## DePaul University College of Law

## Professor Joshua D. Sarnoff submits the following comments in regard to the “Call for inputs: Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergenerational justice” (“Call”). Professor Sarnoff teaches intellectual property, administrative, and climate law at DePaul University College of Law, and has written about many topics relating to the human right to benefit from scientific progress. The comments focus on the right to access the benefits of science in regard to climate change and on barriers to access from intellectual property rights. Attached to these comments are similar comments submitted to the SR for Toxics in 2021 on similar themes. I have also edited a book on Intellectual Property and Climate Change, which includes an extract on human rights and climate (written by Stephen Humphries and the International Council on Human Rights Policy) that is well worth considering for its implications on choices that need to be made regarding whose rights to protect, and when.

## Summary

“The right to science encloses all scientific disciplines. It encompasses enabling access for all without discrimination to the benefits of science and its impacts for the full enjoyment of all human rights, including the right to life, the right to health, the right to body integrity and the right to education.” These concerns regarding scientific benefits and disciplines should be evident from the COVID-19 pandemic and worldwide responses to it.

This submission therefore focuses on the Article 15(1) International Covenant on Economic, Social and Cultural Rights (“ICESCR”) “recognition of the right of everyone … (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its application; [and] (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.” There are many ways that the public may be deprived of such rights and progress by intellectual property rights, particularly in regard to climate change (as evidenced from the experience with COVID-19 and vaccine hoarding). Thus, intellectual property rights and technology transfer must be addressed in any new legislation to assure that human rights to benefit from science are protected, and to date have not done so adequately.

Changing the existing systems will be extremely difficult and will be vigorously resisted by vested interests. The most significant problem to address is the rhetoric of counter-narratives to protecting the right of the public to benefit from science and its applications. The most pervasive and persuasive counter-narrative is that any changes to our current reliance on intellectual property rights and private markets for development and dissemination of needed technologies will damage investment and reduce innovation and thereby impede rather than promote the progress of science and limit the benefits of its applications. Further counter-narratives treat any such changes as requiring “inappropriate” government intervention in private markets, which interferes with purportedly fundamental or at least vested rights of scientists and private investors. These counter-narratives, however, fail to focus adequately on *duties* of scientists and of private investors or on the corresponding *harms* to the rights of the public – including to benefit from such scientific and cultural progress and their applications – which result from privileging the private and property interests highlighted by the counter-narratives. Thus, legislation is needed that will, in fact, assure that the public is able to obtain benefits that are recognized rights under the ICESCR.

Climate-change-related technologies and pollution.

As I have written about extensively, intellectual property rights will affect the nature of technology development and transfer to address climate change. *See, e.g.,* Research Handbook on Intellectual Property and Climate Change (Joshua D. Sarnoff, ed., Edward Elgar Press 2016); Joshua D. Sarnoff & Margaret Chon, *Innovation Law and Policy Choices for Climate Change-Related Public-Private Partnerships*, in Global Intellectual Property, Public-Private Partnerships, and Sustainable Development Goals (Cambridge U. Press Pedro Roffe et al. eds 2018); Jesse Reynolds, Jorge L. Contreras & Joshua D. Sarnoff, *Solar Climate Engineering and Intellectual Property: Toward a Research Commons*, 18 Minn. J. of L. Sci. & Tech. 1 (2017); *Intellectual property rights and new climate change technologies,* in The Oxford Handbook of International Climate Change Law (Kevin R. Gray, Richard Tarasofsky & Cinnamon P. Carlarne eds., Oxford U. Press 2016); Joshua D. Sarnoff, *The Patent System and Climate Change,* 16 Virginia J. L. & Tech.301 **(**2011). Not only will such IPR potentially result in reduced R&D or needed product manufacturing, but also will increase the costs of access to needed mitigation and adaptation technologies (including carbon dioxide removal and solar radiation management technologies). By doing so, it will also require payments for technological access to products (if available) that run counter to the obligations of the United Nations Framework Convention on Climate Change – specifically Article 3.1. UNFCCC, Art. 3.1 (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”).

Intellectual property rights and technology transfer have been controversial issues within the context of UNFCCC negotiations, precisely because of the same reliance on private investment, market approaches, and minimized government regulation and technology development that has been described elsewhere in regard to COVID-19. Not only will climate change cause significant – if not catastrophic – problems in its own right, increased temperatures will also generate greater incidence of pandemic diseases. Accordingly, more attention is needed to assure the right to health and to life in regard to climate change is not impeded by IPR and that the public can properly benefit from the scientific developments that will be generated around the world. Again, if worldwide efforts to promote cooperative R&D and production and international sharing of IPR reduce private investments, governments have numerous means to counteract such measures. And again, further discussion of scientific and private entity duties to the public need to be addressed.

At the national level, adoption of new legislation may be unnecessary to the extent that existing authorities already exist to compel trade secret sharing and compulsory patent licensing. *See, e.g.,* David S. Levine & Joshua D. Sarnoff, *Compelling Trade Secret Transfers,* 74 Hastings L.J. 987 (2023). But political will to exercise those authorities to assure that human rights are fulfilled is indeed needed. Similarly, sharing of data and technologies for solar climate engineering or for carbon dioxide removal will likely be needed, given the failure to regulate carbon emissions adequately, even if the current approach to developing and disseminating such technologies is to rely upon market mechanisms that have proven inadequate in the past. *See, e.g.,* Jesse L. Reynolds, Jorge L. Contreras & Joshua D. Sarnoff, Solar Climate Engineering and Intellectual Property: Towards a Research Commons, 18 Minn. J.L. Sci. & Tech. 1 (2017). Again, the main concern is to recognize that business as usual will not solve the problems we face, and to make human rights prioritizations paramount in any new treaty obligations and legislation that is adopted. *See, e.g.,* Human Rights and Climate Change (Stephen Humphreys ed. Cambridge U. Press 2010).

Conclusion

Although the Rapporteur is to be commended for initiating this Call, the concerns with the rights to science and culture go far beyond what was said above. It is to be hoped that the Call will address in more detail the many different facets of these issues. The Rapporteur should offer concrete suggestions for changes to treaty law and to national legislation to change our reliance on intellectual property and private markets to generate and distribute equitably the needed benefits of science and of culture.

Attachment: 2021 Comments to SR on Toxics