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Approaching intellectual property as a human right



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Assistant Editor a.i.: Caroline Descombris
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Tel.: +33.1.45.68.47.02

Fax: +33.1.45.68.55.89

e-mail: E.Guerassimov@unesco.org

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DOCTRINE

Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)¹

Audrey R. Chapman*

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* American Association for the Advancement of Science

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Introduction

Just as raw materials and labour were key resources in the first industrial revolution, intellectual property is a central asset in an information- or knowledge-based economy. Intellectual property is a generic term that refers to intangible objects, such as literary works, artistic productions, scientific discoveries, and plans for inventions and designs, which acquire their value primarily from creative efforts. A recent book makes the claim, for example, that ‘intellectual property and its conceptual neighbours may bear the same relationship to the information society as the wage-labour nexus did to the industrial manufacturing society of the 1900s’.² Knowledge has been identified as a corporation’s most valuable resource, the ultimate substitute for raw materials, labour, capital, and inputs.³ In the new global economy of ideas, ownership, control, and access to creative works and scientific knowledge have considerable economic import, giving rise to fierce competition over intellectual and creative works, or what one analyst describes as the ‘knowledge wars.’⁴

The manner in which creative works, cultural heritage, and scientific knowledge are turned into property has significant human-rights implications. Beginning with the provisions of the American Declaration on the Rights and Duties of Man,⁵ key international human-rights instruments have acknowledged that intellectual products have an intrinsic value as an expression of human creativity and dignity. Several enumerate the right of authors, creators, and inventors to some form of recognition and benefit from their intellectual products. Article 27 of the Universal Declaration of Human Rights (UDHR),⁶ states 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’. This right is linked to another provision of Article 27: ‘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.’

Building on Article 27 of the UDHR, the International Covenant on Economic, Social and Cultural Rights (hitherto ICESCR or the Covenant) has similar provisions.⁷ Article 15 (1) (c) requires States parties, the countries which have ratified this instrument, to recognize the right of everyone ‘to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’⁸ Also like the UDHR, other components of Article 15 link this obligation to the rights ‘to take part in cultural life’⁹ and ‘to enjoy the benefits of scientific progress and its applications.’¹⁰ To achieve these goals, the Covenant mandates that States parties undertake a series of steps. These include ‘those necessary for the conservation, development, and diffusion of science and culture’. States parties are also directed to ‘undertake to respect the freedom indispensable for scientific research and creative activity.’¹¹

The centrality of intellectual property to almost every sphere of economic life means that international treaties, national legal codes, and judicial decisions about intellectual property can have significant ramifications for the protection and promotion of human rights. This is particularly the case for the economic, social, and cultural rights enumerated in the Covenant. Thus, as various economic actors rush to stake claims over creative works and forms of knowledge, human rights are being trampled. Creators risk losing control of their works. The free exchange of information so vital to scientific discovery is being constrained, and publicly held resources, including the cultural and biological heritage of groups, privatized.

In recent years, industrialized countries, led by the United States, have pushed for increased global protection of intellectual property. The establishment of the World Trade Organization in 1994 and the coming into force of the international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995 have strengthened the global character of intellectual property regimes. In the years ahead the provisions of TRIPS are likely to reshape intellectual property law and economic relationships within and across countries.

Unless human-rights advocates provide an effective intellectual and organizational counterweight to economic interests, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights. The development of a global economy in which intellectual property plays a central role underscores the need for the human-rights community to claim the rights of the author, creator and inventor, whether an individual, a group, or a community, as a human right. It is equally important for human-rights advocates to protect the moral interests and rights of the community

to secure access to this knowledge. Yet another human-rights consideration is whether relevant laws identifying rights to creative works and scientific knowledge and determining the nature of the subject-matter which can be claimed as intellectual property are consistent with respect for human dignity and the realization of other human rights.

Noting that actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution addressing this topic at its August 2000 session.¹² The resolution 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 a human right, subject to limitations in the public interest. It declares that:

since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human-rights law, on the other.¹³

It reminds all governments of the primacy of human-rights obligations over economic policies and agreements. Furthermore, it makes a number of recommendations, among them that the World Trade Organization and particularly its Council on TRIPS take existing state obligations under international human-rights instruments fully into account during its ongoing review of the TRIPS Agreement. The resolution also requests governments to protect the social function of intellectual property in accordance with international human-rights obligations when shaping national and local legislation.

Development of intellectual property regimes

Efforts to protect intellectual property have a long history. Some analysts date the origins of intellectual property as far back as the fourth century B.C. to Aristotle;¹⁴ others to ninth-century China.¹⁵ Still others trace laws dealing with intellectual property to the system of royal privilege giving that operated in medieval Europe. The Venetians are credited with instituting the first properly developed patent laws in 1474, and their model spread to many other European states in the next 100 years. Modern copyright law began in England with the 1709 Statute of Anne.¹⁶ The United States Constitution, drafted in 1787, vests the Congress with power ‘to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respectful Writings and Discoveries.’¹⁷

Historically, countries have adopted laws to protect intellectual property for several reasons. According to the World Intellectual Property Organization (WIPO), an independent specialized agency within the United Nations family of organizations,¹⁸ intellectual property regimes give statutory expression to the moral and economic rights of creators in their creations and define the rights of the public to access to such creations. The second motivation WIPO identifies is to provide incentives and rewards to inventors and creators and thereby stimulate economic and social development.¹⁹ Beyond these traditional rationales, governments use intellectual property laws as a means to improve the country's competitive economic advantage. This third concern has become an increasingly dominant motive in the global economy. Often these policies favour major economic interests, particularly large multinational firms, to the detriment of protecting public access and benefits in the home country and promoting development in countries in the South.²⁰

Intellectual property has three customary legal domains: copyright (author's rights), patent, and trademark. Various legal regimes have evolved over time, each of which, to different degrees, recognizes rights of ownership in a particular form of intellectual subject-matter under specific conditions for designated periods of time.

Copyright, which is called 'author's rights' in most European languages other than English, is a branch of the law dealing with the rights of intellectual creators. The subject-matter of copyright protection covers original works in the literary, scientific, and artistic domain, whatever the mode or form of expression. Copyright grants authors and other artistic creators of works of the mind (literature, music, art) rights to authorize or prohibit, for a specific limited time, often 70 years after the author's death, use made of the works. In so doing, copyright awards limited monopolies to creators related to their creations so as to control the right to make copies of a given work. Generally copyright protects the expression of the author's ideas in tangible form rather than the ideas themselves.²¹ Copyright protection is justified as an important means of encouraging authors and artists to create, thereby promoting, enriching and disseminating a nation's cultural heritage.

A patent is a document issued by a government office, upon application by an inventor, which describes an invention and creates a legal situation in which the patented invention requires the authorization of the owner for any use, such as manufacture or sale. Simply put, a patent is a monopoly granted by the State to an inventor for a limited period, in return for the disclosure of the invention, in order to enable others to have the benefit of the invention. The effect of the grant of a patent is to give the owner the legal authority to prevent others from exploiting his/her invention.²² Generally laws require that, in order to be eligible for patent protection, an invention must meet several criteria:²³ (a) the invention must be new or novel; (b) it must be non-obvious (or involve an inventive step);²⁴ and (c) it must be useful or industrially applicable. Patenting regimes also generally exclude

certain specific kinds of inventions from the possibility of patenting.²⁵ This may be because certain types of objects are considered inappropriate for private ownership or for ethical reasons. For example, TRIPS, building on the precedent of the European Patent Convention Agreement, allows members to exclude subject-matter from patenting ‘to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment’.²⁶

A trademark is a sign or name that individualizes the goods of a given enterprise so as to identify the source and thereby distinguish the items from the goods of competitors.²⁷ Like patents, a trademark can be registered with the competent government authority, which in most countries is the same as the authority that processes patent applications.²⁸

Intellectual property law was developed on a national basis, with considerable diversity in the nature and stringency of protections. As international commerce increased during the nineteenth century, however, States became interested in developing some forms of international collaboration and harmonization. At first, countries concluded a series of bilateral agreements, but this was cumbersome and often ineffective. The next step was the formulation of two major agreements that provided international standards. These were the Paris Convention of 1883 for industrial property (patents and trademarks) and the Berne Convention of 1886 for the protection of literary and artistic works (copyright or author’s rights), both of which were subsequently revised several times. Nevertheless, many countries chose not to abide by these agreements and suffered few ill consequences. The United States only ratified the Berne Convention in 1989. Although international secretariats were established for both the Paris and the Berne conventions and then merged to form a United International Bureau for the Protection of Intellectual Property (eventually to be superseded by the World Intellectual Property Organization), the enforcement mechanisms were very weak.

In contrast, the TRIPS Agreement, which was a product of the Uruguay Round of trade talks, is binding *in toto* on all members of the World Trade Organization. It sets mandatory minimum standards for national protection of intellectual property that require States to implement a common and often expanded set of intellectual property protections. It also imposes enforcement measures, including potential trade sanctions against nations that do not comply with these standards.

Not only have intellectual property regimes become globalized, the scope of the subject-matter has also been expanded. This has occurred in several ways. First, restrictions and limitations that previously excluded specific types of subject-matter from patenting have been eliminated. The patenting of biological

entities constitutes one example. Prior to 1980, some 200 years of legal doctrine conceptualized life-forms as ‘products of nature’ rather than as a human invention and therefore unable to meet the three criteria for patents: novelty, utility and non-obviousness. These standards were overturned by a landmark US Supreme Court decision, *Diamond v. Chakrabarty*, which ruled that a genetically modified strain of bacteria capable of degrading components of crude oil was patentable as a new and useful manufacture or composition of matter.²⁹ Subsequently, the US Patent and Trademarks Office, followed by the European and Japanese patent offices, began to grant biotechnology patents on new plant varieties, non-naturally occurring non-human multicellular living organisms, including animals, and discoveries of naturally occurring human gene sequences.³⁰ Other extensions of protected subject-matter have resulted from adapting legal instruments to fit new situations and technologies, as for instance, efforts to extend copyright print protections into the digital domain. A third trajectory is the expansion of private intellectual property claims into areas that formerly were part of the public domain, such as the privatization of works of cultural heritage and the biological and ecological knowledge of traditional peoples.

Drafting of the intellectual property provisions of UDHR and ICESCR

The drafters of the UDHR and ICESCR decided to recognize the intellectual property claims of authors, creators, and inventors as a human right. Why did they decide to do so? How did they conceptualize this right? And was it just accidental that drafters of both documents link the intellectual property claims of authors and creators with the rights to participate in cultural life and to enjoy the benefits of scientific progress and its applications, or did they understand the three to be intrinsically interconnected?

According to Johannes Morsink’s account of the drafting history of Article 27 of the 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.³¹ 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 UDHR.

A review of the *travaux préparatoire* of the drafting committee for the UDHR operating under the aegis of the United Nations Commission on Human Rights indicates that the initial discussions of author’s rights introduced by the French delegation were concerned primarily with two issues. The first was the moral right of an author to control alteration and other misuses of the creation. The second was the right of authors and creators to remuneration for their labour.³² An

important factor influencing the inclusion of author's rights as a basic human right was that the American Declaration on the Rights and Duties of Man adopted earlier in the year (1948) contained a provision on intellectual property. Article 13 of the American Declaration 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.³³

Mexican and Cuban members of the UDHR drafting committee, supported by the French delegation, introduced language on author's rights so as to harmonize the Universal Declaration with the American Declaration. The Mexican representative argued that the United Nations needed the moral authority to protect all forms of work, intellectual as well as manual, so as to safeguard intellectual production on an equal basis with material property. (Provisions of the draft of the UDHR already recognized the right to work.)

The provision on intellectual property was rejected in the Commission on Human Rights but passed in the Third Committee. It survived objections that intellectual property was not properly speaking a basic human right. Others also argued that intellectual property needed no special protection beyond that afforded generally by property rights (already in Article 17 of the Universal Declaration), as well as claims by other members of the drafting committee that special protection for intellectual property entailed an élitist perspective.³⁴ Apparently the motives of those who voted for adoption of the intellectual property provision were mixed. Some voted for the provision on the 'moral rights' issue. Others sought to support efforts to internationalize copyright law, already given a boost by the Berne International Copyright Convention, adopted earlier that year.³⁵

The text of Article 15 of the ICESCR closely resembles Article 27 of the UDHR. Like the UDHR it has three components dealing with right to culture, scientific advancement, and intellectual property. However, there was nothing automatic about carrying over the three provisions of the UDHR. The drafting of the Covenant involved heated debate about whether to include the intellectual property provision.

In 1951, when the Commission was beginning to consider the inclusion of economic, social and cultural rights provisions into a single planned draft covenant on human rights, UNESCO presented the Commission with draft language of a proposed provision on cultural rights. UNESCO provided two different versions of the proposed article, one longer and more comprehensive than the other. Both the longer and shorter drafts contained language about rights to culture, scientific advancement, and intellectual property.³⁶

A year later, in May 1952, the Commission took up this provision again, this time in the context of a separate Covenant on Economic, Social and Cultural Rights. The French delegation resubmitted a provision containing intellectual-property protection. But the American delegation, still represented by Eleanor Roosevelt, argued that the issue was too complex to be dealt with in the Covenant. Her position was supported by the United Kingdom and Yugoslavia. The UNESCO representative again advocated for including an intellectual property provision in the Covenant. In the discussion, the Chilean delegation raised the issue of the disadvantage of underdeveloped countries stemming from their inability to take out patents and thereby compete in scientific research. The Australian representative argued that it was inadvisable to provide for the protection of the author without also considering the rights of the community. At this stage, the provision on author's rights was rejected.³⁷

Thus the draft Covenant submitted to the twelfth session of the Third Committee of the General Assembly by the Commission on Human Rights in the autumn of 1957 lacked the language of what was to become 15 (1) (c) recognizing the rights of authors and creators. In the initial discussions, there was strong support for the provisions related to the right to take part in cultural life and to enjoy the benefits of scientific progress, but not for author's rights. The French delegation again argued in favour of the inclusion of an intellectual property provision. The representative of UNESCO advised that intellectual property rights be restored.³⁸ Statements of support also came from a variety of delegations on the grounds of encouraging culture and science and not dropping a principle already recognized in the Universal Declaration. The USSR and the socialist bloc, reflecting their socialist interests and the dynamics of the Cold War, however, strongly objected to incorporating the provision on intellectual property. They argued that the people's right to benefit from science should not become intermixed with property rights. The representative of the Soviet Union claimed that author's rights were too complicated and varied to draw up a clause that would be valid for all States. The socialist bloc's opposition to property rights had already played a major role in the decision of the Covenant's drafting committee to drop the text of Article 17 of the UDHR recognizing the right to tangible forms of property in the Covenant.³⁹

The Uruguayan and Costa Rican delegates co-sponsored an amendment reinserting the intellectual property provision arguing for it on several grounds: the UDHR already recognized this right; by incorporating the provision the work of UNESCO in this area would be given new impetus and prestige; the right of the author and the right of the public were complementary, not opposed; and respect for the right of the author would assure the public of the authenticity of works presented to it.⁴⁰ A statement by the Israeli delegate went further. He argued that 'it would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected'.⁴¹ In the end, of

course, the arguments of those defending author's rights won the day. The final vote on the provision was 39 to 9 with 24 delegations abstaining.⁴²

This history underscores four points. The first is the relatively weak claims of intellectual property as a human right. The provision on author's rights was included in the UDHR and the Covenant only after considerable discussion and controversy. In both cases the intellectual property components of articles were supported primarily because of their instrumental character in realizing other rights, which were seen as having a stronger moral basis.

The second point is that the three provisions of Article 15 in the ICESCR were viewed by drafters as intrinsically interrelated to one another. Three major human-rights instruments – the American Declaration, the UDHR, and the Covenant – enumerate these rights as components of a single article. 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.

The third point is that human-rights considerations impose conditions on the manner in which author's rights are protected in intellectual property regimes. 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. Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other.

And fourthly, the discussion of the intellectual property provisions did not provide a conceptual foundation for interpreting this right. To put the matter another way, the drafters did not delineate the scope and limits of author's rights. Considerations at all levels of drafting focused primarily on whether an intellectual property provision should be included and not its substance and implications.

A human-rights approach to intellectual property

Very little attention has been paid to the interpretation of intellectual property as a human right. The human-rights community has neglected Article 27 of the UDHR and Article 15 of the Covenant. Indigenous-rights advocates have constituted the major exception. There is very little literature conceptualizing the scope of Article 15 of the Covenant and the concomitant obligations of States parties. The Committee on Economic, Social and Cultural Rights, the United Nations treaty monitoring body overseeing ICESCR, rarely deals with intellectual property issues. It held its first review of intellectual property in a day of general discussion devoted to this subject in November 2000. Although there is a considerable body of legal practitioners dealing with intellectual property, they

tend to focus on commercial issues and rarely address the ethical and human-rights dimensions of intellectual property regimes.

Nevertheless, it is clear that intellectual property conceptualized as a universal human right differs in fundamental ways from its treatment as an economic interest under intellectual property law. I believe there are several considerations. In contrast to the individualism of intellectual property law, a human-rights approach also recognizes that an author, artist, inventor, or creator can be a group or a community as well as an individual. A human-rights orientation acknowledges that intellectual products have an intrinsic value as an expression of human dignity and creativity. Put another way, artistic and scientific works are not first and foremost economic commodities whose value is determined by their utility and economic price tag.

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. The wording of Article 15 is noteworthy: 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'. This is far short of vesting creators, authors, and inventors with full and unrestricted monopoly property rights.

A human-rights approach also establishes a different and often more exacting standard for evaluating the appropriateness of granting intellectual property protection to a specific artistic work, invention or set of knowledge than those specified under intellectual property law. Intellectual property law generally emphasizes originality as a basis for determining eligibility for copyright protection; to be eligible for patent protection an invention or discovery must meet the criteria of novelty, utility and non-obviousness. In order for intellectual property to fulfil the conditions necessary to be recognized as a universal human right, however, intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realization of the other human rights, particularly those enumerated in the Covenant.

A human-rights approach must be particularly sensitive to the interconnections between intellectual property and the rights 'to take part in cultural life' and 'to enjoy the benefits of scientific progress and its applications'. To be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level. These considerations go well beyond a simple economic calculus often governing

intellectual property law.

A human-rights approach further establishes a requirement for the State to protect its citizens from the negative effects of intellectual property. To do so, governments need to undertake a very rigorous and disaggregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure non-discrimination in the end result. When making choices and decisions, it calls for particular sensitivity to the effect on those groups whose welfare tends to be absent from the calculus of decision-making about intellectual property: the poor, the disadvantaged, racial, ethnic and linguistic minorities, women, rural residents.

The human-rights principle of self-determination as enunciated in Article 1 (1) of the Covenant and reflected in the civil and political rights defined in the International Covenant on Civil and Political Rights emphasizes the right of all members of society to participate in a meaningful way in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the development of intellectual property regimes. To achieve in practice, it requires open and democratic political institutions that can adapt to technological change.

Proposed obligations of States parties

Minimum core obligation

The minimum core obligation refers to the obligations incumbent on all States parties regardless of their level of resources, the nature of their culture, or the character of their political system. As noted above, to date intellectual property norms have rarely been dealt with from a human-rights perspective. For that reason, this article will propose a minimalist approach to a minimum core obligation.

The language in Article 15 (1) (c) of the Covenant imposes an obligation on States parties to develop a mechanism through which to protect the moral and material interests of authors and inventors. While the Covenant requires all States parties to provide some form of intellectual property protection, it offers wide latitude regarding the manner in which this is done. To be consistent with human-rights norms, the paradigm that is adopted, as well as the subject-matter considered to be appropriate for intellectual property protection, must meet the following criteria:

- Intellectual property regimes should have an explicit human rights and ethical orientation. This requires States parties to restrict the subject-matter eligible for intellectual property protection so as to eliminate inventions that are

inconsistent with protecting human dignity. The European Union provides one potential model of an effort to reconcile patent law with principles of human dignity and the ethical norms of the society. Article 53(a) of the European Patent Convention specifically stipulates that patents should not be granted for inventions ‘the publication or exploitation of which would be contrary to *ordre public* or morality’. Several provisions of a recent Directive of the European Parliament and of the Council on the legal protection of biotechnological inventions reiterate this principle. The Directive also excludes inventions from patentability that offend against human dignity and ethical and moral principles recognized in member states.⁴³

- Intellectual property law should incorporate explicit human rights and ethical provisions as criteria for the evaluation of applications for patents and trademarks and develop an institutional mechanism capable of making these determinations. In most cases patent and trademark offices are not competent to undertake such a review and are inclined to subordinate human-rights considerations to an economic calculus. Therefore a meaningful human-rights input requires some the establishment of a body competent to review patent and trademark decisions on human-rights grounds and/or the ability to appeal decisions to a court or tribunal able to make a determination of the human-rights implications. This body should have the jurisdiction to invalidate an existing or pending patent by virtue of a ruling that it would infringe on human rights or be inconsistent with ethical principles or the cultural norms of major groups in the society.
- The nature of the intellectual property regimes adopted must reflect the country’s development requirements and be consistent with the cultural orientations of major groups. Even the TRIPS Agreement offers some flexibility to countries bound by its provisions. Article 27.3(b), for example, allows members to exclude plants and animals from patentability. There is also a provision in TRIPS (Article 27.2), based on the European Patent Convention, which enables members to ‘exclude from patentability inventions, the prevention within their commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.’⁴⁴ TRIPS does not prohibit countries from the practice of parallel importing whereby products under patent or copyright protection in one country are imported from a second country where they are available at a lower price.⁴⁵ Compulsory licensing, whereby countries restrict the monopoly rights of patent holders, is another strategy permissible under some circumstances.
- To promote realization of the right to cultural participation, States parties should develop intellectual property regimes that are consistent with the practice and revitalization of cultural traditions within their country. This

includes the right to maintain, protect and develop both past and present manifestations of cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies, and the arts and literature. Paragraph 29 of the Draft Declaration on the Rights of Indigenous Peoples recognizes that ‘Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral tradition, literatures, designs and visual and performing arts.’⁴⁶

At present, traditional and indigenous knowledge and artistic works rarely qualify for intellectual property protection and for that reason are vulnerable to expropriation and inappropriate utilization by persons outside the group. It is difficult to use copyright laws because copyright laws recognize only a single owner; traditional motifs and folklore are not the sole property of individual artists to sell or withhold freely, but are subject to layers of group rights. Additionally, copyright protections are of limited duration while indigenous people regard cultural rights as perpetual.⁴⁷ A third limitation is that under copyright law fixation or reduction to material form is a condition and much of traditional knowledge is in the form of oral resources, like folklore. The practical consequence is that ideas, themes, styles and techniques that are embodied in a work are not protectable.⁴⁸

To be eligible for patenting, knowledge or an invention must be novel and innovative; while indigenous knowledge and art have innovative elements, they are based on continuity with a tradition. Moreover, patent rights are ordinarily granted to individuals or corporations, rather than to cultures or peoples, and have time limitations further limiting the usefulness of patents for the protection of cultural heritage.⁴⁹

The development of appropriate protections therefore requires adapting existing intellectual property instruments and/or developing new types of intellectual property rights. There are several options. One alternative is to enact a *sui generis* system of intellectual property rights, possibly a hybrid between standard patent law and copyright protection.⁵⁰ A *sui generis* (of its own kind) system of protection means that countries can make their own rules provided that the protection is effective. Trademark protection could be used for handicrafts to facilitate the ability of indigenous peoples to interpret and defend the integrity of their cultures; traditional artists could be encouraged to organize community co-operatives with distinct trademarks for their products.⁵¹

- Intellectual property rights related to science should promote scientific progress and broad access to its benefits.⁵² To do so, these protections must respect the freedom indispensable for scientific research and creative activity.

Intellectual property regimes must also encourage the development of international contacts and co-operation in the scientific field. Consistent with the 1975 Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind,⁵³ all States should also take appropriate measures to extend the benefits of science and technology to all strata of the population. Another requirement is that States parties should protect their population from possible harmful effects of the misuse of scientific and technological developments.

Consistent with the requirements of Article 15 (4) and the increasingly globalized character of intellectual property regimes,

- States parties should be supportive of efforts by other countries to develop international contacts and co-operation in the scientific and cultural fields.
- Governments of industrialized countries should be sensitive to the special needs of less developed countries and be supportive of proposed measures and interpretations of the TRIPS accord that would to provide them with greater flexibility for scientific and cultural development.
- States parties should refrain from efforts to interfere with the policies of other countries.

Other obligations of States parties

- The human-rights principle of self-determination enunciated in Article 1 (1) of the Covenant and the various civil and political rights defined in the International Covenant on Civil and Political Rights emphasize the right of all members of society (or their elected representatives) to participate in a meaningful way in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the nature of intellectual property regimes and the manner in which they affect the development of culture, science, and technology.
- States parties should develop an adequate process of review to anticipate potential harmful effects resulting from the patenting of specific products and processes and to deny intellectual property protection to these items. Many technologies, such as the widespread production of toxic chemical substances and the genetic revolution, pose substantial risks as well as potential benefits. Technologies frequently bring an inequitable distribution of costs and benefits: one group benefits while other groups bear the brunt of the risks and indirect costs. Recognizing this problem, the 1975 United Nations Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind⁵⁴ recommended that ‘All States shall take appropriate measures to prevent the use of scientific and technological

developments, particularly by the State organs, to limit or interfere with the enjoyment of the human rights and fundamental freedoms of the individual as enshrined in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant international instrument'.⁵⁵

- The Declaration also specified that 'All States shall take measures to extend the benefits of science and technology to all strata of the population and to protect them, both socially and materially, from possible harmful effects of the misuse of scientific and technological developments, including their misuse to infringe upon the rights of the individual or of the group, particularly with regard to respect for privacy and the protection of the human personality and its physical and intellectual integrity'.⁵⁶

Related obligations of States parties under Article 15

Article 15 (2) mandates that the steps to be taken by States parties 'shall include those necessary for the conservation, the development and the diffusion of science and culture.' Article 15 (3) directs that States parties 'undertake to respect the freedom indispensable for scientific research and creative activity.' Academic freedom is one critical component of the freedom indispensable for scientific research and creative activity. The Committee has outlined some of the requirements of academic freedom in 'General Comment No. 13: The right to Education (Article 13 of the Covenant).' According to General Comment 13:

Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.⁵⁷

It goes on to state that the enjoyment of academic freedom also requires the autonomy of institutions of higher learning.⁵⁸

Adherence to basic human-rights norms recognized in the Universal Declaration and the International Covenant on Civil and Political Rights is another component of respecting the freedom indispensable for scientific research and creative activity. These norms include effectively protecting the freedom to express and communicate ideas, to travel within and outside of one's country, to assemble and form professional associations. In addition, the pursuit of science requires an environment that supports the freedom to pursue scientific research in accordance with ethical and professional standards without undue interference. Conversely, the freedom to undertake scientific research and creative activity implies a need for scientific responsibility and self-regulation. Scientific societies

in many developed countries have adopted codes of professional ethics in pursuit of these goals. Many of these codes, however, are primarily concerned with the ethics of individual conduct and do not place the scientific enterprise in a sufficiently broad social and ethical context.

Article 15 (4) of ICESCR mandates that States parties ‘recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.’ This requirement should be interpreted in conjunction with other obligations enumerated in ICESCR, particularly the language of Article 2. This provision directs each State party to undertake ‘steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized.’ Several instruments have tried to spell this out in somewhat greater detail. One section of the 1975 Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind states, for example, that ‘all states shall co-operate in the establishment, strengthening and development of the scientific and technological capacity of developing countries with a view to accelerating the realization of the social and economic rights of the peoples of those countries.’⁵⁹

General issues and problems

As noted above, current developments related to intellectual property are often inconsistent with a human-rights approach. Yet the absence of accepted human-rights standards for Article 15 suggests that they may more appropriately be characterized as problems than as violations. This section will outline some of these issues.

Inappropriate or inadequate protection of the rights of the author, creator or inventor

Recognition of the claims of authors, creators, and inventors to moral and material benefit from their intellectual contributions is central to conceptualizing intellectual property as a human right and also serves as the major premise of intellectual property regimes. Therefore the manner in which intellectual property regimes determine eligibility for this entitlement is very significant. Current intellectual property law is problematic in a number of ways.

In many countries, the person filing the first intellectual property claim to a particular work is considered eligible for recognition as the owner. The first filer, however, may not be the true author of a work.

Intellectual property law is constructed around an eighteenth-century paradigm of the author or creator as a single, solitary figure.⁶⁰ But this image often does not fit developments in the contemporary world. In science and technology, for example, researchers often work in large teams and collaborate across national boundaries. Scientific knowledge is additive; discoveries and inventions build on work by others conducted over a long period of time. This means that it is frequently difficult to separate out the relative contributions of various researchers. The many legal suits by members of research teams contesting ownership and control of patents reflect this dilemma.

Current intellectual property regimes, which were developed to suit the needs of an age of printing are often inadequate to deal with the challenges of new technologies. Intellectual property law generally assumes that there are practical limits on the ability to copy and distribute information or works of art. The advent of photocopying and audio- and videotaping began to change the balance between the owners' and users' rights by facilitating the reproduction and dissemination of publications outside the control of the intellectual property owner. The development of computer technology and the Internet has further complicated the protection of intellectual property. Once information is available in electronic form it can be distributed to a worldwide audience at little additional cost. The legal controversy over whether Internet sites, such as Napster, which facilitate the trading of electronic copies of music, are engaging in copyright infringement⁶¹ is but one indication of the need for rethinking approaches to intellectual property protection. Efforts to develop standards for electronic publications that will protect the interest of authors and the integrity of their works are another. On the other side of the issue, some corporate interests have sought new and stricter intellectual property protections which would reduce scientific and public access to resources. The European Union, for example has passed legislation creating a *sui generis* form of intellectual property to protect database rights and in 1996 proposed that WIPO adopt a treaty on intellectual property protection for databases. The American scientific community vigorously opposed this draft treaty and efforts to legislate similar protections in their own country arguing that it would undermine the ability of researchers and educators to access and use scientific data.⁶²

Because the current system of intellectual property is built around the idea of originality, traditional/indigenous knowledge and art forms cannot meet the criteria for copyright or patenting.

Inadequate protection of the public interest

Traditionally, intellectual property regimes sought to balance the rights of creators with the interests of the public to have access to artistic works and technology

products. The very existence of intellectual property rights was originally justified on the grounds that incentives and rewards to artists and inventors result in benefits to society. However, current developments tend to weaken these balances and to skew the system in favour of a much narrower range of interests.

Commercialization has changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism intended to encourage investment and protect the resources of investors. The privatization of the public domain reflects this transformation. Preserving the public domain is important because it serves as a resource for future creators and as raw material for the market-place of ideas.⁶³

Differential impact on developed and developing States

The TRIPS Agreement requires all signatories to develop strong intellectual property protections. The year 2000 was the deadline for developing countries to comply; the least developed countries were allowed an additional five years. It is claimed that such stronger intellectual property protection will contribute to increased investment in research and development, but there is little empirical evidence, even in industrial countries, that this is necessarily the case. While the patent system appears to have stimulated the development of new products and technologies in a few sectors, such as pharmaceuticals, in other sectors patents are often considered to have anti-competitive effects and may even slow the pace of innovation.⁶⁴

Moreover, strict intellectual property models appropriate for advanced market economies are likely to disadvantage less developed countries. Despite the large number of developing countries decided to accede to TRIPS so as to attract foreign investment and to be considered eligible for technology transfers, developing countries generally believe that it is not in their economic interests to implement stronger patent laws. This is because intellectual property protection usually increases the cost of development. In the global economy, industrial countries currently hold 97 per cent of all patents worldwide. More than 80 per cent of the patents granted in developing countries belong to residents of industrial countries, usually multinational corporations from the most advanced economies.⁶⁵ Indeed 70 per cent of global royalty and licensing fee payments are between parent and affiliate in multinational corporations.⁶⁶ This means that under strict enforcement of intellectual property law that the patents awarded and resulting payments for the use of these technologies will primarily benefit foreign multinational corporations and not stimulate local research and innovation.

Moreover, few countries in the South have the requisite infrastructure to uphold strong patent systems.⁶⁷ The lack of a strong regulatory infrastructure also puts these countries at a disadvantage in shaping their laws to benefit from the

openings that the TRIPS Agreement offers for countries to shape their patent laws to fit their needs.

Lack of democratic controls and participation

Today, however, technology is leading rather than being shaped by governmental policy. The concentration of power in transnational corporations and these corporations' ability to find a common interest with personnel in patent offices and other government departments that shape and administer intellectual property regimes weakens the democratic process. Pressures imposed by economic globalization are shifting the balance even further away from citizens' control. One study describes the situation with regard to the formulation of intellectual property law as follows:

Intellectual property laws are defined through closed, secretive international negotiations dominated by industry – and are then brought to national legislatures as *faits accomplis*, without democratic deliberation. Combined with the technical, arcane nature of intellectual property legal specialty, this has helped corporate interests to avoid public scrutiny and expand their control over developments in applications such as electronic information, biotechnology or pharmaceuticals. Industrial country governments promote corporate interests in expanded intellectual property rights in the name of maximizing national competitiveness in a global market-place.⁶⁸

The World Trade Organization's role in standard setting, particularly in light of the closed nature of its proceedings and its lack of concern for democratic procedures or human-rights principles, has been of particular concern to many non-governmental organizations, human-rights advocates, and environmental groups. The TRIPS Agreement not only sets minimum standards for national protection of intellectual property rights. It also imposes enforcement measures through an integrated dispute settlement system. A country that does not fulfil its intellectual property obligations faces the possibility of having trade sanctions applied against it. The power of the WTO has been described as 'unprecedented in the field of intellectual property protection.'⁶⁹

Lack of effective incorporation of ethical concerns

A human-rights approach conditions intellectual property regimes on their conformity with ethical and human-rights principles. Some systems of patent law also explicitly require decision makers to consider moral standards as part of the process of evaluating applications. Nevertheless, morality has generally been

given little import or ignored completely by those who have interpretive custody of the patent system. In part, this reflects the reluctance of patent officers to inject ethical considerations into their work. The patent community generally takes the position that morality has little to do with patent reviews, or, if it does, that the patent system is the wrong place to consider such issues. Patent officers are more likely to consider themselves as serving the business community with a mandate to issue as many patents as possible. Their goal is to encourage the development of science and technology and the competitive position of the country in a globalized economy.⁷⁰

The patenting of life is a prime example. The landmark 1980 United States Supreme Court decision in *Diamond v. Chakrabarty* that extended patent eligibility to life-forms, as long as they were altered or purified in some way, had significant ethical implications. Yet, the court explicitly refused to take ethical factors into account in rendering a decision that has affected patent policy around the world. Instead, the court assigned responsibility for such matters of ‘high policy’ as the purview of political bodies, particularly in this case the US Congress.⁷¹ The dilemma is that political bodies generally prefer not to deal with patent policy. Thus the US Congress has never debated the appropriateness of granting life patents, and the US Patent and Trademark Office has been free to set policy without any meaningful ethical oversight by the courts or political representatives.

Many groups within the religious, environmental and traditional-rights communities have expressed ethical concerns about the patenting of life-forms. Rather than expressing an anti-technology position, this opposition often reflects a conviction that biological patents constitute a threat to the dignity and sanctity of life.⁷² However, such groups have had little means of changing patent policies.

Negative impact on human rights enumerated in ICESCR

Detrimental effects on scientific progress and access to its benefits

Until recently most developed countries provided extensive public funding for basic scientific research so as to assure widespread availability of and access to the findings.⁷³ Large government investments in basic research and development made it possible to argue that the conduct of scientific research, including the maintenance and distribution of scientific data, was a public good. Research scientists actively pursued dissemination of research results through publication and often seemed disinclined to patent their discoveries.⁷⁴

An evolution of government policy, beginning in 1980 with the adoption of the Bayh-Dole Act in the US, has inclined many governments in advanced

economies to encourage the private commercial development of publicly funded research. This development, in turn, has stimulated pressures for new and broader forms of intellectual property rights to protect economic investments. Commercialization has also changed intellectual property from a means to provide incentives to researchers and inventors to a mechanism to encourage investment and protect the resources of investors.

Increasing intellectual property protection has imposed constraints on science's tradition of open publication. In many scientific fields, particularly the life sciences, some scientists are delaying publication and withholding data so as to secure intellectual property rights.⁷⁵ There is widespread concern in the scientific community that privatization, accompanied by legal restrictions and high prices, will restrict scientists' access to data needed for their research.⁷⁶

Rather than stimulating research and applications, intellectual property claims can have negative effects and significantly increase costs. Two well-known intellectual property lawyers argue, for example, that the proliferation of biotechnology patents will deter innovation. They characterize this situation as 'the tragedy of the anticommons'. Their thesis is that the fragmentation of property rights among too many owners will result in a situation where each can block the other. They also warn that the development of new products will require the bundling of agreements, something that scientists may find overwhelming to do. Thus the result will be that more intellectual property rights will lead to fewer useful products.⁷⁷

This thesis already has ample illustrations. In 1998, a working group convened by the US National Institutes of Health reported that a 'serious threat' to science was being posed by patent holders who were making onerous demands on those who wanted to use their tools for research.⁷⁸ Analysts are predicting that the promising new field of human embryonic stem-cell research is likely to be stymied because a very broad patent currently covers these cells, and as a result researchers will be almost entirely at the mercy of the patent holders.⁷⁹

Detrimental impacts on realizing the right to cultural participation

As noted above, current intellectual property systems are not applicable to indigenous artistic creations and knowledge. Moreover, very few countries have developed *sui generis* laws to protect indigenous artefacts and knowledge. The resulting situation is described as follows in the UNDP's *Human Development Report 1999*:

New patent laws pay scant attention to the knowledge of indigenous people, leaving it vulnerable to claim by others. These laws ignore cultural diversity in creating and sharing innovations – and diversity in views on what can and should be owned, from plant varieties

to human life. The result is a silent theft of centuries of knowledge from developing to developed countries.⁸⁰

Detrimental impacts on realizing the right to health

The right to health includes access to appropriate health care. The present intellectual property system reduces the availability of pharmaceuticals in a variety of ways. By increasing development costs, intellectual property protection may hinder research and development of new drugs and technologies appropriate to smaller markets, such as the needs of developing countries. Patented drugs are almost always far more expensive than their generic counterparts. Patent holders, which are almost always corporations, have the freedom to price their products at arbitrary, often high, levels that make many essential drugs beyond the means of poor persons lacking health insurance, which includes the majority of residents in less developed countries. For example, most of the 100,000 people suffering from multi-drug-resistant strains of tuberculosis are resident in developing countries and thus unable to afford the new standard combination treatment priced at approximately \$15,000 per course.⁸¹ Neither can the 26 million people in sub-Saharan Africa infected with HIV manage to pay for the antiretrovirals now available. Ironically and tragically, prices for medicines are often highest in the poorest countries. One study showed, for example, that the prices for many medicines are much more expensive in African countries than in Europe or the United States.⁸² Yet the pharmaceutical corporations holding patents have generally been unwilling to make drugs available at reduced rates in the poorest countries.

Supported by their own governments, multinational corporations have also sought to block governments in poor countries from exercising their legal rights to undertake parallel importing of drugs from cheaper sources of origin or to engage in compulsory licensing so that their people can have access to modern essential treatments. For example, when Thailand sought to produce or import low-cost AIDS drugs, the US Government threatened it with the imposition of trade sanctions.⁸³

Countries that have been willing to produce generics despite existing patent protection or engage in compulsory licensing have sometimes made dramatic breakthroughs in health-care policy. Brazil has become a model in the fight against AIDS because of the government's decision to produce generic AIDS medicines and distribute them to patients free of charge or at a subsidized price. Today, governmental laboratories produce five generic US antiviral AIDS medications. Brazil has countered opposition from the US pharmaceutical industry, arguing that WTO rules permit it to manufacture generic medication in a 'national emergency'.⁸⁴ Similarly, the Indian Government has produced the AIDS

treatment AZT at a cost of \$48 a month, as compared with \$239 in the United States, and Lariam, a treatment for malaria, at a cost of \$4, as compared with \$37 in the United States.⁸⁵

Detrimental impacts on realizing the right to food

Intellectual property regimes have threatened food security in several ways. The extension of very broad patents for specific plant varieties has meant that a few agricultural corporations have virtual monopolies on the genome of important global crops. Monsanto, for example, has been awarded a patent in Europe for all transgenic soybeans.⁸⁶

The patenting regime has also enabled a small group of companies to gain control over ever-growing shares of the global market. In 1998, the top ten corporations controlled 32 per cent of the commercial seed industry and 85 per cent of the pesticide industry.⁸⁷

Some of the patents granted for plants in the United States and Europe have been expropriated from other countries. This raises the issue of biopiracy whereby plants long cultivated in other cultures are patented outside their countries of origin without any benefits going back to the groups that developed them. When this takes place it generally precludes further local development and may increase the costs of production. In May 1998, Bolivia successfully defeated a US patent application from Colorado State University for quinoa, a valuable food grain native to the Andes.⁸⁸ Other traditional developers have been less successful in thwarting the patenting of plant varieties.

The patenting of life, as called for under Article 27.3b of TRIPS, is also problematic for the conservation of indigenous methods of production and biological resources. Traditional cultures often have highly developed ecological knowledge and balanced relationships with their environments. This knowledge, combined with continued access to, and the availability of, natural resources, is essential for the survival of many indigenous groups. Provisions of TRIPS conflict with the protection offered to indigenous and traditional innovation, knowledge, and practices in the 1992 Convention on Biological Diversity (Articles 8j, 10c, 17.2, and 18.4).⁸⁹ The Convention on Biological Diversity commits the signatory nations: (a) to respect, preserve, and maintain traditional knowledge; (b) to promote wide application of traditional knowledge; and (c) to encourage equitable sharing of benefits from traditional knowledge.

Critics claim that plant patents also contribute to a loss of biodiversity. Once commercially viable products are patented, companies undertake massive marketing campaigns, often with the assistance of governments, promoting their products through special loans and grants tied to designated seed and chemical packages. As a result, vast monocultures are planted with genetically identical

seed. This then leads to the disappearance of local plant varieties. Transgenic crops are also vulnerable to diseases and blights. If thousands of hectares are planted with identical seed, a whole crop can be lost.⁹⁰

Traditionally, farmers have had the right to save or replant seed from a harvest or to sell that seed to other persons. Corporations like Monsanto selling patented high-technology seeds, however, require farmers to relinquish these rights and use the seeds only for one season. Under the licence contract between the farmer and the company the farmer becomes the equivalent of a renter of plant germplasm. This arrangement has been described as a new kind of ‘biosefdom’ in which the new feudal lords, the large agrochemical firms, gain their power and wealth by owning the information contained within the new high-tech seed varieties rather than the land.⁹¹ The agreement all farmers must sign to purchase these seeds grants Monsanto, or its authorized agent, the right to inspect and test the grower's fields planted with these seeds and to monitor the fields for an additional three years for compliance with the terms of the agreement. This obviously increases the cost of food production.

‘Terminator’ technologies constitute a further extension of these threats to farmers’ rights. This process for genetic seed sterilizing has been called the ‘neutron bomb of agriculture’ because genetically altered terminator seed will not germinate if replanted a second time. Like other genetically altered seeds, there is always the possibility that those treated with the terminator technology can cross-pollinate other plants. The US Department of Agriculture has recently announced its intentions to commercialize this technology.⁹²

Violations

As noted above, the absence of international human-rights standards in the intellectual property field makes it difficult to utilize violations language. Nevertheless, the following clearly constitute violations.

Failure to develop intellectual property regimes that reflect ethical and human-rights considerations

Even when legally mandated to do so under existing law, patent offices rarely consider the ethical dimensions of patenting. On those occasions that patent offices consider ethical concerns, they tend to construe moral criteria so narrowly that few, if any, tests are likely to exclude patent applications. The European Patent Office, for example, interprets Article 53 (a) of the European Patent Convention, which prohibits the grant of patents that would be contrary to ‘*ordre public* or morality’, as only excluding patents whose exploitation would be

‘abhorrent to the overwhelming majority of the public’ or a contravention of the ‘totality of accepted norms’.⁹³ The technical Board of Appeal in a European case relating to plant genetic systems rejected the probative value of public opinion surveys and opinion polls that objected to patenting. The grounds were that these did not ‘necessarily reflect order public concerns or moral norms’ and that the results of such surveys and polls ‘can fluctuate in an unforeseeable manner’.⁹⁴

Uncompensated expropriation of traditional knowledge

It has been estimated that in 1995 the market value of pharmaceutical derivatives from indigenous peoples’ traditional knowledge amounted to \$43 billion.⁹⁵ In a few cases, such as the 1991 agreement between the Merck corporation and the Costa Rican Association Instituto Nacional de Biodiversidad, a non-profit organization, corporate developers have shared the benefits of commercial exploitation of traditional knowledge. In most, however, individual prospectors and corporate developers have expropriated the knowledge through filing patents in their own name without any form of remuneration. Examples of this ‘biopiracy’ include the following:

Ayahuasca: a small American company, the International Plant Medicine Corporation took out a US plant patent on a variety of ayahuasca native to the Amazonian rainforest. In 1999, an American environmental organization filed a legal challenge on behalf of the Co-ordinating Body of Indigenous Organizations of the Amazon Basin (COICA) and the Coalition for Amazonian Peoples and their Environment (Amazon Coalition). These groups objected to the patent because it appropriated a plant that is considered sacred to many indigenous peoples from this region. The patent was eventually voided on the ground that the claimed plant variety was not distinctive or novel, but the US Patent and Trademark Office did not acknowledge the argument that the plant’s religious value warranted an exception from patenting.⁹⁶

Neem: Multinationals have filed dozens of patent claims on neem, a widely known and long-cultivated tree with medicinal and agricultural uses in Asia, especially in India. Monsanto, for example, has taken out patents on neem wax and oil and claimed broad fungicidal and insecticidal uses.⁹⁷

Rosy periwinkle: Substances derived from Madagascar’s rosy periwinkle flower have yielded the drugs vincristine and vinblastine, used respectively against Hodgkin’s disease and juvenile leukemia, and have earned the patent holder, Eli Lilly & Company, some \$160 million annually.⁹⁸

Kava: Drug companies are racing to patent the many beneficial uses of this ceremonial beverage, which is grown in many of the Pacific island countries and Indonesia. The French cosmetic corporation L’Oreal, for example, has patented the use of kava to reduce hair loss.⁹⁹

Mamala: the prostratin compound isolated from this Pacific medicinal plant belongs to the US Department of Health and Human Service, the US Army, and Brigham Young University.

Interference in the intellectual property policies of other countries

To further its foreign policy interests of promoting strict intellectual property regimes, the United States Government has exercised considerable diplomatic pressure and threatened trade sanctions on a number of occasions. In 1997, for example, the United States Government unilaterally imposed import duties on \$260 million of Argentine exports in retaliation for Argentina's refusal to revise its patent legislation to conform with US standards. In April 1997, the US State Department advised the Thai Government that draft legislation allowing Thai healers to register traditional medicines so as to retain them within the public domain would constitute a possible violation of TRIPS. The United States has also attempted to influence the development of patent laws and policies to suit its interests in other countries, including Ecuador, India, Pakistan, South Africa, and Brazil.¹⁰⁰

As more human-rights advocates become involved with intellectual property issues, it is likely that many of the problems noted above will also be considered to be violations.

Recommendations

The recent Sub-Commission resolution on 'Intellectual Property and Human Rights' makes a number of specific recommendations that are important to implement which pertain to governments and United Nations bodies.¹⁰¹ These include the following:

- The resolution requests governments to protect the social functions of intellectual property in accordance with international human-rights obligations and principles. One way to do so would be to have a mechanism for a human-rights review/appeal of decisions by patent and copyright procedures.
- The resolution also requests intergovernmental organizations to integrate international human-rights obligations and principles into their policies, practices, and operations.
- It further requests the WTO in general and the Council on TRIPS more specifically to take fully into account existing state obligations under international human-rights instruments during its ongoing review of the TRIPS agreement. For this to happen in a meaningful way, however, it would first be necessary to gain recognition for the principle that human rights are

fundamental and prior to free trade itself. Two experts have recently proposed that the interpretation of the primacy of human rights over trade liberalization is consistent with the trade regime on its own terms.¹⁰²

- The resolution calls for a number of studies and reports. More specifically, it asks that the Special Rapporteurs on globalization and its impact on the full enjoyment of human rights to include consideration of the human rights impact of the implementation of the TRIPS Agreement in their next report. It requests that the United Nations High Commissioner for Human Rights to undertake an analysis of the human-rights impacts of the TRIPS Agreement. The resolution also identifies a series of United Nations Agencies, including the World Intellectual Property Organization, the World Health Organization, the United Nations Development Programme, and the United Nations Environment Programme, and points to the need for them to continue and deepen their analysis of the impacts of the TRIPS Agreement, including a consideration of its human-rights implications. And it asks the Secretary-General to provide a report on this issue at its next session.
- Significantly, the Sub-Commission encourages the Committee on Economic, Social and Cultural Rights to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject.

Notes

1. This text is a revised version of a paper originally prepared by the author at the request of the Committee on Economic, Social and Cultural Rights as a background resource for its 27 November 2000 Day of General Discussion on ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15.1 (c) of the Covenant. E/C.12/2000/12.
2. James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, p. 13, (Cambridge, Mass./London, Harvard University Press, 1996).
3. Seth Shulman, *Owning the Future* p. 4, Boston, Houghton Mifflin, 1999.
4. This is the term used by Shulman in *ibid*.
5. Article 13, *American Declaration of the Rights and Duties of Man*, approved by the ninth International Conference of American States, Bogotá, Colombia, 30 March to 2 May, 18, 19. Resolution XXX, Pan American Union, Final Act of the Conference, 38–45, Washington, D.C., 1948.
6. Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), 3 UN GAOR (Resolutions, Part 1) at 71, UN Doc. A/810 (1948).
7. International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNT.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 UN GAOR Supp. (No.16) at 49, UN Doc.A/6316 (1966).

8. Ibid., Article 15 (1) (c).
9. Ibid., Article 15 (1) (a).
10. Ibid., Article 15 (1) (b).
11. Ibid., Article 15 (3).
12. 'Intellectual Property Rights and Human Rights,' Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, Agenda item 4, E/CN.4/Sub.2/2000/7, adopted 17 August 2000.
13. Ibid.
14. Geoff Tansey, *Trade, Intellectual Property, Food and Biodiversity: A Discussion Paper*, p. 3, London, Quaker Peace and Service, 1999.
15. Robert L. Ostergard Jr, 'Intellectual Property: A Universal Human Right?' *Human Rights Quarterly*, No. 21, 1999, p. 157.
16. Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', *Intellectual Property and Human Rights*, Geneva, World Intellectual Property Organization 1999, p. 15 (WIPO Publication No. 762 (E)).
17. Art. 1, para. 8, Section 8, *The Constitution of the United States*, adopted 1787, Washington D.C., US Government Printing Office, 1985.
18. The World Intellectual Property Organization (WIPO) is responsible for the promotion of intellectual property worldwide. It acts as the secretariat for the negotiation of treaties that establish new norms in the field of intellectual property, and administers several treaties. It also conducts extensive programmes for training and technical assistance for developing countries.
19. World Intellectual Property Organization, *Intellectual Property Reading Material*, p. 5, Geneva, World Intellectual Property Organization, 1995 (WIPO Publication No. 476 (E)).
20. Shulman, op. cit., p.19.
21. World Intellectual Property Organization, op. cit., pp. 4–8.
22. Ibid., p. 129.
23. Ibid., pp. 130–3.
24. In technical terms, the question is whether or not the invention 'would have been obvious to a person having ordinary skill in the art'.
25. World Intellectual Property Organization, op. cit., p. 9.
26. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994), Section 5: Patents, Article 27 (2), published in a collection of documents compiled by the World Intellectual Property Organization, Geneva, World Intellectual Property Organization, 1997 (WIPO Publication No. 223 (E)).
27. World Intellectual Property Organization, op. cit., pp. 191–2.
28. Ibid., p. 202.
29. *Diamond v Chakrabarty* 477 US 303 (1980).
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43. Paras. 37–40, ‘Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions,’ *Official Journal of the European Communities*, 30.7.98, L 213/16.
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**Practical aspects of the exercise of
the *droit de suite*,
including in the digital environment,
and its effects on developments
in the international art market and on the
improvement of the protection of visual artists¹**

Gerhard Pfennig*

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* Director General of the Society of Authors of Fine and Graphic Arts – BILDKUNST, Germany.

Droit de suite management

Protected works under ‘droit de suite’ legislation

It should be noted that *droit de suite* concerns not only the originals of paintings and sculptures, but also works created through reproduction techniques, both classical – letterpress and intaglio printing – and modern printing techniques – silk-screen, offset etc. Over the last fifteen years, photographic works, at least those having an artistic character, have been included in the definition of works of art in a literal sense as subjects of the art market. Even original prints of press photographs have been put on the resale art market, in particular through auctions, because picture archives containing analogue black-and-white photograph prints are being increasingly transformed into digital data banks; as a result, the original positives are being put into circulation within the art trade as artistic merchandise, if the artist raises no contractual return claims. For instance, in autumn 2000, German newspaper archives and those of the *New York Times* began marketing activities to sell their stocks.

Apart from the above-mentioned ‘classical’ original works of art and artistic photographs, there are objects considered to be borderline cases between art and handicrafts, which are subjects of *droit de suite* in many countries. The distinction should be made here – the same with regard to original works of graphic art – whether these objects have been created as works of art or whether they consist of commercial editions from commercial enterprises etc. lacking the features of an original work.

Having considered the above aspects, the proposals for the European Union (EU) Directive on the harmonization of *droit de suite*,² which was still at the decision stage, provides for the following definition:

Article 2 Works of art to which the artist’s resale right relates

(1) For the purposes of this Directive, ‘original work of art’ means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.

Persons entitled to ‘droit de suite’ claims

In accordance with Article 14^{ter} of the Berne Convention as revised in 1971 and the existing national legislation, *droit de suite* is part of the author’s rights comprised in copyright and therefore there is no doubt that not only the entitled creators but also eventually their heirs, can claim *droit de suite* in the course of the duration of the term of protection.

The art market is characterized by a marked imbalance between artists and galleries, especially with regard to first sales: there exist a great number of artists compared with the limited number of art galleries; therefore, any young artist seeking to interest an art dealer in his or her work and placing it on the market is faced with a challenge. Hence, it is usually the art dealer who dictates the business conditions and, at least at the beginning of an artist's career, sets the price and sale conditions and, in general, holds a stronger bargaining position.

In view of this, national legislations recognizing *droit de suite*, as well as Article I of the European Union Directive, define *droit de suite* explicitly as an 'inalienable' right that the author cannot waive in advance. Only such a legal construction can guarantee that the artist is able to exercise this right at a later date; however, it does not imply that the artist is obliged to exercise his right: after any resale he can still refrain from making a claim on the basis of resale right with respect to a specific gallery or sale.

Article 14^{ter} (2) of the Berne Convention created *droit de suite* not as minimum right, but as a right whose application in another country can be linked to the condition of reciprocity. This regulation is justified because up to now not all contracting States exercise *droit de suite*; Article 14^{ter} (2) of the Berne Convention is an incentive for States that have not yet recognized *droit de suite* to introduce it to obtain the benefits of its application for their artists in countries already applying *droit de suite*.

Persons obliged to pay 'droit de suite' remuneration

Works of art are usually resold only if the vendor believes there will be a sales profit; furthermore, the development of the art market over the years suggests that works of art that are attractive to the market usually gain in value. This is why all known and working systems of *droit de suite* management – and the EU Directive – intend that each resale case be covered by *droit de suite*. The royalty rates settled for resales take account of this by defining the artist's share as an average rate; in this way it is also borne in mind that in some exceptional cases works are resold at a lower price than at the first sale. However, the resale price to which the *droit de suite* applies is taken as a net price: additional expenses like restoration, framing, etc. have to be deducted.

In order to avoid seeking information and remuneration rights which normally cannot be enforced, and which would lead to a detective-like inquiry practice and infringement of personal privacy a resale between private persons without the intervention of a market professional should remain free of *droit de suite* obligations.

Existing legislation and the EU Directive define all acts of resale as subject to *droit de suite*, if they involve vendors, buyers or intermediaries represented by art

market professionals, such as salesrooms, art galleries and art dealers in general (Article 1 (2)). But *droit de suite* regulations should offer a choice to the entitled parties enabling them to enforce their remuneration right through information right claims (see next section.) both against the original owner/seller and the commissioned art dealer, auctioneer or agent. Nothing but the possibility to call upon the selling art dealer – whether Internet auctioneer, ‘classical’ auctioneer or commercial agent – can really ensure that the claim is respected, especially in international art dealings which, supported by the Internet, are negotiated between persons in different countries or continents. Expanding integrated art trade is not helpful to the artist. If he succeeds at all in enforcing his claim and probably only with the help of a collecting society (see below), it is only by holding the art dealer liable.

Right to information

In order to effectively enforce a *droit the suite* claim, the entitled party – the artist or his heirs – must be aware of the art market. Therefore, it is clear that the sole and proven prerequisite to claim *droit de suite* is the entitled party's right to information in respect of any art dealer, agent or auctioneer involved in the sale. This claim, which can be enforced legally, compels the respective art dealer involved in the resale to name at least the author, work title and resale price that constitutes the information necessary to determine and calculate the claim.

Generally speaking, the person entitled to claim *droit de suite* remuneration is also entitled to claim information about resales. For practical reasons it may be worth considering to what extent only collecting societies should be entitled to raise information claims, similar to the German copyright law – Article 26(5), stipulating that ‘the claims . . . may only be asserted through a collecting society’. Only the collecting society disposes of sufficient personal resources with which to watch the market, to pursue the development of new art business firms and to add them to its information lists, to visit art sales and fairs, to evaluate relevant publications and media and therefore succeeds in gaining an overall perspective of the market, enabling it to properly enforce the information claim system. Experience shows that an information claim framed in favour of a collecting society in this way will push the art dealer and the society to conclude special agreements at the national level in order to regulate jointly how to provide the necessary information in a way which will reduce the bureaucratic obstacles as much as possible.

Compared with the possibility of raising the information claim individually, as described above, a practice-orientated administration, including a collecting society, is possible and it will not impede the art trade more than is necessary and desirable. This applies especially to cases where *droit de suite* claims are to be

enforced beyond national borders: only the collecting societies' contractual network of mutual representation, as it exists within CISAC, enables an artist of one state, on one continent, to claim information on the sales of his works in another state, on another continent. If he does not seek the help of a collecting society, he will not be able to control and make his claims outside his native country. It is possible to make an information claim in this manner at comparatively low cost, even if only through the means of simple data processing; for example in Germany, administrative costs for making *droit de suite* claims in this way – asserting information right and collecting remuneration by the collecting society – amount to about 10 per cent of the collected amounts.

But the above manner does not require the collecting society to intervene in every single case where *droit de suite* claims are raised by individuals. It is possible that the artist or his heir, who has personally collected the information about resales, for example by consulting himself the auction houses' sales lists, does not need the help of the collecting society to obtain the necessary information. In such cases he should be free to make his claim for remuneration without the involvement of a collecting society.

Royalty rates

The current provisions in national laws concerning *droit de suite* provide for royalty rates in nearly all countries where this right is recognized. The rates vary between 5 per cent – in Germany or Denmark – and 3 per cent in France, where for the time being only auctions are covered by *droit de suite*. Only in Italy the rates vary from 1 to 10 per cent depending on the sales prices, but, to our knowledge, these rates have never been applied in practice. Nevertheless, it should be emphasized that in every country with an efficient *droit de suite* system the same royalty rate is applied for all kinds of sales. At least at a national level a clear and predictable practice is being formed which greatly facilitates the collective management and, to some extent, even creates the precondition for concluding contracts with groups of vendors; through such contracts *droit de suite* remuneration is collected in the form of a lump-sum payment.

In contrast, the EU Directive provides for graded royalty rates for *droit de suite*; Article 4 specifies as follows (as decided by the European Parliament on 13 December 2000):

The royalty provided for in Article 1 shall be set at the following rates:

- (a) 4% for the portion of the sale price to €50,000;
- (b) 3% for the portion of the sale price from €50,000.01 to €200,000;
- (c) 1% for the portion of the sale price exceeding €200,000.01 to €350,000;
- (d) 0.5% for the portion of the sale price from €350,000.01 to €500,000;

(e) 0.25% for the portion of the sale price exceeding €500,000.
However, the total amount of the royalty may not exceed €12,000.

In our view, the EU Directive is unsatisfactory in many respects, but it reflects the Union Members States' differing legislations and takes into consideration the fact that within the harmonization process several member States insisted that the implementation of *droit de suite* with high royalty rates would lead to the transfer of the art trade to third countries which do not recognize this right and, in particular, to the United States. In the process of elaboration of the proposals for a Draft Directive the EU authorities feared the displacement of the art trade from Europe to the United States. This fear may have been justified at a time when *droit de suite* had not yet been recognized in many countries of the world. It should be noted, however, that royalty rates of 3 per cent would not prompt any vendor to quit a market place. Experience shows that sellers trade in those markets that promise the highest sale prices; these markets vary, depending on the origin and period of the art work in question. Nevertheless, certain art-trade lobbyists maintain the argument that the recognition of *droit de suite* in a State leads to the transfer of the art market to other States. This point of view fails to take into account that in many cases art sales can only be negotiated in certain places and while a transfer might, on the one hand, save *droit de suite* remuneration, on the other hand, it might not interest the buyers sufficiently, thus leading to a decline in prices.

To avoid sale-price manipulations and bureaucratic obstacles, the EU Directives example of the different rates should on no account be taken as a model. Only one fixed rate for all sales is practicable and it enables debtors, entitled parties, art dealers and collecting societies handling the management of *droit de suite* remuneration to develop the most simple and practical administrative procedures.

Claiming 'droit de suite' remuneration

As mentioned above, mandating a collecting society to claim *droit de suite* remuneration on behalf of the artist is the best way to administer this right if the artist or other entitled party does not have his own information on a sale. Should he possess this information, there is no obstacle to making an individual claim in his own country. The artist simply has to raise his claim against the vendor, whether auction house or an individual even, if need be, by means of legal action.

Social and cultural aspects of ‘droit de suite’

Those artists who are members of authors’ societies, at least in States having civil law legal traditions and traditions developed thereof, have the possibility of establishing support organizations in the framework of their societies and within the national legal framework which provide a certain percentage of *droit de suite* remuneration to support young artistic talents. Social benefit organizations can as well support needy elderly or disabled artists. Thus, the collective administration of *droit de suite* offers the possibility to establish a support system encouraging artistic creativity. However, care should be taken that these deductions do not affect the whole management of *droit de suite* and do not totally avoid payment of the remuneration emerging from the increased value of an artist’s work.

Summary

- All original works of fine art in its widest sense, including works of graphic art and photographs of a creative nature, which are resold on the art market in the world, must be subject to *droit de suite* legislation.
- The persons entitled to *droit de suite* remuneration are the artists and their heirs. In order to prevent the art dealers from forcing the artists to give up this right on the occasion of the first sale it must be recognized as inalienable and non-waivable. The *droit de suite* claim must be addressed not only to the vendors themselves, but also to any art market professional involved in resale either on the vendor’s or on the buyer’s side.
- This right should not apply to sales between private persons.
- *Droit de suite* legal provisions should provide for uniform royalty rates; rate splitting for certain portions of sale prices only complicates its management.
- The precondition to making *droit de suite* claims is a right to information granted to the right owners and enforceable against vendors and traders; it is more appropriate that this right be exercised by a collecting society.
- The remuneration claim can be enforced independently of the information claim and be asserted either individually or by a collecting society; practice will prove that this claim is usually made by a collecting society jointly with the information claim which makes the management of this right less costly and minimizes the interference in the market proceedings.
- Author’s societies mandated to exercise *droit de suite* are in a position to maintain social institutions or institutions which support young artistic talents with a view to encouraging the growth of the artistic potential of the nation, as well as persons excluded from the art market who benefit, at least partially, if this lies in the national legislature’s intentions.

- To encourage all States to introduce this right, it should be bound to the principal of material reciprocity

The impact of *droit de suite* on the art market

Any consideration of the effect of *droit de suite* on the art market must take into account that art markets are influenced by different factors having proportionally varied effects from country to country. On the one hand, a country's art market depends on the quantity and creative productivity of its artists and consequently on its cultural activity and its geographical size and, on the other hand, on its domestic economic situation. Economic growth and the optimism of the market forces, as well as tax legislation and a policy of encouragement of the arts fundamentally influence any art market's development.

These factors have been printed out in several international studies, and recently by Market Tracking International Ltd on behalf of the The European Art Market 2000,³ the European Fine Art Foundation. Dealing in priority with the consequences of two different kinds of import VAT and *droit de suite* regulations in the EU member States, this study suggests that import VAT has a greater effect on the art market than *droit de suite*. Art dealers and experts confirm that even in the current EU situation art sales are shifting to the United Kingdom not only because it does not recognize *droit de suite*, but also because a different category of buyers, interested for example in German Expressionism, can be found there more than in Germany itself; further motives for export can be the tax factors and an interest in conducting sales anonymously. Moreover, regarding the structure of terms and conditions, particularly in the sales of works important in the public eye, international auction houses are definitely prepared not only to adapt their conditions to the vendor's wishes, but possibly even to give sales guarantees. It is evident that not only the non-recognition of *droit de suite* leads to moving important sales to certain countries.

Nevertheless, the study suggests what is also obvious: *droit de suite* represents an additional financial burden for the art dealers, at least as long as no equivalent legislation exists in competing international markets. It should be borne in mind that *droit de suite* will always affect only a certain part of the market, namely, the part of the resale market of works of fine art protected by copyright and which, furthermore, have been created by artists whose home countries apply *droit de suite* and who are prepared to have this right administered by a collecting society.

All in all, the respective EU publications substantiating the Directive on the harmonization of *droit de suite*, as well as studies carried out by the IfO institute in Germany and by the above- mentioned British institute conclude that the main problem with regard to *droit de suite* has to be seen in its non-recognition

worldwide or, at least, not having been harmonized for a special group of markets. The fact that the important American market is not yet governed by *droit de suite* gives particular cause for concern in that, with harmonization in Europe and not only Western Europe but also the Middle and East Europe where *droit de suite* is recognized by the laws, the worldwide art trade might become unbalanced.

Experience shows that applying property tax on works of art usually results in their being shown less often; works of art intended for the sale room are moved to other countries to avoid national tax authorities becoming aware of any fiscal fraud on the part of the owners. Besides, the success or failure for market – at least in view of works from other States being put on the market – is influenced by the application of import VAT on works of art, which might impede their importation.

Legal regulations to support artists may have positive and negative impact on the production of works of art and subsequently on the art market. In Germany, for example, the Federal Government sponsors the exhibition of young artists in special gallery space during the biggest German fair of contemporary art, ‘The Art Cologne’ – a measure intended, first of all, to support the artists but also the development of the galleries; public funds for the participation of galleries in foreign art fairs have a similar effect. Social insurance contributions for artists paid by the art trade, for example, in Germany and France, also affect the market, as well as *droit de suite* which influences the resale of works of art, that is, the secondary art market.

The foregoing illustrates that *droit de suite* is one of several factors influencing the art market; the debate held with a view to European harmonization clarified that, on one hand, the non-recognition of *droit de suite* in important art trading countries can, to a limited extent, be decisive for shifts in the art market; undoubtedly it has had psychological effects that have been used by British art dealers to push their government to argue against *droit de suite* harmonization and thereby a burden on the British market even if comparatively light.

With their arguments against the introduction of *droit de suite*, the art trade tried to disguise the fact that this right is imposed not on the art trade itself, but on the persons reselling works of art and finally profiting from the increases in value; art dealers are only included in the *droit de suite* system in so far as in some cases, they transmit the remuneration from the private vendor to the artist entitled to *droit de suite*.

Therefore a worldwide harmonization will help, above all, to spread more evenly the markets’ economic burdens and to reduce the psychological obstacle for recognition of this right. National art markets should not fear negative economic impact: after the introduction of *droit de suite* the additional burden on an art market, unknown previously, will be relatively light, because this right affects only that part of the market which deals with the resale of those works of art which still are being protected under copyright laws. Neither the galleries’ first-

sale market nor the resale market for the public domain works of art will be affected.

Importance of *droit de suite* for the improvement of the situation of artists

The economic situation of the plastic artists and creative photographers is influenced by many different factors somewhat similar to those that affect the art market's development. We should mention the following:

- A living art market in the economic environment providing enough free capital for art purchases.
- Public and private systems of cultural support, tax relief for sponsoring and patronage;
- Public commissions for artists in the context of new buildings, environmental designs or science and public education.
- The artists' social situation, their inclusion in systems of health and social-security insurance.
- Development of copyright legislation and the artists' participation in any use of their works by way of reproduction, TV transmissions, private reprography and exhibitions.
- Support for a good professional start for young artists in the form of public funds and special aid for galleries.

Combined with these factors determining the economic situation of artists, *droit de suite* is one element among others in the context of national legislations. It goes without saying that effective support of artists through *droit de suite* is possible if there exists both a national art market for first-time sales and a secondary market allowing the circulation of works through auction houses and special art galleries; the international application of this right further requires national artists to be also economically successful abroad to expect a reflux of *droit de suite* remuneration.

In economically significant dimensions *droit de suite* benefits mainly those artists who at least in a certain creative phase were economically successful; with regard to a large number of other less successful artists, it brings a share in resales and offers at least a certain and, apparently in later years, a growing share in resales of their works in the art market. Therefore, there can be no doubt that this right rewards the success of works in the art market enabling their authors to partake with the buyers in the economic benefit they derive from the increases in value of art works. However, *droit de suite* is not an instrument that would considerably improve the economic situation of a country's artistic population.

This result is not unusual, albeit a similar picture of a small top team and a comparably broad basis exists in the field of music: it is sufficient to compare the list of the musical works registered with the societies of composers with the titles

and performers (composers, librettists, music editors and performers) being represented in ‘hit parades’.

Additionally, at least in Central European states with a tradition of collective representation not only in respect of the single author’s individual share, but also acknowledging the copyright’s cultural and social role, *droit de suite* definitely can be one of the different instruments for social or cultural support of artists. The European authors’ societies maintain social and cultural support organizations also with *droit de suite* remuneration. These organizations are mainly intended to help young talented artists entering the market for the first time and to promote exceptional talent. In this way *droit de suite* not only has a positive impact on the next generation of artists, but also on the art trade, which is enabled to discover, promote, support and include new talents in the art market.

To sum up it can be said that *droit de suite*, as one of various copyright elements, serves to help plastic artists individually, like their colleagues in the field of literature and music, to benefit from the further use of their works, namely the art market’s use increasing their value. Together with further copyright elements and other means of support of the artists, it represents an important factor in strengthening the artists’ legal security and economic autonomy.

Notes

1. This study was prepared at the request of the UNESCO Secretariat.
2. Amended Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art, title No. 96/0085 (COD).
3. Marlies Hummel, *The Droit de Suite*, IfO Institute, August 1994; *The European Art Market 2000*, TEFAF, The European Fine Art Foundation, January 2000.

UNESCO ACTIVITIES

Report of the Intergovernmental Copyright Committee (IGC)

Introduction

The Intergovernmental Copyright Committee (hereinafter referred to as ‘the Committee’), set up by Article 11 of the Universal Copyright Convention as revised at Paris on 24 July 1971, held its twelfth ordinary session at UNESCO Headquarters, Paris, from 18 to 22 June 2001, with Mr Mayer Gabay (Israel) in the chair.

Twelve member States of the Committee were represented, namely: Algeria, Argentina, Austria, Cameroon, Chile, China (People’s Republic of), Cuba, Greece, Israel, Japan, Portugal and the United States.

The following seventeen States parties to the Universal Copyright Convention but not members of the Committee sent observers: Bolivia, Colombia, Costa Rica, Croatia, the Czech Republic, Ecuador, El Salvador, Haiti, the Holy See, Hungary, Lebanon, Mexico, Panama, Poland, Spain, Switzerland and Ukraine.

The following six States not parties to the Universal Copyright Convention were also represented: Honduras, Jordan, Kuwait, Thailand, the United Arab Emirates and the United Republic of Tanzania, together with the Palestinian Authority.

The representatives of the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and of the Director-General of the World Intellectual Property Organization (WIPO) attended the meetings of the Committee in an advisory capacity. The European Commission was represented by an observer.

The representatives of the following seven international non-governmental organizations also attended the meetings of the Committee as observers: the International Literary and Artistic Association (ALAI), the Association Valentin Haüy pour le Bien des Aveugles (AVH), the International Association of Art (IAA), the Conseil National Français des Arts Plastiques, the International Federation of Film Producers’ Associations (FIAPF), the International Federation

of Musicians (FIM) and the International Federation of the Phonographic Industry (IFPI).

Opening of the session

The session of the Committee was opened by Mr Gabay, Chairperson of the Committee.

The representative of the Director-General, Mr Mounir Bouchenaki, Assistant Director-General for Culture, welcomed all the participants and wished the meeting every success in its work. With regard to UNESCO's activities in the field of copyright, he emphasized the importance of teaching the subject at university level for the purpose of assisting the developing countries in training national specialists. UNESCO, he continued, was engaged in a new phase of drawing up an instrument concerned with the safeguarding and international protection of traditional culture and folklore as the intangible heritage of humanity. He invited the Committee to reach conclusions on the various matters on the agenda and stressed the importance UNESCO attached to the outcome of the twelfth session of the Intergovernmental Committee.

Adoption of the agenda

On the proposal of the Chairperson of the Committee, it was decided to consider Item 8 after Item 10 of the agenda. After making that change, the Committee unanimously adopted the agenda contained in document IGC(1971)/XII/1 (prov.).

Information on the state of accession to the international conventions administered by UNESCO alone or jointly with WIPO and ILO (IGC(1971)/XII/2)

Universal Copyright Convention – 1952 text

The Secretariat informed the Committee that since its eleventh ordinary session (23–27 June 1997) the number of Member States parties to the Convention had remained unchanged. It recalled that the accession of Azerbaijan and the Republic of Moldova mentioned in document IGC(1971)/XII/2 had in fact been announced to the Committee at its eleventh session. The number of Member States parties to

the Convention, as at 19 March 2001, consequently remained unchanged at ninety-eight.

Universal Copyright Convention – text revised in 1971

A single State, Liechtenstein, had notified the Director-General of UNESCO, on 11 August 1999, of its accession to the text of the Convention of 24 July 1971.

It was also to be noted that the Committee had already been informed at its eleventh session of the accession of the former Yugoslav Republic of Macedonia. That new accession brought the number of States parties to the 1971 text to sixty-two.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)

The Secretariat informed the Committee that, since its eleventh session, the following fourteen States had deposited their instruments of accession to the Rome Convention: Albania on 1 June 2000; Belgium on 2 July 1999; Canada on 4 March 1998; Cape Verde on 3 April 1997; Croatia on 20 April 2000; Dominica on 7 May 1999; Estonia on 28 January 2000; Latvia on 20 May 1999; the former Yugoslav Republic of Macedonia on 2 December 1997; Lebanon on 12 May 1997; Liechtenstein on 12 July 1999; Lithuania on 22 April 1999; Nicaragua on 10 May 2000; Romania on 22 July 1998.

It also noted that the Committee had been informed at its eleventh session of the accession of Poland (on 12 March 1997). Those new accessions had brought the number of States parties to the Convention, as at 19 March 2001, to sixty-seven.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Phonograms Convention)

The Secretariat informed the Committee that, since its eleventh session, the following eleven States had acceded and become parties to the Convention: Croatia on 20 April 2000; Estonia on 28 May 2000; Kazakhstan on 3 May 2001; Latvia on 23 August 1997; Liechtenstein on 12 October 1999; Lithuania on 27 January 2000; the Republic of Moldova on 17 July 2000; Romania on 1 October 1998; Saint Lucia on 2 April 2001; the former Yugoslav Republic of Macedonia on 2 March 1998; Ukraine on 18 February 2000.

As at 19 March 2001, the number of States parties to the Convention stood at sixty-five.

Convention relating to the Distribution of Phonogram-carrying Signals transmitted by Satellite (Satellite Convention)

The Secretariat also informed the Committee that, since its eleventh session, three States had acceded to that Convention: Costa Rica, on 25 March 1999; the former Yugoslav Republic of Macedonia, on 2 September 1977; and Jamaica, on 12 October 1999.

By 19 March 2001, the States parties to that Convention totalled twenty-four.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties

No further State had acceded to that Convention. On 19 March 2001, the following seven States had deposited their instruments of accession, acceptance and/or declaration of succession to that Convention: the Czech Republic, Ecuador, Egypt, India, Iraq, Peru and Slovakia. In accordance with its Article 13, this Convention would enter into force only with the deposit of the tenth instrument of ratification, acceptance or accession.

The Committee took note of all the information provided by the Secretariat. The Chairperson of the Committee observed that it was important that the Committee take into account, in the course of the discussion on Item 8 relating to future sessions of the Committee, of the large number of States parties to the Universal Convention, namely, ninety-seven.

Legal and technical assistance to States (IGC(1971)/XII/3)

Introducing that document, the Secretariat provided information on the activities carried out since the last session on the Committee, in March 2001. Those activities had mainly focused on:

- (i) the development of the teaching of copyright and neighbouring rights;
- (ii) support for the collective management of rights through the publication of a practical guide intended for developing countries and countries in transition, in order to help them organize the effective exercise of recognized rights and facilitate the public's lawful, swift and equitable access to protected cultural works and performances;
- (iii) legal assistance and consultation services to Member States;
- (iv) efforts to achieve the legal protection and safeguarding of the contents of traditional culture and folklore; and
- (v) information for specialists and the groups concerned on the present situation regarding the ratification of the Conventions, the progress of the legal

protection of copyright and neighbouring rights, and the debate on the general problem of the adaptation of protection in relation to the way in which modes of production and distribution of protected cultural works and performances have changed. This information is provided by means of the *Copyright Bulletin* (quarterly publication), issued by the Organization in Chinese, English, French, Russian and Spanish, and the UNESCO website. Since 2001, the *Copyright Bulletin* has been published electronically (<http://www.unesco.org/culture/copyright>).

Special emphasis was placed on the teaching of copyright and neighbouring rights at university. The Committee had already been informed of developments in the implementation of UNESCO's special programme in that regard, which it had regularly supported during its previous sessions. A network of UNESCO Chairs had been set up in Latin America and the Caribbean to foster inter-university co-operation aimed at the further training of specialists in that field. The success of that network, called RAMLEDA, had led to the establishment of thirty-four specialized Chairs in other universities in the region.

Three Chairs had been established in the Arab region: Tunisia (1998), Jordan (2000) and Algeria (2000). Two UNESCO Chairs were being established in Morocco and Egypt respectively.

In Africa, the process of establishing a Chair in Senegal and another in Cameroon had begun.

In the countries in transition, a Chair had been established in Moscow (Russian Federation) in 1998 and preparations were under way for a Chair in Georgia and another in Kazakhstan.

The teaching of copyright at university under the UNESCO Chairs system was facilitated by a UNESCO textbook, published in Spanish (1993), French (1997) and English (1998). Publication of the Russian and Arabic versions of the textbook was in progress.

The safeguarding and legal protection of traditional culture and folklore had become one of UNESCO's priority activities. That heritage, which was an important component of the cultural heritage, made vulnerable by its oral nature, today had a greater need to be preserved and promoted in society, both as a means of promoting cultural diversity and as a tool for giving effective support to the endogenous cultural development of developing countries.

In consequence, UNESCO had been committed by its governing bodies to a new phase in creating an international protected status for the intangible heritage (traditional culture and folklore and traditional knowledge) which sought to involve, with increased obligations, local communities, national authorities and international co-operation in a spirit of solidarity in the establishment of standardized, complementary and user-friendly inventories of the various components of that intangible heritage, and in the implementation of the principles that should govern its utilization in society.

The Chairperson of the Committee spoke of the usefulness of a wide-ranging international campaign for the promotion and effective enforcement of copyright protection. He urged UNESCO to carry out those useful activities in co-operation with WIPO in view of its own limited financial possibilities. He also suggested that UNESCO's programme on the teaching of copyright at university should include the training of specialists serving in the police, customs, etc., with a view to strengthening the enforcement of national legislation, which needed to be applied more effectively in many countries.

The delegations that took the floor thanked the Secretariat for all the assistance provided to States, which was most useful for the appropriate protection of copyright and neighbouring rights.

The delegation of Chile also considered co-ordination and collaboration between UNESCO and WIPO to be fundamental, particularly where assistance to developing countries was concerned. It stressed the importance and usefulness of complementary co-ordination of the action taken by the two organizations to safeguard and protect traditional culture and folklore.

The Secretariat informed the Committee that UNESCO and WIPO had long-established relations, which were governed by a co-operation agreement that the two organizations were striving to implement purposefully and effectively in accordance with needs. He observed that UNESCO was no longer responsible for the preparation and updating of standard-setting international instruments in the field of the protection of copyright and neighbouring rights. For the last few years, that work had been carried out exclusively by WIPO, which was the principal United Nations agency responsible for codifying and administering the protection of intellectual property. The two organizations also co-operated closely in the management and promotion of international conventions in that field, which they were legally obliged to administer in common.

The Organization's activities aimed at promoting the teaching of copyright, assistance to States and information for specialists and the general public complemented those of WIPO and contributed to broader satisfaction of the major needs of developing countries, which were to build up a national system of copyright that would be capable of contributing effectively to the country's endogenous cultural development and serving as an active partner in the preparation and enforcement of an international consensus in that field.

The representative of the European Commission informed the Committee that the European Commission intended to participate constructively in the work undertaken in the context of WIPO on the issue of possible legal protection for expressions of folklore. To that end, the Commission had ordered a study on the desirability of such protection and the form that it might take. That study, conducted for the Commission by independent experts, was available on request. However, it did not necessarily represent the official position of the European Union. On the subject of traditional knowledge and access to genetic resources

which had a bearing on industrial property, the Commission had taken part in the debate that had unfolded at WIPO in May 2000, at the meeting of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

The Chairperson of the Committee observed that it would be desirable for UNESCO to direct its action towards the safeguarding, conservation and preservation of folklore and traditional knowledge, and for WIPO to take responsibility for protection of the intellectual property aspects of that heritage while at the same time co-ordinating their joint efforts.

The United States delegation stated that, in regard to the protection of folklore, there was a great need for training and information. Substantial assistance on various aspects connected with folklore should be provided to developing countries. In its opinion, it was not indispensable to create a new international instrument in that field, since the legal protection of folklore could be secured through the existing system of intellectual property (copyright, neighbouring rights, trademarks and patents, etc.).

In regard to the effective enforcement of national legislation on copyright, it informed the Committee that the issue had been the focus of particular attention by the United States Government. An intra-governmental process involving the State Department, the Department of Justice and other bodies, and also the customs authorities, had been organized in order to improve co-ordination and strengthen the training activities conducted by the United States and WIPO. The objective was to strengthen the effective protection of copyright. Moreover, it expressed agreement with the delegation of Chile concerning the absolute need for close co-operation between UNESCO and WIPO in order to avoid duplication or dispersal of the efforts of the two organizations.

The delegation of Algeria, while expressing its support for the work done on the teaching of copyright, urged UNESCO to expand that programme and extend it to all developing countries. It also suggested that the UNESCO Chairs should co-ordinate their activities with other advanced training institutions in each country in order to extend education in copyright and neighbouring rights to specialized training institutions or schools for judges, customs officers, police officers and the senior staff of ministries and local authorities.

The delegation of China described the numerous information and training activities undertaken in the field of copyright in China with a view to strengthening further the protection of copyright. It stated that research units on the teaching of intellectual property at university had been established in more than seventy institutions. Expressing satisfaction at the work accomplished by UNESCO, it drew attention to the fact that UNESCO's *Copyright Bulletin* had been published in Chinese by the national copyright administration since 1994. It hoped that the already extensive co-operation with UNESCO would be continued and strengthened.

The Secretariat, responding to comments on the protection of folklore, informed the Committee that that intangible heritage had become a priority sector for the Organization. It recalled that that cultural heritage, made vulnerable by its oral nature, now had an even greater need to be safeguarded and promoted in society, since it was both an excellent means of preserving cultural diversity and an effective tool for providing support for the endogenous cultural development of developing countries.

The results of the evaluation, conducted in 1998 and 1999 in co-operation with WIPO, of the need for a more appropriate legal protection of that heritage, and the conclusions of the evaluation (1995–99) of the implementation of the 1989 UNESCO Recommendation provided further confirmation of that need. UNESCO had commenced a new phase in the preparation of an international protected status for that intangible heritage on that basis. The intention was to speed up its action in particular during implementation of the Programme and Budget for 2002–03 that the General Conference would be required to adopt at its thirty-first session, in October 2001. The preparation of a new international instrument for the safeguarding and protection of the range of expressions of traditional culture and folklore and traditional knowledge was intended to involve, with increased obligations, local communities, national authorities and international solidarity in the establishment of standardized, complementary and accessible inventories of the various components of that intangible heritage and in the enforcement of the equitable principles that should govern its utilization in society.

UNESCO would work in co-operation with WIPO, the Secretariat of the Convention on Biodiversity, FAO and WHO so that a new protected status for that heritage, in keeping with UNESCO's statutory mission and respectful of the attributions and competence of other international organizations in the United Nations system, might be prepared and founded on a broad international consensus that would guarantee the effectiveness of its implementation.

The role of service and access providers in digital transmission and their responsibility regarding copyright (IGC(1971)/XII/4)

Introducing the document, the Secretariat pointed out that the study had been prepared in accordance with the Committee's decision at its eleventh session (para. 43 of the report).

The question of the responsibility of access and service providers had been the subject of intense debate since the adoption of the WIPO Copyright Treaty (1996). The lack of agreement on the nature and scope of the right of reproduction in the digital environment in that new instrument and the apparent contradiction of

the declaration relating to Article 9 of the Berne Convention, aimed at clarifying that right, and the declaration relating to Article 8 (right of communication) of the Treaty adopted by the Diplomatic Conference appeared to require that codification of this important issue be referred back to national law.

The study outlined, in that connection, the experience of the United States of America. The approach there had been the outcome of thorough negotiation between authors and other right-holders on the one hand and, on the other, US Internet companies. That negotiated system determined in a detailed manner the limits of access and service providers' liability for infringements of copyright and neighbouring (related) rights in the context of digital data transmission activities if access and service providers were willing to respect the legally recognized rights of authors and acted expeditiously when alerted to put an end to copyright infringements.

The European Commission's approach was technically different but had the same objective. Contrary to the implications of the study prepared by Ralph Oman, that approach was governed primarily by the Directive on Electronic Commerce of 8 June 2000, and not by the Directive on Copyright and Neighbouring Rights in the Information Society of 22 May 2001. The status of liability of intermediaries was regulated by a single system for all third-party or societal rights. The common liability system thus instituted was not confined to infringements of copyright or neighbouring rights. It also covered respect for personal rights, good moral standards, the protection of young people and issues relating to apologia for crime or racism, etc.

That system included conditions exempting intermediaries from liability for transport, caching and hosting activities on the multimedia electronic network communication system. Such liability had to be borne in accordance with respect for rights granted to authors and other right-holders by the Directive of 9 April 2001 on Copyright and Neighbouring Rights in the Information Society of 22 May 2001.

The point of the debate on that issue was whether the two experiences of the United States and of the European Union had struck an appropriate balance between the creators of cultural works and performances and the Internet industry. It also provided a good opportunity to learn about other national approaches and experiences.

It was also of great interest to know how copyright exceptions, recognized by treaty law and national legislation, could be usefully and objectively exercised while respecting the interests of all parties. Acknowledgement of that problem was an excellent means of completely refuting unfounded attacks on copyright and of organizing in an equitable manner regular access to knowledge and information, which had become one of the crucial requirements of the information society.

The Chairperson of the Committee remarked that, with regard to the liability of service providers, WIPO, like UNESCO, had become involved in that field and

closer co-operation between the two organizations with a view to working out satisfactory solutions was to be encouraged.

The delegation of Argentina raised the need to clarify the rules determining the applicable law and the competent jurisdiction to settle matters relating to infringements committed by access and service providers.

The delegation of Austria, after congratulating the Secretariat on the quality of the documents, observed that access and service providers enjoyed a special exemption, under the Directive on the Protection of Copyright in the Digital Environment, contained in Article 5(1). That Directive also stipulated, in Article 8(3), that right-holders could bring an injunction against access and service providers when they contributed to an infringement of copyright committed by a third party. The liability of intermediaries, meanwhile, was regulated by the Directive on Electronic Commerce of 20 June 2000. The system set out in that Directive had the same objective as the Digital Millennium Copyright Act (DMCA) of the United States of America. It defined the liability of access and service providers in a horizontal approach. That approach could lead to non-observance of rights recognized by the above-mentioned Directive on the protection of copyright in the digital environment. The speaker recalled in that connection the scope of the protection of rights and the mandatory and optional exceptions provided in the European Directive, on which claims regarding the liability of access and service providers must be based.

The delegation of the United States gave detailed information about the way in which the Digital Millennium Copyright Act (DMCA) had codified the responsibility of Internet service providers (ISPs). It recalled that the DMCA was an update of the general law governing copyright protection, the Copyright Act of 1976, which did not exempt ISPs but only limited their potential responsibility in the case of certain activities, and subject to their complying with certain conditions.

When the question of the responsibility of ISPs had arisen in the United States, national law already stipulated that temporary copies saved on computer during the transmission of cultural works and performances on the Internet were copies subject to copyright whenever they could potentially constitute a breach of protected rights. That principle, enshrined in national law, was the one that the DMCA proposed to apply to the responsibility of ISPs when, in the exercise of their professional activity, they committed an infringement of the rights of authors and of other right-holders.

The DMCA identified various forms of activity in which the service provider might enjoy legal limited responsibility: transport, ‘caching’, ‘hosting’ and other technical transmission operations of protected cultural works and performances, but only if certain conditions were fulfilled.

The DMCA had set up for that purpose the system of ‘notice and take down’. When an ISP received, from a right-holder, a notification informing it that a

breach of copyright had been committed through its system, the ISP was obliged to take account of that information and to act to restrict all access to the offending information through its system, on pain of being held accountable. The impugned party which believed that, contrary to the notification given to the ISP, the accusation against it was unfounded, might request the ISP to restore access to the information in accordance with the agreements governing their relations.

That system appeared to work well, to the satisfaction of the ISPs, even if they complained about the volume of complaints, and also to the satisfaction of right-holders, even if they would prefer the system to be more efficient.

The delegation stated that that system of limiting the responsibility of ISPs had enabled it to create an equitable balance among the interests of all parties, and it encouraged the other countries to act similarly to persuade the right-holders and ISPs involved in the process of communicating protected cultural works and performances on the Internet to establish operational systems which took fairly into account the legitimate interests of both parties.

The delegation said that exceptions to rights should be treated with the utmost care because they might result in serious financial injury to the right-holders. The United States Congress had begun to examine that matter with respect to certain categories of users, in particular for use in classrooms and in distance education. There was a need to ensure that those users respected copyright, and that the works were used exclusively for the stated purpose, taking care not to make them accessible to the general public. The same applied to public libraries. It was essential to strike a good balance in that regard in order to avoid unwelcome consequences for legitimate uses of the works.

The delegation of Cameroon noted the importance of the balance between the various interests struck in the United States legislation and the European Directive. It announced that Cameroon's new copyright law had defined the major principles that would determine the liability of intermediaries in the digital transmission of cultural works and services protected by copyright. However, reflection needed to be completed, in the light of international experience, on the way in which they should be codified and made operational.

The Chinese delegation informed the Committee of the rapid growth in the use of the Internet in China, with some 30 million users forecast for the end of 2001. However, the rate of growth remained slow in relation to the total population. The main use was for e-mail. The Chinese Government was currently working on changes to the copyright law in order to adapt it to the digital environment and intended to introduce into the new text provisions concerning the right of reproduction and public communication in that environment. That law would be adopted before China became a member of the World Trade Organization (WTO). The Chinese delegation stated that the problem of exceptions to and limitations of rights, in particular in regard to use by libraries, remained to be resolved, and requested UNESCO's assistance in that respect.

The representative of Poland stressed the importance of determining in what cases and under what conditions there was indirect, temporary or potential violation. Those aspects should, he considered, be included in national legislation in the light of Article 9.2 of the Berne Convention concerning exceptions to the right of reproduction.

The representative of the European Commission took the floor to state that the study carried out by UNESCO should be amended to take account of the Directive relating to certain legal aspects of services in the information society, and in particular electronic commerce, on the domestic market, and wished to supplement the statement made by the Austrian delegation. She said that the Directive on Electronic Commerce defined the common rules governing general liability of service providers in the context of the information society, and that the Directive on the harmonization of certain aspects of copyright and neighbouring rights in the information society defined the scope of authors' recognized rights in the digital environment, with one specific exception, Article 5(1), in order to ensure the technical functioning of electronic transmissions. All Member States of the European Union must incorporate in their national legislation the implementing rules for those Directives for the purpose of harmonizing the domestic market. She reported that the balance struck by the Directive in regard to the harmonization of certain aspects of copyright and neighbouring rights in the information society had been achieved after extensive negotiations with the parties concerned. That balance should facilitate optimal use of the potential of the Internet in the interests of all, including right-holders. Regarding exceptions to rights, she emphasized that the Directive proposed the mandatory exception mentioned above, and that the other exceptions were voluntary. Those exceptions covered, *inter alia*, private copying, teaching, reprographic reproduction and other cases mentioned in the Berne Convention. She stated that those exceptions had a very variable economic impact, which in some cases was minimal.

The representative of the International Federation of Film Producers Associations (FIAPF) expressed satisfaction with the balance achieved in the DMCA and European Union Directive on Electronic Commerce. He also noted that the Information Society Directive did not deal with liability and that Mr Oman's study incorrectly gave the impression that the European Union has dealt with the issue of service provider liability in the Information Society Directive by means of an exception to the reproduction right when in fact this was done in the Directive on Electronic Commerce by means of limitations on liability subject to certain conditions. He did note that because the exception in the Information Society Directive, which might deal with some aspects of caching, there was some confusion between the two directives but that in any event service providers must meet the conditions in the E-Commerce Directive to be eligible for the limitations on liability.

The representative of the International Federation of Phonographic Industry

(IFPI) stressed the importance of achieving a balance between the legitimate interests of ISPs and those of right-holders. With regard to the question of ISP liability, a prerequisite for obtaining the balance is that right-holders are granted protection that ensures that their rights are adequately protected in the online environment. Any limitations to liability should therefore be considered only after countries have adjusted their copyright laws so as to ensure that right-holders enjoy such rights. Finally, he pointed out that neither the DMCA nor the European Electronic Commerce Directive provided total limitations to liability for injunctive relief, a point which, he said, is of utmost importance in the fight against online piracy.

At the stage of adoption of the report concerning this point, the delegation of the United States made the following statement. As countries begin to grapple with the very important issue of Internet Service Providers (ISP) liability, it is important that the working document under discussion does not contribute to giving the wrong impression as to how countries are dealing with this issue. An international consensus is developing an approach based on limitations on liability. The Oman study may give the wrong impression that ISP liability is being dealt with by means of an exception to the reproduction right. The United States delegation asked that the Final Report reflect that the Chair, the Austrian and the European Commission delegations, as well as the industry (FIAPF and IFPI) raised the paper's shortcoming of not addressing ISP liability in the European Union in the context of the Directive on Electronic Commerce.

International experience in regard to procedures for settling conflicts relating to copyright in the digital environment (IGC(1971)/XII/5)

In introducing the study, carried out at the request of the Committee at its eleventh session (para. 41 of the Report), the Secretariat stressed the salient aspects of the problems examined, which were not limited to copyright disputes. The study began by summarizing the theoretical foundations of the alternative mechanisms for settling disputes in a digital environment characterized by fluidity, intangibility, delocation of information, encryption techniques, techniques for the protection of anonymity, and the ever-increasing number of information highways. It then outlined the first attempts to introduce such mechanisms and examined questions relating to their appropriate organization and effective functioning with an eye to their future development as a possible alternative approach for the administration of justice in the various fields of business, including that of intellectual property. In that connection, the study noted that the degree of autonomy of will granted by national legislation in respect of copyright and neighbouring rights left the door open to extensive possibilities for online

arbitration in that field. There the fundamental question was the need to take care to prevent the evolving *lex electronica* from developing in such a way as to generate new contractual rules that would ignore the rights of authors and other right-holders recognized by the relevant national legislation and international conventions.

The Committee took note of the various points raised by the study.

Practical aspects of the exercise of the *droit de suite*, including in the digital environment, and its effects on developments in the international art market and on the improvement of the protection of visual artists (IGC(1971)/XII/6)

In the statement on that item, the Secretariat recalled that the Committee had that question before it in accordance with the request expressed by several delegations during its eleventh session (para. 50 of the report). The document submitted to the Committee for information and assessment fell into three parts: *droit de suite* management, the impact of *droit de suite* on the art market, and the role that *droit de suite* should play in the improvement of the status of visual artists. The scope of *droit de suite*, as outlined in the study, extended to a range of artistic works, including art photographs and signed craft objects. The right to information for artists and their beneficiaries concerning sales operations, with the obligations of sellers to make known the titles of the works, the names of their authors and the selling price and to respond to the requests of authors or their collective management companies, was presented as crucial to the effective exercise *droit de suite*, which national legislation should sanction. The subject of the percentage of the remuneration on the retail selling price was raised, with a preference expressed for a fixed percentage and a critical appreciation given of the graded rates according to the size of the retail sale price, chosen by the European Directive on *Droit de Suite*. The study emphasized that *droit de suite* could, admittedly, have an impact on the market. But the deciding factors determining the development of an art market were, rather, taxation (VAT) and the objective existence of abundant artistic creativity which was varied and of high quality. Recognition and enforcement of *droit de suite*, on the other hand, encouraged creativity and the enrichment of the artistic heritage and contributed to the legitimate social welfare of artists.

Opening the debate, the Chairperson observed that *droit de suite* was recognized chiefly in Europe, but had not yet been incorporated into the legislation of numerous countries. Much therefore remained to be done to promote recognition of that right at the international level. In Israel, where that right was

not recognized, it appeared to be difficult to change attitudes and to convince legislators. He added that that issue was not being examined by WIPO.

The Algerian delegation informed the Committee that *droit de suite* had been recognized in Algeria since 1973, with royalties of 5 per cent of the resale price. The body responsible for the collective administration of copyright and neighbouring rights was currently sensitizing artists and art galleries to the need for broader application of *droit de suite*. A website on works protected by *droit de suite* was under construction, and would allow the exchange of works with other bodies concerned by national artistic production.

The delegation of Cameroon informed the Committee about the consultation on a draft decree concerning practical application of *droit de suite*. That draft contained provisions requiring information to be provided on the resale of works of art, and introducing sanctions for failure to provide information on the author of the work, the price of sale and the seller.

The representative of the European Commission indicated that the European Commission was preparing a Directive on *droit de suite*. That Directive was intended to put an end to the competition distortions which affected the domestic market for works of modern and contemporary art by universalizing and harmonizing *droit de suite*. That Directive would be adopted in July 2001. The European Directive on the matter would have to be incorporated in national legislation by all the Member States of the Union within four years. The Member States that did not implement *droit de suite* on the entry into force of that Directive would be able, for a further four years, to limit it to living artists and thus not to apply it to the authors' heirs. That period could be extended by two years or reduced if international negotiations had, meanwhile, made it possible to extend *droit de suite* internationally.

The representative of WIPO indicated that it was indispensable for all international organizations concerned by the protection of the rights and interests of creative artists to co-operate. He was pleased to see that a number of important issues relating to problems encountered by several States had been included in the Committee's agenda. Although the Universal Convention did not deal with electronic transmission, it was important that the Committee should pay particular attention to the digital environment. He noted that certain issues discussed by the Committee had already been resolved in the two new WIPO treaties of 1996. WIPO was endeavouring to ensure that a maximum number of countries were made aware of the importance of those two new treaties, whose entry into force would help to harmonize national legislation regarding electronic transmission. The two international treaties of 1996 had already been ratified by twenty-six countries, and were expected to enter into force shortly. It was indispensable for international organizations to co-operate in order to ensure the effective implementation of those treaties.

The representative of the International Literary and Artistic Association

(ALAI) welcomed the progress achieved in recognition of *droit de suite* in the national legislation of various countries, and noted the objective difficulties that hampered the consecration and implementation of that right by States. He called for a continuation of the efforts of the international institutions concerned and UNESCO aimed at securing better recognition of *droit de suite*.

The Chairperson stressed that UNESCO should strengthen its activities on protection of *droit de suite* in order to convince States of the importance of recognition of that right.

Partial renewal of the Committee (IGC(1971)/XI/8)

The Secretariat observed that the document had been drawn up in response to the Committee's request for more detailed study of the UNESCO system of electoral groups, which had been presented to it at its eleventh session (para. 56 of the report) as a system that could possibly be adopted for the renewal of the Committee. The aim was to determine whether that system could provide a 9/9 parity membership for the representatives of the developing countries and the industrialized countries each time that the Committee was partially renewed in accordance with its statutes.

The study prepared by the Secretariat had finally demonstrated that it would be difficult to achieve the desired result with the UNESCO system of electoral groups. Given the fixed number of eighteen Member States on the Committee, such a system could even create problems with each significant increase in the number of States parties to the Convention. Such an increase would increase the number of States parties within electoral groups. The electoral groups could have the right, at some point, to request an adjustment in their representation on the Committee in proportion to their size. That could be done only by reducing the representation of other groups, since the total number of members of the Committee remained unchanged at eighteen.

In view of that considerable risk, and also because of the disappearance of the old blocs of States and the emergence of a new era in inter-State relations and international co-operation, the Secretariat expressed the view that the Committee's current rules of procedure should be maintained and applied on the basis of the gentleman's agreement used in the past, which had functioned well at the eleventh session. The Committee took note of that suggestion.

The Chairperson reminded the Committee that the term of office of six of its members would expire at the end of the current session: Algeria, Australia, Chile, India, Israel and the United States.

In the absence of the representative of India, Vice-chairperson, who was unable to attend, the Committee elected Chile Vice-chairperson, on the proposal of

the Chairperson, in accordance with its Rules of Procedure, and in particular Rule 47. Argentina and Japan were also elected by the Committee as ad hoc members of the Nominations Committee, as stipulated in Rule 47 of the Rules of Procedure. The Nominations Committee, composed of the Chairperson of the Committee (Israel), the two Vice-chairpersons (Algeria and Chile) and two ad hoc members (Argentina and Japan), then met in private and proposed the following six members for election to the Intergovernmental Copyright Committee: Algeria, Croatia, India, Israel, Ukraine, the United States.

The proposal of the Nominations Committee was adopted unanimously.

Following those elections, the Intergovernmental Committee was composed of the following members: Algeria, Argentina, Austria, Cameroon, China, Croatia, Cuba, France, Greece, Guatemala, India, Israel, Japan, Morocco, Portugal, the Russian Federation, Ukraine, the United States.

Election of the Chairperson and two Vice-Chairpersons of the Committee (Rule 17 of the Rules of Procedure)

The delegation of Argentina, on behalf of the members of the Committee, proposed the re-election of Mr Mayer Gabay (Israel) as Chairperson of the Committee, and the election of the representatives of Cameroon and China as Vice-chairpersons. That proposal was seconded by the delegation of the United States and adopted by acclamation.

The delegation of Ukraine thanked the Committee for the confidence it had placed in its country by electing it as a full member and expressed its country's willingness to work within the Committee to promote the protection of copyright worldwide.

The delegation of Croatia, thanking the Committee for its election to serve on it, likewise expressed that country's willingness to work within the Committee to promote the safeguarding of copyright throughout the world.

Future sessions of the Committee (IGC(1971)/XII/7)

The Committee debated that item on the basis of information contained in the reference document and the opening statement by the Assistant Director-General for Culture, to which the Secretariat gave a brief introduction. After an exchange of views on the nature and scope of each of the options proposed in paragraph 6 of document IGC(1971)/XII/8, the Committee decided by consensus, provisionally and in view of the circumstances, to lengthen the periodicity of its statutory meetings from two to four years. It therefore amended Rules 2.1, 42 and 43 of its Rules of Procedure accordingly. Pursuant to that provisional decision to hold

regular meetings of the Committee every four years, the thirteenth session of the Intergovernmental Committee would be held at the end of the first half of 2005.

Other business

At the conclusion of the work of the Committee, the representative of the Palestinian Authority made a statement concerning Agenda Item 4, 'Assistance to States'. He informed the Committee of his country's efforts to draft a new law on copyright and to organize the collective administration of rights. However, he regretted that the current situation in his country hampered the adoption of the bill by the parliament, which was unable to meet, and made it difficult to reorganize the various government structures. He also informed the Committee of Palestine's willingness to ratify the international conventions on intellectual property, as neighbouring countries had done, and hoped that UNESCO might provide Palestine with legal and material assistance for the organization of its national system of copyright and neighbouring rights.

The Chairperson endorsed the request for assistance made by the representative of the Palestinian Authority, and invited the Secretariat to exert the requisite efforts in response to that legitimate request.

Date and place of the next session

The Committee decided, in accordance with the Rules of Procedure, to ask the Secretariat to fix the most appropriate place and date for its next session.

Adoption of the report

This report was adopted unanimously, with the amendments submitted by certain delegations.

Closing of the session

The Chairperson recalled the importance of UNESCO's role in the promotion and safeguarding of copyright and neighbouring rights. He emphasized the scale of the work to be accomplished in that field in co-operation with WIPO, ILO and other international organizations.

The representative of the Director-General thanked the members of the Committee and all the participants for the interest that they had taken in the

twelfth session of the Committee, which had raised important issues for the determination of properly balanced protection of authors in the digital environment and for the promotion of *droit de suite*.

After the customary expressions of thanks, the Chairperson declared the session closed.

Report of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961)

Eighteenth Ordinary Session (Geneva, 27–28 June 2001)

Report adopted by the Committee

Introduction

The Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), hereinafter referred to as ‘the Committee’, convened in accordance with Article 32(6) of the Convention and Rule 10 of the Rules of Procedure of the Committee, held its eighteenth Ordinary Session at the International Labour Office (ILO) in Geneva from 27 to 28 June 2001.

The following ten member States of the Committee were represented: Burkina Faso, Colombia, France, Germany, Greece, Japan, Mexico, Poland, Sweden and the United Kingdom. Eight States parties to the Convention, but not members of the Committee, namely Albania, Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Latvia and Slovakia, and fourteen States not parties to the Convention, Côte d’Ivoire, Indonesia, the Islamic Republic of Iran, the Republic of Korea, Kuwait, Madagascar, the Russian Federation, Saudi Arabia, Senegal, the Syrian Arab Republic, Thailand, Tunisia, Turkey and the United States of America were represented as observers.

A representative of one intergovernmental organization, the European Commission, and representatives of the following five international non-governmental organizations attended in an observer capacity: the Association of European Performers’ Organizations (AEPO), the International Federation of Actors (FIA), the International Federation of Musicians (FIM), the International Federation of the Phonographic Industry (IFPI) and the International Federation of Film Producers’ Associations (FIAPF).

Opening of the session

The Chairperson of the Committee chaired the opening session. On behalf of Mr Juan Somavia, Director-General of the International Labour Office, the Executive Director of the Social Dialogue Sector, Ms Sally P. Paxton, welcomed the participants.

Election of the Chairperson and two Vice-Chairpersons

Following a proposal made by the delegation of Japan, Ms Assetou Touré (Burkina Faso) was elected unanimously as Chairperson, and Mr Henry Olsson (Sweden) and Mr Wojciech Dziomdziora (Poland) were unanimously elected as Vice-chairpersons of the Committee by acclamation.

Adoption of the agenda

The provisional agenda (document ILO/UNESCO/WIPO/ICR.18/1 Prov.) was unanimously adopted by the Committee.

Information on the state of adherence to the Rome Convention (document ILO/UNESCO/WIPO/ICR.18/2)

The Secretariat informed the Committee that since the seventeenth Session, the following States had adhered to the Rome Convention: Albania, Belgium, Croatia, Dominica, Estonia, Latvia, Liechtenstein, Lithuania and Nicaragua. Yugoslavia had also succeeded to the former Yugoslavia's adherence to the Convention, thus the total number of States parties to the Convention was sixty-eight.

The Committee took note of this information.

Information on States not parties to the Rome Convention but parties to the international copyright conventions referred to in Article 24 of the Rome Convention (document ILO/UNESCO/WIPO/ICR.18/3)

The Secretariat informed the Committee that since the seventeenth session, the following States had ratified or adhered to the Berne Convention: Antigua and Barbuda, Armenia, Azerbaijan, Bangladesh, Belize, Nicaragua, Qatar, Sudan,

Tajikistan and Tonga. The total number of States parties to the Convention was 148.

As regards the Universal Copyright Convention (1952), the total number of States parties remained at ninety-eight, while the Universal Copyright Convention (1971) had obtained a further ratification from Liechtenstein, bringing the number of States parties to sixty-two.

The Committee took note of this information.

Information on membership of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Phonograms Convention), of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention) and of the WIPO Performances and Phonograms Treaty (WPPT) (document ILO/UNESCO/WIPO/ICR.18/4)

The Secretariat informed the Committee that, since the seventeenth Session, Croatia, Estonia, Kazakhstan, Liechtenstein, Lithuania, Republic of Moldova, Nicaragua, Saint Lucia and Ukraine had ratified or adhered to the Phonograms Convention (Kazakhstan had done so since document ICR.18/4 was prepared). The total number of States parties to the Convention was therefore sixty-six.

As regards the Satellites Convention, Jamaica had adhered to the Convention, bringing the total number of States to twenty-four.

As regards the WIPO Performances and Phonograms Treaty (WPPT), the following States had ratified or adhered to it since the seventeenth session: Albania, Argentina, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Ecuador, Latvia, Lithuania, Mexico and Paraguay (Bulgaria and Chile had done so since document ICR.18/4 had been prepared). The total number of ratifications or accessions to the WPPT had reached twenty-three, and it would enter into force after thirty instruments of ratification or accession had been deposited with the Director-General of WIPO.

The delegation of Albania informed the Committee that his country had lodged its instrument of accession to the Phonograms Convention with the United Nations on 26 March 2001, and it had just come into force.

The Committee took note of this information.

Report on the activities of the three organizations, to provide assistance and training for developing countries with a view to promoting the protection of performers, producers of phonograms and broadcasting organizations (document ILO/UNESCO/WIPO/ICR.18/5)

A representative of the International Labour Office stated that the ILO's activities in providing assistance and training related to its four strategic objectives – standards and fundamental principles and rights at work, employment, social protection and social dialogue – within the framework of its Decent Work Agenda. Such activities were aimed at general and specific areas of the world of work, but they were rarely directed solely towards performers, producers of phonograms and broadcasting organizations. The relevant activities of the ILO since the seventeenth session of the Intergovernmental Committee were summarized in Annex I of document ILO/UNESCO/WIPO/ICR.18/5. The ILO planned to continue work in this area, including participation in meetings and activities related to the possible adoption of WIPO instruments on the protection of audiovisual performances and of broadcasting organizations.

The representative of the United Nations Educational, Scientific and Cultural Organization (UNESCO), referring to the activities carried out by his organization, stated that they mainly focused along five lines: introduction and teaching of copyright and neighbouring rights at university level; promotion of the collective management of rights; legal assistance and consultation services to Member States; promotion of the protection of traditional or popular culture (folklore); and information of specialists and sensitizing governments and the general public on copyright and neighbouring rights matters. Special emphasis was placed on the teaching of this subject at university level. Therefore in 1987 UNESCO had commenced development of a special teaching programme on copyright and neighbouring rights. Aware of the great lack of legal literature in the developing countries, the Organization commissioned a special manual on copyright and neighbouring rights which was first published in Spanish, then translated into French and English. At present the Russian version was being printed and negotiations were being held for publication of the Arabic version. UNESCO was currently involved in the creation of UNESCO Chairs on copyright and neighbouring rights. A network of such Chairs (consisting of eight Chairs) – RAMLEDA – was created in Latin America. In the Arab region, Chairs had been created in Tunisia (1998), Jordan (2000) and Algeria (2000), and two other Chairs – in Morocco and Egypt – were being set in place. Such Chairs would be created in Cameroon and Senegal in Africa, and for Asia in China. One Chair had been established in Moscow and preparations for their creation were under way in Georgia and Kazakhstan. The final goal was the creation of networks of Chairs to encourage inter-university co-operation in this field. The speaker added that as for

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collective administration, UNESCO had in 2001 published a special Guide to the Collective Administration of Authors' Rights, and a similar guide might be published in future with regard to performers' rights. The speaker also advised the Committee that the English, French and Spanish versions of UNESCO's *Copyright Bulletin* were now available only via the Internet, either on www.unesco.org/culture/copyright or upo.unesco.org

The representative of the World Intellectual Property Organization (WIPO) underlined that training in copyright and related matters constituted an important part of WIPO's activities. WIPO responded to requests from governments for comments on draft laws. In addition, the organization organized meetings and provided considerable training for their constituents from developing countries. Such meetings had an impact at a wider level. The WIPO Academy contributed to the education and training process. Distance learning activities were undertaken and scholarships were granted for graduate studies. In general, WIPO placed emphasis on the building up of infrastructure, including the collective management of rights.

The delegation of Sweden congratulated the three organizations on the magnitude and quality of their operations. The speaker declared that the ILO Symposium on Information Technologies in the Media and Entertainment Industries: Their Impact on Employment, Working Conditions and Labour-Management Relations had been an important event, particularly in terms of addressing the question of labour-management relations. All efforts needed to be made to fight piracy and protect copyright and related rights. A special event had been held in Stockholm on counterfeiting and piracy during his country's presidency of the European Union. Although the WIPO Diplomatic Conference in 2000 had not led to the desired outcome, the same goal that had been set would be pursued in the future. As for UNESCO's educational efforts, they were particularly welcome since there was a scarcity of knowledge and know-how in the developing countries. Sweden had supported the proposal to set up the WIPO Academy and was gratified that the outcome was so positive. WIPO also needed to be congratulated on its efforts to target special groups such as diplomats, judges and women. The overall achievement was a complementary balance of legislation, labour relations and education.

The delegation of Mexico congratulated the three organizations on their vast training programmes directed to the developing countries. The speaker considered copyright protection and neighbouring rights of utmost importance given their role in national economic development. His country took active interest in WIPO activities and had frequently and enthusiastically participated in such activities and their financing. WIPO had also supported modernization of Mexico's infrastructure following the change of government, and he hoped his country could continue to count on the Organization. The delegation also thanked the ILO and UNESCO for their support.

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The delegation of Japan expressed appreciation for the organizations' efforts to increase the number of parties to the Conventions relating to copyright and neighbouring rights, including the WCT and the WPPT, which it considered to be key instruments for the recent development of the digital and network environment. Japan had ratified the WCT in 2000 and had developed an enhanced training programme with a view to contributing to the development of copyright and neighbouring rights in Asian and Pacific countries.

The delegation of Colombia expressed appreciation to the three organizations for providing assistance and training to Colombia as a developing country. Courses for diplomats were also particularly useful.

The delegation of the Islamic Republic of Iran expressed the opinion that there were problems with the lack of knowledge in the developing countries on how to implement those treaties.

The delegation of Greece recognized that general education on copyright matters was extremely important, especially since students showed more interest in copyright issues as a result of new technology. The speaker proposed that a list of universities that offered copyright training should be drawn up with the assistance of UNESCO and WIPO.

The representative of the European Commission, referring to the mention by the representative of UNESCO of the latest Directive of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001/29/EC), informed the Committee that this new Directive had been adopted and published five days previously and had appeared in the *Official Journal of the European Communities* on 22 June 2001. Since 18 months were required for the Directive to come into force, it was to be expected that towards the end of 2002 the member States of the European Union would adhere to the WIPO Internet treaties, namely the WPPT and the WIPO Copyright Treaty (WCT).

The Committee took note of this information.

Continuation of examination of the study (Walter Report) on the relationship of, and comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the TRIPS Agreement (document ILO/UNESCO/WIPO/ICR.17/6); views and comments on the study from governments (document ILO/UNESCO/WIPO/ICR.18/6)

The Secretariat recalled that the study on this subject had been prepared by Mr Walter, and had been presented at the seventeenth ordinary session of the

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Intergovernmental Committee in 1999, but only a limited discussion on the topic had been possible at that time, as the document had only become available immediately before the session. As had been made clear at that session, the views expressed in the study were those of the author and did not necessarily reflect those of the Secretariat. There had been general consensus then to express appreciation for the comprehensiveness of the study, to point to a number of controversial issues which had been raised in it and to invite States and intergovernmental organizations to submit their views and comments on the study to the Secretariat. Several important points, contained in document ILO/UNESCO/WIPO/ICR.18/6, had been raised in submissions by Australia, Barbados and Norway, particularly on the issues of audiovisual performances and their fixation, broadcasting and dissemination via the Internet, and specific legal interpretations of the Rome Convention. Those written contributions could serve as a starting point for discussion. The Walter Study (document ILO/UNESCO/WIPO/ICR.17/6) points to a number of areas for the possible revision or updating of the Rome Convention on the models of the TRIPS Agreement and the WPPT. It identifies the inter-linkages between the various instruments, noting many complementarities, some overlap and divergences. Following the WIPO Diplomatic Conference on the Protection of Audiovisual Performances held in December 2000, and given the plans for future WIPO instruments on the protection of broadcasting organizations and of audiovisual performances, careful consideration was required on the question of the linkage of the Rome Convention with whatever legal instrument was developed. The Secretariat would welcome any comments on the subject.

The representative of the ILO considered the subject-matter of the Rome Convention to have increased in importance with the major developments linked to the new media and Internet access, and more so given another distinction not reflected in the Walter Study: the oversight mechanism in the Rome Convention, that was not contained in the same manner in the other instruments examined.

The representative of UNESCO stated that in order to contribute to a better understanding of the legal instruments studied by Mr Walter and to clarify certain aspects, UNESCO planned to publish a short article in its *Copyright Bulletin* later in 2001, although the study was in the main considered by him to be very comprehensive and exhaustive.

The representative of WIPO reported that the WIPO Diplomatic Conference held in December 2000 had recommended the reconvening of the Diplomatic Conference at a time and place to be decided. The WIPO Assembly would take the decision in September 2001 as to how the work might proceed. The Standing Committee on Copyright and Related Rights, which had done the preparatory work for the Diplomatic Conference, had started considering a new issue of high relevance to the Rome Convention, namely the protection of broadcasting organizations, on the basis of proposals from Member States. Reports and other

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documents related to this item could be accessed on the WIPO website.

The delegation of Sweden considered the study to be both comprehensive and very valuable in dealing mainly with factual information in the field of neighbouring rights. It also contained some controversial policy considerations. His delegation wished to make three points. First, differing views, as Australia's observations indicated, were possible even on the factual aspects of the study, more so of course since the legal framework changed all the time. Sweden would not comment on those factual and legal aspects. Second, the value of the study perhaps lay more in the factual information regarding the complex relationships in the field of related rights and, perhaps to a lesser extent, on the policy considerations. The policy considerations were important because they could guide the thinking, and the possibility that they could form part of future policy discussions, though it was difficult to draw a distinction between what might be policy and what was legal thinking. The equal importance of the Rome Convention, the WPPT and the TRIPS Agreement were underlined. But the Rome Convention was a cornerstone of the system. Third, as regards the legal analysis of the relationship between these three instruments, the study was of very high and lasting value, though some points might be controversial. Mr Walter should be congratulated very warmly and his study should be kept in mind in future deliberations on the progress and development of copyright and neighbouring rights.

The delegation of Japan considered the study very informative and helpful in understanding the relationships between the various Conventions. The Rome Convention was the basic instrument for neighbouring rights and so further ratifications could be expected. It was, however, necessary to modernize and improve the protection of neighbouring rights in order to respond to the changes in the environment and the development of digital technologies. The TRIPS Agreement and the WPPT were the first steps in that direction. It might be very useful for the Committee to monitor closely the future discussions in WIPO concerning the protection of audiovisual performances and broadcasting organizations, as these had implications for its own future work.

An observer from the International Federation of Actors (FIA) considered the Walter Study improvable, but a good basis for debate. For actors, the priority was a positive conclusion of negotiations on the protection of audiovisual performers, which should restart soon. He suggested that NGOs could also submit written comments on the text.

The Committee had no objection to that request.

The representative of UNESCO suggested that there had been little comment on the Walter Study since its publication. The Secretariat could simply distribute any comments received to all delegations.

An observer from the International Federation of Musicians (FIM) stated that the Walter Study was not a good basis for an in-depth discussion of the issue.

Other business

The Chairperson invited delegations' views on whether the current two-year cycle of the Committee's sessions should be maintained, or whether consideration should be given to postponing the nineteenth session.

The delegation of Sweden considered the Committee's Rules of Procedure to have been designed for a different era. They needed to be adapted to the times, linking the periodicity of sessions to developments affecting the Rome Convention's legal framework. The Secretariat should be mandated to decide changes to the periodicity of the Committee's sessions.

The delegation of Mexico shared the views of the delegation of Sweden. Since matters discussed in the Committee were closely related to those reviewed in other forums, the Secretariat should be mandated to convene sessions of the Committee on the basis of progress in those forums.

The delegation of Germany agreed with the previous speakers, as their proposal would give time for the other Conventions to come into force. Her delegation would therefore support a looser programming of the Committee's sessions. Rule 35 allowed the Committee to amend the Rules of Procedure, and the issue should be put on the agenda of the next session.

The representative of UNESCO believed that without appropriate amendments to the Committee's Rules of Procedure and a fixed date, the Secretariat would be in the dark as to the timing of future sessions. The Committee's instructions on this matter needed to be clearer.

The Chairperson suggested to the Committee the suspension of Rule 11, which provides that 'the Committee shall meet in ordinary session once in each odd-numbered calendar year'.

The Committee decided to suspend Rule 11.

The Committee decided to convene the nineteenth session in 2005. The Committee also proposed that the agenda of the 2005 session could, in addition to the traditional items, include an item on the future of the Rome Convention, taking account of developments that would have taken place in the interim. An item on the amendment of Rule 11 would also be included in the agenda. With regard to the concern expressed that there should be possibilities for the Committee to convene if member States thought it necessary, she noted that Rule 12 already provided for a meeting in extraordinary session at the request of the majority of the members of the Committee.

The representative of the ILO suggested, in the context of the agenda item on the future of the Rome Convention, additional comments received on the Walter Study, including those from the international NGOs, could be taken into consideration, for a new factual study for the nineteenth session. It would also distribute such comments to all delegations.

The proposals for the agenda of the nineteenth session, as suggested by the Chairperson, were accepted by the Committee.

Adoption of the report

The Chairperson proposed that the Committee examine the report, and that any amendments be submitted in writing to the Secretariat.

The following delegations suggested changes to their paragraphs of the report: Sweden, Japan and Mexico.

The representative of UNESCO observed that no decision had been reported in Section IX, and, following interventions by the representative of the ILO and the delegation of Poland, it was agreed to insert a paragraph at the appropriate place.

The representative of WIPO proposed an amendment to the paragraph on ratifications of WPPT, to update the number of ratifications and the list of countries.

The Committee unanimously adopted this Report, with the proposed amendments.

Closing of the session

The Chairperson declared the session closed and invited the contracting States to the Rome Convention to proceed to the election of the Members of the Committee.

NEWS AND INFORMATION

Copyright law in Nepal

Pustun Pradhan*

Nepal's Copyright Act dates from 1965 and was updated in 1997. The 1965 Copyright Act came at a time when the infrastructural and other institutional supports and facilities needed for the development and promotion of creative works were virtually non-existent; the few that existed were poorly equipped and their impact was negligible. Sound broadcasting began in Nepal in 1951 with short-wave broadcasts by Radio Nepal from Kathmandu. A radio set was then a luxury. Television was a distant phenomenon. There was no recording industry as such. The film industry was yet to make its appearance.

The printing industry was in the early stages of development. Offset lithographic printing was introduced only towards the mid-1970s. Book printing was mostly carried out at Varanasi, on the Indian border. The book industry was dominated by foreign imports, and national authorship had not yet taken root. All that existed in the name of a publishing industry was a handful of government and private publishing houses which operated on a small scale. Newspaper, periodical and magazine publication was limited, and much of the domestic need for such publications was provided by foreign imports.

It is obvious that a Copyright Act framed against such a background can barely meet the needs of the present developments in various sectors of the copyright industry. With new technologies offering different ways of creating, reproducing and disseminating protected works, the prospect for exploiting these works for various commercial purposes has broadened immensely. As a result, intellectual property containing protected works has now become a subject of foremost importance in the world of trade and commerce.

Unfortunately, the 1997 Amendment of the 1965 Copyright Act failed to consider the range of new developments and their implications in a national and

* Project Director for the Centre for Economic Development and Administration (CEDA) at Tribhuvan University, P.O. Box 797, Kirtipur, Kathmandu, Nepal. Tel.: +977 1 331722; e-mail: ceda@wlink.com.np

global perspective. It made only a few alterations on matters of immediate concern relating to coverage and penalties.

Coverage was extended to include computer programs and research works, and the penalties for infringement of copyright (unauthorized publication), hitherto negligible, were made more severe with a first-offence fine up to RS 100,000 (approximately \$1,500), or six months' imprisonment, or both, and for each offence thereafter RS 200,000, or one year's imprisonment, or both.

Enforcement

Copyright in Nepal is administered by the Nepal National Library (NNL). The first amendment of the Copyright Act in 1997 handed this responsibility to the Department of Archaeology but it is still being administered through the NNL. Despite the existence of copyright law since 1965, there was little evidence of its implementation until copyright rules were formulated and brought into effect from December 1989. Neither the Copyright Act nor the copyright rules contain procedures for legal action to be instituted against infringement. In such circumstances, the scope of copyright administration is confined to being a mere instrument for copyright registration. As of August 1999, works of various description being brought to copyright registration at the NNL included 250 books, 325 audio cassettes, sixty paintings and five video films. To date, only three complaints have been lodged with the NNL, against copyright violation: one relates to a book, one to a video film and one to an audio cassette. Such complaints, however, do not receive the necessary investigation or legal redress because of the lack of adequate and well-defined authority on the part of copyright registrar. The law has recognized copyright infringement as a criminal offence for which both criminal and civil remedies have been provided. Yet at the operational level these provisions are meaningless through lack of enforcement procedures. There exists not a single case of copyright litigation in Nepal.

Another important element lacking in Nepalese copyright law is the absence of provision for a copyright collecting society. Without the existence of such a society, authors can hardly exercise their rights, for it is virtually impossible for them to keep track of the various uses made of their works in this digital environment.

The publishing industry

In the publishing sector, one of the major concerns of copyright, many new entrepreneurs have appeared over the last few years. With the development that is now taking place in various sectors, especially education, demand for books of all

kinds is growing at an ever-increasing rate. In the absence of a reliable database, it is still not known exactly how many new titles a year are published in Nepal: estimates vary in the range of 600 to 700 titles. Nepalese copyright law makes no provision for a compulsory library deposit and there is no other mechanism for ascertaining the titles of books produced in the country every year. Besides, there are no official statistics indicating the annual consumption of books nor the volume of imports and exports. According to one estimate, 40–60 per cent of the demand is met by domestic production while the rest is fulfilled by foreign imports. Although the lack of detailed information makes it difficult to describe the present status of the publishing industry, the growth in the number of publishing houses, printing works, bookstalls, reading materials and such other factors, definitely indicates that the market for the publishing industry is growing, as has the investment in this sector over the last few years. But it is not clear, in the absence of any reliable study, to what extent this growth has been able to develop and promote the national authorship needed to strengthen the domestic publishing industry and achieve self-sufficiency in book production.

The existence of an effective copyright regime is largely a reflection of a well-developed and well-established indigenous copyright industry. Whether it is music, publishing or any other sector of the copyright industry, people tend to see more harm than good in copyright compliance at an early stage of development, when the scope for their products generally remains inelastic due to limited market size. But once they see the market for their products becoming viable and more stable and lucrative, they are inclined to look for strong copyright protection. The reason perhaps is that with the steady growth of the market more investment is required to exploit the increasing opportunities. However, such investment may be highly insecure and negative in relation to market potential if there exists no effective mechanism to deter the large-scale piracy and other counterfeiting acts that usually take place along with market growth, depriving the legitimate producers from exploiting their due share of market. It is at this level of market development that producers of copyright goods begin to see copyright adherence as in their best interest and start putting pressure on the government for the enactment and effective enforcement of copyright laws.

A case in point is the recent development of the music industry in Nepal. Until a decade ago, neither the government nor those in the copyright profession ever articulated any concern for the enforcement of copyright laws in Nepal. But a few years ago the issue of copyright abruptly came into the light when some artists and music producers put pressure on the government for the revision and enforcement of the existing copyright law. It is interesting to discover why only music and other audio-cassette producers are so concerned about copyright enforcement, while the responses of the majority of those in other sectors of the copyright industry, like publishing, are still lukewarm. The reason perhaps is simple. Over the last few years, the market for music cassettes has picked up

dramatically whereas no such rapid growth in other sectors of the copyright industry could be detected. But, much to the distress of the producers, almost half this market is flooded with counterfeit copies of cassettes. Copyright infringement not only means loss of revenue to the government exchequer but, more importantly, will pose a major setback to the flow of investment needed for growth and innovation in the copyright industry of the country.

Press release:

ADBS-GESTE Agreement on the Electronic Publishing Charter

ADBS (the French association of information and documentation professionals) and GESTE (the French grouping of editors of online services) signed an agreement on 17 May on the Electronic Publishing Charter, which had been submitted at the ADBS meetings in Reims. While the text does not amount to a contract, it gives tangible expression to the dialogue initiated between the two structures and officializes the points of agreement on the digital reproduction and dissemination of press content.

GESTE seeks to defend its members' interests in the forums where decisions are made on the rules applicable to online communication. ADBS is concerned in particular with defending the interests of documentation professionals in liaison with the union or employers' bodies concerned and with the public authorities. GESTE published on its Internet site an electronic publishing charter dated 21 April 2000. ADBS made known its disagreement with some points of the document in a letter to the President of GESTE, published in July 2000 in the ADBS monthly *Actualités du Droit de l'Information*.

The leaders of the two associations met in October 2000 to find a compromise applicable to the practices of information/documentation professionals. These professionals are generally responsible for collecting information, processing it and disseminating it to a variety of audiences, and more generally for managing it.

The following provisions, which do not amount to a contract between ADBS and GESTE, are intended to remind information/documentation professionals of how copyright rules affect the online dissemination of information, and to remind GESTE members of the purpose of documentary practices.

From the discussions between the ADBS and GESTE leaders the following points emerge:

1. ADBS reiterates, with reference to the professional standards of practice in information/documentation, its attachment to respect for copyright rules, including the obligation to quote information sources.
2. GESTE considers that the work of information-documentation professionals is not prejudicial to the work of press editors but rather serves to enhance it by encouraging consultation of the articles cited.
3. ADBS and GESTE recognize that:

ADBS-GESTE Agreement on the Electronic Publishing Charter

- the full reproduction of press articles in large numbers on every type of information carrier, effected without the permission of the rights-holder, damages the interests of publishers and is prohibited;
- the modification or alteration of articles, titles, logos, marks, information or illustrations is also prohibited;
- reviews inform of the existence of an article but that they in no case dispense with the need to read the article or publication reviewed;
- a quotation is the reproduction of an extract from the publication, respecting the moral right of the author by mentioning his or her name and the source, that it is necessarily short to avoid plagiarism and that the qualifier 'short' is to be understood in relation to both the publication from which the quotation is taken and that into which it is introduced. The quotation illustrates a point made and must not amount to competition with the original publication;
- it is possible to create a link to a site without the express permission of the site editor on the sole condition that the link opens a new browser window in order clearly to distinguish the information source as between the content of the site consulted and that of the site to which the link directs the user;
- permission is required to display the editor's logo, to incorporate the content of the editor's site in another site, and to establish a link to pages protected by a password or any other device.

BIBLIOGRAPHY

MAKEEN, *Copyright in a Global Information Society*, Kluwer Law International, 2000.

This book examines the scope of the author's rights of broadcasting, cabling, and the making available of works over computer networks under the copyright laws of the United States, the United Kingdom and France. Since the Berne Convention and the WIPO Copyright Treaty represent the international standard for the protection of authorship, the relevant provisions of these two international instruments are used as the archetype against which the compatibility of national laws with them is examined.

The study demonstrates that the expansion of the scope of copyright to cover broadcasting, cabling and the exploitation of author's works over computer networks was influenced by a shift in the governing criterion applicable to the dissemination of copyright works in non-material form. While before the advent of broadcasting, 'communication in public' was the governing criterion, the argument is advanced that today 'communication in public' has been replaced by a broader and more flexible criterion: 'communication to the public'. This criterion covers three distinct aspects, which came into existence in response to new technologies. The first two, which are a consequence of broadcasting, require the author's consent for every communication of his work to people geographically dispersed, and for every communication of his work to a new public not intended by the original rendition. The third aspect, which results primarily from the new technology of video on demand, requires the author's consent for every communication of his work to people chronologically dispersed.

In some national laws, the scope of the communication to the public criterion was restricted, and also was given a subordinate role to that of the reproduction right in respect of online exploitation. This book maintains that in the new global environment, where modern technologies recognize no national boundaries, the scope of the 'communication to the public' criterion should be fully harmonized among national laws, and furthermore should serve as the primary vehicle for the protection of online exploitation.

Price: €136.00.

To order, telephone: USA/Americas, + 1 617 354 0140; other countries, + 31 78 654 6454.

WATAL, Jayashree, *Intellectual Property Rights in the WTO and Developing Countries*. Kluwer Law International, Netherlands, 2001, 512 pp.

As a former TRIPS negotiator for India, Jayashree Watal brings great authority to her account of the benefits and pitfalls of TRIPS compliance for developing countries. She provides a detailed understanding of how TRIPS was negotiated at the Uruguay Round, how various countries have implemented it so far, and how the WTO monitors compliance. She reveals how the WTO dispute settlement process has worked to date in matters involving TRIPS, and how it is likely to deal with new issues that arise. Most importantly, she explains how developing countries can interpret TRIPS to their best advantage, and how to ensure that the 'constructive ambiguity' that characterizes the agreement remains flexible.

Among the present and future issues discussed in depth are limits to patent rights, the clash of biotechnology and biodiversity, trade secrets, test data, copyright on databases, geographical indications, competition policy, domestic enforcement under TRIPS, and the role of the World Intellectual Property Organization (WIPO). Each chapter presents an articulate evaluation of the way forward for developing countries in the specific area of intellectual property rights under discussion. The text is enhanced in some cases with explanatory tables, and is followed by an extensive bibliography of both primary and secondary sources.