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September 15, 2014

Ms. Farida Shaheed
UN Special Rapporteur in the Field of Cultural Rights
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms. Shaheed,

I write in reference to your inquiry on the impact of intellectual property regimes on the right to participate in and to enjoy science and culture, as per Article 27 of the Universal Declaration of Human Rights. Thank you for considering my comments.

As an accredited NGO with the World Intellectual Property Organization (WIPO), the Institute for Policy Innovation (IPI) is familiar with the issue of the relationship between IPRs and benefits to society. We believe strongly that those who claim IPRs are a barrier to access to knowledge and culture are incorrect, and that in fact the opposite is true: IPRs facilitate the creation and enjoyment of culture and knowledge. I will attempt to lay out the reasons in this commentary.

Creation Logically Precedes Access and Enjoyment

Logically, creation logically precedes access to knowledge and enjoyment of culture. In other words, a thing must exist before it can be enjoyed. Therefore, priority must be given to the factors that lead to creative acts, including property right incentives, before considering how those works are distributed.

Opponents of IPRs have to various degrees simply assumed that creators and inventors would continue their creativity activity at pace regardless of whether the creators themselves received any reward for their work; in some cases, some have even maintained that creativity would *increase* absent IPRs. While I do not believe that IPRs are the only factor that incentivizes creation, it is clearly a major factor, and certainly so at the economic margin of investing in an additional creative work.

Some forms of creativity are extraordinarily expensive and capital-intensive, such as the development of pharmaceuticals. But all creative endeavors have costs, not only for the development of the creative work, but also for its distribution.

Not only must a work exist before it can be enjoyed, the consumer must be aware of its existence before it can be enjoyed. IPRs provide incentives for the distribution, advertising, and marketing of creative works, which raises awareness of the work and thus increases access and enjoyment.

Rights of Creators Do Not Restrict Consumer Access to Knowledge and Culture

It is sometimes maintained that IPRs restrict access to knowledge and culture, but this is a false accusation. IPRs restrict theft but not access. Nowhere in the concept of "access" does it mean that every bit of knowledge and culture must be made known to the consumer and provided to the consumer at zero cost and with zero effort and obligation on the part of the consumer. One has a right to access a performance of the Vienna Philharmonic, but one does not have a right to a free ticket and free transport.

No one creates without the intention of sharing the fruit of their creativity. Authors want their works read, performers want audiences, researchers want their research incorporated into the body of human knowledge, and inventors want their products adopted by businesses and consumers. No one creates with the intention of hiding their creation in a hole in the ground.

Indeed, a primary virtue of patent law, for instance, is that it requires the public description of the invention. The general society immediately gains access to the knowledge behind the patent—the only requirement is to not steal the invention. But the knowledge is free.

So of course creators do not see their property right as a barrier to access; in fact, access is the creator's primary desire. But the creator rightly expects that his or her rights are also recognized.

Concerns about access to culture and knowledge in developing countries are, of course, legitimate. But the first step in creating a market and distribution system for creative works is the IPR. Once IPRs are in place, incentives are in place, and it is now possible for contracts to be negotiated. Distribution channels don't work without contracts, and contracts are impossible without clear ownership.

Democratic Institutions Have the Ability to Negotiate Terms For Access to Knowledge and Culture

As should be clear from the previous comments, of course access to culture and knowledge are vitally important. But it is precisely the IPR that ensures that the products exist in the first place, and that allows for the creation of distribution channels through contract. Upon this foundation business models can be tried and built that are uniquely appropriate for individual countries, and even for specific groups within a particular country. There is no one "right" or "best" business model, and different countries will develop different business models. But no business model is possible without its foundation of property rights.

Once this foundation is in place, democratic, representative societies have the tools to negotiate and work out for themselves the terms for access for knowledge and culture. This is why global IP treaties preserve national flexibilities within the framework of property rights.

Non-democratic societies have bigger problems than access to knowledge and culture.

A Tool of Human Rights

Intellectual property rights further the extension of other human rights, such as political speech, health care and education. It was copyright that took publishing out of the hands of governments and monarchs and enabled the free published expression of individual authors and publishers.

It is undeniable that new pharmaceuticals improve health care, or that expansive publication improves education. And it is precisely the implementation of intellectual property protection that has resulted in widespread creation and distribution of new pharmaceuticals and the expansion of publication.

Intellectual Property Rights are Themselves a Basic Human Right

A fundamental right, according to John Locke, was the right of a laborer to the fruit of his labor, which he had the right to sell to another or to retain. For a creator, the fruit of his or her hands is the creative product, in which we would assert that he or she has a fundamental right. Those who would deny that IPRs reflect a basic human right argue the preposterous: namely, that the right of a creator to the fruit of his or her labor is somehow less than that of other, non-creative forms of labor.

It is for these and other reasons that what we today call intellectual property rights have been recognized as basic human rights in a number of important human rights documents.

What follows are excerpts from a number of documents, most of which have widespread international support. What is clear is that those concerned about human rights made a conscious and concerted effort to ensure that intellectual property rights were protected.

(1) **The U.S. Constitution**: “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;” (Art. 1, Section 8, Clause 8)

The U.S. Constitution contains both specific protections for and limitations on intellectual property. These protections were not placed there by multinational corporations. Rather, the protections of intellectual property in the Constitution were a logical extension of the right to the fruits of labor, and were designed to protect the rights of creators and inventors.

(2) The American Declaration on the Rights and Duties of Man: "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." (Article 13)

The Declaration (1948) was the "first international human rights instrument," according to Wikipedia. And this language has been reused repeatedly in international human rights documents to secure the right of creators to own and profit from their creations.

(3) The Universal Declaration of Human Rights: "Everyone has the right to the protection and material interests resulting from any scientific, literary, or artistic production of which he is the author." (Article 27)

The 1948 Declaration clearly asserts that the right to intellectual property protection is a human right.

(4) International Covenant on Economic, Social and Cultural Rights: (Article 15, ratified by the UN General Assembly on December 16, 1966):
The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Note that while everyone has the general right to benefit from innovation, those who create innovations have a specific right to the "protection" of "material interests" resulting from their own innovations. This can mean nothing other than ownership of intellectual property, despite the absence of that legal term. An IP regime that provides the general public access to and benefits from innovative works while also protecting the ownership of those works meets the criteria of the these instruments.

(5) Vienna Declaration and Programme of Action: "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." (1993, Part One, Paragraph 10)

> Remember, the right to the ownership of one's discoveries and creations is a human right under the agreements we've cited. So according to the Vienna Declaration, intellectual property protection *may not be infringed because of a lack of development*.

Obstacles to Authors, Creators and Inventors

The Special Rapporteur also wisely asks concerning the "concrete obstacles met by authors, creators and inventors, such as scientists and artists, to enjoy this right." The "right" to which the Special Rapporteur refers is Article 27 of the Universal Declaration of Human Rights, recalled above. We are grateful that the Special Rapporteur grants the proper interpretation of Article 27 as primarily referring to the rights of creators to benefit from their creation.

Far beyond any other obstacle for creators is the permissionless theft of their work, whether it be piracy of a written or recorded work, production of a patented invention or molecule in violation of the patent, or counterfeiting of trademarked goods. We are concerned about rampant piracy and counterfeiting of creative works, as well as by national strategies designed to ignore internationally recognized patents, such as India's purposeful violation of pharmaceutical patents that are globally recognized.

We ask that nations claiming to believe in the supremacy of the rule of law devote themselves to proper and consistent application of that law, and to behavior that comports with their international treaty obligations, in the area of IPRs, by respecting copyrights, trademarks and patents, and by cooperating in the identification and prosecution of those who violate IPR law.

Conclusion

The crux of the 20th Century competition between capitalism and communism was this question: Does the general public benefit from private ownership and control of capital, or must the general public expropriate that capital in order to benefit from it? What is clear as we move into the 21st century is that private ownership and control of capital delivered far superior results than did its opposite.

In the 21st Century, there is no reason to replay the experiment (though some seemingly desire to do so) by asking the question: Does the general public benefit from private ownership of intellectual property (IP) capital? Or must the general public expropriate those IPRs in order to benefit from them? We already know that ownership of creative capital through IPRs generates the greatest benefit to the general public through more widely appreciated culture, through expanded knowledge and through improved public health.

I appreciate the opportunity to share these thoughts with the Special Rapporteur, and would be happy to continue to participate in the thematic report to the Human Rights Council as appropriate.

Sincerely,

Tom Giovanetti
President