

TACKLING THE NEGATIVE IMPACTS OF INTELLECTUAL PROPERTY SYSTEMS A HUMAN RIGHTS APPROACH

3D → Trade - Human Rights - Equitable Economy (3D) organized this panel on 13 March 2008, at the Palais des Nations in Geneva in collaboration with Office of the High Commissioner for Human Rights (OHCHR) and the International Environmental Law Research Centre (IELRC).

Scheduled in parallel with the Human Rights Council and the World Intellectual Property Organization (WIPO)'s Standing Committee on Copyright and Related Rights, and expanding upon recommendations of 3D's earlier 'In-Depth Study Session on Intellectual Property and Human Rights,'¹ this event raised awareness about the important human rights endangered by current Intellectual Property (IP) policy trends. The goal of this panel was to educate, empower and build capacity among human rights advocates to work more proactively to change IP policies.

Based on past successes in improving access to medicines, panellists illustrated how the current IP regime negatively impacts the right to education and the right to food and offered strategies for how to engage to reverse these trends.

This report summarizes each speaker's presentation and gives a resuscitation of the subsequent brief discussion. It is divided into the following sections:

- 1. The Negative Impact of IP Rights on Agriculture and Strategies for Change – Phillip Cullet**
- 2. The Right to Education Threatened by the IP Copyright Regime – Eddan Katz**
- 3. The WIPO Development Agenda: A Point of Entry for Human Rights Advocates – Dalindybo Shabalala**
- 4. The Importance of Civil Society in Making the Case for the Human Rights Impact of IP Policy – Alejandro Neyra**
- 5. Establishing Human Rights Norms in IP and Working Beyond Rhetorical Repackaging – Ibrahim Salama**
- 6. Questions & Answers – Panellists and Audience Participants**
- 7. Takeaway Strategies for Human Rights Defenders**

¹ 3D, *In-Depth Study Session on Intellectual Property and Human Rights* (2005), http://www.3dthree.org/pdf_3D/3DIPHRStudySessreporteng.pdf.

1. The Negative Impact of IP Rights on Agriculture and Strategies for Change – Dr Philippe Cullet, Director, International Environmental Law Research Centre (IELRC)

Using the agricultural domain as an example, Cullet noted three instances of how current Intellectual Property Rights (IPR) impact human rights. First, by restricting access to knowledge, IPR favour monopolies. Second, IPR allow agribusiness to patent genetic modifications of seed lines. While these IP protections help businesses reap profits from innovation, they also restrict access to and use of many seeds. Thirdly, the IP regime fosters the commercialization of agriculture, promoting monoculture and cash crops over subsistence farming. Such IP restrictions and favouritism of big business interests have devastating impacts on the human right to food and protection of traditional knowledge.

Flagging the now well-known impact of patents on access to medicines, Cullet proposed that a similar approach be used to realign agricultural IP norms with human rights. He argued that legal instruments in support of such a framework exist. For example, Article 15² of the International Covenant on Economic, Social and Cultural Rights (ICESCR) articulates the right to benefit from scientific progress. Advocates could use provisions such as this one to substantiate demands for access to and protection of knowledge. In addition, Cullet described how Article 15 could be used by human right defenders to claim IP protections for traditional knowledge.

Strategies for human rights advocates to effect change within the IPR regime include three basic steps: 1) participate in informing and advising IP policy decisions, 2) lobby in favour of containing and limiting the IP system (such as the prohibition of seed patents), and 3) challenge the rising trend towards increased commodification of knowledge.

2. The Right to Education Threatened by the IP Copyright Regime – Eddan Katz, International Affairs Director, Electronic Frontier Foundation (EFF) and Senior Fellow, Yale Information Society Project, Yale Law School

According to Katz, the World Intellectual Property Organization's (WIPO) Copyright Committee³ favours implementing what will in effect become obstacles to the rights to record and impart information, the right to benefit from information and the right to freedom of expression.

Over past decades, the publishing industry has consolidated into a select few companies who control 2/3 of the industry. These businesses prioritize “super profits,” garnering returns of up to 200% from the publication of law, medicine, physics and chemistry text books. Such financial burdens, especially in developing regions, restrict access to education, the ability to participate in cultural life and the enjoyment of freedom of expression.

Technology pushes against this narrowing trend by making information available to wider audiences through digital media channels. However, current IP rules impede the distribution and use of these materials through technological processes and copyright barriers, even for teachers and

² ICESCR art. 15, December 16, 1966, <http://www2.ohchr.org/english/law/cescr.htm#art15>.

³ WIPO, Meetings by topic: Standing Committee on Copyright and Related Rights, http://www.wipo.int/meetings/en/topic.jsp?group_id=62.

students. Consequently, there is a need for effective and coordinated advocacy to realize the right to education unencumbered by these limits.

Since current IP rules offer little flexibility for libraries, educators and students who wish to use copyrighted materials, Katz suggests lobbying for exceptions and limitations to copyright regulations – for instance in the WIPO Copyright Committee – in order to offer increased access. Another promising strategy is championing “open source” licensing of publications and pressuring government ministries to make information freely available. Finally, human rights defenders should continue to raise awareness about the dangerous impacts IPR have the right to education.

3. The WIPO Development Agenda: A Point of Entry for Human Rights Advocates - Dalindyabo Shabalala, Director, Intellectual Property and Sustainable Development Project, Center for International Environmental Law (CIEL)

Shabalala stressed the importance of civil society’s role in mainstreaming development and human rights concerns in WIPO’s agenda. He cited the Development Agenda, a list of 45 proposals brought to WIPO by a group of mostly developing countries, as an example of this.⁴ The language in these proposals, while not explicitly that of human rights, can be unpacked and interpreted to uphold and promote human rights. Importantly, these norms are the first set of standards brought in from outside the organization, to which WIPO can now be held accountable.

Further importation of human rights standards such as the right to transparency and participation should be integrated into WIPO’s mechanisms. The Development Agenda describes several duties which can be understood in terms of human rights. For example, technical assistance that must be “development-oriented” and “transparent” implies the right to information and the right to development. The Development Agenda’s request that States assess the “economic, social and cultural impact” of IP systems further indicates that human rights benchmarking will be important.

Human rights can also play a role in encouraging WIPO to balance the needs of indigenous communities with their rights of self-determination. While the Development Agenda is still a new process, civil society and non-governmental organizations are well positioned to influence its implementation and interpretation. Bringing a human rights perspective to WIPO negotiations can help ensure that IP systems are consistent with human dignity and development.

Shabalala encouraged people to look at CIEL’s ‘Citizen’s Guide to WIPO,’⁵ which aims to demystify WIPO and empower people to engage with the organization.

4. The Importance of Civil Society in Making the Case for the Human Rights Impact of IP Policy – Alejandro Neyra, First Secretary, Mission of Peru to the UN

Neyra represents his country both on the issues of human rights and of intellectual property in Geneva. He spoke from his practical experience in these two very different systems, noting that human rights and IP are not always in tension.

⁴ WIPO, *The 45 Agreed Recommendations under the WIPO Development Agenda*, http://www.wipo.int/ip-development/en/agenda/cdip_recommendations.html.

⁵ CIEL, *A Citizen’s Guide to WIPO* (2007), http://www.ciel.org/Publications/CitizensGuide_WIPO_Oct07.pdf.

In his capacity as a negotiator in both WTO and Free Trade Agreement (FTA) deals, Neyra stressed the roles of civil society, human rights activists and the media in both helping to educate negotiators about the harmful impacts of IP policies and creating the political will to bring decisions under close scrutiny. Thanks to briefings, in large part led by national human rights groups, Neyra was able to understand the implications of trade decisions before negotiating and take this information to the table when at WIPO. With the proliferation of FTAs, WTO IP policy is being undercut and circumvented by States who use their powerful bargaining positions to tailor-make IP obligations that go above and beyond those agreed to by WTO Members. In such situations, the role of human rights defenders is even more essential. For example, during the US-Peru FTA negotiations, civil society was vital in informing negotiators of the detrimental aspects of proposed IP policies. This understanding allowed Peruvian negotiators to lobby against regulations that would negatively impact their citizens' human rights.

Neyra also noted that IP issues are not discrete to the WTO, they seep into the International Telecommunication Union, the World Health Organization, human rights and environmental debates. The negative impacts of IP policy are especially harmful in developing nations where developed countries misappropriate knowledge and rights of indigenous peoples through bio-piracy.

5. Establishing Human Rights Norms in IP and Working Beyond Rhetorical Repackaging – Ibrahim Salama, Chief, Human Rights Treaties Branch, Office of the United Nations High Commissioner for Human Rights

Salama spoke of the links between intellectual property and human rights and raised questions about the readiness and capacity of international systems to deal with such cross-cutting issues. He warned against a tendency towards “rhetorical repackaging” that integrates human rights language into instruments from other UN bodies but goes no further than this superficial addition. The structural diffusion throughout the UN scatters human rights obligations everywhere and nowhere (for example, among the Human Rights Advisory Committee, Special Procedures and Universal Periodic Review processes).

Establishing norms is key and should consist of a social dimension (advocacy), precise content, and a monitoring mechanism. Impact assessment on how IP affects human rights is necessary in order to establish an empirical link. The Human Rights Council Working Group on the Right to Development is one potential forum for interpreting and implementing IPR in support of human rights. Using the Millennium Development Goals to inform and guide trade policy is another possibility. In short, a complementary, coordinated approach of pressure through advocacy, empirical evidence and strategic thinking on where to exert influence can help bring a more fulsome human rights perspective to ongoing IP and trade policy debates.

6. Questions & Answers – Panellists and Audience Participants

Tom Goodwin (UK Mission) stressed that civil society was crucial in getting the WIPO Development Agenda started. This marks the beginning of debate on ties between IP and human rights, we should engage cognizant of the complexity of such issues.

Jacqueline Coté of the ICC raised a question about the lack of representation from the private sector, noting that IP issues also imply a host of economic factors and for a full-fledged debate multi-sector viewpoints should be consulted. In response to this, panellist Shabalala clarified that there is a distinction between the right to profit from the fruits of one's labour and granting monopoly rights.

Ahmed Abdellatif from ICTSD raised the issue of bringing "coherence" to the UN system. Are IPR human rights themselves, or a tool for protecting and promoting human rights? Thinking about a practical approach to resolve such internal conflicts will help in devising a stronger strategy for change.

Riaz Tayob of Third World Network, in his personal capacity, said the incoherence within the UN system prevented meaningful progress. He cited an example of the drafting of negotiation documents by the World Health Organization (WHO) Secretariat which of its own accord limited the focus of a strategy to address "neglected diseases" to only fourteen diseases when no member state had proposed such a limitation. This seemed to indicate a high degree of regulatory capture undermining WHO's ability to respond to public health needs.

As a final cautionary note, panellist Cullet emphasized that because the UN system is so fragmented, activists must be careful to ensure that the language of human rights is not diluted. He encouraged human rights advocates to strengthen human rights norms and mechanisms, by using human rights procedures to counter potential harmful effects of IP systems worldwide.

7. Takeaway Strategies for Human Rights Defenders

Some of the main points for possible strategies raised by panellists and participants are as follows:

- Human rights advocates play an important role in changing the trend of IP policy which currently ignores or negatively impacts human rights.
- Activists can build upon the successes achieved in guaranteeing access to medicine and must expand these lessons into ensuring access to information and the right to food.
- Existing treaty instruments and monitoring mechanisms offer entry points for applying the duty to respect, protect and fulfil human rights to a state's IP policies.
- General Comment 17 of the CESCR provides an opportunity for human rights defenders to advocate for the interpretation of the Covenant's Article 15 in a manner protective of traditional knowledge⁶
- Raising awareness, conducting research and building strong empirical evidence of negative impacts of IP on human rights and development continue to be key factors for success.
- The cross-sectionality of IP creates negative impacts across a broad range of sectors, including education, agriculture, health care and indigenous rights, therefore activists

⁶ OHCHR, Committee on Economic, Social and Cultural Rights, <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. Also see IELRC, Intellectual Property, http://www.ielrc.org/research_intellectual_property.php.

should learn from each other and work together to advocate for policies that support human rights.

- The WIPO Development Agenda offers an ability to hold the organization accountable to values in synch with human rights.
- Advocates should actively participate in WIPO activities, using resources such as CIEL's *A Citizen's Guide to WIPO* to help inform their engagement.

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