interpretation of the provisions of the Covenant in the form of General Comments. Among these, General Comment No. 17 published in 2005 regarding subsection (c) of Article 15, is of great importance since it constitutes the clearest and most specific document on the meaning of author's and inventor's rights in the framework of the ICESCR. Also fundamental, is the research published in 2009 in General Comment No. 21.

¹²⁴ Helfer, Laurence, *op. cit.*, pp. 505-506.

In November 2000, Audrey Chapman in her capacity of Director of the Science and Human Rights Program of the American Association for the Advancement of Science, presented a document before the Committee of Economic, Social and Cultural Rights devoted to the analysis of the emergent topics emanating from the implementation of Article 15 (1)(c) of the ICESCR. The report, titled “Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))”, addresses in detail the meaning of the right of every person to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author¹²⁵.

In line with the resolution on human rights and intellectual property of the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted in its session of August 2000, Chapman recalls that the Agreement on the TRIPS doesn't adequately reflect the fundamental character and indivisibility of the human rights. Also, she states that there are apparent contradictions between the intellectual property regime brought forward by the WTO and the international laws regarding human rights, even when she acknowledges that the right to the protection of the moral and material interests resulting from any scientific, literary or artistic productions of which he is the author is a human right subject to limitations in the public interest. Chapman sustains and reaffirms the expression of the Sub-Commission in relation to the primacy of the human rights over any other international negotiation and agreement of commercial nature¹²⁶.

Chapman draws four possible conclusions in relation to the inclusion of the rights of authors in the declarations of human rights:

¹²⁵ *Idem.*

¹²⁶ *Idem*, pp.7-8.

a) The weakness of the claims of intellectual property as a human right, particularly taking into account the considerable controversy during the discussions of the inclusion of a provision on author's rights among the articles of the international instruments, and the fact that its inclusion was strictly justified on the fact that author's rights would be accessory in realizing other rights, which were seen as having a stronger moral basis.

b) The three provisions of Article 15 in the ICESCR were viewed by drafters as intrinsically interrelated to one another. All human-rights instruments enumerate these rights as components of a single article. Therefore, the rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedom and participation and access to the benefits of scientific progress.

c) Human-rights considerations impose conditions on the manner in which author's rights are protected, since to be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote other components of Article 15. The rights of authors and creators should facilitate rather than constrain cultural participation.

d) The discussion of the intellectual property provisions in the framework of ICESCR did not delineate the scope and limits of author's rights, rather they simply focused on whether they should be included in the Covenant or not.

Chapman concludes that authors rights are conditional on contributing to the common good and welfare of the society, and adds that in regard to Article 15, States parties are directed to ensure that everyone will be able 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. But that this is far short of vesting creators, authors, and inventors with full and unrestricted monopoly property rights¹²⁷. Authors' and inventor's rights enshrined in Article 15, paragraph 1 (c) of ICESCR must be clearly distinguished from any other right enshrined in most of the intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. 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 for the benefit of society as a whole. Thus, the monitoring Committee of the ICESCR establishes the key difference between human rights and the intellectual property rights¹²⁸:

En contraste con los derechos humanos, los derechos de propiedad intelectual son generalmente de índole temporal y es posible revocarlos, autorizar su ejercicio o cederlos a terceros. Mientras que en la mayoría de los sistemas de propiedad intelectual los derechos de propiedad intelectual, a menudo con excepción de los derechos morales, pueden ser transmitidos y son de alcance y duración limitados y susceptibles de transacción, enmienda e incluso renuncia, los derechos humanos son la expresión imperecedera de un título fundamental de la persona humana. Mientras que el derecho humano a beneficiarse de la protección de los intereses morales y materiales resultantes de las producciones científicas, literarias o artísticas propias

¹²⁷ *Idem*, p.14.

¹²⁸ *Idem*, p 1.

protege la vinculación personal entre los autores y sus creaciones y entre los pueblos, comunidades y otros grupos y su patrimonio cultural colectivo, así como los intereses materiales básicos necesarios para que contribuyan, como mínimo, a un nivel de vida adecuado, los regímenes de propiedad intelectual protegen principalmente los intereses e inversiones comerciales y empresariales.

In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.

Attributes of human rights in intellectual property

To overcome the dichotomy of the conflict or coexistence approach between the systems of intellectual property and human rights, it seems fundamental to include a perspective that accounts for the fact that there are numerous attributes of intellectual property that are considered within the human rights, while other attributes and features are not. In order to do this, it is vital to address the problem in a detailed and rigorous way, by

properly distinguishing each of the provisions of the international intellectual property system and then assessing which is a part of the human rights system and which is not. And only then, address the possibility of invoking the primacy of the human rights system.

To formalize his analysis, Peter Yu divides the tension between intellectual property and human rights in two types of conflict: the external conflicts and the internal ones. While external conflicts are related to the tension between the systems of human rights and the intellectual property regimes, the internal conflicts only exist within the systems of human rights¹²⁹. In the assessment of the external conflicts, it's essential to separate the human rights aspects of intellectual property from those that have no human rights basis. Only then it is possible to invoke the primacy of human rights to resolve the conflict. Meanwhile, with internal conflicts, invoking the primacy principle proves sterile, since the contours of the conflict are very weakly drawn.

In the definition of which aspects of intellectual property can be considered human rights, it is useful to recall General Comment No. 17 of the monitoring Committee which explicitly distinguishes the rights of authors and inventors in the ICESCR, from the rights established by the international treaties of intellectual property. These systems, as has been mentioned, are not comparable.

¹²⁹ Yu, Peter K. (2007). "Ten Common Questions About Intellectual Property and Human Rights". *Georgia State University Law Review*, Vol. 23, pp. 709-53; *Michigan State University Legal Studies Research Paper* N.º 04-27. Available at <http://ssrn.com/abstract=1090241> (Accessed 12 February, 2013).

There are aspects of the intellectual property regimes that have no human rights basis. For example, the protection of corporate brands is far from being considered a human right. The same happens with trade and industrial secrets, as well as works-made-for-hire, the inventions of employees, neighboring rights, database protection, the rights of film or phonogram producers (record companies), and any other right that applies to the head of a corporation or artificial person, explicitly excluded from the enjoyment of human rights.

Another important feature to consider is that human rights are inalienable. While corporations, publishers or record companies can obtain rights waived by individual authors and inventors under contract or a work-made-for-hire arrangement, the human rights-based material and moral interests of these individuals are not transferable to the corporate rights holders.¹³⁰

On the other hand, it's impossible to interpret all attributes of intellectual property as if they were a human right. Only some of them are, and thus, a strengthening of the intellectual property system in this regard doesn't seem possible.

As stated in the UDHR and the ICESCR, the right to the protection of interests in intellectual creations covers two different types of interests: moral interests and material interests. While the former safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, the latter refer to the enjoyment of an adequate standard of living¹³¹.

¹³⁰ *Idem*, p. 728.

¹³¹ Yu, Peter K. (2007). "Reconceptualizing intellectual property interests in a human rights framework". *U.C. Davis Law Review*, vol. 40, pp. 1039-1149; *Michigan State University Legal Studies Research Paper* N.º 04-01. Available at <http://ssrn.com/abstract=927335>

The protection of the moral interests seems to be what was manifested in the draft proposed by the French delegate Cassin, in the drafting of the Declaration. In those drafts the French proposal stated that

in addition to just remuneration for the authors' labour, the protection of moral rights on their work and/or discovery shall not disappear, even after such a work or discovery have become the common property of mankind.

Such protection is important to human dignity, because it safeguards the personal link between authors and their creations and assures the public of the authenticity of the protected works, just like the Chinese delegate Chang had proposed in his time. The French delegate was understandably familiar with the strong protection of moral rights traditionally offered in continental Europe, in particular France and Germany. These rights include the right of attribution, the right of integrity, the right of disclosure, and the right of withdrawal, among others¹³². These attributes are covered in Article 6bis of the Berne Convention¹³³.

Unlike the definition of moral rights, material interests are hard to define. These were included by the French delegation when they included paragraphs of the American Declaration in the Universal Declaration at the Third Session of the Drafting Committee. These words were also included in Article 15 (c) of the ICESCR.

While the statements of the declarations give no hints as to which exactly are those material interests, the monitoring Committee, in its General Comment No. 17, explains that these interests have a close relationship with the provisions on the rights to own property,

¹³² *Idem*, p. 1081.

¹³³ See Art. 6bis at http://www.wipo.int/treaties/es/ip/berne/trtdocs_wo001.html#P132_23079 (Accessed 12 February, 2013).

either individual or collective. However, a review of the drafting history of the UDHR as well as of the ICESCR seems to indicate that the phrase refers to a type of material interest much more restricted than private property. We should recall that the Cold War and the negotiation between the countries drafting the treaties, resulted in the withdrawal of the expression “private” property from the texts¹³⁴. Given the characteristics of the wording and of the documents, it remains unclear if the delegates agreed on making a special type of property for intellectual creations, and so, judging by the rights protected in the ICESCR, Article 15(1)(c) should be considered a right that exists independently of property rights¹³⁵.

If we go back to Cassin’s draft of what would later become Article 27 of the Declaration, we would find: “just remuneration for the authors’ labor”. The reason why the proposed phrase was withdrawn from the final draft goes back to Cassin himself, who believed that such a right was already covered by another provision in the draft, related to just remuneration and an adequate standard of living for all workers¹³⁶.

Thus, the drafting history of the declarations seems to suggest that the reference to material interests should not be interpreted broadly to cover all forms of economic rights as protected in the existing intellectual property system, but rather narrowly to cover the limited interests in obtaining just remuneration for one’s intellectual labor¹³⁷.

It becomes clear then, that a property-based regime is not the only acceptable modality of protection that can be used to realize the right to the protection of material

¹³⁴ While the USA pleaded for the inclusion of the protection of the right to private property in the declaration, the USSR refused to sign such declaration, and consequently, Article 17 speaks of property rather in a wide sense, either individual or collective, but eliminating the words “private property”.

¹³⁵ Yu, Peter K. (2007), *op. cit.*, pp. 1085-1086.

¹³⁶ *Idem*, pp.1087-1088.

¹³⁷ *Idem*, p. 1088.

interests. Nor is it the best. Judging by the statements of the monitoring Committee, it could be replaced by different options such as prize funds, onetime payments, vesting the author with exclusive rights for a limited period of time, or other ways to enable authors to enjoy a just remuneration for their labor. The key criterion to evaluate if the right to the protection of material interests is being fulfilled or not, is not whether if the level of protection required by existing intellectual property agreements is being met, but rather if the system enables for enough protection of the authors in terms of just remuneration for an adequate standard of living.

On the other hand, the protection of material interests isn't comparable to the postmortem monopoly of authors, that is, the rights of the heirs, and granting exclusive rights during the whole of the authors' life isn't necessary either. It is key to state that the provision about material interests over the work of which a person is author, doesn't consider the rights of heirs. Consequently, the beneficiaries that hold rights over some creations can't sustain their claims on grounds of human rights, since heirs are clearly not the authors referred to in the declarations.

Once the human rights attributes in intellectual property have been clearly identified and defined, it is possible to apply the primacy principle of human rights over every other attributes that are not considered by these rights; and agree with the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations High Commissioner's Office that the obligations with these inalienable rights have primacy over economic policies and trade-related treaties.

It must still be determined if the primacy of human rights can or cannot be addressed from the flexibilities and limitations considered in the trade treaties, since the primacy of human rights doesn't necessarily imply that States parties should resign to the commitments adopted in other organizations such as the WTO.

In this regard, taking into account this consideration about the hierarchy of rights, Julio Raffo states that

en caso de ser uno de ellos de superior jerarquía habrá que subordinar el de menor jerarquía en aras de la efectiva vigencia del que le es superior. Al respecto entiendo que el derecho de 'acceder a la cultura' por parte de todos los ciudadanos puede causar un 'perjuicio justificado' a la comercialización de la obra, pero si atenta contra su 'explotación normal', ello constituye el ejercicio de un derecho.¹³⁸

in the case of one of them being of greater hierarchy, we shall subordinate the one of lesser hierarchy in order to provide for the effective fulfillment of the superior one. In this respect, I understand that the right to have access to culture by all citizens can cause a "justified perjury" to the commercialization of the work, but if it threatens its "natural exploitation", that constitutes the exercise of a right.

From this, it remains to be determined if the laws of each country contribute to the full compliance of cultural rights or if they should be reviewed in the light of the primacy of human rights.

¹³⁸ Raffo, Julio (2011). *Derecho Autoral. Hacia un nuevo paradigma*. Buenos Aires: Marcial Pons Editores, p. 276.

Chapter 3: Conclusions. Towards a public policy for the exercise of cultural rights

Is it necessary to make amendments in Authors' Rights Law? The case of Argentina

Argentina is one of the countries internationally bound by the human rights treaties. In fact, the National Constitution, in its revised version of 1994, includes them in this, the highest body of law of the republic, by stating in Article 75, subsection 22:

The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.

It is clear that the rights enshrined in the ICESCR and in the UDHR coexist with the rights and guarantees recognized in the first part of the National Constitution and do not revoke any of them, rather, they should be understood as complementary. The relationship between the aspects of human rights in intellectual property and the rights to access and

participation in culture must be understood in this complementary framework.

Intellectual Property Law No. 11,723 – which, constitutionally, has an inferior hierarchy than the International Human Rights Treaties – prevents and restricts the exercise of a good part of the enshrined cultural rights, including not just the right to access and participation but the right to education and some aspects of the freedom of expression. Therefore, the law requires a revision in light of the guarantee and the progressive advancements of the rights Argentina has committed to.

The different comments of the monitoring Committee of the ICESCR clearly established that the authors' rights recognized in the human rights are not comparable to the international and national laws of intellectual property. Consequently, in order to comply with the commitments on such a matter it isn't necessary to establish a restrictive frame of authors' rights. As appropriately stated in paragraph 16 of General Comment No. 17:

The term of protection of material interests under article 15, paragraph 1 (c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production.

In this regard, the commitments adopted on authors' and inventors' rights can be achieved by various strategies that bring recognition to the author, and do not forcibly need to be the ones currently contemplated in Law 11,723.

In view of the marked differences existing between the intellectual property systems

held in trade negotiations at different levels, either multilateral or regional, and their implementations in national laws as Law No. 11,723, it is unavoidable to agree with the proposal of Lea Shaver, who considers this to be a systemic and structural difference. Her proposal, is to understand that beyond the possible tensions between both systems in certain aspects, there is a fundamental difference, because intellectual property transforms public goods as creativity, culture in general, information, science and technology in private goods. This premise, as Shaver adequately remarks, doesn't imply the abolition of authors' rights regulations, rather it requires that the protection of authors' and inventors' interests is considered and carefully justified in the framework of human rights.

In the last decades, the process of deepening and global harmonization of intellectual property, have systematically neglected the guarantees of the exercise of cultural rights, such as access to culture, participation and the right to education. Law No. 11,723 in Argentina was no exception to that process, and in line with the global trend, suffered permanent modifications that led it to be one of the most restrictive laws in the world, and almost undoubtedly, the most restrictive one in the continent, at least among the laws surveyed by Consumers International. For this reason, it can be concluded that Argentine law on authors' rights requires an extensive general revision, and even the proposal of an entirely new legislation that includes guarantees that balance the rights of authors with those of the community as a whole, in light of the human rights.

The study of intellectual property from the perspective of human rights offers a framework of reference that enables the revision of national laws from these principles. It provides lawmakers with some strategies that allow the design of a law that aims at

establishing a socially useful balance between the authors' rewards and the legal possibilities of access to culture and knowledge.

It is clear that the systems of flexibilities, limitations and possible exceptions foreseen in the international trade treaties like the TRIPS and intellectual property treaties like the Berne Convention, would offer a positive alternative to reduce the huge gap existing between the restrictions considered by Law No. 11,723 and the rights of access and participation enshrined in the human rights treaties. These flexibility systems are a starting point for the establishment of a fairer system of authors' rights in Argentina. However, these systems do not fix the structural problem defined by Shaver regarding the private appropriation of public goods, and in turn, they seem to suggest an alleged primacy of intellectual property rights over human rights, which you could only fully exercise through a system of exceptions.

A view from the human rights perspective enables the affirmation that the exception should be the restriction of access and participation in culture, the restriction of education and of freedom of expression, and not the other way round. Helfer and Austin explain in the conclusions of their work¹³⁹:

In the existing intellectual property system, the producers and owners of intellectual property products are the only "rights" holders. All other actors – consumers, future creators, and the public generally – are relegated to an implicitly inferior status.

Unlike the proposals of flexibilities through exceptions and limitations, the arguments

¹³⁹ Helfer, L. y Austin G., *op. cit.*, p. 509.

based on human rights reformulate the demands of consumers, future creators and general public in terms of considering that their rights are conceptually equivalent to some of the rights of authors, and superior to those of corporations and other beneficiaries, such as heirs or publishers and other artificial persons, that cannot reclaim human rights.

As Austin and Helfer appropriately state, it's not a mere discursive shift, the human rights perspective reformulates the normative agenda and the negotiation strategies:

From a normative perspective, such a reframing directs intellectual property reform advocates to work within international human rights venues – in particular the treaty bodies and the special rapporteurs and independent experts of the Human Rights Council – to clarify ambiguous legal norms and evaluate the human rights consequences of existing intellectual property laws and policies¹⁴⁰.

Now that these actors historically linked to human rights have turned to the study of the consequences of intellectual property, it would be myopic from the reform advocates in the field of the Internet and of copyright not to turn to them, state Helfer and Austin. In Argentina this process is just beginning, and there already are some traditional institutions of human rights starting to analyze and discuss about the growing impacts of intellectual property on the exercise of fundamental rights.

However, in this new panorama opened by some social organizations, it is regrettable that in Argentina the discourse of authors' rights in the framework of human rights has been adopted by maximalists who sought to assimilate the provisions of international treaties such as the Universal Declaration and the ICESCR to the current regulatory framework on intellectual property. Helfer

¹⁴⁰ *Ibidem*.

and Austin assume the possibility of such readings occurring, by explaining that

los discursos expansionistas de la propiedad intelectual son a menudo sostenidos por las industrias que ven la viabilidad financiera de sus modelos de negocios atada a los derechos de explotación exclusivos que la protección de propiedad intelectual confiere. Apoderándose y muchas veces malinterpretando las cláusulas sobre los derechos de los creadores y los derechos de propiedad de los instrumentos internacionales, estas industrias buscan afianzar visiones maximalistas de la propiedad intelectual invocando la retórica de los derechos humanos como triunfos.

expansionist arguments are often raised by industries that view their business models and financial viability as tied to the exclusive exploitation rights that intellectual property protection confers. Seizing upon (and often misreading) the creators' right and property rights clauses of international instruments, these industries seek to lock in maximalist intellectual property protection by invoking the rhetoric of human rights as trumps¹⁴¹.

Fear of these interpretations isn't unfounded and we find good examples in Argentina to sustain it. However, this trend must be – and is being – counterweighed by a growing number of decisions, analyses and criticism that allows limiting the expansionist view in relation to intellectual property.

Keys for the drafting of an authors' rights law that promotes the exercise of cultural rights

From Helfert and Austin's analysis it is possible to determine two starting points for

¹⁴¹ Helfert, L. y Austin G., *op. cit.*, p.510.

the construction of a human rights framework for intellectual property.

In the first place, there is a *protective* framework that tends to recognize and respect the rights of individuals and groups to enjoy modest moral and material benefits relating to the creative and innovative activities of which they are authors. These protections don't apply to corporations or other business entities. The legal safeguards to guarantee those rights are significantly inferior to those requested by trade treaties and international treaties on intellectual property. Even while complying with the minimum requirements of the interests of authors and inventors, each State can use different strategies to reduce the terms of protection, expand the limitations and exceptions, or think of other strategies without neglecting the rights of authors and inventors adopted in the legal mandate of the human rights. A one-time compensation system for authors can even be established, or appealing to reasons of public good, determine some other kind of compensation, or even none at all. General Comment No. 17 of the monitoring Committee has set its position in this respect, giving State parties different options outside the current intellectual property system.

This system, can also be broader than the current intellectual property system in other aspects, such as the inclusion of the traditional knowledge of the indigenous communities. In addition, it can provide authors and inventors with a setting that offers more and better guarantees against corporations, publishers and other sectors of the industry that are based on the waiver of rights to commercially exploit the works. This framework prioritizes creative persons over exploitation rights, offering authors and inventors better safeguards in the case of working under contracts or in fixing the terms of cessation for the commercial exploitation of a work. This is, a human rights perspective can

not only help to promote the free circulation of works and the rights of access and participation, but it can also benefit the authors in the pursue of their objective to maintain an adequate standard of living when negotiating the rights of exploitation of their works.

We should stress that State parties of international treaties have adopted commitments to guarantee minimum life standards in matters of economy, social welfare in areas such as health, food and education, and have the obligation not to interfere in the exercise of the social and political rights. In each case, the extent to which intellectual property laws may help or not should be defined, that is, if they have any relevance in the pursue of those objectives. It is important to mention, that in many cases the existence of restrictive laws is just one factor among many others in the fulfillment of each of these objectives. For example, access restrictions to educational material is only one aspect of the exercise of the right to education among many others, like the availability of infrastructure, teachers and the curriculum. It is important to analyze the limitations in their context, but it is fundamental not to minimize the impact of these restrictions.

In the second place, there is a *restrictive* framework when a State expands the legal privileges of authors and inventors beyond the minimum requirements needed to establish an area of personal autonomy, as previously described. In this framework, it is valid to seriously discuss which are the consequences of this type of decisions in the exercise of the other rights, as well as in the development of a country and the living conditions of its population. There are large debates on whether intellectual property stimulates or stagnates economic development, especially in developing countries and the least developed¹⁴², but

¹⁴² To continue this debate, see Cimoli Mario; Dosi Giovanni and Stiglitz, Joseph (2009). *Industrial Policy and Development*. Oxford: Oxford University Press. Among many others.

even assuming that intellectual property meets the objectives of development, the countries that implement these policies still have a responsibility towards the obligations adopted in the framework of the human rights.

Intellectual property laws have long term impacts. Therefore, every public policy on the subject must necessarily include a plan that allows a follow-up of the structure and design of proposals for the progressive achievement of human rights, that is, to redirect the incentives and guide market forces towards the fulfillment of socially valuable objectives. In that way for example, open systems like the free software models, open licenses like the *Creative Commons* system, open educational resources, and the collective and free construction of public goods, offer innovative schemes for the progressive fulfillment of the full exercise of rights.

The comprehensive system of the human rights gives us clear frameworks for action. In particular, the right to science and culture can provide a tool to reformulate the international system of intellectual property – and consequently the national laws as well – to reaffirm the concept of knowledge as a public good. It is therefore essential to reinforce the objective of promotion of universal access and protection of authors' interests, rather than the promotion of intellectual property itself. Understanding this paradigm can serve as the basis for the revision of different national legislations.

Legislative proposals in accordance with the international treaties and the commitments adopted by the countries

Establishing guidelines for a new system of authors' rights in each country presents many difficulties. In the first place, the general framework for the design of a public policy

on the subject should be the National Constitution or Magna Carta of each country and the international human rights treaties included therein. In this regard it is essential to comply with the objectives committed to in the UDHR and the ICESCR. But at the same time, many countries have international commitments bound by the World Trade Organization and the World Intellectual Property Organization that set minimum standards for the legislation on the subject. As long as every country fails to adopt measures tending to report these commitments and break away from them, the lawmaker will be obliged to draft laws in agreement with treaties such as the TRIPS and the Berne Convention, among others. Therefore, the design of a new policy of intellectual property demands to consider both legal systems, even when the framework of human rights is considered as the fundamental basis with primacy over the rest of the current regulations.

Thus, for the time being, different nations can't ignore the minimal provisions in matters of authors' rights. However, this does not prevent a redesign of the policies that aim to make the system more flexible in order to guarantee the progressive realization of the cultural rights.

In this regard, the present proposal is based on three axes to be considered in the event of a modification of intellectual property legislation¹⁴³.

1. To redefine the relationship between the authors, the industry and their corporate representatives

Subsection (1)(c) of Article 15 of ICESCR enshrines the right to all to benefit from

¹⁴³ This proposal is based on the previous work found in Busaniche, B. et al. *Argentina Copyleft. La crisis del modelo de derecho de autor y las prácticas para democratizar la cultura* (2010), pp. 165-168. It was also enriched by following the public consultation process for the construction of a new law on authors' rights in Brazil. See <http://www.vialibre.org.ar/2010/01/11/algunas-notas-sobre-el-proyecto-de-reforma-de-la-ley-de-derechos-de-autor-en-brasil/> (Accessed 8 March, 2013).

the protection of moral and material interests resulting from any scientific, literary or artistic creation of which he or she is author.

There is a recognized inequality in the balance of power between large companies in the entertainment industry and the bargaining power of most artists at the time of establishing working conditions and contracts of transfer of rights. Setting appropriate conditions for authors to reach a decent living standard also involves offering tools to prevent abuses from the companies that hire them.

On the other hand, it also becomes essential to redesign the collective management model of authors' rights and neighboring rights, that in many occasions doesn't represent the artist's interest that they claim to represent. In many cases, these collective management entities expropriate authors' rights over their works, receive royalties that ultimately do not reach the pockets of the right holders, or prevent the exercise of authors' rights such as the possibility of offering works to the public for free or under other licensing paradigms¹⁴⁴. Giving the power back to the authors, to control the institutions that represent them, as well as offering them tools for negotiation and control of these companies – thus allowing them to prevent abuses in matters of contract and marketing of their works – are measures that tend to guarantee authors an appropriate standard of living in line with the provisions of General Comment No. 17.

A control system for publishers, a system to limit the transfer of exploitation rights in time, an open and transparent system and the elimination of monopolies in the system of collective management will enable authors to organize themselves and establish

¹⁴⁴ See Raffo, J., *op. cit.*, pp. 214-234.

improvements in the working conditions of the sector. Promoting new forms of business, new delivery mechanisms and more autonomous ways of managing culture, appear on the horizon as promising strategies. Rethinking the relationship between authors and corporations also has a direct impact on cultural diversity, since it's the large conglomerates of the entertainment industry who drive and determine much of the cultural consumption.

2. The relationship between rightsholders and the public

To start redesigning the system, it is fundamental to include flexibilities as broad as possible in the framework of the commitments adopted in the Berne Convention. In this regard we can summarize:

- The reduction of the duration of the monopoly of authors' rights to the minimum established in the international treaties.
- Freeing and promoting public domain by abolishing domaine public payant and promoting projects that tend to digitize, spread and promote access to the enormous cultural heritage available.
- The adoption of a broad system of exceptions for libraries and archives that includes the right to make copies for personal use, copies for interlibrary loans, copies for conservation and preservation, copies of unique volumes or volumes unavailable in the market, as well as permits to elude technical measures of protection for the exercise of these rights. All these exceptions should be granted equally for the analogical and for the digital environment.

- Extension of the exceptions in favor of libraries, archives and museums so that they can legally digitize and publically make available, through diverse technological media, the cultural heritage which they protect.
- Broadening of the exceptions and limitations in favor of the persons with reading and visual disabilities, in order for this right to be exercised by the people and not just the institutions committed to such end. The exception should focus on the people and not on the institutions, in such way that it can be exercised by any person with a visual disability without regard for his belonging to any institution or place of residence within the national territory, free from any type of discrimination.
- Inclusion of broad exceptions for academic, pedagogical and educational purposes at all levels, including the possibility to copy works for study and research in every environment at a national level. This exception should include the possibility to reproduce and communicate works, to broaden the right to quote if necessary, to authorize the compilation of materials, the recording and taking notes in classes and conferences without any compensation needed, respecting the gratuitous principle that characterizes the public educational systems if applicable. In the case of a broadening of the right to quote, it should also extend to audiovisual works.
- Establishing exceptions in favor of the freedom of expression and the new cultural forms, including the possibility to perform parodies with or without profit. This exception should extend to the possibility to perform remixes and mashups without mediation of authors' or rightsholders' authorization when they don't have commercial

purposes. The extension of the right to quote to audiovisual works, is also essential for the production of new works such as documentaries, etc.

- The new regulatory framework must maintain the guarantee of free reproduction of news in whatever form, always citing the source, and the free publishing of portraits for the sake of public interest.

- Inclusion of an explicit guarantee of the right to copy material for private and personal use, whether for domestic use, or in private spheres such as companies or organizations, without any mediation of compensatory remuneration.

- Promotion and depenalization of the right to free access to culture through the Internet, insofar as both the download and use of copyrighted works doesn't have a for-profit or commercial purpose.

- Inclusion of exceptions that contemplate the temporary digital copies.

- Establishment of a system of guarantees to release Internet service providers of all civil or criminal liabilities for the actions carried out by the users of their services, except in the cases in which they had direct involvement in criminal acts, or in the case of deliberate omission of a Court ruling the removal or blocking of contents.

- Elimination of intellectual property infringement from criminal jurisdiction, in cases of individuals that reproduce works outside of the broad framework of exceptions without authorization, but with not-for-profit or non-commercial purposes.

2. Redefinition of the role of the State

Insofar as it is a public policy, the role of the State is essential at the time of planning reforms and defining objectives and indicators to measure the scope and consequences of the policy, in addition to establishing mechanisms to assess them. The State has a key role as regulator in the matter, but also as the ultimate guarantor of the exercise of the rights enshrined in the ICESCR and as auditor of the compliance of the defined legal guidelines.

The State could recover its active role in the promotion of cultural policies through many mechanisms:

- Recovery of its key role in the definition and promotion of policies of access to culture and authors' rights.
- Promotion of new models that favor the objective of allowing authors and inventors to enjoy an adequate standard of living and receive the benefits resulting from their contributions to the scientific and cultural wealth through the design of diverse incentives to production, innovation and creativity.
- Recovery of the controlling role over collective management entities.

All these measures must necessarily be discussed in a broad and open manner, with the intervention and participation of all the sectors involved in such a way that it strengthens a public policy forged on consensus, aiming to fully comply with the commitments of human rights. The public consultation route, the open hearings at Congress

and Legislative bodies, and the participation of all stakeholders can conform a strategic initiative for the future of authors' rights and cultural rights in the world.

General Bibliography

ABBOT, F. M. (2006). *TRIPS and Human Rights: Preliminary Reflections. International Trade and Human Rights: Foundations and Conceptual Issues*, p. 145. University of Michigan Press, 2006; FSU College of Law, Public Law Research Paper; FSU College of Law, Law, Business & Economics Paper.

ACHUGAR, H (2003). *Derechos culturales. ¿Una nueva frontera de las políticas públicas para la cultura?* Available at <http://www.oei.es/pensariberoamerica/ric04a04.htm>

AGUILAR, S et al (2008). *¿Qué es eso de los derechos humanos? Apuntes para una reflexión crítica. Historia, documentos, conceptos y actividades*. Buenos Aires, Argentina: Asamblea Permanente por los Derechos humanos.

ALONSO, R. et al (2009). *¿Desea guardar los cambios?*, Córdoba, Argentina: Centro Cultural de España Córdoba.

ALVAREZ NAVARRETE, L (2006). *El derecho de autor. Los debates de hoy*. La Habana, Cuba: Editorial de Ciencias Sociales.

BERTONI, E. (2012). *Hacia una internet libre de censura. Propuestas para América latina*. Centro de Estudios en Libertad de Expresión y Acceso a la Información. Facultad de Derecho. Universidad de Palermo.

BEUTZ LAND, M (2008). *Intellectual Property Rights and the Right to participate in cultural life*. Institute for Information Law and Policy. White Paper Series 08/09 #02 New York Law School.

BOYLE, J. (2008). *The Public Domain: Enclosing the Commons of the Mind*. New Haven. Yale University Press.

BUSANICHE, B. et al (2007) *Monopolios Artificiales sobre Bienes Intangibles*. Córdoba, Argentina: Fundación Via Libre.

BUSANICHE, B. et al (2010). *Argentina Copyleft. La crisis del modelo de derecho de autor y las prácticas para democratizar la cultura*. Córdoba, Argentina: Fundación Vía Libre. Fundación Heinrich Böll

BUSANICHE, B (2010). *El ejercicio de los derechos culturales en el marco de los monopolios del derecho de autor*. Final assignment for Art and Culture Law. Masters' Program on Intellectual Property. FLACSO Argentina. Available online at http://www.bea.org.ar/wp-content/uploads/2010/10/busaniche.final_derechoarteycultura1.pdf

BUSANICHE, B. (2011). *La influencia del lobby y la búsqueda de renta en las últimas modificaciones de la Ley 11.723 en Argentina*. Final assignment for Economic Analysis of Law. Masters' Program on Intellectual Property. FLACSO Argentina. Available online at <http://www.bea.org.ar/2011/07/la-influencia-del-lobby-y-la-busqueda-de-renta-en-las-ultimas-modificaciones-de-la-ley-11723-en-argentina/>

- CERDA SILVA, A. et al (2008). *Acceso a la Cultura y Derechos de Autor*. Santiago de Chile. LOM y ONG Derechos Digitales.
- CERDA SILVA, A, y RUIZ, C. (2010). *Internet, Copyright y Derecho: Opiniones Contingentes*. Santiago de Chile: ONG Derechos Digitales.
- Chapman, "Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))", XXXV (2001) Copyright Bulletin, No. 3, 4-36.
- CREWS, K. (2008). *Estudio sobre las limitaciones y excepciones al derecho de autor en beneficio de bibliotecas y archivos*. Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192
- DOBUSCH, L. (2011). *The Digital Public Domain: Relevance and Regulation*. Berlin: Freie Universität Berlin.
- EMERY, M. (2004). *Propiedad Intelectual*. Buenos Aires, Argentina: Editorial Astrea.
- FISHMAN AFORI, O (2004). *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*. Israel: Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 14. Nro. 2.
- Green, Maria (2000), "Drafting history of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights," UN Doc. E/C.12/2000/15, 9 October 2000
- HARVEY, E. (2008). *Derecho a participar en la vida cultural (artículo 15 (1) (a) del Pacto)* En Comité de Derechos Económicos, Sociales y Culturales. Cuadragésima sesión. Ginebra.
- HELPER, L. (2003). Human Rights and Intellectual Property: Conflict or Coexistence?. Minnesota Journal of Law, Science & Technology, Vol. 5, p. 47, 2003; Loyola-LA Legal Studies Paper No. 2003-27; Princeton Law and Public Affairs Working Paper No. 04-003. Available at SSRN: <http://ssrn.com/abstract=459120> or <http://dx.doi.org/10.2139/ssrn.459120>
- HELPER, L (2006). Collective Management of Copyright and Human Rights: An Uneasy Alliance. Daniel J. Gervais, ed., Kluwer Law International, 2006; Vanderbilt Law School, Public Law and Legal Theory Research Paper Series No. 05-28.
- HELPER, L y AUSTIN, G (2011). *Human Rights and Intellectual Property: Mapping the Global Interface*. Cambridge University Press.
- HERRENDORF, D y BIDART CAMPOS, G. (1991). *Principios de Derechos humanos y Garantías*. Buenos Aires, Argentina: Ediar.
- LAMARCHE, L (2011). *Cultural Rights: An essential Key to Understand Human Rights in Complex Societies*. Human Rights Education and Research Centre.
- LANDES, W. y POSNER, R. (2003). *The Economic Structure of Intellectual Property Law*. Harvard University Press.
- LESSIG, L. (2004). *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York. Penguin. Spanish versión edited by LOM

y Derechos Digitales de Chile. “Cultura Libre. Como los grandes medios usan la tecnología y la ley para controlar la cultura y la creatividad.”

LESSIG, L. (2008). *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. New York. Penguin.

LIPSZYC, D. (2006). *Derechos de Autor y derechos conexos*. Buenos Aires. Argentina: Ediciones UNESCO, CERLALC, Zavalía.

LIPSZYC, D. (2004). *Nuevos temas de derecho de autor y derechos conexos*. Buenos Aires. Argentina: Ediciones UNESCO, CERLALC, Zavalía.

LIPSZYC, D. y VILLALBA, C. (2009). *EL derecho de autor en la Argentina*. 2da Edición. Bs. As., Argentina: La Ley.

LITMAN, J. (1990). *The Public Domain*. Emory Law Journal, 39, 965-1023.

MONROY RODRIGUEZ, J.C. (2009). “Estudio sobre las limitaciones o excepciones al derecho de autor y los derechos conexos en beneficio de las actividades educativas y de investigación en América latina y el Caribe”. OMPI SCCR/19/4 Available at http://www.wipo.int/meetings/es/doc_details.jsp?doc_id=130303

MORSNIK, J. (1999). *The Universal Declaration of Human Rights. Origins, Drafting and Intent*. Philadelphia, Pennsylvania: University of Pennsylvania Press.

NETANEL, N.W. (1996). *Copyright and a Democratic Civil Society*. 106 Yale Law Journal 283

NIKKEN, P (1994). *El concepto de los derechos humanos*. San José de Costa Rica: Instituto Interamericano de Derechos humanos.

ONAINDIA, J. M. (1998). *Instituciones de Derecho Constitucional* Buenos Aires. Argentina: Errepar.

PELAYA, L y SANLLORENTI, A.M. (2010). La amenaza a la misión de las bibliotecas y la legislación de derecho de autor en Argentina, en *Argentina Copyleft*, Córdoba, Ediciones Vía Libre.

PRIETO DE PEDRO, J. (2004). *Derechos culturales y Derecho Humano*. Pensar Iberoamérica. Revista de Cultura. N.º 7. Sept-dic 2004. Organización de Estados Iberoamericanos. Available at <http://www.oei.es/pensariberoamerica/ric07a07.htm>

RAFFO, J. (2011). *Derecho Autoral. Hacia un nuevo paradigma*. Buenos Aires. Argentina: Marcial Pons.

SAMUELSON, P. (2003). *Mapping the Digital Public Domain: Threats and Opportunities*. *Law and Contemporary Problems*, 66 (1/2), 147-171.

SHAVER, L. (2010). “The Right to Science and Culture”. *Wisconsin Law Review*, Vol. 2, p. 121. Available at SSRN: <http://ssrn.com/abstract=1354788> O <http://dx.doi.org/10.2139/ssrn.1354788>

SHAVER, L y SGANGA, C (2009). *The Right to Take Part in Cultural Life: Copyright and Human Rights*. Yale Law School Yale Law School Legal Scholarship Repository. Faculty

Scholarship Series. Paper 23. http://digitalcommons.law.yale.edu/fss_papers/23

SYMONIDES, J. (1998). *Derechos culturales: una categoría descuidada de derechos humanos*.

SMIERS, J. (2006). *Un mundo sin Copyright. Artes y medios en la globalización* Barcelona, España: Gedisa.

SPRIGMAN, C (2004). *Reform(aliz)ing Copyright*, Stanford Law Review, Vol. 57, No. 2 (Nov., 2004), pp. 485-568

TORREMANS, P. et al (2008). *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights*. Amsterdam, Holanda:Kluwer Law International.

VIDAURRETA, G (2007). *Historia del Sistema Argentino de patentes de invención (1580-1863). Propiedad Intelectual en la Constitución Nacional. Antecedentes. Fuentes e Interpretación*. Buenos Aires, Argentina. Facultad de Derecho de la UBA. La Ley.

VIDAURRETA, G (2011). *De cómo el criterio utilitarista de justificación primó en los albores del sistema de patentes : estudio de casos : Inglaterra, Estados Unidos y Francia : desde el medioevo a la primera revolución industrial*. Tesis de Maestría. FLASCO. Sede Académica Argentina, Buenos Aires.

YU, PETER. (2007). Reconceptualizing Intellectual Property Interests in a Human Rights Framework. *Legal Studies Research Paper Series*. Research Paper Nro. 04-01 Michigan State University. College of Law.

YU, PETER. (2007). Ten Common Questions About Intellectual Property and Human Rights. Georgia State University Law Review, Vol. 23, 2007, pp. 709-53; Michigan State University Legal Studies Research Paper No. 04-27. Available at SSRN: <http://ssrn.com/abstract=1090241>

Laws, International Treaties and Declarations

Constitution of the Argentine Republic. Available at:

<http://www.senado.gov.ar/web/interes/constitucion/cuerpo1.php>

Law No. 11,723 updated. Available at

<http://infoleg.mecon.gov.ar/infolegInternet/anexos/40000-44999/42755/texact.htm>

Universal Declaration of Human Rights <http://www.un.org/es/documents/udhr/>

Historical Archives of the Drafting of the Universal Declaration of Human Rights

https://www.un.org/Depts/dhl/udhr/meetings_1947_4th_esc.shtml

International Covenant on Economic, Social and Cultural Rights

<http://www2.ohchr.org/spanish/law/cescr.htm>

General Comments of the monitoring Committee of the ICECSR

<http://www2.ohchr.org/english/bodies/cescr/comments.htm>

Ibero-American Cultural Charter <http://www.oei.es/xvicumbrecarta.htm>

Fribourg Declaration on Cultural Rights

http://www.culturalrights.net/descargas/drets_culturals239.pdf