

## Human Rights Bodies Gear Up on TRIPs

By Peter Prove and Miloon Kothari

In a move warmly welcomed by many civil society organizations, the UN Sub-Commission on the Promotion and Protection of Human Rights on 17 August 2000 adopted a resolution on 'Intellectual property rights and human rights'.

This was a leading step in a recent flurry of activity by international human rights bodies on the issues of intellectual property rights and the TRIPs Agreement. In addition, the UN Committee on Economic, Social and Cultural Rights (the UN Committee on ESC Rights) has committed itself to holding a 'day of general discussion' on intellectual property and human rights on 27 November 2000. That debate is likely to lead to the drafting of a 'general comment' by the Committee on this topic.<sup>1</sup>

These interventions by the international human rights community come in the midst of the ongoing review of the controversial article 27.3(b) of the TRIPs Agreement by the WTO Council on TRIPs, and on the brink of the anticipated general review of the TRIPs Agreement mandated by Article 71.1.

The Sub-Commission's resolution<sup>2</sup>, which was adopted without a vote, noted the links between human rights and intellectual property<sup>3</sup>, but declared that "since the implementation of the TRIPs Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, ...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".

The right to benefit from the protection of the moral and material interests resulting from one's own scientific, literary or artistic production is a recognized human right pursuant to article 27.2 of the Universal Declaration of Human Rights and article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (albeit subject to limitations in the public interest). However, taken together, the major international human rights instruments, "place a discernible emphasis on the interests that humans have in the diffusion of knowledge."<sup>4</sup>

### Main Points of the Resolution

The key human rights identified by the Sub-Commission as being at threat under the TRIPs regime include the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination.<sup>5</sup>

In its resolution of 17 August, the Sub-Commission:

- reminded all Governments of the primacy of human rights obligations over economic policies and agreements, and requested them to integrate into their legislation and policies, provisions, in accordance with international human rights obligations and principles, that protect the "social function of intellectual property";
- called upon the WTO, and particularly the Council on TRIPs during its ongoing review of the TRIPs Agreement, to take fully into account the existing State obligations under international human rights instrument;
- asked the UN Secretary-General to provide a report on this question at the Sub-Commission's next session in August 2001.

Making a link between biodiversity concerns and human rights concerns, the Sub-Commission also commended the Conference of Parties to the Convention on Biodiversity (CBD) for its decision to assess the relationship between the CBD and the TRIPs Agreement.

### Human Rights Should Guide the Development of Intellectual Property Rights

In a paper presented at a WIPO panel discussion on 'Intellectual property and human rights' in November 1998, Dr. Peter Drahos (Herschel Smith Senior Research Fellow, Queen Mary Intellectual Property Research Institute, London) had already made the observation that intellectual property rights (IPRs), being subject to adjustment according to economic circumstances and being generally limited in duration, lack the characteristics of fundamental

human rights. As subordinate or "instrumental" rights, Dr. Drahos suggested that IPRs "should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights." It is precisely because information has become the primary resource, he said, that exploitation of information through the exercise of IPRs affects interests that are the subject of human rights claims. Dr. Drahos

concluded by noting that "the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers", and he called for a dialogue between the human rights community and the intellectual property community.<sup>6</sup>

### Workshop Takes a Deeper Look at Key Issues

Two days after the passage of the resolution, the UN Committee on ESC Rights and the International NGO Committee on Human Rights in Trade and Investment organised an informal workshop, the second half of which dealt with intellectual property and human rights and particularly focused on the TRIPs Agreement. Participants included members of the Committee on ESC Rights, representatives of several UN and other multilateral agencies (including WIPO, UNCTAD and the WTO), NGOs and academics.

The discussion on intellectual property, TRIPs and human rights was launched by Dr. Drahos, presenting a further paper in which he noted that although the history of the implementation of TRIPs is relatively recent, "we have some evidence that should make us suspicious of arguments that continuing to globalise and ratchet up standards of intellectual property will serve human rights interests."<sup>7</sup> He referred in particular to the impacts on markets in food and health. "Clearly", he said, "the interest in health of all people has not to date been met in relation to the production of drugs for people in developing countries by a market system that relies significantly on patents to generate investment in drug research", for the simple reason that "the direction of patent-based research is determined by ability to pay." He concluded that the same trend was likely to be manifested in relation to genomics. He

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noted also that the price effects of global intellectual property standards on health and food products inevitably result in higher prices than those prevailing without protection.

With regard to the impact of globalized IPRs on the capacity of international institutions to provide public goods to developing countries in the agricultural sector, Dr. Drahos referred to the experience of the Consultative Group on International Agricultural Research (CGIAR), which necessarily uses biotech tools to undertake its research mission. Increasingly such tools fall under proprietary control. A CGIAR investigation had revealed that in nearly half of the cases in which CGIAR centres were using proprietary biotechnology, “they were uncertain whether the results of their research could be applied freely (or at all)”.<sup>8</sup>

Finally, Dr. Drahos referred to the impact of global IPRs on the human right to education, drawing attention to the price impacts of globalizing copyright standards on educational texts, particularly in developing countries.

Dr. Drahos portrayed the TRIPs Agreement as a prime example of “business sovereignty over regulatory standard setting”. He said that the goal of the human rights community should be “to make those involved in intellectual property begin to think about intellectual property rights systematically in relation to human rights values and law”, by:

- becoming active in the intellectual property standards setting process, and
- promoting the development of linkages between those institutions responsible for the administration and interpretation of intellectual property rights and those that have responsibility for human rights.

In a warning against “snappy sloganeering”, however, he said that calls “for an end to patents on life...do little to advance regulatory solutions to the problems of agricultural diseases, some of which will require a biotech solution and may in part need to be funded via the patent system.”

The workshop discussions, which were also informed by presentations by Mr. Simon Walker of the Office of the High Commissioner for Human Rights and Ms. Kristin Dawkins of the Institute for Agriculture and Trade Policy, were seen as a constructive preparation for the Committee on ESC Rights’ further consideration of this issue, and for its drafting of the ‘general comment’ on intellectual property and human rights.

### **Human Rights Concerns about TRIPs**

The extraordinary level of activity by international human rights bodies on this rather technical aspect on international economic law is founded on increasingly widespread concerns in human rights circles about the social impacts of the enhanced regime of IPR protection under TRIPs.

Amongst other aspects of the current interpretation and implementation of the TRIPs Agreement which have raised serious human rights concerns are the following:

- The implementation of the TRIPs Agreement has resulted in the restriction of access to patented pharmaceuticals for citizens of developing countries, as has been highlighted by analysis by the World Health Organization, Médecins sans Frontières and others – raising obvious implications for the enjoyment of the right to health.

- The ‘pirating’ of indigenous and traditional knowledge and designs for commercial exploitation by others pursuant to IPRs, contrary to both human rights law and the spirit of intellectual property law, is nevertheless flourishing under the TRIPs regime. Unlike the Convention on Biological Diversity, the TRIPs Agreement does not explicitly protect the interests of indigenous and local communities.
- The establishment and expansion of plant variety rights and intellectual property protection of genetically modified organisms hold serious implications for food security, and the enjoyment of the right to food.
- Stronger intellectual property protection under TRIPs also tends to impede technology transfer to developing countries, particularly through the imposition of higher prices for protected technologies, thereby presenting an obstacle to the universal right to enjoy the benefits of scientific progress and its applications, and to the realization of the right to development.
- The larger ethical issues surrounding human genome mapping and patenting also carry implications for the human right to self-determination.

Intellectual property law is founded upon the attempt to balance the interests of the originator/author (or IPR holder) with those of consumers and the general public. A human rights analysis helps to sharpen the view, shared by some sectors of the intellectual property law community, that implementation of the TRIPs Agreement has upset that balance in favour of intellectual property right holders.

The current levels of activity on this issue in the human rights bodies shows that they are intent upon making their voices heard and injecting a human rights perspective into this policy discussion.

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### **ENDNOTES**

- <sup>1</sup> A ‘general comment’ by the Committee on ESC Rights is an authoritative interpretation of the relevant international human rights law under the International Covenant on Economic, Social and Cultural Rights.
- <sup>2</sup> E/CN.4/Sub.2/RES/2000/7
- <sup>3</sup> Article 27.2 of the Universal Declaration of Human Rights (UDHR) and article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) both declare a right to “protection of the moral and material interests resulting from any scientific, literary or artistic production” of which one is the author – subject, however, to limitations in the public interest.
- <sup>4</sup> Drahos, P., *The Universality of Intellectual Property Rights: Origins and Development*, published in *Intellectual Property and Human Rights*, WIPO publication No. 762(E), 1999
- <sup>5</sup> UDHR article 27.1 and ICESCR article 15.1(b); UDHR article 25.1 and ICESCR article 12; UDHR article 25.1 and ICESCR article 11; and ICESCR article 1. Also article 1 of the International Covenant on Civil and Political Rights (ICCPR), respectively.
- <sup>6</sup> See note 4 above.
- <sup>7</sup> Drahos, P., *Human Rights, Globalisation and Intellectual Property Rights*, unpublished paper presented at informal workshop on 19 August 2000.
- <sup>8</sup> Report of the CGIAR Panel on Proprietary Science and Technology, Technical Advisory Committee Secretariat, FAO, 1998, xiv.