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**INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS:
THE URGENT NEED FOR A LUTHER OF JURISPRUDENCE**

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STARTING POINTS

The logical starting point for this contribution is an understanding that the foundation for the temporary monopoly rights conventionally granted by intellectual property law, is the advancement of the public interest. It is not, as such, the advancement of the private interests of those to whom the rights are given.

Thus, in the *Statute of Anne* (1710), the first copyright law in the common law world, proclaimed that its objective was the encouragement of learning and the dissemination of knowledge, as a means to enhance the public welfare¹. In the field of copyright LAW, the promotion of the public interest is thus given, as the ultimate rationale for the qualified grant of proprietary rights over the fruits of the creative impulse².

A similar statement of the objectives of intellectual property protection appears in the language of the *Constitution* of the United States of

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¹ See *Statute of Anne*, 8Anne c19 (1710), pmb1 and art.[2] 1.

² See e.g. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the *Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society*, OJ No.L167 at 10 (2001), pmb1 3.

America. It declares that the Congress of the United States had the power to make laws:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”³

The equivalent grant of power to the Federal Parliament in Australia was conferred in more laconic terms. It was to make laws with respect to:

“Copyrights, patents of invention, and designs and trademarks”⁴

Still, those words themselves drew heavily on the history of Anglo-American intellectual property law to import notions of public interest, progress and the advancement of science and knowledge. In our kind of society, even by the time such Constitutions were written, the exceptional provision of special property interests was not to authors and inventors simply for personal profit and gain. It was to encourage, protect and compensate inventiveness which was shared with the community.

During the past century, the same “public-centred rationale” has been articulated in “all major instruments for ... global regulation of intellectual property”⁵. Thus, as Professors Hugenholtz and Okediji have pointed out⁶:

“The currently pre-eminent global Intellectual Property (IP) Treaty, the Agreement on Trade-Related Property Rights⁷ (TRIPS) Agreement, concluded under the auspices of the World Trade

³ United States *Constitution*, Art 1, s8, cl8.

⁴ Australian *Constitution*, s51(xviii).

⁵ See *Berne Convention on the Protection of Literary and Artistic Works*, September 9, 1886 as last revised, July 24, 1976; 828 UNTS 221; *Universal Copyright Convention (WIPO) Copyright Treaty*, December 20, 1996.

⁶ P.B. Hugenholtz and R.LL Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (Final Report), March 06, 2008, Uni of Amsterdam and Uni of Minnesota, 5-6.

⁷ TRIPS Agreement, April 15, 1994, Marrakesh Agreement establishing the World Trade Organisation, Annex.1C; 33 ILM 81 (1994).

Organisation (WTO) in 1994 ... reflected and re-affirmed this basic precept by describing the over-arching objective of intellectual property protection under the Agreement as “the mutual advantage of producers and users of technological knowledge ... conducive to social and economic welfare⁸”.

Even before the TRIPS Agreement, however, the *Universal Declaration of Human Rights* (UDHR) of 1948⁹ was adopted by a committee chaired by Eleanor Roosevelt. It was brought into operation by vote of the General Assembly of the United Nations, presided over by an Australian, Dr. Herbert V. Evatt, past Justice of the High Court of Australia. A relatively little known provision of the UDHR contains an express recognition, amongst the fundamental rights there provided, of the entitlement of all members of the community to enjoy the fruits of inventiveness. Authors and inventors are to have protection for their creativity. Thus Article 27 states:

“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.

27.2. 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.”

The potential juxtaposition of, and tension between, the successive subparagraphs of Article 27 was quickly recognised. When the UDHR was re-expressed in treaty form, relevantly in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹⁰, the states parties to the Treaty committed themselves to “achieving progressively the full realisation of the rights recognised in the present Covenant by all

⁸ TRIPS Agreement, Art.7. See also id. Art 8.1.

⁹ *Universal Declaration of Human Rights*, United Nations, GA Resolution 217A(iii), 1948.

¹⁰ 993 UNTS 1453 (1976).

appropriate means, including particularly the adoption of legislative measures”¹¹.

Amongst the specific rights recorded in the ICESCR were those stated in Article 15:

- “15.1 The States Parties to the present covenant recognise the right of everyone:
- (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its application;
 - (c) To benefit from the production of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- 15.2 The steps to be taken by the States Parties to the present covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
- 15.3 The States Parties to the present covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- 15.4 The States Parties to the present covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

Again, within the same article, principles are stated that appear to pull in differing, and even opposite, directions, so far as the award of exclusive rights to creative authors is concerned. Thus, the rights of particular persons to benefit from the protection of their moral and material interests in their creations can sometimes reduce the competing rights of “everyone” to take part in cultural life and to enjoy the benefits of scientific progress and its applications. Somehow, the competing entitlements have to be reconciled.

¹¹ ICESCR, Art2.1

Additionally, the rights of authors and inventors have to be reconciled with other statements in the UDHR, the ICESCR and the other foundational treaty of human rights: the *International Covenant on Civil and Political Rights* (ICCPR)¹². In apparent conflict with protection of an author's moral and material interests is, for example, Article 19 of the ICCPR. Relevantly this states:

“19.1 Everyone shall have the right to hold opinions without interference.

19.2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, *receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or *through any other media* of his choice.”¹³

The World Trade Organisation (WTO) is not, as such, an agency of the United Nations. However, the World Intellectual Property Organisation (WIPO) is one of the 16 specialised agencies of the U.N. Organisation. It was created in 1967 by its Convention that entered into force on 26 April 1970. The Agreement between the United Nations and WIPO signals the commitment of both entities to a special perspective of intellectual property protection. This is to laws that facilitate the transfer of technology relating to intellectual property to developing countries in order to accelerate their economic, social and cultural development.

Being an agency of the United Nations, WIPO is obliged to conform to the *Charter* of the United Nations with its tripartite and over-arching commitments to international peace and security; economic equity; and the progressive realisation of universal human rights. WTO, on the other hand, is not controlled in the same way by the statutes, treaties and

¹² 999 UTS 171 (1976). Adopted and opened for signature by General Assembly Resolution 2200A(XXI) of 16 December 1966.

¹³ 999 UNTS 171 (1976), 16 December 1966 (emphasis added).

other law of the United Nations. It is beholden, instead, to the multilateral treaty system instituted by its participating countries. To some extent, this has produced the consequence that the WTO, and specifically the TRIPS Agreement, have reflected balances deriving from (and the interests and expertise of) the world's major trading powers. These are not necessarily the same as the balances, interests and perspectives of *all* of the member states of the United Nations, joined together under the *Charter*.

PATENTS

Recently, I was appointed by the United Nations Development Programme (UNDP) to a new body that it has created, the Global Commission on HIV and the Law. The purpose of this body is to examine, and develop proposals in relation to, laws applied in member states of the United Nations, that affect the success of the global response to the human immuno-deficiency virus (HIV). This is the virus that causes the acquired immuno-deficiency syndrome (AIDS).

The HIV/AIDS epidemic has already claimed the lives of about 40 million people in the world. Approximately the same number of people are currently living with HIV. An urgent strategy of the United Nations is to reduce the current rate of infections with HIV, now running at between 2.6 and 2.7 million people each year. The urgency of reducing the rate of infection has been increased by the global financial crisis of 2007-9. That crisis has reduced the subventions made by developing countries to the Global Fund Against AIDS, Tuberculosis and Malaria ("the Global Fund"). In the absence of a safe and reliable vaccine against HIV, or of a therapeutic cure, the strategies recommended by the relevant United Nations agencies (especially UNAIDS, the World Health Organisation

(WHO) and UNDP) include the care and treatment of those who are infected with palliative anti-retroviral drugs (ARVs) and the prevention of further infections to the greatest extent achievable.

The UNDP Global Commission has identified a number of special areas of the law that require attention where, it believes, the current state of the domestic laws of member countries may impede successful strategies of care and treatment and of prevention. Amongst the areas of law so identified are those dealing with intellectual property rights, specifically the rights enjoyed by multi-national pharmaceutical corporations in respect of the ARVs.

Debates over the intellectual property protections for ARVs are intense, heated and sometimes quite emotional. Many representatives of civil society organisations (CSOs) participate in those debates, including large numbers who are themselves people living with HIV and AIDS (PLWHAs). Because many such people have gone through frightening experiences of therapy-free struggles with HIV (and can therefore specially empathise with those who are still in that plight), they voice strong objections to what they see as the trend of global intellectual property protection afforded to multinational pharmaceutical corporations. In short, they regard the protections that have so far evolved, and that are in the process of being developed further at this time¹⁴ as an unbalanced imposition upon the basic human rights of PLWHAs and their families, struggling to survive each day and particularly in the poorer developing countries which constitute the epicentre of the HIV epidemic

¹⁴ In particular, in the form of the Anti-Counterfeiting Trade Agreement (ACTA). See L.R. Helfer and G.W. Austin "Human Rights and Intellectual Property: Mapping the Global Interface", *Arizona Legal Studies*, DP No.10-18 (University of Arizona, May 2010), 17.

At a regional consultation of the UNDP Global Commission held in Bangkok, Thailand, on 16-17 February 2011, one of the UNDP commissioners, Mr. Jon Ungakorn, a former Thai senator, explained the public interest concerns voiced on behalf of developing countries, specifically Thailand and particularly PLWHAs living in such countries.

In the 1990s, half a million Thai citizens died on AIDS. Since the 1990s, the Thai death rate from this cause has dropped by more than 80 percent. This is a result of access to the ARVs. Although the TRIPS Agreement permits developing countries to safeguard flexibilities and particular protections, in order to be able to respond to national medical emergencies, such as HIV, a number of changes are occurring that render such provisions (for example, licensing of the manufacture of generic drugs), increasingly ineffective in the following circumstances:

- * The TRIPS Agreement itself allows governments to override pharmaceutical patents for non-commercial use and for emergency health situations, by procedures of compulsory licensing;
- * Such licences have led to the development of generic drugs including production of the essential AIDS therapies in a number of developing countries, notably Brazil, India and South Africa;
- * In retaliation, major western countries and groups of countries (particularly the United States, the European Union and Japan) began negotiating bilateral and other treaties to require protections for intellectual property larger than those provided in the TRIPS Agreement. Developing countries were placed under pressure to conform to “TRIPS+” as a price for securing the benefits of free

trade agreements for their economies. However, they have done so at a potential cost to the health and lives of PLWHAs;

- * A practice has also developed of acquiring, and taking over, generic drug manufacturers, so as to extinguish their capacity to provide generic drugs needed in developing countries, including the ARVs essential to the control of HIV;
- * Additionally, a further practice has arisen of “tweaking” ARV drugs, where patents are about to expire (as by converting pills to a syrup), so as to secure extensions of the duration of already substantial patent protection;
- * Pressure, political and economic, has reportedly been applied to developing countries by leading western nations, in support of powerful pharmaceutical interests and their intellectual property claims;
- * Typically, non-differentiated pricing for patented drugs is applied worldwide with potentially devastating consequences for developing countries whose populations cannot afford to pay the western prices;
- * On top of these developments, the global financial crisis has resulted in western commitments to the Global Fund dropping; and
- * Additionally, the therapeutic effectiveness of the original ARVs, as treatment for HIV control in PLWHAs, is reportedly diminishing. This requires resort to so-called ‘second line therapies’, protected by fresh patents with larger operative lives, for which generic drugs are not currently available and arguably may not be lawful.

The result of the foregoing, and other, developments is a looming crisis in the availability of life-saving ARVs for PLWHAs in many countries.

But especially so in the poorest countries of the world. It is the aggressive expansion, vigorous lobbying, enlarged Anti-Counterfeiting Treaty claims¹⁵ and enhanced retaliation by way of bilateral free trade agreements, generic drug-makers, takeovers and legal challenges in developing countries that together cause strong and sometimes desperate voices to be raised in AIDS conferences. Put bluntly, these complain about the unacceptability of global intellectual property law as it is now developing. They condemn the tactics of international pharmaceutical corporations. They challenge the strategy of global intellectual property lawyers. They complain about the heartlessness of their endeavours. They point to the many deaths that the new developments will occasion. They condemn the ‘excessive profits’ being claimed by the pharma industry. And they contend that these developments are producing a global situation in which the legitimate objectives of intellectual property protection are being pushed to a point of extreme selfishness that threatens to destroy the balance that should exist between the other basic human rights that compete with the right to protection of the “moral and material interests” resulting from scientific and other inventiveness.

The UNDP Global Commission on HIV and the Law is in the midst of its investigations of these subjects. It would therefore be premature for me to express any concluded opinion on these claims. Naturally, every opportunity will be given to the global pharmaceutical industry, intellectual property lawyers, patent claiming nation states and others to respond to the objections voiced both by governmental and civil society organisations, critical of the directions in which current IP protections are

¹⁵ C. Sexton, “Editorial – The Anti-Counterfeiting Trade Agreement: The Dawn of New International Standards for Intellectual Property Enforcement” [2010] *Intellectual Property Forum* 2.

moving. However, enough has been said to successive meetings of the Global Commission and, in written submissions, to indicate that there is a case to be answered. Ultimately, that case is presented by the fact that IP protections are, and can only be, defensible within the United Nations system, in so far as they respect other competing, fundamental human rights. Amongst the most important of these is the right of access to essential health care and particularly where fulfilment of that right is necessary to preserve and defend the right to enjoy human life itself¹⁶.

The foregoing points have been forcefully made in successive reports to the Human Rights Council of the United Nations by the United Nations Special Rapporteur on the Right to Health (Mr. Anand Grover, India). One possible outcome of the deliberations of the UNDP Global Commission could be a recommendation that the United Nations launch, under its own auspices (as distinct from the multi-lateral initiatives of IP asserting countries in the WTO and in the ACTA negotiations¹⁷), an attempt to create a new global system for intellectual property law that is more attentive than the WTO and ACTA systems are to the many competing interests that need to be maintained in balance. Where, potentially, the lives of millions of people living with HIV and AIDS are at stake, a global sense of outrage could accumulate if those lives were discarded or disrespected because of the effective unavailability of life-saving drugs in those very countries of the world where the HIV/AIDS

¹⁶ UNHR, Art 3 (“Everyone has the right to life”); Art 25.1 (“Everyone has the right to a standard of living adequate for ... health ... and medical care ... in the event of ... sickness, disability”). See also ICESCR, Art 12.1 (“The States Parties ... recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”); ICCPR Art 6.1 (“Every human being has the inherent right to life. This right shall be protected by law”).

¹⁷ ACTA was initiated in 2006 by action taken by representatives of the United States of America, the European Union, Switzerland and Japan. See Sexton, above n.15, 2.

epidemic is most evident and the needs of effective responses are the greatest.

COPYRIGHT

There is another reason why intellectual property lawyers and their interests are unpopular, apart from the current developments affecting patents. I refer to those concerned with copyright.

In the field of copyright, the urgencies may not be so life-threatening. However, they are still acute. And, as in patent law, they arise from the inflexibilities of the present global system, the incapacities of the procedures that exist to reconcile that system with the rapid advances in technology; and the consequent exposure of millions of people to illegal acts and to pressures, mainly from a small number of developed countries, to enforce outdated laws, at a cost to the essential interests of developing countries.

In the context of copyright, the essence of the problem was stated in a United Kingdom report *Digital Britain*¹⁸. This was published in January 2009. The report described the way in which current international copyright law applies to the rapidly advancing technology of informatics, available to millions of people, including through the internet. Professor Adrian Sterling quotes the *Digital Britain* report as making the following point¹⁹:

“In the new digital world, the ability to share content legally becomes ever more important and necessary ... There is a clear and unambiguous distinction between the legal and illegal sharing of content which we must urgently address. But we need to do so in a way that recognises that, when there is very widespread

¹⁸ BERR, Interim Report, *Digital Britain*, (January 2009), The Stationery Office.

¹⁹ *Ibid*, [3.2].

behaviour and social acceptability of such behaviour that is at odds with the rules, the business models that the rules have underpinned and the behaviour itself, may all need to change. ... Our aim, in the rapidly changing digital world is a framework that is effective and enforceable, both nationally and across borders. But it must be one which also allows for innovation in platforms, devices and applications. ...”

Whatever its original history, copyright law today is often less a means of promoting progress in science as of protecting established national interests in the matter of trade. A realisation that this is so has led to claims that global copyright law has “de-stabilised previous balances” and “left unattended” the protection of international human rights law (access to information, research and free speech), particularly in developing countries, because “the trade benefits to The North have a cost in limiting access to information, use thereof and formation of new speech [resulting in] a cost in freedom to The South.”²⁰

The slow-moving pace of legislative change, of decisions by officials and judicial opinion writing, makes it difficult, if not impossible, to cope in IP law with the pace of technological innovation. But, if this is true in municipal law, how much more so in international law where the means of securing any new consensus are much more slow-moving and resistant to any alteration that could impinge on the perceived economic interests of current major players.

To render hundreds of thousands of people in the world guilty of illegal acts every day, because they download songs that are freely available to them online, is plainly an unacceptable situation, both socially and

²⁰ Michael Birnhack, “Global Copyright, Local Speech”, 25 *Cardozo Arts and Entertainment Law Journal* 491 (2006).

legally. Yet to demand the stringent enforcement of the current law, as if nothing has happened in the supervening technology, is not only unrealistic. It simply will not occur. It is like the futile efforts of copyright owners, in the early days of wire recorders and the first home video machines, to enforce the old legal paradigm in relation to millions of peaceful citizens, using the new technology for their private domestic amusement and enjoyment.

When such radical changes in technology occur, it is the law, not the technology, that will ordinarily have to give way. This is a point that Professor Laurence Lessig has been repeatedly making, often to deaf ears, both in the United States of America and in Australia.

REFORM

The fundamental problem presented by global intellectual property law is that the structure of the current regimes was established in much earlier times. It was erected for different creations and inventions. With the advent of digital technology and the huge escalation in the pace of inventiveness (in part brought about precisely because of the technology itself), the need was obviously for a fresh regime. Such a regime would provide much shorter intervals of monopoly protection, with larger pre-conditions for the grant, and new and substantial exceptions and qualifications for their exercise. Yet instead of the global community developing a new regime, apt to the rapidly advancing technology, the world has persisted with attempting to squeeze a new and very large collection of genies into the same inappropriate bottles.

The consequence is a serious disharmony in, and hostility towards, intellectual property law; a disparity between the letter of that law and

what is actually happening in society (copyright); and an asserted danger to millions of human lives in the context of present pharmaceutical protections and the AIDS and other epidemics (patents).

The world today needs a new Luther of jurisprudence to guide the international community, including its intellectual property lawyers, to a reformed, simpler, abbreviated and more qualified regime for intellectual property law. What would such a Luther do? In my opinion, he would do exactly as the monk of Wittenberg reputedly did five centuries ago in 1517. After protesting with little or no effect to the bishops and other leaders of his time who were deaf to his pleas, and who threatened him with calumny for his heresies, he advanced his propositions for reform in the most public place he could possibly find. In 1517, this was on the doors of the castle church at Wittenberg in Germany. Today it would be in the Councils of the United Nations, in its agencies and on the internet.

Today's Luther would proclaim his theses and go back to fundamentals. In Martin Luther's case, this was the scriptural sources in the Bible, illuminated occasionally by church history and experience. By analogy, global intellectual property law will, sooner or later, have to do much the same. It will have to return to the fundamental values that are expressed in the UDHR. It will have to address the ways the values in that instrument were given effect by the provisions of United Nations treaty law, including the threefold objectives of the *Charter* itself, the universal human rights principles in the UDHR and the covenants and treaties that followed it²¹.

²¹ IP lawyers, in their response to universal human rights, divide, according to Professors Helfer and Austin, into four groups: those who embrace human rights law and regard IP law as not fitting into its new world; those who reject human rights law as fundamentally antagonistic to IP law objectives; those who seek reconciliation but doubt that the WTO and ACTA are adequately equipped to mediate; and those who seek

When this is done, it will mean a fresh and effective reconciliation between the legitimate right to protect the moral and material interests resulting from scientific, literary and artistic productions whilst at the same time upholding the basic rights safeguarded by intellectual property law. Those rights include the right to have and to hold opinions and to express and receive information in media of choice (copyright), and the basic rights to the protection of human life and of access to essential health care (patents)²².

The urgency of the need for international legal reform based on fundamental values is apparent. A realisation of the urgency of reform may come when millions of lives are effectively put at risk. A catalyst for action may prove to be the UNDP Global Commission on HIV and the Law under Fernando Henrique Cardoso, former President of Brazil. The United Nations is not just a geopolitical forum for ambitious politicians. It is a large moral enterprise for humanity. By its *Charter* and its treaty law and agencies, it is committed to building a better world of peace and security, economic equity and universal human rights. Intellectual property law must find its place in that bold enterprise. At the moment, many voices are raised in our world to suggest that it does not.

reconciliation through an empirical approach to the competing interests that will reflect the legitimate desires and needs of all players, IP and human rights alike. See *ibid.*, above n14, 10-16.

²² Professors Graeme Austin and Amy Zavidow, "Copyright Law Reform Through A Human Rights Lens", 2008, *Arizona Legal Studies*, Discussion Paper No.0734.