

General Comment No. 17 on “Authors’ Rights”

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General Comment No. 17 on authors’ rights is a comprehensive assessment of the normative content of article 15, paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). Also, the obligations and violations are spelled out in great detail. It is found that the General Comment makes a clear distinction in principle between standard intellectual property rights and the protection given in accordance with article 15, paragraph 1(c). At the same time, the General Comment does not outline any specific tools for determining when an intellectual effort would result in human rights protection and when it would fall outside of the scope of this protection. Two clarifications have resulted in a positive reception of the General Comment among those who expressed criticism during the drafting. First, General Comment No. 17 acknowledges the need for human rights protection for local and indigenous communities. Second, General Comment No. 17 emphasizes the balance between the private interests of the authors and the other human rights recognized in the Covenant.

Keywords human rights; General Comment No. 17; International Covenant on Economic, Social and Cultural Rights; authors’ rights

On 21 November 2005, the Committee on Economic, Social and Cultural Rights (the Committee) managed to agree on General Comment No. 17 outlining the content of the right, the corresponding obligations, as well as the potential violations of the human right outlined in article 15, paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights (the Covenant; UN, 2005a). Hence, the Committee has for the first time adopted a general comment on article 15, which regulates cultural human rights.

Article 15, paragraph 1(c) of the Covenant recognizes 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”. For reasons of simplicity, this paragraph can be termed “authors’ rights”, based on a relatively wide understanding of who is an author. Similar formulations are found in the Universal Declaration of Human Rights, article 27, paragraph 2, as well as two documents from the inter-American human rights system.

First, the American Declaration of the Rights and Duties of Man,¹ adopted in 1948, recognizes authors’ rights (as well as inventors’ rights) in article 13, paragraph 2. Second, the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights² recognizes authors’ rights in article 14, paragraph 1(c). This article will therefore not analyse whether

authors' rights *can* be a human right, as the above references indicate that they can. Rather, the article will emphasize whether General Comment No. 17 is of any help in identifying *when* authors' rights are legitimately justified as a human right.

The main element of this article is therefore an analysis of General Comment No. 17. First, some general observations on the nature of general comments will be provided. More specifically, the article seeks to identify the basis for the adoption of general comments, as well as their status in international law. Second, the background, structure, approaches and principles of General Comment No. 17 will be analysed. Third, the substantive content of this specific General Comment will be examined. Fourth, a critical appraisal of General Comment No. 17 will be given. The distinction between the intellectual efforts that result in *ordinary* intellectual property rights and the intellectual efforts that qualify for *human rights* protection are important to draw precisely, and I will analyse whether General Comment No. 17 does this. Fifth, the article will address the bigger picture by seeking to assess whether General Comment No. 17 identifies principles that are helpful in order to clarify and possibly solve the perceived conflicting relationship between human rights and particularly patent rights.³ Sixth, some conclusions are drawn.

Short Background on General Comments

The mandate to issue general comments is given in paragraph 9 of Resolution E/RES/1987/5 adopted by the Economic and Social Council (ECOSOC). At that time, the practice of adopting general comments was already established in three of the other United Nations human rights committees. The main task of all the committees is to supervise the implementation of the respective treaties by examining reports written by state parties to these treaties. The Committee itself says that general comments seek "... to suggest improvements in the reporting procedures and to stimulate the activities of the State parties, international organizations and specialized agencies" (UN, 1989).

A distinction can be made between three different kinds of general comments: first, those that address particular groups of people or situations; second, those that give specific advice on national implementation; third, those that represent clarifications of one specific human right, as recognized in the Covenant. General Comment No. 17 belongs to this third category.

Moreover, it is important to have an understanding of what motivates the adoption of—and subsequent endorsement of—general comments. First, it is important to observe that the Committee itself defines whether and when it adopts a general comment. States are not instructing the Committee on which issues warrant a general comment, but might specifically invite the human rights treaty bodies—of which the Committee is one out of seven—to involve themselves in

efforts of clarification. One prominent example is the Plan of Action from the 1996 World Food Summit. In objective 7.4(e), the state parties:

... invite the High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant ... (Food and Agricultural Organization [FAO], 1996).

No similar request has been made to the Committee, as the relevant treaty body, to define the human rights of the authors in accordance with article 15, paragraph 1(c).

Second, the emphasis and structure of general comments are decided by each individual committee. For those general comments that address specific provisions, there is a standard format, where the content, the obligations, as well as the violations are identified. Third, there is no formal endorsement or adoption of the general comments by state parties. A general comment can subsequently be ignored by the state parties, or the state parties can choose to refer to them in resolutions, as well in the legislation and national plans of action that they adopt.

Therefore, a general comment can never be an *authoritative* interpretation in accordance with the Vienna Convention on the Law of Treaties, article 31, paragraph 3, simply as it does not involve the state parties. At the same time, a general comment must be considered to be the best effort to outline the content of specific provisions, carried out by an international body comprised of internationally recognized experts. Hence, a general comment can be said to be the *most* authoritative clarification of a human rights provision. Moreover, general comments serve to facilitate the exchange of positions between the states and the human rights mechanisms of the United Nations.

Background, Structure, Approaches and Principles of General Comment No. 17

No less than 57 paragraphs are contained in General Comment No. 17. While there have been relatively few references to article 15, paragraph 1(c) in the work of the Committee,⁴ the year 2000 represented a change. In November of this year, the Committee set aside a so-called “Day of general discussion” to elaborate on the content of the paragraph, as well as its drafting. Experts from the United Nations and the World Bank contributed, and nine papers are available on the home page of the High Commissioner for Human Rights.⁵ This day of general discussion resulted in the adoption of a “Statement” on article 15, paragraph 1(c) one year and two sessions later (UN, 2001). The Committee chose this strategy of a statement, which, by its specificity in addressing only *one* paragraph of the Covenant, is unprecedented for the Committee.⁶ This strategy must be understood to reflect an interest in the Committee of seeking to keep the momentum while elaborating more in depth

on the content of this paragraph by the means of a general comment. A statement is less detailed than a general comment, but serves to highlight the concerns of the Committee.

The drafting of General Comment No. 17 was performed in close cooperation with the World Intellectual Property Organization (WIPO). WIPO has contributed to the increased awareness on the existence and content of article 15, paragraph 1(c) of the Covenant by holding a seminar in cooperation with the UN High Commissioner for Human Rights in 1998, in commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights (WIPO, 1999). WIPO has not been able to follow this up, but WIPO states on its home page that it "... continues to follow closely relevant developments in human rights and the work of the OHCHR, including the Committee on Economic, Social and Cultural Rights" (WIPO, undated).

Concerning the structure, General Comment No. 17 has six sections: introduction (1–5); normative content (6–24); state parties' obligations (25–40); violations (41–46); implementation at the national level (47–54); and obligations of actors other than state parties (55–57). This structure follows General Comment No. 14 on the right to the highest attainable standard of health and General Comment No. 15 on the right to water. It must be noted, however, that only these most recently adopted general comments have one full section on violations. In general comments such as No. 12 on the right to adequate food and No. 13 on the right to education, violations are outlined in just three or two paragraphs, respectively.

Concerning the approach, those sections in General Comment No. 17 addressing implementation and violations apply the recognized framework on respect, protect and fulfil, where the fulfil obligation comprises both the obligation to facilitate and the obligation to provide. This is a framework that can apply with regard to all categories of human rights: civil, cultural, economic, political and social. At the same time, the merits of applying this framework on the human right recognized in accordance with article 15, paragraph 1(c) are not self-evident. Particularly, the identification of the obligations and violations at the level of fulfil (provide) presents challenges. Initially, it is sufficient to say that General Comment No. 17 is not clear regarding how authors' rights impose a fulfil (provide) obligation. As an example, the nature of the obligations with regard to fulfilling the right to food is different from the state obligations with regard to fulfilling the moral and material interests resulting from one's scientific, literary or artistic production. Introducing this level of obligation in this latter context does not add so much to the other levels of obligations.

Concerning the overall interpretative principles of General Comment No. 17, these can be summarized in three main points. First, paragraph 2 of General Comment No. 17 very explicitly emphasizes the personal link between the author and their creations, and between people and their cultural heritage, in order to identify the core human rights element. Thus, the Committee distinguishes *this* from the intellectual property rights rationale, which—according to the Committee—serves the business and corporate interest and investment.

Second, paragraph 4 of General Comment No. 17 firmly establishes authors' rights in the context of the other rights recognized in article 15. These are the rights to take part in cultural life (article 15, paragraph 1(a)); the right to enjoy the benefits of scientific progress and its applications (article 15, paragraph 1(b)); as well as freedom indispensable for scientific research and creative activity (article 15, paragraph 3). The Committee emphasizes that the relationship between these must be both mutually reinforcing and reciprocally limitative.

Third, several paragraphs of General Comment No. 17 confirm both the relationship between the realization of article 15, paragraph 1(c) and the enjoyment of other human rights, as well as the balancing and possible limitations of article 15, paragraph 1(c) in order to achieve the realization of other recognized human rights. This is most explicitly spelled out in paragraphs 22, 35 and 39(e), the latter of which is the paragraph outlining the "core obligations". At the same time, paragraph 27 of General Comment No. 17 establishes a high threshold for introducing deliberately retrogressive measures, for the purpose of restricting the enjoyment of the human rights recognized under article 15, paragraph 1(c).

Based on these structure, approach and interpretative principles, a more in-depth analysis of the actual content of General Comment No. 17 will now be undertaken.

Substantive Aspects of General Comment No. 17

From the wording of article 15, paragraph 1(c), everyone has the right to the "interests resulting from scientific, literary or artistic production of which he is the author". The terms "scientific, literary or artistic" indicate that a broad range of creative activities are included. While there have been attempts, including by the German Chapter of the International Law Association, to include only copyright-related activities within the scope of article 15, paragraph 1(c) (Oppermann, 1997), the Committee does not make such distinctions in General Comment No. 17. While inventors are not mentioned explicitly in article 15, paragraph 1(c), unlike in the American Declaration of the Rights and Duties of Man, the inventors *cannot* be categorically excluded from the scope of this paragraph. At the same time, it must be noted that the primary concern of the drafters, working in the 1950s, was to protect those involved in *artistic* and *literary* work in the repressive communist states.

As has been argued in the article "Intellectual Property—Rights or Privileges?" (Haugen, 2005a), scientific production that qualifies for patent protection does *not* necessarily fall outside of the scope of paragraph 1(c) of article 15. To qualify for protection under human rights provisions, however, the protection must serve to uphold the human dignity. The authors' rights provision of article 15, paragraph 1(c) establishes this relationship with human dignity through the phrase "moral or material interests".

The most comprehensive analysis of the core content of article 15, paragraph 1(c) undertaken in General Comment No. 17 is on the three phrases "benefit from

the protection”, “moral interests” and “material interests”. Seven paragraphs seek to clarify their content. Paragraph 10 of General Comment No. 17 says that “. . . the protection under article 15, paragraph 1(c) need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes . . .”. The protection must, however, secure the authors’ moral and material interests. It is hence not surprising that the Committee, in subsequent paragraphs, finds that both the moral interests and the material interests can be protected by other means than by the standard intellectual property legislation.

One member of the Committee was very explicit in stating that intellectual property rights and human rights belong to two different realms: “We have stated a very clear difference, that [intellectual property rights and human rights] are two very different concepts, because human rights are not subject to any negotiation, while the other is economic”.⁷ It is true that General Comment No. 17 does make a clear distinction between authors’ rights under the international human rights regime, on the one hand, and intellectual property rights under the international economic law regime, on the other. What are the reasons elaborated in General Comment No. 17 for making these distinctions, and are these reasons justified?

The second paragraph of General Comment No. 17 starts with the wording “In contrast to human rights, intellectual property rights are generally of a temporary nature, and cannot be revoked, licensed or assigned to someone else”. The same paragraph says with regard to human rights that these are “timeless expressions of fundamental entitlements”, stressing “the personal link between the authors and their creations” and the “material interests which are necessary to enable authors to enjoy an adequate standard of living”. Hence, it is the substantive and procedural aspects relating to whether a right can be revoked or not, the person–product link and the relationship with other human rights, such as an adequate standard of living, which are the basis for distinguishing between human rights, on the one hand, and intellectual property rights, on the other.

Such distinctions are easier in the field of patent rights than in the field of copyrights. The same criteria that are made to identify authors’ rights as human rights in paragraph 2 of General Comment No. 17 could also have been made regarding authors’ rights under copyrights treaties. This is clear if another phrase of the same paragraph 2 is quoted: “. . . intellectual property regimes primarily protect business and corporate interests and investments”. A musician, a painter or a poet would simply not consider such descriptions to be relevant for himself or herself. Hence, the clear distinctions between human rights and intellectual property rights might be relevant to describe what was previously termed “industrial property rights”. Such distinctions, however, are *less* evident in the realm of copyrights, especially in the common law tradition, which integrates a strong moral justification for the protection of the works of the authors.

General Comment No. 17 does not, however, exclude that the requirements of article 15, paragraph 1(c) can be met by standard intellectual property legislation. In such situations, the Committee states in paragraph 18 that the administrative and

legal remedies available must be affordable for all. Moreover, the Committee acknowledges in paragraph 24 that imposing *limitations* on the enjoyment of rights in accordance with article 15, paragraph 1(c) *may* require compensatory measures, such as adequate compensation, for any public interest use. This can be understood as a form of compulsory licences, which is a central element in standard patent law.

The most noteworthy aspect of the section on obligations is that paragraph 32 of General Comment No. 17 includes “measures to ensure the effective protection of the interests of indigenous peoples” as a “specific legal obligation”. Paragraph 9 applies the phrase “indigenous and local communities”, implying that local communities that are not indigenous are not *per se* excluded from the scope of protection in accordance with article 15, paragraph 1(c). There is national legislation in place that introduces *sui generis* intellectual property systems for the recognition of indigenous peoples’ applicable knowledge in the field of plants and medicines. On the international level, however, there is no international treaty or other soft-law instrument that regulates the positive recognition of indigenous peoples’ traditional knowledge strictly from an intellectual property perspective.⁸ In this context, it must be observed that WIPO’s Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore⁹ was, in 2005, mandated to continue its work (WIPO, 2005a, paragraph 202), which *might* result in an internationally binding instrument.

In the Committee, there were disagreements on whether the scope of article 15, paragraph 1(c) actually extends to the protection of indigenous peoples’ intellectual property rights. Committee members from those regions where indigenous peoples’ intellectual property is starting to be recognized under national legislations argued in favour of an inclusion of such reference to indigenous peoples. Other Committee members argued that General Comment No. 17 needed to reflect *de lege lata* more strictly.¹⁰ In the article “Traditional Knowledge and Human Rights”, it was argued that human rights provisions, read together, *could* imply that positive recognition of indigenous peoples’ culturally embedded applicable knowledge falls within the scope of human rights protection (Haugen, 2005b). Such a reading also includes article 27 of the International Covenant on Civil and Political Rights, recognizing the rights of minorities, if such a recognition is important for the continued enjoyment of their human rights. It also includes common article 1, paragraph 2 of both these covenants. Article 1 recognizes the right of peoples. It provides a context for understanding the other rights in the two covenants.

General Comment No. 17, by identifying effective protection of indigenous peoples’ cultural heritage and traditional knowledge as a specific legal obligation, and by emphasising the principle of non-discrimination, has identified indigenous peoples to be potential intellectual property holders, eligible for protection in accordance with national legislation.

A Critical Appraisal of General Comment No. 17

As mentioned initially, the application of the comprehensive framework of respect, protect and fulfil poses particular challenges in the context of the rights recognized

in article 15, paragraph 1(c). These three levels of state obligations are also applied in order to identify violations. By this in-depth clarification, authors' rights are elaborated upon in more detail than most other rights recognized in the Covenant, and hence given a certain prominence.

On the one hand, the application of the framework of respect, protect and fulfil might imply that states are becoming more aware of the means available to ensure the realization of the human rights recognized in article 15, paragraph 1(c). On the other hand, the application of such a comprehensive framework on one of the paragraphs that has been given relatively limited attention by the Committee must be noted. General Comment No. 17 is, to a limited extent, based on information provided in the state parties' reports, or in the Committee's examination of these reports. The Committee hence indicates that they are more concerned about authors' rights than what is reflected in the examination of state reports. Therefore, states *might* be more attentive to all dimensions of this human right.

As an example, in the context of violations, paragraph 45 of General Comment No. 17 identifies a violation where there is

... failure to ensure that third parties compensate authors, including indigenous authors, for any unreasonable prejudice suffered as a consequence of the unauthorized use of their scientific, literary and artistic productions.

Moreover, there are more paragraphs that give the authors relatively high levels of protection of their moral and material interests. First, in the context of the term "violation of authors' human rights", General Comment No. 17 says that there is a violation if there is a "... failure of a state to take all necessary measures to safeguard authors' within their jurisdiction from infringements" (paragraph 44). Second, the term "effective protection" (paragraph 39a) indicates a level of protection that might at least be as high as the level of protection under existing intellectual property rights treaties, especially when seen in relation to the requirements that any *limitation* on the exercise of the rights must fulfil (Helfer, 2007). Paragraphs 22–24 give no less than five substantive requirements that such limitations must meet: determined by law; compatible with the nature of these rights; pursue a legitimate aim; solely for the purpose of promoting the general welfare in a democratic society; and proportionate, implying that the least restrictive measure must be adopted. Moreover, paragraph 24 introduces a procedural requirement, more specifically payment of adequate compensation—under certain circumstances—after limitations are imposed. Third, General Comment No. 17 is not elaborating in detail on the application of *alternative* measures than those found under intellectual property legislation. Two examples that could be encouraged as alternatives are legislation against defamation of authors and communities, and legislation ensuring minimum wages for authors (3D, 2006).

To avoid acting in violation of the Covenant, the state parties need to have in place mechanisms and institutions for determining what is "unauthorized", what is

“unreasonable prejudice” and what is “compensation”. This phrase implies that the distinction between authors’ rights as recognized in article 15, paragraph 1(c) and *established* intellectual property rights is difficult to draw. No state has yet provided these mechanisms and institutions as a part of their human rights regimes, and therefore they need to rely upon existing intellectual property institutions and legislation to ensure that authors can enjoy their human rights.

Another objection that relates to the application of the three levels of state obligations is that General Comment No. 17 does not make a logical distinction between the obligations on the level of protect and the obligations on the level of fulfil. The main reason for this is that while General Comment No. 17 acknowledges the various means by which article 15, paragraph 1(c) can be given effect, the emphasis—also with regard to the obligations on the level of fulfil—is on the *legal* measures. These measures are more appropriately placed on the level of *protect*, but are reiterated on the level of fulfil (provide). The *additional* obligations on the level of fulfil (facilitate) are, according to paragraph 34 to “. . . facilitate the formation of professional and other associations representing the moral and material interests of authors . . .”. Moreover, the same paragraph defines the obligations of the state parties on the level of fulfil (promote) as to ensure that the authors are taking part in decision-making processes, and that they are consulted before significant decisions are taken.

While effective participation is an important human rights principle, which applies to all recognized human rights, it can be questioned whether there is a human rights obligation on the state parties to facilitate the formation of associations. General Comment No. 17 limits, however, the list of *violations* on the fulfil level. In addition to failure to provide effective remedies to authors against third-party infringements, which I argue is an obligation on the level of protect, General Comment No. 17, paragraph 46 identifies as a violation on the level of fulfil the failure to provide authors with “. . . adequate opportunities for the active and informed participation of authors and groups of authors in any decision-making process that has an impact on their right . . .”. Providing opportunities for authors’ participation is primarily a procedural obligation, but unwillingness to facilitate such participation *can* also result in a situation where the rights of authors are not taken sufficiently into consideration.

I therefore argue that the list of state parties’ violation of human rights obligations could have been made shorter. General Comment No. 17 contains six paragraphs on violations. However, there is no clear distinction between established intellectual property enforcement and the human rights-based “remedies” and “opportunities”.

Before ending this critical appraisal of General Comment No. 17, two more issues will be brought up. First, while the acknowledgment that indigenous peoples and local communities can enjoy human rights protection as authors under article 15, paragraph 1(c) has already been commented upon, it must be observed that issues relating to *collective* enjoyment of authors’ rights are not discussed in detail.

Paragraph 9 of General Comment No. 17 states that the rights recognized can “. . . under certain circumstances, also be enjoyed by groups of individuals or by communities”. Such “certain circumstances” are not defined more precisely. Most instruments and draft texts, however, refer to rights of indigenous peoples and local communities *as such*, and only exceptionally to *individuals* within these communities. The forming of one form of legal entity, which can act on behalf of a larger community, can be seen as a requirement in order to enable such communities to enjoy rights in accordance with article 15, paragraph 1(c).

Finally, General Comment No. 17 addresses in several paragraphs legal mechanisms that involve financial resources. First, paragraph 43 emphasizes the need to “. . . provide administrative, judicial and other appropriate remedies . . .”. Second, paragraph 52 says: “Parties to legal proceedings should have the right to have these proceedings reviewed by a judicial or other competent body”. Such remedies might be costly, particularly for least-developed states. Third, paragraph 46 says that states are required to take “. . . all necessary steps within their available resources . . .”. The phrase “available resources” is *different* from the standard formulation of “*maximum* of its available resources” as found in article 2, paragraph 1 of the Covenant. By avoiding the term “maximum”, the Committee somewhat modifies the pressure for providing costly and comprehensive administrative and judicial remedies. It is a burden on many states to introduce and manage appropriate means for ensuring the rights of the authors. In conclusion, General Comment No. 17 must be understood to establish relatively high standards for ensuring the enjoyment of the human rights of the authors.

By emphasizing the rights of authors in such strong terms, there is a risk that a human rights approach to intellectual property can actually result in too strong a protection. Cooper Dreyfuss (2006, p. 11) concludes that “. . . rights talk creates an adversarial climate . . .”. She does not, however, undertake an analysis in order to identify whether “rights talk” can also serve to balance the recognized human rights. Such balancing is carried out in General Comment No. 17, as will be seen below.

The Bigger Picture

While some industrialized states initially expressed concern regarding the drafting of a general comment on article 15, paragraph 1(c),¹¹ the final wording of General Comment No. 17 has not caused strong reactions. This could either be because the wording is acceptable, because there is a lack of awareness on the existence of General Comment No. 17 or because General Comment No. 17 is simply not considered to be of much practical importance. One explicit endorsement of General Comment No. 17 is from the high-level task force on the implementation of the right to development, working under the auspices of the UN High Commissioner for Human Rights. The task force “. . . welcomes the [adoption] of General Comment No. 17 (2005) by the Committee on Economic Social and Cultural Rights

and considers that further reflection is needed upon the complex relationship between intellectual property and human rights . . .” (UN, 2005b, paragraph 67). The *Intellectual Property Quarterly Update*, issued by the South Centre and the Centre for International Environmental Law, which expressed strong concerns during the drafting of General Comment No. 17, concludes that “. . . the General Comment alleviated some of these concerns” (South Centre/International Centre on Trade and Sustainable Development, 2005, p. 11). An article by two World Trade Organization staff (Anderson and Wager, 2006) and an article and a book chapter by Helfer (2006, 2007) build their arguments on General Comment No. 17.

The lack of loud voices and strong criticism can also be explained by the fact that the Committee seems to have managed to draft a general comment that is able to satisfy most interests. Those paragraphs that outline the balance between authors’ rights and the other human rights, such as the right to food, health and education, or the other rights recognized in the Covenant, are relatively explicit. It must be observed that public interest provisions are also contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights or in the draft Substantive Patent Law Treaty, negotiated under the auspices of WIPO, but then with certain conditions on their application.

A related question is whether General Comment No. 17 increases the awareness among the state parties of how they can *implement* paragraph 1(c) of article 15 in their national legislation. In the current context, emphasizing the development dimension of intellectual property, as well as the emerging issue of traditional knowledge as a basis for potentially new *sui generis* systems of intellectual property rights, human rights might provide important normative arguments and principles in the ongoing discussions, and General Comment No. 17 will be of much help. National legislation solely built on article 15, paragraph 1(c), on the other hand, seems less likely. An additional reason for the lack of strong critical comments could be that General Comment No. 17 is simply not considered to have much impact.

Paragraph 35 of General Comment No. 17 is the most comprehensive paragraph with regard to identifying principles to ensure an appropriate balance between the different rights. The wording is careful with regard to finding the right balance with the *other* human rights obligations:

State parties should therefore ensure that their legal and other regimes for the protection of the moral and material interests resulting from one’s scientific, literary or artistic production constitute no impediment to their ability to comply with their core obligations in relation to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.

The term “core obligation” was introduced by the Committee in General Comment No. 3 (UN, 1991), paragraph 10, where the Committee stated that

incumbent upon every state party is a “. . . minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . .”. A situation where a “. . . significant number of individuals is deprived of essential foodstuffs . . .” was given as an example of a situation where the state does not comply with its core obligations. In General Comment No. 17, paragraph 35, concern is not expressed over *accessibility* to foodstuff, but rather on *affordability*, namely prices of seeds and other means of food production.

Another observation made in paragraph 35 of General Comment No. 17 is on the nature of intellectual property rights as a social product introduced for the purpose of benefiting the whole society. In this context, it is relevant to take note of the clearest statement on human rights implications of understanding intellectual property as a social product serving the larger interest of society. This statement is made by the British Commission on Intellectual Property (2002). In its final report the Commission stated on p. 6: “. . . there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection”. This latter formulation, written by a Commission representing intellectual property academics, attorneys and users, is actually stronger than the formulations chosen by the Committee in General Comment No. 17. In the discussions in WIPO, developing countries have referred to this principle (WIPO, 2005b, paragraph 51), while the balanced approach as formulated in General Comment No. 17 has been subject to more interest by the academic community.

There have been five sessions of relevant intergovernmental bodies in the field of intellectual property since the adoption of General Comment No. 17. First, after the adjournment of WIPO's Inter-Sessional Intergovernmental Meeting for a Development Agenda for WIPO in 2005, WIPO's General Assembly (WIPO, 2005a, paragraph 146) decided that the “Provisional Committee on Proposals Related to a WIPO Development Agenda” should meet for two 1-week sessions and report to the 2006 General Assembly. Neither any of the sessions nor the 2006 General Assembly have been addressing issues relating to the content of article 15, paragraph 1(c) or General Comment No. 17 or human rights in general. General “reminders” about the importance of human rights do, however, appear (WIPO, 2005c, paragraph 8; WIPO, 2006a, p. 16). Moreover, there have been two sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. As demonstrated by Haugen (2005b, p. 676), there has been little emphasis on human rights provisions in the documents prepared for this committee, as well as in the actual discussions. This has not changed during the ninth and tenth sessions. The term “rights” appear,¹² but not the more specific term “human rights”.¹³

The Committee, in order to identify principles to balance the human rights recognized in article 15, paragraph 1(c) with other human rights, applies phrases such as “reciprocal limitative” (paragraph 4); “ensure that their regimes constitute no impediment” (paragraph 35); and “State parties should take appropriate steps to

ensure that the private business sector consider the effects on the enjoyment of other human rights” (paragraph 48).

Hence, the following characteristics of General Comment No. 17 are the most relevant in order to classify it as carefully worded and not causing too many problems, being loyal to the wording of article 15, paragraph 1(c). First, it adopts an inclusive approach towards the realization of article 15, paragraph 1(c) by not causing problems in the implementation of article 15, paragraph 1(c) through specific human rights remedies, on the one hand, and by the means of general intellectual property legislation and enforcement provisions, on the other. Second, it does not question the nature of intellectual property, particularly patents, as an instrumental tool for serving the general interests of society. Third, the comprehensive outline of both national obligations as well as violations implies that the emphasis unavoidably is placed on how to ensure the enjoyment of the moral and material interests, in accordance with article 15, paragraph 1(c), while at the same time General Comment No. 17 carefully stresses that the enjoyment of this right must promote human rights relating to the enjoyment of science and culture, including international cooperation for these purposes (paragraphs 4, 35 and 38). An implicit consequence of these three factors is that General Comment No. 17 has a limited potential for providing arguments in order to challenge intellectual property legislation and enforcement.

Conclusion

The initial question being raised was whether General Comment No. 17 is of any help in identifying when authors' rights are legitimately justified as a human right. Based on the analysis undertaken, it is concluded that the General Comment makes an important distinction between the right recognized in accordance with article 15, paragraph 1(c) of the Covenant and standard intellectual property rights. This clear distinction will most likely reduce the likelihood of general statements saying that “intellectual property rights are human rights”.¹⁴

General Comment No. 17, however, does not introduce a principle to make a clear distinction between those rights derived from the efforts of intellectual and creative workers that fall within the scope of human rights protection, on the one hand, and those efforts that qualify for the more general intellectual property rights protection. There is a *core* of intellectual and creative production that might give rise to human rights protection. Does General Comment No. 17 define this core? It does not do so explicitly. To identify the criteria for determining which production qualifies for human rights protection, one possibility is to apply the subtitles in the section on normative content in General Comment No. 17. These are: “Author”, “Any scientific, literary or artistic production”, “Benefit from the protection”, “Moral interests”, “Material interests” and “Resulting”. If a test should be undertaken on whether an author's production falls within the scope of human rights protection, the test must also be supplemented with a criterion of whether the

rationale for the protection is embedded in human dignity of the author. This is simply because human rights are embedded in human dignity.

Therefore, General Comment No. 17 does not provide the full answer for distinguishing between scientific, literary and artistic production that might qualify for human rights protection in accordance with article 15, paragraph 1(c) of the Covenant, and intellectual efforts that qualify for intellectual property protection, but are outside of the human rights realm. The reason for this is also to be found in the wording of article 15, paragraph 1(c) itself, which *is* both ambiguous and complex.

About the Author

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Notes

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- 1 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States in 1948.
- 2 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), O.A.S. Treaty Series No. 69 (1988), entered into force 1999.
- 3 As one example, see 3D (2005).
- 4 For the most recent references, in the context of the right to health, see *ibid*.
- 5 Office of the High Commissioner for Human Rights, Documents E/C.12/2000/12 to E/C.12/2000/20 [online]. Available at <http://www.unhchr.ch> [Accessed on 15 December 2006].
- 6 For an overview of the 15 statements, which mostly address international conferences and summits, see the Committee’s report to ECOSOC, Document E/2005/22, Annex V [online]. Available at <http://www.unhchr.ch> [Accessed on 15 December 2006].
- 7 Intellectual Property Watch (2005). In the same posting, the Committee’s Vice-President, who was responsible for the draft, highlighted the difference between human rights and intellectual property rights by referring to the “changeable IP regimes”.
- 8 The provisions of the Convention on the Safeguarding of the Intangible Cultural Heritage (17 October 2003, entered into force 20 April 2006), particularly article 14(a)(iii); the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 October; not yet entered into force), particularly article 6.2(e)—see

- Helfer (2007) for an interesting analysis regarding the (lack of) references to intellectual property rights treaties; and the Convention on Biological Diversity (5 June 1992, 1760 UNTS 79, entered into force 29 December 1993), particularly articles 8(j), 10(c), 17.2 and 18.4, are all important, but are not intellectual property provisions.
- 9 Increasingly, the term “traditional cultural expressions” is replacing the term “folklore”.
- 10 See *supra* n. 7.
- 11 See Intellectual Property Watch (2004), where one of the members of the Committee referred to the “extreme political sensitivity of the topic”, and the Vice-President of the Committee (the person responsible for the draft) admitted: “The States are watching very carefully what the Committee says in the General Comment”. The Vice-President has explained to the current author that objections coming from the USA, Japan and other Western states were that the Committee “would overstep its mandate” if it were to adopt a general comment on article 15, paragraph 1(c).
- 12 The most specific and relevant reference is the proposed objective of “meet the actual needs of the communities” in WIPO (2006b, Annex 1, at 1), which contains the following element with regard to indigenous peoples: “. . . respect their rights under national and international law . . .”.
- 13 There are, however, academic courses on the interlinkages between human rights and intellectual property; see *The Politics of Intellectual Property, Human Rights and Development* [online]. Available at <http://www.yorku.ca/rcoombe/courses/6308/> [Accessed on 15 December 2006]; and *Human Rights and Intellectual Property Rights Law* [online]. Available at <http://www.jur.lu.se/Internet/english/Master/human.nsf> [Accessed on 15 December 2006].
- 14 The most recent example of stating categorically that intellectual property rights are human rights is Giovanetti and Matthews (2005).

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