

# **EIPIN Congress, Strasbourg**

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**The right to health and patents**

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# Article 28 TRIPS

## Rights conferred

"1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

# U.S. Constitution 1787

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

*Article 1, Section 8, Clause 8*

# Universal Declaration of Human Rights, 1948

## Article 27

“(1) 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.

(2) 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.”

# United Nations International Covenant on Economic, Social and Cultural Rights, 1966

## Article 15.1

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

(a) To take part in cultural life;

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

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

# *Article 17 of the Charter of Fundamental Rights of the European Union*

“(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary in the general interest.

(2) Intellectual property should be so protected.”

# United Nations Committee on Economic, Social and Cultural Rights, 2001

“The allocation of rights over intellectual property has significant economic, social and cultural consequences that can affect the enjoyment of human rights.”

## Article 25.1 of the Universal Declaration of Human Rights, 1948

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care...”



## Article 12.1 of the United Nations International Covenant on Economic, Social and Cultural Rights, 1966

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

# General Comment No. 14, UN Committee on Economic, Social and Cultural Rights, 2000

“Health is a fundamental human right indispensable for the exercise of other human rights...However, the reference in Article 12.1 of the Covenant to ‘the highest attainable standard of physical and mental health’ is not confined to the right to health care...the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life...”

# Article 35 of the Charter of Fundamental Rights of the European Union

“Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

# United Nations Sub-Commission on the Promotion and Protection of Human Rights Resolution 2000/7

- "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"
- "...actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to ... restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health"

# The interface between patents and the right to health

A rights-based discourse can effect:

- Legislative change
- Policy change
- Judicial interpretation

# Article 21 of the Constitution of India, 1949

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

# Section 5(1)

## Indian Patents Act of 1970

"In the case of inventions –

- (a) claiming substances intended for use, or capable of being used, as a food or as medicine or drug...

no patent shall be granted in respect of claims for the substance themselves, but claims for the methods or processes of manufacture shall be patentable."

## *Section 3(d) of the Indian Patents Act (1970), as amended by the Patents (Amendment) Act 2005*

“the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

*Explanation.*-For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.”



# Article 196, Constitution of Federal Republic of Brazil, 1988

"Health is a right and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery."

# Constitution of the Republic of South Africa, 1996

Article 11: "Everyone has the right to life."

Article 27(1): "Everyone has the right to have access to (a) healthcare services including reproductive health care."

Article 28(1) : "Every child has the right to ... (c) basic nutrition, shelter, basic health care services and social services."

# What else can a rights-based discourse achieve?

A rights-based discourse can act as a blocking mechanism, for instance:

- Privacy and data protection as fundamental rights and freedoms in the EU were central to the rejection of ACTA by the European Parliament on 4 July 2012
- Right to work provided the basis for farmers' rights to be incorporated in India's Protection of Plant Varieties and Farmers' Rights Act, 2001

# Article 7 of the Charter of Fundamental Rights of the European Union

"Everyone has the right to respect for his or her private and family life, home and communications."

# Article 8 of the Charter of Fundamental Rights of the European Union

- "1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority."

# Article 19.1 of the Constitution of India

“(1) All citizens shall have the right-

.....

(g) to practise any profession, or to carry out any occupation, trade or business.”

# Where has the impact of a rights-based discourse been less evident?

- Community rights and traditional knowledge
- Right to development and IP-related technical assistance

# *UN General Assembly Resolution 41/128, 4 December 1986*

Declaration on the Right to Development,  
Article 1.1

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”



# *UN General Assembly Resolution 41/128, 4 December 1986*

Declaration on the Right to Development,  
Article 3

- "1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right of development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations."

# Moving forward...

- Are there issue-based reasons for different outcomes in the interface between IP and human rights?
- Have contestations involving the relationship between IP and human rights changed over time?
- Has the nature of the right to “enjoy the benefits of scientific progress and its applications”, and the right 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”, changed over time?

# Has the rights-based discourse changed (or does it need to)?

- Have the very notions of inventorship and creativity lost their original connection with the self, the individual, the lone inventor, author, creator of those works?
- Does the way we understand justifications for intellectual property rights impact on how we perceive the way that IP interfaces with (other) human rights?

# Statement by the UN Committee on Economic, Social and Cultural Rights 2001

"... Human rights are fundamental as they derive from the human person as such, whereas intellectual property rights derived from intellectual property systems are instrumental, in that they are a means by which States seek to provide incentives for inventiveness and creativity from which society benefits..."

*UN Economic and Social Council E/C.12/2001/15*

# Statement by the UN Committee on Economic, Social and Cultural Rights 2001

"...In contrast with human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While intellectual property rights may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person..."

*UN Economic and Social Council E/C.12/2001/15*

# Thank you for your attention

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