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IPRS COMPATIBILITY WITH HUMAN RIGHTS: STRIVING FOR A RIGHT BALANCE

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1. Brief Introduction to the Interface

Human Rights and Intellectual Property Law were strangers to each other for a long time. For the first time on November 9, 1998 a panel discussion on "Intellectual Property and Human Rights"[1] took place in Geneva to mark the Fiftieth Anniversary of the Universal Declaration of Human Rights (UDHR). The World Intellectual Property Organization (WIPO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) jointly organized the discussion. In that discussion the panelists explored the complementarity of intellectual property rights and international human rights standards.

Scholars found two distinct approaches to the interface of human rights and intellectual property.[2] The first approach considers human rights and intellectual property as in fundamental conflict.[3] The scholars of the approach found strong intellectual property protection as undermining and therefore as incompatible with a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights. The prescription that proponents of this approach advocate for resolving this conflict is to recognize the normative primacy of human rights law

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1. See, Intellectual Property and Human Rights, A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, WIPO Publication No. 762(E), WIPO 1999.
2. Human Rights an Intellectual Property: Conflict or Co-existence?, Professor Laurence Helfer, available at http://ssrn.com/abstract=459120, last visited 6 March 2007.
3. See, e.g., Sub-Commission on the Protection and Promotion of Human Rights, Intellectual Property Rights and Human Rights, Res. 2000/7, E/CN.4/Sub/2/2000/L.20, preambular ¶11 [hereinafter Resolution 2000/7] (stating that "actual or potential conflicts exist between the implementation of the TRIPs Agreement and the realization of economic, social and cultural rights"). Cited in Human Rights an Intellectual Property: Conflict or Co-existence?, Professor Laurence Helfer, available at http://ssrn.com/abstract=459120, last visited 6 March 2007.

over intellectual property law in areas where specific treaty obligations conflict.[4]

The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power to give authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school views human rights law and intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives, on the one hand and access on the other.[5]

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4. Ibid. (emphasizing "the primacy of human rights obligations over economic policies and agreements"). Statements by legal commentators and NGOs also advocate the primacy of human rights over economic agreements, including those relating to intellectual property rights. Notably, these assertions of primacy are not limited to *juscogens* or peremptory norms, which are hierarchically superior to other international law obligations. See, e.g., Robert Howse & Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization at *6 (Int'l Centre for Human Rts. & Democratic Dev., Policy Paper, 2000) ("Human rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific conflicting provisions of treaties such as trade agreements."); HIV/AIDS Legal Network & AIDS Law

   Project, South Africa, TRIPs and Rights: International Human Rights Law, Access to Medicines, and the

   Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights at 2 (Nov. 2001), available at www.aidslaw.ca (asserting that because "States' binding legal obligations to realize human rights have primacy in international law," obligations in TRIPs "must be recognized as not binding to the extent there is a conflict with [states'] human rights obligations"). Cited in Human Rights an Intellectual Property: Conflict or Co-existence?, Professor Laurence Helfer, available at http://ssrn.com/abstract=459120, last visited 6 March 2007.

5. See, e.g., Intellectual Property and Human Rights: Report of the Secretary-General, ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001) at 8 (submission by WTO asserting that existing international agreements permit states sufficient room to balance intellectual property and human rights standards, but noting that "[h]uman rights can be used – and have been and are currently being used – to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing [intellectual property] rights or by creating new rights"); World Health Organization, Globalization, TRIPs and Access to Pharmaceuticals, WHO Policy Perspectives on Medicines, No. 3, WHO/EDM/2001.2 at 5 (Mar. 2001)

One of the proponents of the second approach, i.e. compatibility of human rights with IP, opined that international human rights instruments in fact complement intellectual property law; for example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Paragraph 1(c) stipulates that everyone has the right:

"To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic protection of which he is the author."

States Parties not only have an obligation to respect this right, they are also to "... undertake to respect the freedom indispensable for scientific research and creative activity" and to "...recognize the benefits to be derived from the encouragement and development of international contracts and cooperation in the scientific and cultural fields" (paragraphs 3 and 4 of Article 15).

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) prescribes that:

"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."

States Parties to both the Covenants are obliged to submit periodic reports to the relevant International Committees outlining the legislative, administrative and other steps taken to ensure the enjoyment of, *Inter alia,* intellectual property rights and freedom of expression. In addition, the Commission on Human Rights' Special Rapporteur on the Right to Freedom of Opinion and Expression has responsibility for investigating and reporting on the implementation of freedom of expression in specific countries. Within the framework of the work of the Special Reapporteur,

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[hereinafter WHO Policy Perspectives] (asserting that "[a]cess to essential drugs is a human right" but urging states to using existing "safeguards" within TRIPs to "enhance the affordability and availability" of patented medicines); Report of the High Commissioner, The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, E/CN.4/Sub.2/2001/13, 11-12 (June 27, 2001) [hereinafter High Commissioner Report] (stating that "[t]he balance between public and private interests found under article 15 [of the ICESCR] - and article 27 of the Universal Declaration - is one familiar to intellectual property law" but asserting that the key question "is where to strike the right balance"). Cited in Human Rights an Intellectual Property: Conflict or Co-existence?, Professor Laurence Helfer, available at http://ssrn.com/abstract=459120, last visited 6March 2007.

issues concerning the protection of intellectual property rights may be discussed and brought to international attention.[6]

Dr. Peter Darhos opined that the international document, which can perhaps be said to constitutionalize the human rights regime, is the Universal Declaration of Human Rights, 1948 (the UDHR).[7] He further stated that the UDHR does not expressly refer to intellectual property rights, but Article 27.2 states, "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." At the same time Article 27.1 states that 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." Article 27 thus carries with it a tension familiar to intellectual property law: the tension between rules that protect the creators of information and those that ensure the use and diffusion of information. The recognition of the interests of authors in the UDHR is complemented by the proclamation in Article 17.1 of a general right of property. This Article states that "[e]veryone has the right to own property" and 17.2 states that "[n]o one shall be arbitrarily deprived of his property." The implication of Article 17.2 is that states do have a right to regulate the property rights of individuals, but that they must do so according to the rule of law.

Some international human right instruments do recognize a general right of property or something close to it. The African Charter on Human and Peoples' Rights, 1981 in Article 14, guarantees the right to property, although it then goes on to recognize that that right may be encroached upon in the "interest of public need or in the general interest of the community". The American Convention on Human Rights, 1969, in Article 21.1, recognizes a right of property, a right which no one is to be deprived of "except upon payment of just compensation" (see Article 21.2). A right to property was not included in the European Convention of Human Rights and Fundamental Freedoms, 1950 because of controversy over its drafting, but a right to peaceful enjoyment of one's

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6. Opening Address, Mr. Brian Burdekin on behalf of Mrs. Mary Robinson, United Nations High Commissioner for Human Rights, published at Intellectual Property and Human Rights: Report of the Secretary-General, ESCOR, Sub Commission on the Promotion and Protection of Human Rights, 52nd Session, Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001).

7. See, Dr. Peter Drahos, The Universality of Intellectual Property Rights: Origins and Developments, published at Intellectual Property and Human Rights, A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, WIPO Publication No. 762 (E), WIPO 1999.

possessions was included in Article 1 of Protocol 1. That Article then goes on to recognize the right of a "State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."[8]

The Sub-Commission on the Promotion and Protection of Human Rights declared intellectual property rights as human rights on August 17, 2000 (E/CN.4/Sub.2/2000/7) "subject to limitations in the public interest" (substantive paragraph 1).[9]

It would be examined in this article that how far human rights e.g. freedom of expression, right to development, right to education and right to information etc. are being protected or uphold in different international IP Treaties like the Paris Convention, the Berne Convention, the Rome Convention, the WIPO Treaties, 1996 and the TRIPS Agreement etc. How far the national laws of the USA and the UK, two of the most developed nations could achieve the right balance in upholding the human rights while protecting the IPRS would be examined with famous case references of the respective jurisdictions. The Copyright Law of Bangladesh would be discussed briefly. Specific attention will be given on software patenting since software plays a vital role in today's development.

The discussion would be confined to the copyright laws and patent laws for brevity since the inclusion of other IPRS would make the article voluminous.

2. Human Rights and International IP Treaties

The "national treatment" is one of the basic principles of important international intellectual property right treaties like the Berne Convention and Paris Convention, which is based on principle of non-discrimination. The Principle of National Treatment has been explained in WIPO-Guide to the Berne Convention as Follows:

> This provision treats foreigners in the same way as nationals as regards the protection of their works. In other words, works, which have a country of origin ..., which is a Union Country, benefit, in all other Union Countries, from the same protection as the latter give to the works of their own nationals. For example, if the copyright in a work by a Senegalese author,

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8. Ibid.
9. See, Wend Wendland, "Intellectual Property and Human Rights Working Draft", P 11, Presented for the United Nations Committee on Economic, Social and Cultural Rights in Geneva, November 27 2000.

> published for the first time in the Ivory Coast, is infringed in France, this author and his successors in title must be treated in France as if the work were one made by a French author and published on French Territory.

Some of the most important provisions on non-discrimination are Article 2 of the UDHR, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), Article 2.1 of the International Covenant on Civil and Political Rights (the ICCPR), Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of the American Declaration of the Rights and Duties of Man, Article 1.1 of the American Convention on Human Rights and Article 2 of the African Charter on Human and Peoples' Rights. Equality before the law has been laid down as a human right in Article 7 of the UDHR, Articles 14.1 and 26 of the ICCPR, Article 24 of the American Convention on Human Rights, Article 2 of the American Declaration of the Rights and Duties of Man, and Article 3 of the African Charter on Human and Peoples' Rights. The provisions on non-discrimination apply to the rights recognized in the respective treaties and declarations.

How "national treatment" principle is incorporated in various international IP treaties is discussed below.

2.1 The Paris Convention

Article 2.1 of the Paris Convention for the Protection of Industrial Property of 1967 (the Paris Convention) determines the personal scope of application on the basis of nationality: Beneficiaries of protection under the Convention are nationals of any other country of the Union. In respect of nationals of other Union countries, no requirement as to domicile or establishment in the country where protection is claimed may be imposed (Article 2.2 of the Paris Convention). Article 3 of the Convention extends national treatment to nationals of countries outside the Union, provided that they are domiciled or have a real and effective industrial establishment in the territory of one of the countries of the Union.[10]

2.2 The Berne Convention

Under the Berne Convention for the Protection of Literary and Artistic Works of 1971 (the Berne Convention), the personal scope of application

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10. See, on the question how to determine nationality in case of legal persons, to which the Paris Convention applies, Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of IndustrialProperty* (Geneva, 1968), Article 2.1, note (b).

has been laid down in Articles 4, 5 and 6.[11] Accordingly, the beneficiaries of national treatment are either nationals of one of the countries of the Berne Union, or those who have their habitual residence in one of these countries, or those who are not nationals of one of these countries, for their works first published in one of those countries (or simultaneously in a country outside the Union and a country of the Union). In respect of cinematographic works and works of architecture, additional possibilities to become eligible for protection are provided for under Article 4 of the Berne Convention: authors of cinematographic works are eligible if the maker of the work has his headquarters or habitual residence in one of the countries of the Union. Eligibility is also stated in respect of authors of works of architecture, which are erected in a country of the Union, and for authors of other artistic works, which are incorporated in a building, or other structure located in a country of the Union.

In sum, the criteria of eligibility are nationality or habitual residence of the author, or different points of attachment regarding the work, namely first publication, nationality of the maker of the cinematographic work and place of a building or other structure. The possibility to obtain the protection by the Berne Convention by first publication of a work in a country of the Union represents a remarkable extension of such possibilities for authors who are not nationals of a country of the Union nor have their habitual residence in such a country. This solution in particular goes far beyond that of the Paris Convention, where nationals from countries outside the Union may obtain protection only if they are domiciled or have their real and effective industrial establishment in the territory of one of the countries of the Union.

2.3 The Rome Convention

Under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961(the Rome Convention), different points of attachment for the protection of performers, phonogram producers and broadcasting organizations are provided for in Articles 4, 5 and 6 of the Rome Convention.[12] For performers, nationality has not been chosen for practical reasons: very

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11. See, on the question how to determine nationality in case of legal persons, to which the Paris Convention applies, Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of IndustrialProperty* (Geneva, 1968), Article 2.1, note (b).

12. See, a commentary on these articles in Masouyé, *Guide to the Rome Convention and to the Phonograms Convention* (WIPO Publ. No. 617E, Geneva, 1981) p. 26 *et seq.*

often, performing ensembles such as orchestras, bands or choirs include performers of different nationalities, which would render the application of the point of attachment of nationality too difficult. Instead of the nationality, the place of the performance is a point of attachment, as are the incorporation in a phonogram which is protected under Article 5 of the Rome Convention, and the broadcast of a performance which is not fixed on a phonogram if the broadcast is protected by Article 6 of the Rome Convention (Article 4 of the Rome Convention). Article 5 of the Rome Convention establishes, in respect of phonogram producers, the points of attachment of nationality, of first fixation and first publication; publication in a Contracting State within 30 days of first publication in a non-contracting State fulfills the requirement of first publication (Article 5.2 of the Rome Convention). In respect of broadcasting organizations, the points of attachment are either the headquarters of the organization or the transmission of the broadcast from a transmitter situated in another Contracting State.[13] Accordingly, also the Rome Convention covers only international situations: the relevant criterion must be related to another Contracting State than that in which protection is claimed.

2.4 The TRIPS-Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (the TRIPS Agreement) basically made it obligatory upon the Member States to incorporate the national treatment rules provided by the relevant Intellectual Property Conventions in their respective national legislation. The national treatment rules including the exceptions to them as provided under the relevant intellectual property conventions remained in the end untouched even by the most-favored nation clause in Article 4 of the TRIPS Agreement. The drafting techniques used are the following: Article 3.1, phrase 1 of the Agreement states the general principle that "each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals ...". In order to take account of the fact that nationality is not the only criterion, or even not at all a criterion for eligibility used in the conventions in order to determine the beneficiaries of protection, Article 1.3, phrase 2 of the TRIPS Agreement defines the term "nationals" by reference to "those natural or legal persons that would meet the criteria for eligibility for protection provided for in..." the relevant Conventions, "... were all Members of the WTO members of those Conventions." This

13. Article 6(1) of the Rome Convention. A Contracting State may notify that it will protect broadcasts only if both criteria are fulfilled, Article 6(2) of the Rome Convention.

legal technique made it not necessary to spell out the relevant rules of the Conventions (Articles 2, 3 of the Paris Convention, Articles 3, 4 of the Berne Convention and Articles 4, 5 and 6 of the Rome Convention). In addition, TRIPS took over the exceptions to national treatment already provided in the relevant Conventions, such as the cases of reciprocity under the Berne Convention. In respect of the neighboring rights covered by the Rome Convention, the TRIPS Agreement chose the same approach of a narrow scope of national treatment, which is limited to the rights provided under the TRIPS Agreement (which are, at the same time, minimum rights). In addition, the national treatment provisions of the Berne Convention have been included in the compliance clause of Article 9.1, phrase 1 of the TRIPS Agreement. In sum, the TRIPS Agreement has followed the national treatment provisions of the relevant intellectual property conventions.

2.5 The WIPO Treaties, 1996

The WIPO Copyright Treaty, 1996 (the WCT) incorporated the rules on national treatment of the Berne Convention. According to the Article 1 of the WCT it is a special agreement within the meaning of Article 20 of the Berne Convention, which requires that the special agreement does not contain any provision contrary to the Berne Convention. Accordingly, Article 3 of the WCT obliges Contracting Parties to apply *mutatis mutandis* the relevant provisions of the Berne Convention dealing with national treatment (Articles 2 - 6 of the Berne Convention). An Agreed Statement explains how to understand certain notions of Articles 2 - 6 of the Berne Convention in applying them to the WCT.

Article 4 of the WIPO Performances and Phonograms Treaty, 1996 (the WPPT) again follows the basic approaches of the Rome Convention and the TRIPS Agreement. Regarding the eligibility for protection, it also, like TRIPS, uses the word "nationals" (of other Contracting Parties) and defines this word by a reference to the criteria for eligibility for protection provided under the Rome Convention, " . . . were all the Contracting Parties to this Treaty Contracting States of that Convention" (Article 3.2, phrase 1 of the WPPT). Accordingly, Articles 4 and 5 of the Rome Convention have to be applied as criteria for eligibility for protection under the WPPT.

Regarding the scope of national treatment, Article 4.1 of the WPPT follows in principle the narrow approach of the Rome Convention and the TRIPS Agreement. It is even clearer than the Rome Convention, since it is limited explicitly to the "exclusive rights specifically granted in this Treaty" (as opposed to the "protection specifically guaranteed and their limitations specifically provided for" in the Rome Convention) and

covers, as the only remuneration right, the right for secondary uses under Article 15 of the WPPT. Accordingly, any other remuneration rights, such as those for private copying, are clearly not covered by the national treatment provision of Article 4 of the WPPT. The only provision of material reciprocity is Article 4.2 of the WPPT, which corresponds largely to Article 16.1(a)(iv) of the Rome Convention. It allows the application of material reciprocity in a case where another Contracting Party makes use of the reservations permitted by Article 15.3 of the WPPT in relation to the remuneration right for secondary uses of phonograms.

In sum, the more recent treaties dealing with intellectual property rights and even those which are larger trade treaties have continued to not only make national treatment one of their main principles, but also to rely on the provisions of the Conventions as far as they relate to the criteria for eligibility for protection, to the scope of national treatment and the exceptions thereto.

3. Human Rights and Copyrights

We have seen at the beginning of this article that Article 19 of the ICCPR provides for freedom of expression which includes 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 choice. Generally copyright seems to be an impediment to this right. It's a difficult task to strike a balance between the exclusive rights of the copyright owner and the right to freedom of expression. In order to see how far this balance has been achieved we shall now examine the International copyright laws as well as national jurisdictions.

3.1 International Copyright Laws

If we carefully examine the International laws on copyright like Berne Convention, TRIPS Agreement and WIPO Treaties we would find that Member States of these Conventions are relentlessly trying to strike a balance between these apparently two conflicting notions.

3.1.1The Berne Convention

Article 2 (8) of the Berne Convention states "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." The basic aim behind not to give copyright protection to the news item is to ensure the right to information of the people.

Article 2 *bis* of the Convention runs as follows:

> (1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided

> by the preceding Article political speeches and speeches delivered in the course of legal proceedings.
>
> (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis (1) of this Convention, when such use is justified by the informatory purpose.
>
> (3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

So the right to freedom of expression is to the same extent reflected in these provisions of the Convention.

Articles 10 and 10 *bis* of the Berne Convention provide the provisions for imposing limitations on the author's exclusive rights to exploit his work in order to meet the "public for information".[14] Article 10 and 10 *bis* are as follows:

Article 10[15]

> (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
>
> (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.
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> (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon.

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14. See, WIPO –Guide to the Berne Convention, P. 58, WIPO (1978).
15. See, Berne Convention, Article 10, WIPO Publication no. 223 (E).

Article 10 *bis*[16]

> (1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire, of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.
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> (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Considering the text of Article 10 we find that the Convention puts three limitations on the licence to quote. In the first place the work from which the extract is taken must have been lawfully made available to the public. Unpublished manuscripts or even works printed for a private circle may not, it is felt, be freely quoted from; the quotation may only be made from a work intended for the public in general. This provision applies to the works available under compulsory licence.

Secondly, quotation must be "compatible with fair practice". This concept, introduced at the Stockholm Revision (1967), appears a number of timers in the Convention. It implies an objective appreciation of what is normally considered admissible. Whether there was fairness or mala fide intention would be determined by the courts, which would consider the size of the extract and then where it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc.

In the third place, the quotation must only be to the extent "justified by the purpose". This is also to be determined by the courts. For example, the writer of a work of literature or history who, illustrates his theme with few quotations cannot be blamed or sued; on the other hand if he seems to use the extracts from others' works in bad faith, and without any

16. See, Berne Convention, Article 10*bis*, WIPO Publication no. 223 (E).

relevance to his subject, the court may decide that the quotation is not lawful.[17]

The aforementioned considerations sufficiently explained the effort of making balance between freedom of expression and author's exclusive rights to exploit his intellectual creations.

But one criticism against the Berne Convention is that Article 19[18] of the convention provides that a country of the Union shall not be precluded from the making of a claim to the benefit of any greater protection, which may be granted by legislation of that country.

The human rights proponents claim that the Berne Convention should set the maximum standard of protection in order to be preserved the right to freedom of expression.

3.1.2 The TRIPS Agreement

Article 9 paragraph 2 of the TRIPS Agreement provides, "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This provision is conducive to the freedom of expression. Because only expressions of literary works are protected not ideas, which would be convenient to seek, receive and impart information.

Article 10 paragraph 1[19] of the TRIPS Agreement protects computer programs as literary works under the Berne Convention. Therefore, all the aforementioned provisions of the Berne Convention are applicable to the Computer programs also. This means under specific circumstances provided in the Convention the exclusive rights of the author of the computer program could be derogated.

Article 13 of the TRIPS Agreement provides, " Members Shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[20] By this provision TRIPS made it obligatory to Members to impose limitations to exclusive rights. Though the language is not very clear and specific but

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17. See, Guide to the Berne Convention, P. 59, WIPO (1978).
18. Article 19 of the Berne Convention runs "The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.".
19. Article 10 Paragraph 1 of the TRIPS Agreement runs, "Computer programs, whether in source of object code, shall be protected as literary works under the Berne Convention (1971).
20. See, WIPO Publication no. 223 (E), P. 21.

still we find a week effort on the part of TRIPS to provide provisions for keeping up freedom of expression.

The main criticism against TRIPS is that it provided a minimum standard for the Members and set no limit for imposing maximum intellectual property protection. Professor Laurence Helfer in his article Human Rights and Intellectual Property : Conflict or Coexistence? mentioned that the new intersection between human rights and intellectual property – the articulation of "maximum standards" of intellectual property protection. Treaties from Berne to Paris to TRIPS are all concerned with articulating "minimum standards."[21] But higher standards are not considered problematic, and nothing in the treaties prevents governments from enacting more stringent domestic intellectual property laws, or from entering into agreements that enshrine such standards.[22] Indeed, since TRIPS entered into force, the United States and the EC have negotiated so-called "TRIPS plus" bilateral agreements with many developing countries. These treaties contain intellectual property rules that impose higher standards of protection than TRIPs requires. The U.N. High Commissioner for Human Rights and the WHO have voiced strong objections to TRIPS plus treaties on human rights grounds.[23] Together with the particularization of soft law[24] norms these objections may, for the first time, begin to impose a ceiling on the upward drift of

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21. See, e.g., TRIPs Agreement, art. 1(1) ("Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement."); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together, 37 Va. J. Int'l L. 275, 295-304 (1997) (emphasizing the importance of TRIPs' minimum standards framework).

22. See, GRAIN, "TRIPs-plus" Through the Back Door: How Bilateral Treaties Impose Much Strong rules for IPRs on Life than the WTO (July 2001) (describing bilateral agreements negotiated by the United States and EC that require developing countries to adopt more stringent intellectual property rules than those found in TRIPs).

23. See, Ibid F.N. 2.

24. Comm. on Hum. Rts. Res. 2001/33 (Apr. 23, 2001); Comm. on Hum. Rts. Res. 2002/32 (Apr. 22, 2002); see also Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria, Comm. on Hum. Rts. Res. 2003/29 (Apr. 22, 2003). See also Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Follow-up to the day of general discussion on article 15.1(c), Nov. 25, 2001, Statement on Human Rights and Intellectual Property, E/C.12/2001/15 ¶¶ 4, 11 (14 Dec. 2001).

intellectual property standards that has accelerated over the past few decades.

3.1.3 WIPO Copyright Treaty

WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) together are popularly known as the Internet Treaties. If we go through the preamble of WCT we would find the fundamental objects of the treaty. The relevant portion of the preamble is as follows:

> Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,
>
> Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,
>
> Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,[25]

This clearly shows the contracting parties intention to achieve a balance between the author's exclusive rights to exploit his intellectual creation and larger public interest.

Article 10 of WCT provides for optional provision for the contracting parties to incorporate in their national legislation, limitations or exceptions to the author's rights under special cases. Article 10 of the Treaty runs as follows:

> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
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> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.[26]

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25. See, Preamble of WIPO Copyright Treaty (WCT) (1996), WIPO Publication No. 226 (E).
26. See, WIPO Copyright Treaty (WCT) (1996), WIPO Publication No. 226 (E).

The aforementioned provisions indicate that whilst in general, copyright comprises a set of exclusive rights, there are opportunities to modify them by, on occasions, allowing free use of copyright works, or use in exchange for fair compensation; but all such modifications are subject to the three-step test provided by Article 13 of the TRIPS Agreement, i.e. such modifications must be for special cases, must not be conflicting with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author. This has been the approach taken, for example, in the recently adopted European Directive on Copyright and Related Rights in the Information Society (May 2001).

3.2 National Jurisdictions

3.2.1 U.S.A.

The doctrine of fair use has been incorporated in the following way in the US Copyright Act:

> §107. Limitations on exclusive rights: Fair use
>
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[27]

The doctrine of fair use developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing

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27. See, 17 USC 107, Limitations on exclusive rights: Fair Use, Bitlaw , available at www.bitlaw.com/source/17usc/107.html/ , last visited 6 March 2007.

copying in certain, limited circumstances. This doctrine has at its core a fundamental belief that not all copying should be banned, particularly in socially important endeavours such as criticism, news reporting, teaching, and research.

In the context of computer technologies, the fair use doctrine is often used in the context of reverse engineering. Under trade secret principles, it is generally accepted to "reverse engineer" a product to determine how the product works. Reverse engineering may involve analyzing circuit board layouts, "peeling" back a integrated circuit chip, or decompiling computer software. However, it is impossible to decompile software and then analyze the results without making a copy (or a derivative work) of the software. Courts have sometimes held that the making of these copies in the context of reverse engineering is a fair use and is not copyright infringement.[28]

The Digital Millennium Copyright Act (DMCA) was enacted in 1998 to implement the World Intellectual Property Organization Copyright Treaty (``WIPO Treaty''), which requires contracting parties to

> provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[29]

The DMCA contains exceptions for schools and libraries that want to use circumvention technologies to determine whether to purchase a copyrighted product, 17 U.S.C. § 1201(d); individuals using circumvention technology "for the sole purpose" of trying to achieve "interoperability" of computer programs through reverse-engineering, *id.* § 1201(f); encryption research aimed at identifying flaws in encryption technology, if the research is conducted to advance the state of knowledge in the field, *id.* § 1201(g); and several other exceptions.[30]

In *Universal City Studios, Inc.* v. *Reimerdes*[31], one of the first cases to test the bounds of the DMCA, a federal district court in New York enjoined the

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28. See, Bitlaw , available at www.bitlaw.com/source/17usc/107.html/ , last visited 4 August 2004.
29. See, *UNIVERSAL CITY STUDIOS, INC.* v. *CORLEY*, 273 F.3d 429 (2nd Cir. 2001).
30. Ibid.
31. 111 F.Supp.2d 294.

owners of a website from posting or electronically linking to a software program designed to decrypt the technological copyright protection encoded in digital versatile discs (DVDs).[32] In this case The District Court, Kaplan, J., held that: (1) posting decryption software violated DMCA provision prohibiting trafficking in technology that circumvented measures controlling access to copyrighted works; (2) posting hyperlinks to other web-sites offering decryption software violated DMCA; (3) DMCA anti-trafficking provision was content-neutral as applied to computer program; (4) DMCA did not violate First Amendment as applied to defendants and decryption software; (5) defendants failed to establish anti-trafficking provision was overly broad on grounds that it prevented noninfringing fair use of movies; (6) application of anti-trafficking provision to enjoin defendants from hyper-linking to other web-sites offering decryption software did not violate First Amendment; and (7) plaintiffs were entitled to injunction enjoining defendants from posting decryption software or hyperlinking to other web-sites that made Software available.

The Appellate Court in *Universal City Studios, INC.* v. *Corley* mostly supported Judge Kaplan's view taken in *Universal City Studios, Inc.* v. *Reimerdes.* The Appellate Circuit Court held that Digital Millennium Copyright Act (DMCA) does not prohibit the "fair use" of information just because that information was obtained in a manner made illegal by the DMCA. 17U.S.C.A. § 1201(c)(1). The Judge also referred the legislative history of the DMCA that the legislative history of the enacted bill makes quite clear that Congress intended to adopt a ``balanced" approach to accommodating both piracy and fair use concerns, eschewing the quick fix of simply exempting from the statute all circumventions for fair use. The Appellants contend that the DMCA, as applied by the District Court, unconstitutionally ``*eliminates* fair use" of copyrighted materials. The Court rejected the Appellants contention on the following reasons:

(a) The Supreme Court has never held that fair use is constitutionally required.

(b) The Appellants do not claim to be making fair use of any copyrighted materials, and nothing in the injunction prohibits them from making such fair use. They are barred from trafficking in a decryption code that enables unauthorized access to copyrighted materials.

(c) The District Court properly noted, to whatever extent the anti-trafficking provisions of the DMCA might prevent others from copying portions of DVD movies in order to make fair use of them,

32. See, 2001 Harvard Law Review Association in West Law.

"the evidence as to the impact of the antitrafficking provision[s] of the DMCA on prospective fair users is scanty and fails adequately to address the issues." *Universal I*, 111 F.Supp.2d at 338 n. 246.

(d) The Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. The judge further explained this point stating that the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use.

The aforesaid two cases sufficiently explained the American position regarding fair use and Freedom of expression.

3.2.2 United Kingdom

The Copyright, Designs and Patents Act 1988 of UK, which incorporated the E.C. Software Directives, disclosed the following special permitted acts for computer programs:

i. decompilation of computer programs;

ii. making back-up copies of computer programs; and

iii. making copies of adaptations of computer programs.

Permitted acts that do not require the permission of the rightsholder and may not be held to infringe copyright under CDPA can be divided into three groups:

A. Fair Dealing

B. Library and Archive privilege

C. Other educational exemptions

A. Fair Dealing[33]

This applies particularly but not exclusively to the 'restricted act' of copying. There is no precise definition and the courts ultimately make interpretation. However, it essentially allows limited copying without

33. See, www.jisclegal.ac.uk/ipr/fairdealings.htm?/name=lis-fair , last visited 7 March 2007.

permission provided it is 'fair' and the commercial interests of the rights holder are not damaged. Fair Dealing applies principally to literary, artistic, dramatic and musical works, for films, sound recordings, computer software etc. it may apply in more limited circumstances. It is not so much a right but a defence in law. Some rightsholders have issued guidelines on what is considered 'fair', for example in terms of how much may be copied of a book. Fair Dealing covers material in digital/ electronic form, however databases require caution, as Database Right (as opposed to copyright) does not permit Fair Dealing as a defence for copying in all circumstances, for example not for Criticism and Review. In addition to Fair Dealing there is a general statutory exemption for 'insubstantial use', where the amount copied and its significance is so small as to be of negligible consequence to the rights holder. Again there is no precise definition but note that a very small part of a work may be of great significance to the whole. Unlike Fair Dealing this exemption extends to a wider range of purposes.

The principal purposes for which the Fair Dealing defence may be used are:

i. Research and Private Study. (Note that many commentators feel these two should be separated. It excludes sound recordings and films in both cases.)

ii. Criticism and Review.

iii. News Reporting. Photographs are excluded from this.

A key point is that an individual may only normally make one copy of an item under this defence, unless it can be shown to be 'fair' to do more, which is difficult. A second is that it does not cover use of the material for teaching. With regard to databases note that Fair Dealing does not apply for Research and Private Study if the copying is for commercial purposes.

In addition to the above the defence of 'incidental inclusion' can be used where relevant. For example a photograph may include accidentally a work of art. The work 'copied' must not be the subject or essential to the work in which it is contained. Music however must never be copied incidentally or as background unless permission is granted. For example a video or film shot in a bar might catch a CD being played at the time of filming. It is a condition of the Fair Dealing defence that the source of the work is acknowledged in all cases.

B. Library and Archive privilege

The CDPA allows certain normally restricted actions to be carried out under this 'exception'. It is a right not a defence in law. Librarians and 'users' can still make copies under Fair Dealing however but not both.

The privilege only allows the making of single copies, essentially for the purpose of research and private study. The right is largely restricted to non-profit libraries and archives and there are certain condition's attached. It does not apply to the making of electronic copies, which may have implications for Inter Library Loans and other services. Copies may be made of items for archival purposes under certain circumstances. For example the replacement of an archive copy. Library and Archive privilege does not extend to computer software. There are special rules for unpublished works.

C. Other Educational Exemptions

There is a general educational exemption that allows the copying of very restricted amounts of material in specific circumstances.

3.2.2.1 Case Law

Article 10 of the European Convention of Human Rights (ECHR) Specifically guarantees the right to freedom of expression which has been reflected in the permitted act provisions of CDPA[34] The complex relationship between the defences of fair dealing and public interest, on the one hand, and the right of the freedom of expression, on the other, has been addressed in recent case law and is referred as follows:

In Pro *Sieben Media AG* v *Carlton UK Television Ltd*[35], the plaintiff secured the exclusive right to broadcast an interview with M in Germany who became pregnant with octuplets in or about March 1996. The defendant had broadcast a programme which included a 30-second sequence taken from the interview. The plaintiff brought an action for copyright infringement and the defendant relied on the fair dealing defence for criticism or review. At first instance , the judge held that the defence failed principally for lack of sufficient acknowledgement of the author of the original programme and did not decide whether the use was fair dealing. The Court of Appeal reversed the decision with finding that there had been sufficient acknowledgement and that the defence of fair dealing did apply to the use of the 30-second extract. The Appellate Court stated that the permitted acts under the CDPA are all directed to achieving a proper balance between protection of the rights of a creative author and the wider public interest and that free speech is a very important part of that wider public interest.

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34. See, Gillian Davies, Copyright and the Public Interest, P. 53, Sweet and Maxwell (2002).
35. [1999] 1 WLR 605.

But in *Hyde Park Residence Ltd.* V. *Yelland (Hyde Park)*[36] a newspaper published some still photographs, taken on a security camera, of a visit by Diana, Princes of Wales, and Dodi Fayed, to Villa Windsor in Paris, on the day prior to their death in a car accident. The stills had been stolen by a security guard and sold to the newspaper, which published them more than a year later. The Trial Court upheld the defendant's fair dealing claim. But the Appellate Court reversed the decision concluding that the defence of fair dealing could not succeed. The Appellate Court stated that it is not believable that a fair minded and honest person would pay for the dishonestly taken driveway stills and publish them in a newspaper knowing that they had not been published or circulated. The Appellate Court also found that the extent of the use was excessive.

3.2.3 Bangladesh

The Copyright Act, 2000 (Act no. 28 of 2000) was enacted on 18 July 2000 in order to implement the provisions of the TRIPS Agreement and to make the copyright law up-to-date. The present Copyright Act provided for the fair use exception in section 72 of the Act. Basically the following acts have been exempted from copyright infringement:

i. Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work;

ii. Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work;

iii. Fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events in newspaper, magazine or periodicals or broadcasting or movie or photography does not infringe any copyright in the work;

iv. Reproduction of any literary, dramatic, musical or artistic work for judicial proceedings or for the reporting of judicial proceedings;

v. Reproduction or adaptation of a literary, dramatic, musical or artistic work in the course of instruction or of preparation for instruction by teacher or student for only educational purpose; and

vi. Copying or adaptation by a lawful user of a copy of a computer program from that copy for the purpose of using the program for which it was supplied or to make any back up copy of it for temporary protection from loss, destruction or damage.

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36. But see, Gillian Davies, Copyright and the Public Interest, P. 61, Sweet and Maxwell (2002).

On perusal of the aforementioned provisions it seems that the principles set out in the international human rights instruments like UDHR, ICCPR and in the IP laws of the developed countries like the UK and the USA regarding right to information and right to share in scientific advancement have been to the some extent reflected in the Copy Right Act, 2000.

4. Human Rights and Software Patenting

Article 15.1(c) of the ICESCR Provides that:

"The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." From this provision it can be derived that to be consistent with human rights norms in order to get patent protection a subject matter must meet the following considerations[37]:

i. Intellectual property rights must be consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein;

ii. Intellectual property rights related to science must promote scientific progress and access to its benefits;

iii. Intellectual property regimes must respect the freedom indispensable for scientific research and creative activity;

iv. Intellectual property regimes must encourage the development of international contacts and cooperation in the scientific and cultural fields.

The European Union provides one potential model relevant to the first point. Article 53(a) of the European Patent Convention specifically stipulates that patents should not be granted for inventions "the publication or exploitation of which would be contrary to *'ordre public'* or morality." Several provisions of a recent Directive of the European Parliament and of the Council on the legal protection of biotechnological inventions reiterate this principle. The Directive also excludes inventions

37. See, AR Chapman, A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science, P138, Intellectual Property and Human Rights, A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, WIPO Publication No. 762(E), WIPO 1999.

from patentability, which offend against human dignity, and ethical and moral principles recognized in member states.[38]

In order to obtain a patent the inventor must disclose the invention. This condition ensures the dissemination of information, which enriches the store of publicly available knowledge and promotes further innovation by other inventors. The inventor gets exclusive rights in lieu of an extensive dissemination of the inventive steps, by which society at large benefits because the protected invention can then be used as a basis for further creative and inventive works.[39] Article 29.1 of the TRIPS Agreement requires that an application for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by others. The resulting information, which is stored and classified in patent documentation, is accessible to anyone, including to those in countries where a patent has not been sought.[40] Therefore, in order to obtain a patent on software, which fulfills the criteria of a patent, the inventor must disclose his invention and which would be the basis of further creative and inventive works.

Most of the industrialized countries support that strong intellectual property provisions promote growth of a strong domestic economy. Developing countries are against the stringent application of the patent law. Their opposition is based on three factors: (1) the benefits of an intellectual property system tend to be long term and tenuous; (2) in the short-term, intellectual property protection increases the cost of development, with the patents awarded and resulting payments for the use of these technologies going primarily to foreign multi-national corporations; and (3) few of these countries have the requisite infrastructure to uphold strong patent systems. Thus developing countries

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38. See, "Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998, paragraphs. 37-40, on the legal protection of biotechnological inventions", Official Journal of the European Communities, 30.7.98, L213/16.

39. See, Wend Wendland, "Intellectual Property and Human Rights Working Draft", P 5, Presented for the United Nations Committee on Economic, Social and Cultural Rights in Geneva, November 27 2000.

40. See, Protection of Intellectual Property Under the TRIPS Agreement, Secretariat of the World Trade Organization, available at www.wto.org , last visited 7 March 2007.

sometimes accuse former colonial countries and multinational corporations of seeking to impose "technological colonialism."[41]

But software patenting would be rather convenient for a developing country like Bangladesh. This country has more than 200 software houses and data-entry centres and numerous computer shops. At present, there are around 20 - 30 Bangladeshi software developers with foreign clients, some of which are 100% export orientated. Several years ago, the government of Bangladesh identified software as having important export potential. The total amount of software and IT-services exports is currently estimated at a maximum of $ 30 million per year.[42]

5. Human Rights Approach in DRM[43]

The constitutionality of the Digital Millennium Copy Right Act of the USA has been tested in Universal City Studios, Inc, v. Corley and the court upheld the constitutionality of the DMCA. Moreover the Court held that injunction, which prevented Internet web sited owners from providing hyperlinks to other web sites that posted decryption code, was unrelated to suppression of free expression. In this case the U.S. Court of Appeals upheld the copyright owners right to use the encryption codes to bar access to copyright materials and found that fair use did not guarantee access to such materials in order to copy it by the optimum method or in the identical format.[44] Therefore, it can be inferred that the digital rights management is not opposed to the right to freedom of expression. It is also argued that technical protection measures only apply in the digital environment, and in particular, to works made available in digital form on-line over the Internet. The public will still be able to have access to works on paper, to make analogue copies of sound and audiovisual recordings and so on. Protection measures aim at securing the public interest in making information available to the public but do not guarantee the public the possibility of making private copies

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41. A. E. Carroll, "A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Biotechnology and the Global Impact of U.S. Patent Law: Not Always the Best Medicine:," *The American University Law Review* (1995), pp. 2464-2466.
42. See, Paul Tjia, "The Software Industry in Bangladesh and its Links to The Netherlands", available at www.ejisdc.org , last visited 7 March 2007 .
43. Digital Rights Management.
44. See, Gillian Davies, Copyright And the Public Interest, P. 309. Second Edition, Sweet & Maxwell, 2002.

of the highest possible quality. WIPO Internet Treaties were designed to encourage the development of technical protection devices and rights management systems. The preamble to both the Treaties address the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments. The Preambled of both the Treaties also recognize the need to maintain a balance between the rights of copyright and related rights owners and the larger public interest, referring, in particular, to education, research and access to information.

The right to development is recognized as human rights.[45] Article 1 of the Declaration on the Right to Development mentions that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The IIPA[46] 2002 Report confirms the important role of copyright-based industries, which represent one of the fastest-growing sectors of the economy, making significant contributions to domestic employment and revenue growth as well as to international trade. The *Report* states that in both developed and developing countries, studies have generally reported contributions to GDP in the range of 3 to 6 per cent.[47]

The Internet created a huge demand for content and an opportunity of its production, which has not been fully explored by the developing countries. The implementation of copyright laws, modernized by the WIPO Internet Treaties enable these countries to go for the creative development and ensure the protection of such development. A 'digital divide' now exists between technologically developed and developing countries, as well as between populations within countries, and between

45. First recognized by the UN Commission on Human Rights in 1977, Declaration on the Right to Development adopted by the General Assembly in 1986.

46. The International Intellectual Property Alliance (IIPA).

47. See, E-Commerce and Development Report 2002, P.173, United Nations Conference on Trade and Development, available at www.unctad.org last visited 7 March 2007.

genders and age groups worldwide.[48] The G8 Digital Opportunity Task Force (DOT Force), described the phenomenon as follows:

> "This 'digital divide' is, in effect, a reflection of existing broader socio-economic inequalities and can be characterized by insufficient infrastructure, high cost of access, inappropriate or weak policy regimes, inefficiencies in the provision of telecommunication networks and services, lack of locally created content, and uneven ability to derive economic and social benefits from information-intensive activities."[49]

The United Nations Secretary General, Kofi Annan, stated about building 'digital bridges' to enable the socio-economic development of billions of people throughout the world who are not connected to the digital technologies and their potential benefits.[50]

How effective application of IP law might narrow down the digital divide can be perceived from the following statement:

"The intellectual property system is a tool that may be used to narrow the digital divide. National policies and legal systems that include up-to-date intellectual property laws can support foreign and local investment and encourage the creation of local content that enables the population to derive economic as well as social benefits from their creative endeavors."[51]

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48. For a general discussion of the digital divide, see the presentation of J. O. Okpaku, Sr., President and CEO, Telecom Africa Corporation, Second WIPO E-Commerce Conference (September 2001).

49. See Report of the Digital Opportunity Task Force (DOT Force), "Digital Opportunities for All: Meeting the Challenge," (May 11, 2001), at p.6, available at *http://www.dotforce.org/reports/DOT_Force_Report_V_5.0h.html.* The DOT Force was created by the G8 Heads of State at their Kyushu-Okinawa Summit, July 2000, and comprised 43 teams from government, private sector, non-profit organizations and international organizations, representing developed and developing countries.

50. Message of United Nations Secretary-General Kofi Annan to the meeting of the Internet Corporation for Assigned Names and Numbers (ICANN), in Accra, Ghana, March 10 to 14, 2002. See also the Report of the UN ICT Task Force Meeting "Digital Bridge to Africa: The Launch of the Digital Diaspora Network - Africa," (DDN-A), New York (July 12, 2002).

51. See Intellectual Property On the Internet: A Survey Issues,P. 150-151, WIPO/ INT/02, December 2002, available at www.wipo.int, last visited 7 March 2007.

The Internet and its related information technology (IT) were invented and developed in North America and Europe, but have been virtually taken up by every country in the world.[52] Due to the Internet and eCommerce the participation of the people in contributing and enjoying economic development has been increased considerably. In order to boost such participation the protection of IPRs in eCommerce transaction, especially protection of software is extremely important. If we can protect software infringements through implementation of IP law then people would be able to contribute much economic development through the Internet and eCommerce. Such a contribution would be definitely helpful to achieve the right to development.

6. Conclusion

An objective of intellectual property protection is to promote long-term public interest by means of providing exclusive rights to right holders for a limited duration of time. After the expiration of the term of protection, protected works and inventions fall into the public domain and anyone is free to use them without prior authorization by the right holder.[53] An important balance between IP rights and public interest is a careful definition of protectable subject matter. For example copyright protection does not cover any information or ideas contained in a work; it only protects the original way that such information and ideas have been expressed in a work.[54] As regards patents, the basic conditions imposed in the TRIPS Agreement are that for an invention to be patentable it must be new, involve an inventive step and be capable of industrial application.[55] Moreover the Agreement recognizes the importance of ethical and other considerations by allowing a country, even where an invention fulfills the normal conditions of patentability, to refuse to grant a patent, if the commercial exploitation of the invention is prohibited on grounds of public order or morality, including if its exploitation might be dangerous to life or health or seriously prejudicial to the environment.[56] A computer

52. See, Intellectual Property On the Internet: A Survey Issues, P. 148, WIPO/INT/02, December 2002, available at www.wipo.int , last visited 7 March 2007.
53. See, Protection of Intellectual Property Under the TRIPS Agreement, Secretariat of the World Trade Organization, available at www.wto.org , last visited 7 March 2007.
54. See, Article 9 paragraph 2 of the TRIPS Agreement.
55. See, Article 27 paragraph 1 of the TRIPS Agreement.
56. See, Article 27 paragraph 2 of the TRIPS Agreement.

program related to process of diagnostic, therapeutic and surgical methods for the treatment of humans or animals may be excluded from patentability.[57] The most important point is to be considered here that the grant of an IP right does not prevent the possibility for the governments to regulate production and the use and distribution of products on any public policy grounds, such as concerns about public order, morality, health or environment.[58]

The TRIPS Agreement provides a fair amount of flexibility to Member Countries to adjust the level of protection by providing limitations and exceptions to exclusive rights.[59] In addition, the Agreement and the Conventions incorporated in it allow for numerous specific limitations and contain provisions on compulsory licenses.

An important part of IP policy as the Secretariat of the WTO described is that governments take appropriate measures in other areas of economic and social policy that enable the society to benefit for the IP system and to prevent its abuse. Article 8 of the TRIPS Agreement, entitled "Principles", recognizes that "Members, may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." The Agreement explained the proviso to the paragraph in paragraph 2 that the proviso may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.[60]

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57. See, Protection of Intellectual Property Under the TRIPS Agreement, Secretariat of the World Trade Organization, available at www.wto.org , last visited 7 March 2007.
58. This is categorically stated in Article 17 of the Berne Convention, which has been incorporated into the TRIPS Agreement.
59. See, Article 13, 17, 26.2 and 30 of the TRIPS Agreement.
60. See, Protection of Intellectual Property Under the TRIPS Agreement, Secretariat of the World Trade Organization, available at www.wto.org , last visited 7 March 2007.

There are arguments that the patent system could be detrimental to: scientific progress and access to its benefit, realizing the right to cultural participation, right to health, right to food etc.[61] But human rights activists yet to come up with any concrete example that how the enforcement of IPRs affect these rights in practice. Moreover by issuance of compulsory license and imposing other legal restrictions within the ambit of the international treaties a government can effectively regulate the patent system to the benefit of its people and ensure the right to development of people.

The developing countries should come up with strong voice that the TRIPS Agreement including other international IP treaties should set the maximum limit of the IPRS protection to be provided in the national laws of the member countries. The Ministerial Conference of the WTO could be a right forum for such campaign. The tension observed in Article 27 of the UDHR between right to protection of IPRS and right to enjoy the arts and scientific advancement would continue and we are to strive for finding out a right balance between enforcement of IPRS and protection of human rights.

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61. See, Dr. Audrey R. Chapman, Discussion paper on " Approaching Intellectual Property as a Human Right: Obligation Related to Article 15 (1) (C), Published by United Nations Economic and Social Council, E/C.12/ 2000/12, 3 October 2000.