ADALPI

Association Internationale pour
le Développement
de la Propriété Intellectuelle

The International Society for the Development of
Intellectual Property

Consultation by the UN Special Rapporteur in the field of cultural rights on the impact of intellectual property regimes on the enjoyment of the right to science and culture

Contribution by ADALPI

The International Society for the Development of Intellectual Property (ADALPI) thanks the Special Rapporteur in the field of cultural rights for this opportunity to contribute observations regarding the impact of intellectual property regimes on the enjoyment of the right to science and culture.

The status of intellectual property in the human rights framework is at the heart of our activities: ADALPI was established in 2010 by a group of experienced and independent IP professionals with a view to securing an appropriate working environment in which creators and innovators can flourish by fostering the development of intellectual property regimes worldwide in accordance with ethical principles and by respecting national cultures and infrastructures. Our aim is to ensure that the benefits of intellectual property accrue to authors and other creative contributors as well as to society as a whole.

While ADALPI's work ranges across the whole intellectual property field, we should like to limit our observations in the present consultation to the right to culture and the protection of the moral and material interests of authors of literary and artistic works in the sense of Article 15(1)(a) and (c) of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR").

Introduction

A rich and diverse cultural life is the result of the creative input of a variety of individuals, be they writers, composers, cinematographers, choreographers, musicians, actors or dancers, architects, painters, sculptors or photographers. Together with their publishers, producers and other creative contributors, these authors and artists require a working environment in which they can think, work and express themselves freely. As intellectual workers they also need to be able to make a living from their creative activities, just like any other worker.

Article 15 ICESCR appears to accommodate these needs: While Article 15(3) ICESCR facilitates the creative process by obliging States Parties to respect the freedom which is indispensable for scientific research and creative activity, Article 15(1)(c) protects the moral and material interests of the author.

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Article 15 ICESCR thus contains a unique "culture package" which:

- invites everyone to take part, either actively or passively, in cultural life;
- stimulates creation by allowing authors to work in a free environment;
- protects the moral and material interests of authors in their productions and thus the personal link with their work as well as their livelihoods;
- obliges States to preserve their cultural heritage.

By uniting access to culture, protection of authors, freedom of creative thought and preservation of cultural heritage under a right to culture, the role of culture and the creative process in general have been strengthened, even though the concept may not have been originally intended as a package by the drafters. This is an important signal to policy-makers who often sideline culture at the expense of other, allegedly more compelling needs. Thus, the right to culture in Article 15(1)(a) of the Covenant appears in principle well-suited to foster cultural life and to take care of both the moral interests and the material needs of authors.

This being said, ADALPI should like to avail itself of this opportunity to address some concerns with regard to the scope of the protection of the author's moral and material interests and its relationship with other components of the right to culture under the Covenant that arise specifically out of General Comment No. 17 (2005) (hereinafter "GC No. 17 (2005)").

1. The moral and material interests in the sense of Article 15(1)(c) ICESCR

GC No. 17 (2005) makes a distinction between the protection of the moral and material interests of the author, which is the subject of the human right in Article 15(1)(c) ICESCR, and intellectual property rights in general. According to paragraph 3 of the General Comment, intellectual property rights must not be equated with the human right recognised in Article 15(1)(c) ICESCR. Despite the fact that the author is the beneficiary of protection under the Berne Convention, TRIPS or the WIPO Treaties, the drafters of GC No. 17 (2005) take the view that intellectual property regimes protect business and corporate interests and investments rather than the individual author.

This suggests that the protection of the moral and material interests of the author under the Covenant has nothing or at least not much in common with the protection provided for in international copyright and related rights conventions or the relevant regional or national law. Indeed, paragraph 2 of the General Comment states that Article 15(1)(c) "*does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements*". Yet, the General Comment, at paragraph 3, compares the right in Article 15(1)(c) with a number of similar provisions in regional human rights instruments, including Article 1 of Protocol No. 1 of the European Convention on Human Rights which has clearly been applied to a broad range of intellectual property rights by the European Court of Human Rights over the last decade[1]. Moreover, in the reporting mechanism under the ICESCR, Contracting

[1] For patents: *Smith Kline and French Laboratories Ltd. v the Netherlands*, App. No. 12633/87, European Commission on Human Rights Decision of 4 October 1990; for trademarks: *Anheuser-Busch Inc. v Portugal*, Application No. 73049/01, Judgment of 11 January 2007; for copyright: *Melnychuk v Ukraine*, App. No. 28743/03, Judgment of 5 July 2005; *Dima v Romania*, App. No. 58472/00 of 16 November 2006; *Balan v Moldova*, App. No. 19247/03, Judgment of 29 January 2008; *Ashby Donald v France*, App. No. 36769/08, Judgment of 10 January 2013; *Neij and Sunde Kolmisoppi v Sweden*, App. No. 40397/12, Judgment of 19 February 2013.

Parties usually point to their copyright and related rights legislation to demonstrate their compliance with Article 15(1)(c) of the Covenant[2].

Thus, the argument that the human right in Article 15(1)(c) cannot be equated with intellectual property rights appears somewhat flawed. Perhaps the best way to untie the knot is to try and understand what the moral and material interests of the author are and how they might coincide with or differ from copyright protection.

While the reference to "*moral interests*" points towards a personality rights component, the material interests reveal a more economic dimension of the protection with a link to the right of workers to adequate remuneration in Article 7 ICESCR or the right to property in Article 17 UDHR. The General Comment (at para 13) then clarifies that the moral interests comprise the right of the author to be recognised as the creator of his production and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions which would be prejudicial to their honour and reputation. Thus, the scope of the moral interests corresponds to the protection in Article 6 *bis* Berne Convention which is even recognised by the General Comment[3].

The waters become murky when material interests and economic rights of authors and other creators come into play. Just like the international copyright conventions, Article 15(1)(c) ICESCR does not advocate a particular system for the protection of the material interests of the author. One could thus argue that any form of economic interest in a work requires protection and that the protection contained in international copyright and related rights treaties and conventions is an indication for what is to be understood by "*material interest*". However, GC No. 17 (2005) takes a different stand: one of the core obligations under the Covenant is "*to respect and protect the basic material interests of authors resulting from their scientific, literary or artistic productions which are necessary to enable those authors to enjoy an adequate standard of living"* (at para 39(c), emphasis added). Thus, the General Comment adds a restriction which is not contained in the language of Article 15(1)(c) ICESCR and is not as such reflected in the legislative history. All what seems to be needed is to guarantee an adequate standard of living through the protection of the basic material interest (GC No. 17, para 15). According to the General Comment, this would not even require a term of protection that extends over the entire lifespan of the author (GC No. 17 (2005), para 16) which, incidentally, is in contradiction with paragraph 2 where human rights are defined as timeless expressions of fundamental entitlements of the human person. Moreover, an adequate standard of living in the sense of Article 15(1)(c) could be achieved through one-time payments or by vesting an author for a limited period of time with the exclusive right to exploit his scientific, literary or artistic production (GC No. 17 (2005), para 16). Exclusive rights of exploitation are however a common feature of the international copyright and related rights system.

The endeavours of the drafters of the General Comment to cut back protection to the basic material interest reflects the growing fear in the human rights field that the protection of intellectual property might be spiralling out of control and affect adversely the right to take part in culture. While copyright protection has certainly been updated since the UDHR was adopted in 1948 and the ICESCR in 1966, it must be born in mind that, with the exception of the Beijing Treaty on Audiovisual Performances of 2012, which is not yet in force, the last overhaul of copyright and related rights protection at the international

[2] Latest examples: El Salvador, Fifth Periodic Report, UN Doc. E/C.12/SLV/3-5, paras 478/479, http://www.un.org/ga/search/view_doc.asp?symbol=E/C.12/SLV/3-5; Uzbekistan, Second Periodic Report, UN Doc. E/C.12/UZB/2, paras 936-938, http://www.un.org/ga/search/view_doc.asp?symbol=E/C.12/UZB/2.

[3] Cf. Para 13 FN 14.

level dates back to 1996 when the WIPO Treaties were adopted. These changes were a response to a technological evolution which has changed fundamentally the way cultural productions are used in comparison with the situation back in 1948 or 1966. The constantly uprising protection is hence a myth, at least in the copyright field. To the contrary, specific legislative measures have been taken to strike a balance between the protection and the public interest both at the time of adoption of the international treaties and subsequently either by the courts or the legislator, for example with the Marrakech Treaty adopted in 2013.

ADALPI therefore does not see any danger if the Covenant does indeed embrace current standards of copyright and related rights protection provided they are adequately balanced with the right in Article 15(1)(a) ICESCR and other relevant human rights. In this context it is worth noting that the protection in the international copyright and related rights treaties and conventions is a minimum protection. There is no reason why this level of protection cannot constitute an indication as to what might be the bare minimum which authors require in order to earn their living today. In order to make an adequate living, authors and other creators require economic rights which they can license or transfer against payment of remuneration to, inter alia, publishers or producers so that the returns from their cultural productions can secure their livelihoods. Authors also need to be able to fight against unauthorised uses of their creations. The proponents of the equivalent provision in the UDHR, Article 27(2), considered that, more than any other, the protection of the moral and material interests lent itself to infringement[4]. The protection of the material interests of the author therefore does not only act as a guarantee for some kind of a minimum wage, but also as a tool for the fight against piracy. The forms of piracy have however changed dramatically since the adoption of the UDHR and the Covenant which requires an appropriate legal and practical response.

Finally, it is also important to bear in mind that human rights treaties are living instruments and as such cannot continuously live in the reality of the 1940s or 1960s but must move with the times and reflect the realities of this day and age. Today's reality is determined by a strong influence of the Internet industry over the cultural sector. The treatment of authors by digitising their works without their prior consent in the context of the Google Book Settlement or through the latest pressure applied by a leading online retailer vis-à-vis authors and publishers with a view to forcing them into probably nothing more than the bare minimum wage are living proof for a domination of cultural life by a new range of players who do not necessarily make a creative contribution. The latest developments leading to the impairment of the distribution of works of non-obedient authors by a strong player in the online market also raises issues with freedom of expression. Nowadays, one of the most prominent concerns in the copyright field is the threat that culture may in future be dictated by a few Internet giants. This is the real danger for a diverse cultural life and for the freedom of expression of authors and other creative contributors. Copyright as the "engine of free speech"[5] can help to counter this danger. A confirmed human rights protection of authors' rights therefore grants authors an extremely valuable stand against these powerful players because as Professors A. Dietz and A. Françon once put it: "(…) *those, however, who seek to do away with copyright or deprive it of the dignity of protecting creative authors (…) are on dangerous ground because to attack copyright is to attack a human right, the highest and most venerable form of legal protection on human activity"*[6].

[4] Official Records of the Third Session of the General Assembly, 151st Meeting, 22 November 1948, Draft International Declaration of Human Rights (E/800), at p. 630.

[5] Harper & Row Publishers v Nation Enterprises, US Supreme Court of 20 May 1985, 471 US 539 (1985).

[6] Dietz A. and Françon, A., Copyright as a human right, UNESCO Copyright Bulletin Vol. XXXII, No. 3, 1998, p.8.

2. Relationship between the right to culture and the protection of the moral and material interests of the author

During the legislative debate on the ICESCR, the delegate from Uruguay indicated when presenting his country's proposal for the protection of the moral and material interests of the author in Article 15(1)(c) ICESCR that the right of the author and the right of the public under the right to culture complement each other[7]. Both aspects are thus part of the "culture package" together with the freedom of creative thought and the protection of cultural heritage. Indeed, the author needs the public, and the public needs the author: without cultural productions, the right to culture is meaningless. The General Comment recognises that the rights in Article 15 ICESCR are intrinsically linked and that their relationship is mutually enforcing and reciprocally limitative (at para 4). Ultimately, the relationship between the different components of Article 15(1) ICESCR is all about striking a balance which is another core obligation under Article 15(1)(c) (GC No. 17 (2005) para 39(e)).

Nevertheless, it has been claimed in human rights literature as well as in Resolution 2000/7 that the balance between the right to culture and the protection afforded in international intellectual property instruments has been upset[8]. This has led to a search for a specific human rights framework for intellectual property, even though such a framework already exists. Indeed, the protection under the international copyright and related rights conventions has already undergone a balancing test at the time it was conceived. As a result, international copyright and related rights treaties and conventions make provision for limitations and exceptions to exclusive rights in order to accommodate different aspects of the public interest.

For example, the Berne Convention contains various limitations and exceptions which balance the protection under the Convention against the public interest (cf. Articles 9(2), 10 and 10 *bis* as well as 11 *bis* (2) and (3) of the Berne Convention). As the President of the preparatory Diplomatic Conferences to the Berne Convention, Numa Droz, put it, limitations on absolute protection are dictated by the public interest[9]. The WIPO Treaties, i.e. Recital 5 of the WIPO Copyright Treaty and Recital 4 of the WIPO Performances and Phonograms Treaty, expressly refer to the need to maintain a balance between the rights granted and the larger public interest. The conditions for balancing the rights of authors, performers and producers with the public interest are then determined in Article 10 WCT and Article 16 WPPT which delineate the parameters and devise tools for the balancing efforts at the regional and national level at the time of implementation. Thus, the international legislator provides regional and national legislators with the necessary materials for crafting their own limitations and exceptions rather than laying down specific exceptions. Consequently, the Treaties achieve a high degree of flexibility which allows to cater for a balance in a fast-changing and diverse environment. The recently adopted Marrakech Treaty is a further example for balancing rights of authors and interests of users in the particular area of access to published works by visually-impaired persons.

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[7] As reported in Green, M., Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/15, para 35.

[8] Green, M., ibid., paras 44-46; Shaver, L.. The Right to Science and Culture, Wisconsin Law Review 2010, 121 at 127; Sub-Commission on Human Rights Resolution 2000/7 on Intellectual property rights and human rights.

[9] As quoted in Janssens, M-C. (2009), 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation' in Derclaye, E. (ed.) Research Handbook on the Future of EU Copyright, Cheltenham, UK and Northampton MA, USA: Edward Elgar Publishing, pp. 317- 348 at pp. 320-322.

In conclusion, a balancing act already occurs when conceiving copyright and related rights legislation in order to take into account the public interest or to respond to market failures. Moreover, courts also play an important role by taking into consideration all affected human rights in a given situation and weighing the various affected interests at stake[10].

Conclusions

It follows from the foregoing that as a result of GC No. 17 (2005) there are some unresolved issues regarding the balancing of the protection of moral and material interests of authors with the wider public interest. A constructive dialogue between human rights and intellectual property experts under the auspices of the Special Rapporteur in the cultural field might contribute towards clarifying the situation. In addition, the practical implementation and application of intellectual property rights also plays an important role in achieving the effects of a balanced intellectual property regime. In this context, concerns that the current intellectual property system could be too onerous for developing countries could equally be accommodated by focussing on the particular needs and infrastructure at the local level. ADALPI is ready to contribute actively to a better understanding and acceptance of intellectual property rights in the human rights framework.

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For the Board of ADALPI:

Brigitte Lindner
Chair

[10] For example, French courts have applied Article 27(2) UDHR directly in their case law: Cour d'Appel de Paris, Judgment of 1 February 1989, RIDA 1989 (142), 301 at 305; Cour d'Appel de Paris, Judgment of 29 April 1959, RIDA 1960 (28) 133 at 138. The European Court of Justice calls for a fair balance to be struck between the various fundamental rights protected by the EU legal order, cf. in particular *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Judgment of the Court of 29 January 2008, Case C-275/06, paras 61-69 and subsequently in numerous other cases in the IP field such as *Laserdisken ApS v Kulturministeriet*, Judgment of the Court of 12 September 2006, Case C-479/04, paras 52-70; *Scarlet Extended SA v Sabam*, Judgment of the Court of 24 November 2011, Case C-70/10, paras 41-53; *Eva-Maria Painer v Standard Verlags GmbH et al*., Judgment of the Court of 1 December 2011, Case C-145/10, paras 112-116; *Martin Luksan v Petrus van der Let*, Judgment of the Court of 9 February 2012, Case C-277/10, paras 68-72; *Sabam v Netlog SA*, Judgment of the Court of 16 February 2012, Case C-360/10, paras 39-51; *UPC Telekabel Wien v Constantin and Wega*, Judgment of the Court of 27 March 2014, Case C-314/12, paras 45-63. Likewise, the European Court of Human Rights carries out a balancing of the affected human rights in intellectual property cases (notably in *Ashby Donald v France*, App. No. 36769/08, Judgment of 10 January 2013, paras 38-44; *Neij and Sunde Kolmisoppi v Sweden*, App. No. 40397/12, Judgment of 19 February 2013, para D), as do courts in the US (cf. for example *Harper & Row Publishers v Nation Enterprises*, US Supreme Court of 20 May 1985, 471 US 539 (1985) at para 560) or South Africa (cf. *Laugh It Off Promotions CC v South African Breweries Intl. (Finance) B.V. t/a Sabmark International et al.* (CCT 42/04), Judgment of the Constitutional Court of South Africa of 27 May 2005, [2005] ZACC 7, at para. 83.