



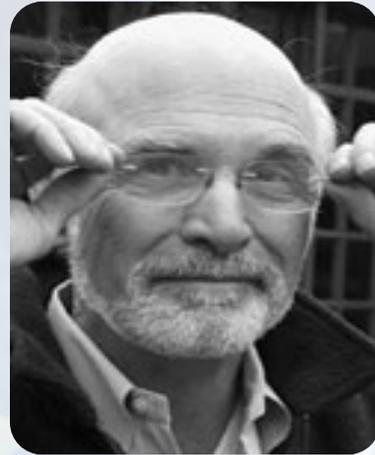
# Right to Culture and Freedom of Arts and Science: Participation and Access

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# Two short stories



**Jon Lech Johansen**



**Jon Else**

# Our Agenda

Background

From papers to bits: the digital revolution  
IP vs. Right to Culture

Framework

The Human Rights Framework

Existing solutions

What has been done...

Roadmap for the  
future

... and what still has to be done



# THE BACKGROUND

# Before the digital revolution

- In the realm of human rights, cultural rights viewed as second class citizens
- **Right** to take part in cultural life as real Cinderella
  - Absent from national constitutions and regional charters
- **Freedom** of arts and science (or research) under the umbrella of freedom of expression

# After the digital revolution

- Different opportunities for **access...**



- ...and plenty of new ways of **participating**



# The response to the digital threats

- TRIPs Agreement
- WIPO Internet Treaties
- National implementations: DMCA, EU InfoSociety and beyond
- TRIPs-plus trade agreements

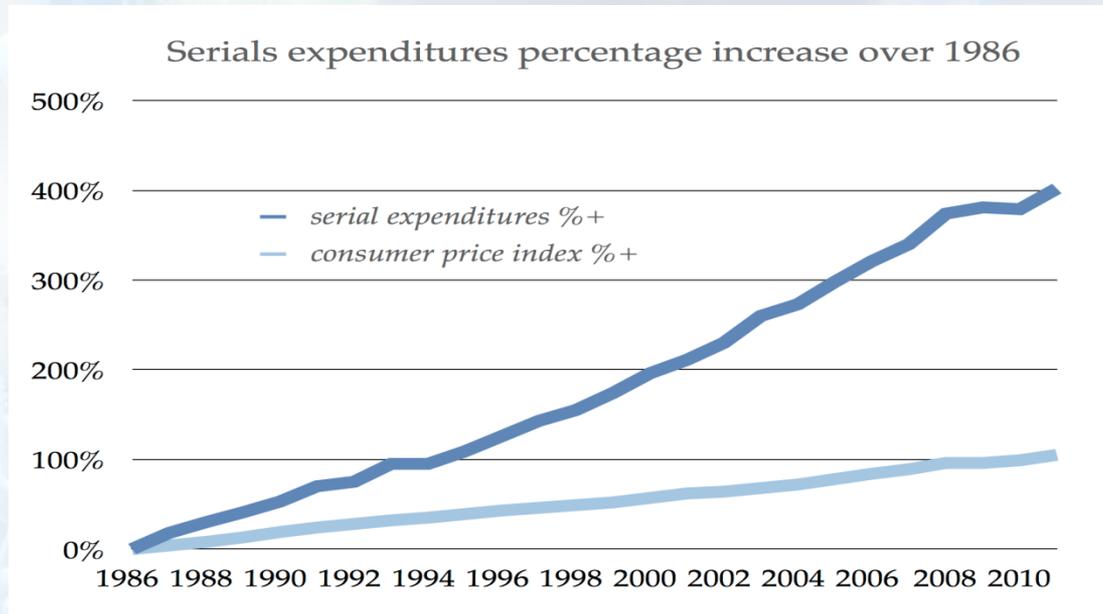


# IP vs. right to culture in developing countries

- **Three-step-test** reinforces one-size-fits-all approach
  - **Difficult adaptability** of exceptions and limitations to social and economic needs
- **Old tailored exceptions have not been updated**
  - E.g. Appendix 1 of Berne Convention on translation and distribution rights

# In developing countries (cont'd)

- **Disproportionate increase in price for proprietary databases**  
→ no access for developing economies



# In developing countries (cont'd)

- Protection of **traditional knowledge** vs. biopiracy and privatization of folk art



# IP vs. right to culture in developed countries

- Restriction of **exceptions and limitations**
  - **US** → reduced power of fair use
    - From *American Geophysical Union v. Texaco* (1994) to DRM circumvention
  - **EU** → Directive 2001/29/EC (InfoSociety)
    - Exhaustive list of non-mandatory exceptions (Art.5)
    - Recital 44: “(...) The provision of such exceptions or limitations (...) should (...) **duly reflect the increased economic impact** (they) may have in the context of the new electronic environment. Therefore, **the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter**”.

# In developed countries (cont'd)

- **Lack of harmonization** of exceptions to copyright & *sui generis* right on databases
- The **unhealthy marriage** of copyright, contract and code



# THE HUMAN RIGHTS FRAMEWORK



# The right to take part in cultural life: UDHR

- Universal Declaration of Human Rights (1948), Art.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**.*

# (Some) other references

- Art. 13 para 2 of the American Declaration of the Rights and Duties of Man, Art.13.2
- International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5 (e) (vi)
- Convention on the Elimination of All Forms of Discrimination against Women, Art. 13 (c)
- Convention on the Rights of the Child, Art. 31.1
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 43.1 (g)
- Convention on the Rights of Persons with Disabilities, Art. 30.1.
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 2.1

# The right to take part in cultural life (cont'd)

- No references in the **ECHR**
  - ... but recent case law more open to cultural rights
- **EU Charter of Fundamental Rights, Art.13** → freedom of arts and sciences
  - *"The arts and sciences research shall be free of constraint. Academic freedom shall be respected"*
- Same in several national **Constitutions**
  - Prong of freedom of expression → limited impact

# The right to take part in cultural life: ICESCR

- **International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976), Art.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.*
2. *The steps to be taken (...) shall include those necessary for the **conservation, the development and the diffusion of science and culture.***
3. *The States Parties (...) undertake to respect the **freedom indispensable for scientific research and creative activity.***

# How to interpret Art.15 ICESCR?

- CESCR General Comment n.17 (Art.15 (1) (c))
  - *"The relationship between these rights and Article 15, paragraph 1 (c), is at the same time **mutually reinforcing and reciprocally limitative**"*
  - Right protected under Art.15 (1) (c) ≠ IP rights
    - IP rights are **NOT** human rights
  - **Clashes** between Art.15 (1) (c) and other HRs should be carefully **solved**
    - E.g. right to food, health, education, and Art.15 (1) (a) and (b)
    - *"Ultimately, intellectual property is a social product and **has a social function**"*

# Which obligations?

- CESCR General Comment n.21 (Art.15 (1) (a))

## PARTICIPATION

*The right of everyone (...) to engage in one's own cultural practices and to express oneself (...), to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.*

## ACCESS

*The right of everyone (...) to know and understand his or her own culture and that of others through education and information (...) and to benefit from the cultural heritage and the creation of other individuals and communities.*

# Which obligations? (cont'd)

- CESCR General Comment n.21 (Art.15 (1) (a))

- **RESPECT** (everyone's right...)

...to freely choose cultural identity; to enjoy freedom of expression; to seek, receive and impart information; to have access and enjoy freedom to create science and culture

- **PROTECT**

Same as under "respect", but vis-à-vis 3<sup>rd</sup> parties

- **FULFILL**

To facilitate access, grant assistance to artists and organizations engaged in scientific/cultural activities, to remove discriminations

# What does it mean for IP law? (cont'd)

- **RESPECT**

- **Exceptions and limitations** are fundamental to balance IP and access/participation → no straitjacketed in rigidities
- No **chilling effects** due to disproportionate civil/criminal sanctions

- **PROTECT**

- vs. **EULA and DRM interference** with exceptions and limitations
- vs. **chilling effects** coming from misleading copyright notices
- vs. anticompetitive **abuses** of IP rights

- **FULFILL**

- What about open access/source projects?

A 3D illustration featuring a white humanoid figure on the left holding a small globe of Earth. In the background, a larger globe of Earth is centered, and a line of smaller white humanoid figures holds hands in a circle around its base. The scene is set against a light blue and white background with a blue border at the top and bottom.

# EXISTING SOLUTIONS

# At an international level

- Access to knowledge arguments supported the **rejection** of a draft **WIPO Treaty on Digital Broadcasting Rights**
- **WIPO Development Agenda (2007)**
  - 45 adopted recommendations → many of them refer to access to knowledge, technology transfer to LDCs, the need to foster creativity and innovation, and to protect and reinforce the public domain
- **WIPO Treaty on Exceptions for Visually Impaired People** → diplomatic conference in June 2013

# At a regional/national level

- **EU and software protection**
  - **Rejection** on proposal for a Directive on Software Patent
  - New Directive on Software protection declares **exceptions mandatory** (no contractual derogation)
- CJEU and **abuse of IP rights**
- Belgium and Portugal → copyright law declares **exceptions mandatory**
- Germany → case law uses **three-step-test as flexible tool** to adapt old exceptions to digital environment

# A ROADMAP FOR THE FUTURE



# At an international level

- Specification of **role of three-step-test** in digital environment
  - Revision of **exceptions and limitations**
    - More flexibility for developing countries
    - Clearer connection with HRs and constitutional fundamental rights
    - Clearer interplay with EULA and DRM
  - Closer **cooperation** of international organizations (UN-WIPO-WTO)
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# At a regional/national level

- Again on **exceptions and limitations**
  - Harmonization in different sectors (general, software, database...)
  - Between copyright and consumer protection law → mandatory exceptions if needed to protect HRs
  - Judicial interpretation → flexibility and analogy when requested to protect HRs
- Different approach to **three-step-test**
- Revision of rules on **DRM and exceptions**
- **Impact assessment** of sanctions on enjoyment of HRs
- **Support of open access** initiatives



# Thank you for your attention!

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