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## STUDIO LEGALE

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**Subject: The impact of Intellectual Property regimes on the enjoyment of right to science and culture \_ Contribution to the open consultation on the issue**

→ Intellectual Property Rights and Human Rights

Intellectual Property (IP) protection is included in some of the basic documents that the world looks to as pillars of civil society.

The 1948 Universal Declaration of Human Rights clearly asserts that the right to intellectual property protection is a human right: "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).

According to Article 15 of the International Covenant on Economic, Social and Cultural Rights, 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<sup>(1)</sup>.

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.

IP protection is a deviation from the free-market paradigm, as it grants temporary monopoly power to the owner of IP, thus reducing competition. Why is this accepted? Because it is generally considered that a certain level of protection is needed to promote innovation and development, the public good.

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Usually, the link between IP and human rights is highlighted when IP has a negative impact on the enjoyment of Human Rights<sup>(2)</sup>.

We need to focus on how Human Rights standards and mechanisms could be used positively to design and implement IP policies in a way that is conducive to the advancement of Human Rights.

Viewed in this light, the discussion of IP rights and Human Rights becomes less about comparing and contrasting discrete legal concepts and their characteristics, but more about finding ways to creatively relate them to each other in order to facilitate the mutual development of both international regimes and to preserve the public interest and the general welfare of all those concerned.

IP even in an economic sense is more properly categorized a limited 'privilege' granted to authors and creators as an incentive to create works and make them public. The inherent and essential flip side to this privilege is the underlying objective that the public has the right to access and use these creative works. The right of the public to access is part and parcel of this IP right.

These IP privileges have a social and cultural function and the emphasis of IP rights is not just with respect to the rights of the author but also the right of the public and the community.

Viewed from this perspective, IP, as a system that balances incentives to creativity and innovation and participation, is undoubtedly a Human Right.

If one stops to think of IP as a mere economic privilege to exclude others and begins to think of IP as economic, social and cultural rights to access and participate in the creation of knowledge and information within a community, IP as a human right becomes all the more obvious<sup>(3)</sup>.

The intersection of IP and Human Rights focuses upon the fundamental question<sup>(4)</sup> of defining the appropriate scope of private monopoly power that gives authors, inventors, and creators a sufficient incentive to innovate, while ensuring that the community has adequate access to those works, inventions, creations, and, in a word, innovations.

On this road, the debates have to open up the integration of an increasingly dense thicket of legal rules governing the same broad subject matter and defining the Human Rights – IP interface with coherent, consistent, and balanced legal norms that enhance both individual rights and global economic welfare.

### → Going beyond

Serious threats challenge our species, and humanity needs to go beyond. It is time to hit the reset button.

Innovation and creativity are essential for sustainable growth and economic development. Of course, the ultimate cause of all innovation is human creativity. But innovation does not occur in a vacuum; it requires a workable structure of incentives and institutions.

Government policies that foster the right enabling conditions for innovation, and that allow entrepreneurship and markets to flourish, can provide a climate that encourages innovation and economic growth in the 21st Century. Increasingly, one of the core enabling conditions is IP protection<sup>(5)</sup>.

One of the oldest critiques of economic thinking has been its perceived disregard of the deeper and more sacred aspects of life.

The recent United Nations (UN) 65/309 Resolution "Happiness: towards a holistic approach to development"<sup>(6)</sup>, "bearing in mind the purposes and principles of the United Nations, as set forth in the Charter of the United Nations, which include the promotion of the economic advancement and social progress of all peoples, conscious that the pursuit of happiness is a fundamental human goal, cognizant that happiness as a universal goal

and aspiration embodies the spirit of the Millennium Development Goals”, recognizes that “the gross domestic product indicator by nature was not designed to and does not adequately reflect the happiness and well-being of people in a country”, inviting Member States to pursue the elaboration of additional measures that better capture the importance of the pursuit of happiness and well-being in development with a view to guiding their public policies.

We, as human beings, are smarter, and can do better - much better - than we have done in creating a secure, sustainable, harmonious, peaceful, and happy economy and society<sup>(7)</sup>.

We must take this shaky moment in human history as a tremendous opportunity to forge a sane path forward together.

Man is both rule and emotion. A man in full accepts the idea of limit as belonging to human nature.

The protection of freedom needs to pass through a sort of a state of uncertainty.

We need to stimulate the economic growth, being on the continuum of problem → knowledge → vision → innovation → solution.

With reference to the economic assessment, this track brings out the value of what cannot be calculated.

The incalculable is the risk the economist faces, but the incalculable has to do with the concept of gift and its assets.

Gift is not an obligation. Gift is both will and freedom.

Undertaking a venture is strictly linked to the idea of gift, and the incalculable.

Gratuitousness cannot be reduced to a purely ethical dimension. The logic of gratuitousness concerns the supra-ethical dimension of human action: it is superabundance.

In this sense, the concept of gratuitousness is something similar to the one of innovation.

Innovation - with all increasingly important ingredients of collaboration, the flow of ideas between different innovation actors, and access to knowledge - is a crucial element of sustainable growth and competitiveness, happening across multiple actors, including governments, nongovernmental organisations, and society as a whole.

So-called innovation ecosystems have become more complex and are now built on more internationalized, collaborative, and open innovation models and knowledge markets.

IP is an essential part of the innovation ecosystem, encouraging those who innovate to be able to have a framework in which to trade their intellectual assets.

A key expression is “inclusive growth through innovation”<sup>(8)</sup>.

In other words, within the universal framework of Human Rights, IP rights are with respect to goods born ‘from the recognition that I am bound to another and that, in a certain sense he is a constitutive part of me’.

These goods represent a source of identity, innovation, and creativity, being an evolving dynamic force relevant to all societies, local or global.

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<sup>(1)</sup>See T. Giovanetti, M. Matthews, “Intellectual Property Rights and Human Rights”, Institute for Policy Innovation - Ideas, From the IPI Center for Technology Freedom, n. 34, September, 2005.

<sup>(2)</sup>See S. Fukuda-Parr, “Why frame IP with HR language and law?”, report presented within “The Right to Development and the WIPO Development” Workshop at Yale Law School, on 13 February 2010.

<sup>(3)</sup>See M. Dizon, “Reframing the debate – IP rights and human rights”, available at <http://michaeldizon.wordpress.com/2009/03/01/reframing-the-debate-ip-rights-and-human-rights/>

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<sup>(4)</sup>See L. R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?", 5 Minn. Intell. Prop. Rev.. 47, 2003, available at <http://mipr.umn.edu/archive/v5n1/Helfer.pdf>

<sup>(5)</sup>See "Creativity, Innovation and Economic Growth in the 21st Century An affirmative case for Intellectual Property rights A BIAC Discussion Paper", Business and Industry Advisory Committee (BIAC) to the OECD, January 2004.

<sup>(6)</sup>adopted by the UN General Assembly on 19 July 2011.

<sup>(7)</sup>"Time for a Sustainable Economic Paradigm (Input for the Draft Outcome Document for Rio+20)", Royal Government of Bhutan. Visit [http://www.isee2012.org/bhutan\\_rio20\\_pdf\\_from\\_un\\_website.pdf](http://www.isee2012.org/bhutan_rio20_pdf_from_un_website.pdf)

<sup>(8)</sup>See Global Innovation Index 2012 - Stronger Innovation Linkages for Global Growth, copublished by INSEAD and the World Intellectual Property Organization (WIPO), 2012.