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SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS

70th session of the General Assembly

Third Committee

Item 69 (b and c)

26 October 2015, pm.

New York
Honourable Chair, Excellencies, distinguished delegates, ladies, gentlemen, and all others;

I am honoured to take the floor before the General Assembly, for the last time in my capacity as Special Rapporteur in the field of cultural rights.

Today, I shall present my last thematic report on patent policy and the right to culture and science (A/70/279), and will share some observations to conclude my six-year tenure as Independent Expert and then Special Rapporteur.

Mr. President,

In this last year, my research has focused on intellectual property regimes and the enjoyment of the right to science and culture. Given the complexities of the subject, I have divided the work into two consecutive reports: the first, which I presented to the Human Rights Council in March 2015, concentrates on the interface of copyright policy and the right to culture and science (A/HRC/28/57). The second, relating to patent policy, is before you today. Both these reports address the unresolved tensions between intellectual property laws and human rights, through the lens of the right to science and culture.

Let me clarify at the outset that the human right to science and culture, and more particularly the right of every person to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author, does not establish a human right to patent protection. The right to protection of moral and material interests cannot be used to defend patent laws that inadequately respect the rights to participate in cultural life, to enjoy the benefits of scientific progress and its applications, to scientific freedoms, to food and health and the rights of indigenous peoples and local communities.

The human rights to science and culture, which should be understood as including a right to have access to, to use and further develop technologies in self-determined and empowering ways, does, however, provide a human rights framework within which to consider patent policy.

In the limited time available, it is not possible to go into details and the complexities and I will only summarize a few key points and recommendations of my report as follows:

Patents, when properly structured, expand the options and well-being of all people by making available new possibilities. Yet, they also give patent owners
the power to deny others access, thereby limiting or denying the public’s right of participation to science and culture. This may be the case, for example, when the patent-holder’s property right is so strong as to make compulsory licensing of medicines impracticable or unduly cumbersome.

The human rights perspective demands that patents do not extend so far as to interfere with the dignity and well-being of individuals. Hence, where patent rights and human rights are in conflict, human rights must prevail.

1) There are a number of identified tensions between patent rights and the right to science and culture. Let me mention two in particular

a. The impact of patent rights and policies on ensuring access to essential technologies. Mechanisms are needed to ensure that innovations essential for a life with dignity are accessible to everyone, in particular marginalized populations. Pharmaceutical products, especially HIV medicines, are a particularly well-known example of this tension between exclusive production and distribution on the one hand and broad public access on the other. But many other areas of scientific innovation also have a significant impact on human rights, such as energy, information and communication technologies, nanotechnology and synthetic biology. It is important to address the gaps and resulting discriminations between those with and those without access to technologies, in the enjoyment of their right to participate in the political, social, economic and cultural life of society.

There are also important implications for food security, food production systems and attendant ways of life that require urgent attention to arrive at a just balance that protects human rights while enabling progress.

b. Patent policies impact the direction of scientific research, and may divert research priorities away from matters of greatest public concern.

A worrisome trend is the expanding roles of patent-seeking in scientific research at universities and public research institutions. The result is that the fruits of publicly funded scientific research are often transferred to exclusive private ownership. Of equal concern is the change in the culture surrounding university research, away from an activity conducted for the public good and human advancement as well as mere curiosity to know, towards an activity valued only for its potential commercial application.
2) **The effects of intellectual property rights are strongly context-dependent.** Therefore, claimed benefits of granting patent rights and implementing international treaties such as the TRIPS Agreement must be assessed keeping in view differentiated contexts. It is not reasonable and also illogical to expect the same outcomes across countries with highly different levels of technological capacity and industrial profile.

It is true that patents can, and do, offer companies incentives to invest in the expensive processes of developing new technologies and bringing them to market; reward human creativity, especially in areas that demand massive investment with no guarantee of an effective financial return; oblige inventors to disclose their findings; and enhance the development of new technologies.

**However, these claims need to be carefully weighed,** taking into consideration the various interests at stake and the technologies in question (for example, some require expensive research, some do not). Many academic and other analyses strongly reject the premise of the TRIPS Agreement, for example, that minimum standards of protection are equally beneficial for countries with diverse levels of socio-economic and technological development.

Here, I would like to recall that, in accordance with Article 7 of the TRIPS Agreement, “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”. The word “should” indicates that such effects do not automatically result from intellectual property protection, and **that countries should frame their legislation with the aim of reaching these effects.**

4) **One important way forward is through effectively using various exclusions, exceptions and flexibilities on patents to protect the right of participation in culture, science and technology.**

- Exclusions, exceptions and flexibilities are fully part of international intellectual property law, such as the TRIPS Agreement. These can, and should, be used by national Governments when implementing multilateral treaties. They are key to striking the proper balance between private and public interests, and to ensuring respect for a wide range of human rights.

- Effectiveness has been limited, however, by the infrequency of their use, for reasons ranging from capacity constraints to commercial and political pressures against their use. And they remain optional from the perspective of trade law.
Yet, from the perspective of human rights, they are often to be considered as obligations.

- Therefore, I consider that States have a positive obligation to provide for a robust and flexible system of patent exclusions, exceptions and flexibilities based on domestic circumstances, including through the establishment of compulsory and government use licences when needed.

States also have a human rights obligation not to support, adopt or accept intellectual property rules, such as TRIPS-Plus provisions, that would impede them from using exclusions, exceptions and flexibilities and thus from reconciling patent protection with human rights. International agreements that do not provide sufficient flexibility should be renounced or modified.

And States should refrain from pressuring other States to adopt TRIPS-Plus provisions or to otherwise forego the use of TRIPS-compliant flexibilities.

It is crucial that international legal regimes on patents continue to leave room for countries to adopt and implement policies to abide by their human rights obligations. New trade or investment treaties, whether bilateral or regional, already concluded or still under negotiation, tend to considerably reduce that margin of manoeuvre.

Ladies \gentlemen, and all others,

Currently, considerable concern is being expressed that intellectual property policy-making in bilateral and multilateral forums tends to be conducted amid great secrecy, with substantial corporate participation but without a similarly well-informed participation of elected officials and other voices representing the public interest.

I am concerned that international trade treaties are being used to drive and delimit domestic patent policies, short-cutting democratic processes and discussions and in contradiction to article 25 of the International Covenant on Civil and Political Rights, which protects the right of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives.

I recommend that international intellectual property instruments, including trade agreements, be negotiated in a transparent way, permitting public engagement and commentary, and that national patent laws and policies should be adopted and reviewed in forums that promote broad engagement, with input from innovators and the public at large.
Mr. President,

The work on intellectual property regimes in conjunction with the other studies and reports I have submitted, as well as the eight country visits I have undertaken over my six-year mandate, has enabled me to complete a first round of exploration of the content of Article 15 of the Covenant on Economic, Social and Cultural Rights.

In my various reports, I have addressed issues related to the right of everyone to participate in cultural life, to access and enjoy cultural heritage, to enjoy the benefits of scientific progress and its applications, to benefit from the protection of authorship, and to the freedom indispensable for artistic expression and creativity.

These reports, I hope, demonstrate how relevant cultural rights are for addressing important issues and challenges, such as history teaching and memorialization processes, the role of artists in our societies, or the impact of advertising and marketing practices on human rights. I am particularly glad that my conclusions and recommendations have translated into new language in some specific resolutions of the Human Rights Council. I think in particular of resolution 27/3 extending the mandate of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence referring to memorialization initiatives and processes, and of resolution 27/31 on civil society space, emphasizing the important role of artistic expression and creativity in the development of society.

I am pleased that a number of States and other stakeholders have taken actions on my recommendations and I hope they will continue their efforts to advance cultural rights, understood as the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they assign to their existence and to development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. Cultural rights protect access to cultural heritage and resources that allow self-identification and development processes to take place. They can also play a vital role in reconciliation and peace-building.
As I have reiterated in many discussions with Governmental actors and other stakeholders, the mandate of the Special Rapporteur in the field of cultural rights is not about protecting culture and cultural heritage \textit{per se}, but about promoting the conditions that allow everyone without discrimination to access, participate in and contribute to cultural life in continuous cycles of creativity.

Because culture is a living, dynamic and constantly evolving process, it must not be seen as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.

All my thematic reports are based on these principles.

In concluding, I would like to thank all the States for your support as well as constructive criticism, and for the privilege and honour of exploring the multi-faceted aspects of cultural rights as the first mandate holder. I am confident that you will extend the same cooperation to the next Special Rapporteur, who will start her functions on November 1st. I wish her good luck.

Once again, thank you very much.