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IP Rights and Human Rights

What History Tells Us and Why It Matters

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3.1 INTRODUCTION

The right to access the benefits of science in Article 27 of the Universal Declaration of Human Rights (UDHR) had received little attention until the spectacular expansion of patents in the life sciences at the turn of the twentieth century. The international legal backdrop which secured this expansion was the adoption of the TRIPS Agreement in 1994 which imposed a legal obligation on all World Trade Organization (WTO) members to grant patents on inventions in all fields of science providing they met certain minimum requirements. The controversies which erupted over the appropriation of human genes by for-profit organizations led to a resurgence of interest in Article 27 UDHR and its sequel, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Scientists and civil society struggled to understand how genes and cells could be classified as "inventions." Many feared that patent holders would become the gatekeepers of science and that patents would delay and obstruct scientific research, ultimately compromising the right of everyone "to share in scientific advancement and its benefits" proclaimed in Article 27(1) UDHR and its counterpart in Article 15(1)(b) ICESCR.

Yet Article 27 UDHR does not set out an unqualified right of access to share in the benefits of science. The second paragraph of Article 27 requires protection of "the moral and material interests of authors and inventors resulting from any scientific, literary or artistic production of which he is the author." The language of Article 27(2) is reminiscent of the language of the Berne Convention of 1928, the first international treaty on copyright, prompting confusion as to whether Article 27 UDHR was intended to proclaim that intellectual property rights are fundamental human rights. Against this background, some scholars have recently begun to question the relevance of Article 27 UDHR and Article 15 ICESCR to address the social and economic challenges raised by IP rights, partly on the grounds that human rights proclaimed therein reflect individualist, Western, and Eurocentric values. This chapter argues that this scholarship attaches undue weight to Western,

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classical liberal conceptions of human rights and overlooks the influence of the Latin American social justice vision of human rights in the Bogota Declaration of 1948, which greatly influenced the drafting of the UDHR's inclusion of social and economic rights.

This chapter draws on the Travaux Preparatoires for the Bogota Declaration, only recently published in full, to show the influence of the Bogota Declaration on the drafting of the provision on moral and material interests of authors and inventors in Article 27(2) UDHR. The analysis is combined with a study of the origins and aims of protecting the "moral" rights of authors in the Berne Convention to draw out the similarities, differences and overlap. The first part of the chapter sets out the controversy which has erupted about the interface between IP rights and human rights and the human rights sceptics' arguments. The second part retraces the origins and purpose of the "moral" rights of authors in the Berne Convention 1928, revealing how its contested and ambiguous meaning facilitated its partial transplant in Article 27(2) UDHR. The final part contrasts the provisions on protection of intellectual property rights in Berne, with the aims of the Bogota Declaration adopted by socialist South American countries whose delegates pressed for the inclusion of the moral and material interests of authors in Article 27(2). This novel, comparative study of the genesis and normative foundations of Article 27 UDHR charts an interpretive route towards recovering the Latin American ideals of universal human rights as foundations of social and economic justice which animated its drafting.

3.2 THE ORIGINS AND GROWTH OF INTERNATIONAL IP RIGHTS

The starting point from which to gain an understanding of the nature of the rights protected in Article 27 UDHR and the interface between IP rights and human rights is the adoption of the Trade Related Agreement on Intellectual Property Rights (TRIPS) in 1994[1] and its enforcement by the World Trade Organization. Intellectual property rights are known as "negative" rights because they confer on holders the right to exclude everyone from using the protected matter without the holder's consent for a fixed number of years. Until the adoption of TRIPS, the legal requirements for protection of IP rights, including patents, copyright, and trademarks were to be found primarily in national laws and were enforced by national courts. The first initiatives to create international legal standards took place in the second part of the nineteenth century with the rapid growth of industrialization in developed countries

[1] General Agreement on Trade in Services (GATS), Annex 1B of the WTO Agreement (Marrakesh, April 15, 1994, 1869 UNTS 183); Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the WTO Agreement (Marrakesh, April 15, 1994, 1869 UNTS 299. For a detailed discussion of the origins of TRIPS and the protection of intellectual property in international law see Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law*, Oxford University Press, 2016.

and the related international trade fairs. These factors exposed exhibitors to the risk that their innovative machines and artifacts could be copied by competitors with no means of redress.[2]

Two important international multilateral treaties were adopted: the Paris Convention on the Protection of Industrial Property (1884)[3] and the Berne Convention on the Protection of Artistic and Literary Works (1886).[4] The Paris Convention applies to "industrial property" in the broadest sense, including patents, trademarks, and utility models (Article 1). It was intended to enable inventors to enforce their IP rights abroad.[5] This power was mainly secured by Article 2 which establishes the principle of national treatment, enabling nationals of any country to enjoy in all the contracting countries the same protection and same legal remedy against infringement of their rights. However, the Paris Convention did not harmonize legal requirements for the grant of patents. These, along with exclusions and exceptions, continued to be the preserve of States. Similarly, the principle of national treatment was replicated in the Berne Convention for the Protection of Literary and Artistic Works, adopted two years later in 1886. Article 2 provided that authors enjoy in all the contracting States the same rights of exclusivity as nationals over translations, adaptations, performances in public, broadcasts, communications to the public, and reproductions. Formal requirements and terms of protection remained the preserve of contracting States.

The Berne Convention was amended in Rome in 1928 with the addition of Article 6bis protecting the "moral rights" of authors. The turning point for international IP law came in 1994 with the adoption of the TRIPS Agreement which imposed on all contracting members of the WTO obligations regarding the nature, scope, and term of protection for intellectual property rights. Unlike previous treaties, the obligations in TRIPS "had teeth" with the creation of an international enforcement machinery through WTO panels.[6] For the purposes of the discussion in this chapter, there are two critical points to note. As regards copyright, TRIPS incorporated the provisions in Berne, except for the moral rights of authors, underscoring the economic and commercial value of the legal rights of exclusivity conferred by international intellectual property law on authors (and their estate) for the duration of their lives and fifty years thereafter. As regards patents, TRIPS imposed on all contracting States an obligation to grant patent protection for a minimum of twenty years (Article 33) in

[2] London: Great Exhibition. Crystal Palace 1851 Paris: Exposition Universelle, 1855, 1867, 1868.

[3] Paris Convention on the Protection of Industrial Property (PC) (Paris, March 20, 1883, last revised at Stockholm on July 14, 1967 and amended in 1979, 828 UNTS 306. On the origins of the Paris Convention see Alfredo C. Jr. Robles, "History of the Paris Convention," 15 *World Bull.* 1 (1999), p. 15.

[4] Berne Convention on the Protection of Literary and Artistic Works (BC) (Berne, September 9, 1886, last revised at Paris on July 24, 1971 and amended in 1979, 1161 UNTS 30).

[5] Through the establishment of the principle of national treatment (Article 2), rights of priority (Article 4) and the requirement that members should provide IP protection for exhibits at international fairs (Article 11).

[6] Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 *Yale J Int'l L* 1.

"all fields of technology for inventions which are new, involve an inventive step and are capable of industrial application" (Article 27[1]). Patent holders enjoy the right "to exclude others from making, using, selling or importing patented product" (Article 28). As this brief history shows, the essence of international intellectual property rights thus lies in the grant to authors and inventors of legal rights to have and retain exclusive use and control of their works/inventions for a specified term (twenty years for patents, lifetime plus fifty years after death for copyright). One of the most profound impacts of TRIPS was to radically alter existing national patent laws. At the time, a large number of countries did not have intellectual property laws and the laws of many others, including developing countries like India, known as the "pharmacy of the world," excluded patents on pharmaceuticals.[7] The knock-on effects of TRIPS on developing countries were catastrophic.[8] At the height of the AIDS crisis, the government of South Africa was sued by a consortium of thirty-nine pharmaceutical companies alleging that South Africa's importation of antiretroviral generics was a violation of the country's TRIPS obligations.[9] The legal suit was dropped following a global outcry, mobilization of civil society movements across borders, and UN institutions reclaiming the primacy of human rights over trade rights.[10]

The adoption of TRIPS also coincided with the race to sequence the human genome. Article 27(1) TRIPS not only permits but makes it obligatory for States to grant patents "in all fields of technology." Were WTO States under an obligation to grant patents on human genes? Who owned science?[11] The controversy over ownership of science prompted a revival of interest in the right science enunciated in Article 27 UDHR and Article 15 ICESCR, pioneered by Audrey Chapman at the AAAS.[12] Several reports on Article 15 ICESCR have since been produced by the UN

[7] Amy Kapczynski, "Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector" (2009) 97 *Calif. L. Rev.* 1571.

[8] See for instance Susan K. Sell. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Vol. 88. Cambridge University Press, 2003 and Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement*. Routledge, 2003, Peter K Yu, "TRIPS and Its Discontents" (2006) 10 *Marq Intell Prop L Rev* 369.

[9] See also Ellen Hoen, "TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha" (2002) 3 *Chi. J. Int'l L.* 27.

[10] The role of civil movements is mobilizing global support for access to medicines at the height of the AIDS crisis is recorded in "Life in the Blood," a documentary which won the Sundance Grand Jury Prize in 2013: www.imdb.com/title/tt1787067/.

[11] The US team of scientists led by J. Craig Venter wanted to patent the genome. By contrast, the international team of scientists led by John Sulston in Cambridge argued that science was a public good. In a relentless campaign against gene patents, Sulston warned that the appropriation of the human genome would result in the closure of traditionally collaborative and open fields of science to the benefit of private, profit making companies. See John Sulston and Georgina Ferry, The Common Thread: A Story of Science, Politics, Ethics, and the Human Genome. Random House, 2002 and Joseph Stiglitz and John Sulston, "The Case against Gene Patents." Wall Street Journal (2010).

[12] Audrey R. Chapman, "A human rights perspective on intellectual property, scientific progress, and access to the benefits of science." *WIPO/OHCHR, Intellectual Property and Human Rights, A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, Switzerland* (1999): 127–168.

(most recently by the then-UN Special Rapporteur in the field of cultural rights, Farida Shaheed).[13]

The unequivocal, strong recurrent theme of the UN reports is that the human rights of authors and inventors protected in Article 27 UDHR and Article 15 ICESCR are not identical to, and should not be confused with, intellectual property rights.[14] In short, IP rights are bound by time and place. By contrast, human rights enunciate moral ideals based on the primacy and dignity of each human being. They are universal and hold irrespective of place and time. They articulate the spheres of civil, political, social, economic, and cultural protection which are required for the full realization and development of each human being's personality. It is this ethos of human self-realization which animates the right to science in Article 27 UDHR and Article 15 ICESCR.[15] Notwithstanding, legal scholars have recently argued that the nature of the rights protected in these articles is not only problematic but indicative of the limited relevance of human rights as counterweights to the global injustices created by the international expansion of IP rights. The next section sets out the arguments of the(se) sceptics before retracing the drafting history of Article 27 UDHR to show that they are based on a limited understanding of the aims of the drafters.

3.3 CONFLATION OF IP RIGHTS WITH HUMAN RIGHTS IN THE UDHR AND ICESCR?

The main arguments questioning the relevance of human rights to IP rights are deployed in a recent article by Okediji.[16] They are threefold. First, it is claimed that the addition of human rights ideals to IP regimes can actually strengthen IP rights in socially harmful ways. The second argument is that human rights-driven global challenges to IP, mainly in the health field, are not neutral but reflect the values of the Western and Eurocentric liberal regimes of developed countries. Lastly, it is argued that the limited effect of human rights on IP is due to a narrow vision of human rights which excludes social and economic rights.[17] To be clear, Okediji does not claim that human rights cannot have a beneficial role to play. Instead, her argument is that they do not offer "a meaningful pathway" as a counterweight to IP rights in the absence of serious engagement with the full panoply of economic, social, and cultural group rights.[18] This notwithstanding, according to Okediji, the

[13] These reports are discussed in other contributions to this volume.
[14] As detailed in Part III.
[15] See Aurora Plomer, *Patents, Human Rights and Access to Science*. Edward Elgar Publishing, 2015.
[16] Ruth L. Okediji, "Does Intellectual Property Need Human Rights?" (2018) 51 *NYUJ Int'l L. & Pol.* 1, p. 4.
[17] Ibid. p. 5.
[18] Ibid. p. 6.

human rights framework "has largely operated as a justification for the core architecture of the international IP system"[19] because of the "unequivocal recognition of authorial interests found in Article 15 of the ICESCR and Article 27 of the UDHR."[20] The rights of authors and inventors, she argues, have operated as "the formal hook" on which strong support for international IP rights have been hung by UN General Comments and reports, as well as by academic commentary,[21] buttressed by utilitarian and liberal ideals of freedom and property as an expression of the human personality.[22] As a result, Okediji argues, whilst General Comment 17 cautions not to conflate IP rights with human rights and claims that IP rights should be subordinated to human rights, the report's recommendations are based on the foundational premise that rights of authors need to be balanced against other interests and may only be limited by States subject to strict legal requirements, reinforcing IP rights.[23] In this way, the "hard" guidance on the legal interpretation of the rights of authors and inventors in General Comment 17 reflects an instrumentalist vision of IP and liberal values of freedom and dignity in Western, Eurocentric, developed countries. Moreover, as rightly noted by Okediji, several writers conflate IP rights with human rights. The World Intellectual Property Organization (WIPO) and the UN Commission for Human Rights have also somewhat confusedly asserted that "intellectual property rights are enshrined as human rights in the UDHR."[24] Okediji acknowledges that a more nuanced position is adopted by the UN former Special Rapporteur in the field of cultural rights in 2015, Farida Shaheed, who explicitly stated that protection of the moral and material interests of authors and inventors "cannot be used to defend patent laws that inadequately respect … scientific progress and its applications."[25] However, in her view, the "hard" guidance in General Comment 17 is likely to prevail over the "soft" guidance in the UN Special Rapporteur's reports.

Yet, on closer examination, the distance between the various UN reports is perhaps not as great as claimed. As mentioned by Okediji in a footnote, General Comment 17 and Shaheed's report concur that "[i]n contrast to the perpetual moral interests of authors … the material interests of authors need not necessarily be protected forever, or even for an author's entire life."[26] Under both reports, human rights have primacy and, in the event of conflict, must prevail over time-limited legal rights of ownership and exclusivity. Furthermore, neither General Comment 17 nor Farida Shaheed's reports provide justification for the view that Article 27 UDHR (or

[19] Ibid. p. 20.
[20] Ibid. p. 18.
[21] Ibid. p. 18.
[22] Ibid. footnote 59 p. 20.
[23] For instance, Okediji cites Daniel Gervais highlighting the "stringent" standard for assessing state limitations on the rights in the ICESCR (at p. 21).
[24] p. 19, footnote 56 and p. 23.
[25] 2015 Shaheed Report, UN. Doc A/70/279 (Aug. 4, 2015).
[26] General Comment No. 17, para. 16.

Article 15 ICESR) imply that intellectual property rights are the foundation on which authorial rights are premised or the presumption that human rights can only limit IP rights at the margins. It is true that Article 27(2) could be read as reflecting liberal, utilitarian, or Hegelian conceptions of property and personhood. It is also true, although not specifically discussed by Okediji, that the rights of authors and inventors over their intellectual creations could be read as reflecting Lockean, natural rights theories of property.[27] However, as will be argued below, to privilege the liberal, utilitarian or natural rights reading of authors rights one has to disconnect the text of Article 27(2) from the intention of the drafters as revealed in its drafting history and one has to read Article 27 in isolation from the full spectrum of interconnected civil, political, social and economic rights encompassed by the UDHR.

By contrast, as shown in the next section, the story of the genesis of Article 27(2) reveals that the insertion of the rights of authors and inventors in Article 27 UDHR was never intended to signal that authors and inventors have a fundamental human right to ownership and exclusivity over their works/inventions or a human right to patents and copyright.

3.4 ARTICLE 27 UDHR: THE INFLUENCE OF BERNE AND BOGOTA

There is no question that reference to the "moral" interests of authors and inventors in 27(2) UDHR is a *renvoi* to the "moral" rights of authors in the revisions of the Berne Convention adopted in Rome in 1928 which provided that:

> Article 6 bis: (I) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

As mentioned above, the Berne Convention is an international treaty on copyright law, raising the question of whether the drafters of the UDHR were aware of the risk of conflating IP rights with human rights and if so, why the text was nevertheless adopted. The analysis of the drafting history of Article 27 shows that the drafters were aware that the concept of the moral rights of authors and inventors was to be found in international copyright law. Moreover it was precisely for that reason that many delegations, mostly from Western liberal countries, opposed the inclusion of authors rights. However, there was limited understanding of international IP law and some confusion over the legal concept of "moral rights," a term whose constructive ambiguity facilitated the final acceptance of 27(2) UDHR. by the General Assembly.

[27] General Comment No. 17, para. 16

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3.4.1 *The Origins and Aims of Article 27(1)*

The origin of Article 27 is in the preliminary Draft Convention prepared by the Canadian lawyer John Humphrey, as Director of the UN Secretariat's Division for Human Rights.[28] From the very beginning, and in contrast with the list of the classical, liberal list of "negative" rights of the Enlightenment, Humphrey's text was intended to go well beyond the civil and political rights enunciated in the texts of the French Declaration of Human Rights or the US Bill of Rights and Constitution. We know from Humphrey's biography, and from scholarship on the UDHR,[29] that Humphrey had drawn inspiration for the inclusion of social, economic, and cultural rights in the preliminary draft list from the text of the human rights bill submitted by the Inter-American Juridical Committee. The forty-eight rights enumerated in Humphrey's draft[30] included the immediate predecessor of "the right to science" (Article 44, now Article 27 UDHR) which Humphrey had listed as follows:

> Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.[31]

Humphrey's wording closely matches the first part of Article XV of the bill submitted by Chile on behalf of the Inter-American Juridical Committee which stated that "everyone has the right to share in the benefits accruing from the discoveries and inventions of science."[32]

[28] For further details on the composition of the drafting committee and the evolution of the text see: http://research.un.org/en/undhr/draftingcommittee.

[29] The leading commentary on the drafting history of the UDHR is by Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. University of Pennsylvania Press, 1999.

[30] UN, ECOSOC, Commission on Human Rights Drafting Committee: International Bill of Rights, E/CN.4/AC.1/3. Amongst the list of socioeconomic rights in Humphrey's list was a right to health (Article 35), the right to free education irrespective of race, gender, language, or religion (Article 36), the right to work (Article 37), the right to equitable share of the national income in proportion to the contribution each makes to society (Article 39), the right to social security (Article 41), the right to food and housing (Article 42) and the right to leisure (Article 43). https://undocs.org/E/CN.4/AC.1/3/ADD.1

[31] Ibid. Article 44

[32] Morsink's claim that Humphrey had almost no other constitutional sources is not strictly correct. Other sources mentioned by Humphrey include the United States' suggestion that the categories of rights to be included should extend to the right to "enjoy minimum standards of social, economic and cultural well-being." Humphrey also mentioned Articles 163 and 164 of the Bolivian Constitution (1938) which asserted the State's obligations to protect artistic, cultural, and archeological heritage and to promote culture. Another source was the Brazilian Constitution of 1946 which imposed an obligation on the State to promote culture through the creation of research institutes particularly in connection with establishments of higher education (Article 174) and further stated that "science, letters and the arts are free" (Article 173). Similarly, Uruguay's Constitution of 1942, declared that education, including artistic and "industrial" skills were social needs which should be freely accessible to all and called for the creation of libraries as well as scholarships in the arts and sciences (Article 62). Finally, the Constitution of Yugoslavia provided that "[t]he state assists science and art with a view to developing the people's culture and creativity" (Article 37).

The original text of Article 27 produced by Humphrey was thus an amalgam of the Inter-American Juridical Committee's text submitted by Chile and some provisions in national constitutions calling for protection of the arts and sciences which should be freely accessible to all. Moreover, Humphrey's "right to arts/science" was conceptually embedded in and interconnected with other social and economic rights, most notably rights to education and rights to leisure. The interdependence and indivisibility of civil, political, social, and economic rights was preserved in the final list of rights enumerated in the UDHR, along with the obligation of States to facilitate access to the benefits of the arts and sciences as a means of securing the social and economic rights which are indispensable for the free and full development of the human personality (in Articles 22, 26, and 29). In addition, the interdependence of the individual and society and the correlation of individual rights and duties is further reflected in Article 29(1) of the final UDHR text, which explicitly links individual rights to communal duties: "Everyone has duties to the community in which alone the free and full development of his personality is possible." As indicated by one of the delegates, the term "alone" stresses "the essential fact that the individual could attain the full development of his personality only within the framework of society."[33]

In short, the origins of Article 27 and its conceptual and normative links to the rest of the Declaration clearly indicate that the original purpose of what was to become the first paragraph of Article 27 was to enjoin States to facilitate free access to the arts and sciences as a means to promote the full development of each individual human being.

In this light, the question which arises is why Humphrey's original text was amended and qualified by the addition of a second paragraph whose wording and purpose appears prima facie at odds with the first paragraph of Article 27?

3.4.2 *The Origins and Aims of Article 27(2)*

The starting point for the second paragraph of Article 27 may be traced back to the full text submitted by Chile on behalf of the Inter-American Juridical Committee. The sections omitted by Humphrey can be seen retrospectively to show awareness of a possible tension between public rights to participate and share in the benefits of science and intellectual property rights. The full text of Article XV of the Inter-American Juridical Committee's bill was as follows (with italics added to highlight the text omitted by Humphrey):

> Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science *under conditions which permit a fair*

[33] The second paragraph of Article 29 further reinforces the mutuality of individual and society in specifying the conditions under which individual rights may be legitimately limited.

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return to the industry and skill of those responsible for the discovery of the invention . . .

The state has the duty to encourage the development of the arts and sciences, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science. It is the duty of the state to protect the citizen against the use of of scientific discoveries in a manner to create fear and unrest among the people.[34]

The omitted sentences arguably indicate that, whilst the Inter-American Juridical Committee accepted the legal obligation imposed on States to protect patents, trademarks, and copyright, the Committee thought that the overriding duty of the State was to protect the human right of everyone to participate and share in the benefits of science. The potential risks to public access to science posed by the monopolies created by IP rights are explicitly acknowledged. Moreover, the profits derived from ownership of IP are subject to a test of fairness, in line with the overarching values of the Draft Declaration of the International Rights and Duties of Man (1947) proposed by the Inter-American Juridical Committee which assumes the interdependence of the individual and society.[35] For instance, in addition to rights to work (XIV), social security (XVI), and education (XVII), Article VIII on the right to own property limits the right to attaining "the minimum standard of private ownership of property based upon the essential material needs of a decent life, looking to the maintenance of the dignity of the human person and the sanctity of home life."[36] Article VII further envisaged that "[t]he state may determine by general laws the limitations which may be placed upon the ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community."[37]

When compared to the text of the Berne Convention and the second paragraph of Article 27, it is clear that the text of the Draft Inter-American Bill on which Humphrey had based the original formulation of Article 27(1) on the right to science had a very different intent from Berne. It was largely at the insistence of the French delegation that "moral" rights of authors had been added to the revision of the Berne Convention in Rome in 1928. The "moral" rights of authors were further extended in the Brussels revision of Berne, in a meeting from June 5 to June 26, 1948 which overlapped with the third Session of the Human Rights Commission from May 24 until June 18, 1948. The next section sets out the ambiguities surrounding the concept of "moral" rights and its contested addition to the Berne Convention in 1928 as a backdrop to the origins of the second paragraph in Article 27.

[34] Article XV, E/CN.4/AC1/3/Add.1, at p. 356.
[35] E/CN.4/2, https://digitallibrary.un.org/record/560759.
[36] Ibid. E/CN.4/2.
[37] Ibid.

3.4.2.1 The "Moral" Rights of Authors in Berne

As mentioned earlier, international intellectual property law had begun to emerge in the last quarter of the nineteenth century and accelerated in the last part of the twentieth century with the adoption of the TRIPS Agreement in 1995 and the enforcement machinery of the WTO panels. When the Berne Convention was originally adopted in 1886 there was no reference to the "moral" rights of authors in the text. Legal scholarship on the origins of the addition of "moral" rights of authors shows that the revisions of the Berne Convention in 1928 rested on confused and contested legal concepts whose inclusion were the result of complex factors and historical accidents.

The rights originally protected in Berne were economic rights, enabling the author/inventor to commercially exploit publication and reproduction of the work for the duration of the copyright term which was originally left to national laws. In 1928, Article 6bis added a new provision entitled "moral rights" which were said to reflect the personality of its creator, just as the economic rights reflect the author's need "to keep body and soul together".[38] The text of Article 6bis has remained virtually unchanged since 1928, although the revisions of 1948 made it mandatory for States to protect the "moral" rights for the duration of the life of the author and in 1967 this was further extended to a minimum of fifty years after the life of the author.[39] Article 6bis stipulated that:

> (I) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

The rights therein protected are commonly referred to as rights of attribution and integrity. They require, inter alia, that the author's name be mentioned in a publication and they entitle authors to object to mutilation or distortion of their works.

Whilst the justifications for "moral rights" are typically drawn from French and German philosophical theories, in practice, in nineteenth-century France, authors assigned their rights to publishers who were the real beneficiaries of the profits generated by publications.[40] In a seminal article on the origins of moral rights in Berne, the legal scholar Rigamonti shows that the doctrine of "moral rights" in the nineteenth century attempted to address two central issues.[41] Could creditors force

[38] www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf at 41.

[39] Ibid.

[40] Ronan Deazley, *Rethinking Copyright: History, Theory, Language*. Edward Elgar Publishing, 2006 and Ronan Deazley, Martin Kretschmer, and Lionel Bently, *Privilege and Property: Essays on the History of Copyright*. Open Book Publishers, 2010.

[41] Cyrill P. Rigamonti, "Deconstructing Moral Rights" (2006) 47 *Harv. Int'l LJ* 353. See also Alexander Peukert, *A Critique of the Ontology of Intellectual Property Law*, CUP, 2021 questioning the transplant of the legal paradigm for tangible property to intangible, 'immaterial' objects in 'intellectual' property law.

publication of a work in debt collection and bankruptcy cases? Secondly, could publishers publish the work without the author's name or modify it without the author's consent? There were no specific legislation or codes dealing with these questions in most European countries and, whilst rules had been developed by courts, systematizing and codifying the rules was challenging because national laws were based on Roman law which recognized only *tangible* forms of property or personality rights which were inalienable.[42]

The solution adopted by Germany in 1906 was to merge these rules in the copyright statutes of 1901 and 1907, effectively creating a new legal category of property – *intangible*, intellectual property – which merged rights of attribution and integrity with economic rights. Although the merging of personality rights with economic rights was described, as "the chronic disease of copyright scholarship in Germany," as argued by Rigamonti, the disease ultimately prevailed.[43] Meanwhile, common law countries had addressed the same issues through a patchwork of rules mostly derived from tort or contract without recourse to the ambiguous concept of "moral" rights in intellectual property. According to Rigamonti, theorization of "moral" IP rights in Europe gained momentum at the turn of the century, and this facilitated their inclusion in the Berne revision of 1928 together with the historical accident of Italy hosting the conference.[44]

The legal history of the concept of moral rights in copyright law thus shows that, in substance, the concept was ambiguous and contested. Moral rights are supposedly universal, inalienable personality rights. As such, they are conceptually distinct from the time limited, proprietary, economic rights of authors and inventors to exclusive commercial exploitation of their work protected in international law. Unfortunately, these legal and conceptual complexities were lost on French and South American delegations leading the debates on the inclusion of Article 27(2) in the UDHR.

[42] For an overview of the nineteenth-century debates see Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10(1) *The Journal of Economic History* 1–29

[43] Cyrill P. Rigamonti "The Conceptual Transformation of Moral Rights" *American Journal of Comparative Law*, Winter, 2007, Vol. 55, No. 1 pp. 67-122 at p. 108 referring to Josef Kohler, Zur Literatur des Autorrechts, 21 Kritische Vierteljahressch rift f?r Gesetzgebung und Rechtswissenschaft 189, 197 (1879).

[44] Rigamonti shows that moral rights were not originally in the agenda for the 1928 Berne conference in Rome, but Italy had recently modelled its own copyright laws on the German copyright statutes. Moral rights were added to the agenda by Italy as it seized the opportunity to enhance its international reputation. Unsurprisingly, Italy's proposal was resisted by common-law countries because "moral" IP rights were not part of their legal tradition and because the legal issues that "moral" rights sought to address were already addressed through common law rules. Changes to Berne had to secure unanimous approval. Australia, reflecting a different common law tradition, opposed the addition of "moral" rights, but ultimately relented because of the constructive ambiguity of Article 6bis which defined the content of moral rights as protection of honour and reputation which common law countries already protected.

3.4.2.2 The Latin American Approach to IP Rights

Apart from Brazil, Latin American countries were not parties to the Berne Convention whose members at the time where mainly former European colonial powers.[45] Instead, Latin American countries had developed their own regional copyright treaty, the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, concluded in Washington on June 22, 1946. There was no mention of the ambiguous "moral rights" or its theoretical scaffold in that text. The legal lacunae concerning rights of attribution and integrity which had prompted the inclusion of moral rights of authors in Berne were addressed pragmatically as follows:

> **Article XI**
> The author of any copyrighted work, in disposing of his copyright therein by sale, assignment or otherwise, retains the right to retain the paternity of the work and to oppose any modification or use of it which is prejudicial to his reputation as an author, unless he has consented . . .[46]

There was another important difference between the Inter-American Convention and Berne. By contrast to the mandatory term of protection of life of the authors introduced in Berne in 1948, the Inter-American Convention left the duration of copyright to the discretion of member states. Whilst there were significant variations, in general, protection lasted for twenty years (Mexico, Chile, and Peru) and therefore significantly less than Berne.[47] This, together with provisions enabling States to create exceptions and limitations on copyright, reflected the socialist vision of the Latin American republics to promote access to books and, more generally, to the arts and science. As argued by Cerda Silva

> in highly simple terms, the European copyright system . . . provided automatic protection to authors for their lives plus at least fifty years, but not that much flexibility for meeting public interest needs. The Inter-American system, which was limited to countries of the Americas, provided international protection for a discretionary term to authors who had complied with formalities set forth by countries of origin.[48]

As noted earlier, the Latin American vision that protection of authorial rights should be subject to a fairness test in order to promote social justice was reflected in

[45] See Alberto J Cerda Silva, "Copyright Tradition in Latin America: From Independence to Internationalization" (2014) 61 *J Copyright Soc'y USA* 57 7.

[46] www.oas.org/juridico/english/treaties/b-28.html.

[47] Twenty years in Chile, Mexico, and Peru; twenty-five years in El Salvador; thirty years in Argentina, Bolivia, Dominican Republic, and Venezuela; forty years in Uruguay; fifty years p.m.a. in Costa Rica and Ecuador; sixty years in Brazil; eighty years in Colombia, Cuba, and Panama; cited by Cerda Silva at p. 597, footnote 117.

[48] Alberto J Cerda Silva, "Copyright Tradition in Latin America: From Independence to Internationalization" (2014) 61 *J Copyright Soc'y USA* 577 at p. 598

the full text of the bill prepared by the Inter-Juridical Committee in 1945. The overriding importance of protection of social and economic rights as fundamental human rights was further affirmed in the American Declaration on the Rights and Duties of Man (Bogota Declaration) adopted in Bogota on May 2, 1948, six months before the UDHR in 1948. Unfortunately, by then the ambiguous language of Berne on the "moral" rights/interests of authors had also made its way into the text of Article XIII which provided that:

> **Article XIII.**
> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.
>
> He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

The final text of paragraph 2 of Article 27 UDHR is almost identical to the text of Article XIII of the Bogota Declaration. If read in isolation from the rest of the Declaration the second paragraph of Article XIII's reference to the "moral and material interests" of authors could be seen as a *renvoi* to the IP rights protected in Berne and, more generally, as an assertion that intellectual property rights are fundamental human rights.[49] It was precisely for this reason that many countries opposed the addition of paragraph 2 to Article 27 UDHR which, they feared, risked conflating IP rights with human rights.[50] Cassin, representing the French delegation, and the Latin American countries who supported the addition of the second paragraph, insisted that this was not the case. In order to understand their reasons, one has to go back to the full text of the Bogota Declaration and read Article XIII holistically in the light of the values enunciated in the Preamble and the full list of social and economic rights which were included.

3.4.2.3 The Meaning of "Moral and Material Interests" in the Bogota Declaration

The Bogota Declaration was based on a humanist vision of human rights grounded in social justice. If the "material" interests of authors are to be understood as the economic rights of authors to exploit their intellectual property, then as a species of property rights, these rights are subject to the limitations in Article XXIII on the right to property which stipulates that "[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." As such, Article 27(2) UDHR (and its

[49] See Mary W. S. Wong, "Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights" (2008–2009) 26 *Cardozo Arts & Ent. L.J.* 775 and J. Janewa OseiTutu, "Corporate Human Rights to Intellectual Property Protection" (2015) 55 *Santa Clara L. Rev.* 1.

[50] Aurora Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science" (2013) 35 *Hum. Rts. Q.* 143.

counterpart Article 15 1(c) in the ICESCR) would at most permit authors and inventors to receive a fair remuneration for their intellectual property.[51]

But there are also indications that the term "material" at the time was used in a different sense to refer to the physical needs and well-being of each human being. For instance, the 1944 Philadelphia Declaration of the International Labour Organization, one of the sources for the Bogota Declaration,[52] provides in Article II that:

> a) all human beings, irrespective of race, creed or sex, have the right to pursue both their *material well-being* and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity; [emphasis added].

The language of *material* wellbeing is echoed in the Preamble of the Bogota Declaration which states that the aim of the Declaration is to acknowledge the dignity of the individual and to facilitate the creation of conditions which: "permit him to achieve *spiritual and material progress* and attain happiness" [emphasis added]. Here, the word "material" is used to distinguish the physical from the spiritual/mental well-being and needs of each person. The word "material" is also used to distinguish physical from mental wellbeing in the *Travaux Preparatoires* of the Philadelphia Declaration, in the text of the right to education which states that "illiteracy prevents individuals from full participation in the political and economic life of the state and to avail themselves of the opportunities for *material and cultural* development" (author's translation from the original Spanish, emphasis added).[53]

The delegates' views on protection of the "moral and material interests" of authors in Article XIII of the Bogota Declaration are consistent with this interpretation of "material" as denoting the physical needs and well-being of the human person as distinct from the individual's mental/spiritual needs. As mentioned earlier, Article XIII provides that:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.
>
> He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

[51] As argued in General Comment 17 – see also Peter K. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 *U.C. Davis L. Rev*. 1039.

[52] As shown by Paúl, Álvaro (2017). *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*. Mexico: Instituto de Investigaciones Jurídicas UNAM. p.1, p. 110.

[53] Álvaro Paúl, *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*. Mexico: Instituto de Investigaciones Jurídicas UNAM, 2017, Article XVII, p. 135. Spanish text: "No se necesita de ningun argumento para demostrar que el analfabeto no puede participar plenamente de la vida politica, economica y social del Estado, y que no puede aprovecharse de las muchas posibilidades de desarrollo material y cultural que se le presentan . . ."

The *Travaux Préparatoires* on the Bogota Declaration and Article XIII, recently published in Spanish, show that the main rationale for the second paragraph of Article XIII of the Bogota Declaration was provided by Fernandez del Castillo, the delegate from Mexico. In answer to the delegate from the USA (Tate), who spoke against the inclusion of rights of authors on the grounds that the rights of authors were not fundamental human rights, Fernandez del Castillo said that intellectual creations were the product of the human genius.[54] They were the main distinctive attributes of human beings which are essential to his person even though they may not have been recognized as such in national constitutions for political reasons.[55] Perez Cisneros, the delegate from Cuba, said that he understood and agreed with the spirit of the Mexican point, but he thought that since the second paragraph of Article XIII referred to intellectual property rights, it did not belong to an Article on the right to science and culture.[56] He was also concerned that a special category of individuals were singled out. Fernandez del Castillo's reply was that the words "paternity" and "property" in relation to intellectual creations were being used by analogy to denote the natural creative attributes of human beings. For this reason, the rights protected therein were universal and not confined to a special category, but extended to all creative human beings who made a fundamental contribution to society through the arts and sciences.[57] As such, protection of the creations of the mind was essential to the advancement of culture. Fernandez del Castillos's arguments prevailed and Article XIII was ultimately approved with the addition of the second paragraph in the Bogota Declaration. The representative of the Mexican delegation at the UN in the discussions on the UDHR turned out to be one of the strongest supporters of Cassin's proposal to add a second paragraph on protection of the rights of authors.

3.5 THE FINAL STAGES OF THE DRAFT OF ARTICLE 27(2) IN THE UDHR

The proposal to add a paragraph on the "moral" interests/rights of authors and inventors was driven by Rene Cassin, on behalf of the French delegation. On May 21, 1948, at the Second Session of the Drafting Committee at Lake City,[58] Cassin proposed an amendment to what by then had become Article 30 stating that:

> Authors of creative works and inventors shall retain, apart from financial rights, a moral right over their work or discovery, which shall remain extant after the financial rights have expired.[59]

[54] Ibid., p. 275.
[55] Ibid.
[56] Ibid., p. 276.
[57] Ibid.
[58] The second session of the Drafting Committee of the Commission on Human Rights opened on Monday, May 3, 1948, at the Interim Headquarters of the United Nations, Lake Success, New York. The Drafting Committee held twenty-five plenary, meetings and terminated its work on Friday, May 21, 1948.
[59] Report of the Drafting Committee to the Commission on Human Rights, E/CN.4/95, p. 13.

Cassin explained that the provision reflected a similar provision recently adopted in the Bogota Declaration. The French amendment was discussed and rejected by the Commission on Human Rights on June 11, 1948. The concerns raised by the critics mirror the arguments previously voiced by other delegates at Bogota. Mehta (India) and Wilson (UK) thought that it was inappropriate to single out a special category of persons in a universal declaration on human rights.[60] The representative from Uruguay disagreed. Uruguay had also supported the Mexican amendment in Bogota. He thought that without the amendment "intellectual workers" would be left without protection. The French amendment also received strong support from Larrain (Chile) who was gratified that it was based on the Bogota Declaration. The Chair (Roosevelt), speaking for the USA, opposed the French amendment on the grounds that it dealt with copyright which was the subject matter of international IP law.[61] Cassin's amendment was rejected by six votes to five, with five abstentions.

Thus, at the close of the 3rd Session of the Commission on Human Rights (held May 24 to June 18, 1948), the draft bill submitted by the Commission for consideration to the UN General Assembly included only the predecessor to the first paragraph of Article 27, then Article 25, stating that:

> **Article 25** Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement. (E/800, p. 13).

Speaking in support of the draft Declaration to the plenary meeting held by the Economic and Social Council at its 7th Session on August 25, 1948, Cassin urged the Council to submit the draft Declaration for approval to the General Assembly notwithstanding the fact that it did not give sufficient prominence to certain rights, notably rights of asylum for stateless persons, limited right to equal pay; and that "[t]he Declaration gave no place to scientific and artistic pioneers, although those who contributed to the advance of civilization were entitled to have their interests protected."[62]

On September 24, 1948, the General Assembly referred the draft International Declaration of Human Rights to the Third Committee. The Third Committee considered Article 25 at its 150th to 152th Meetings from November 20 to November 22, 1948.[63] By then Cassin had gained the support of Mexico and Cuba which had submitted amendments to Article 25 calling for the insertion of an additional clause protecting the moral and material interests of authors and inventors.[64] The three delegations agreed to join their amendments ahead of the

[60] Commission on Human Rights, Summary of the 70th Meeting held at Lake City on June 11, 1948, https://undocs.org/E/CN.4/SR.70, p. 6.
[61] Ibid. p. 7.
[62] E_SR.215 215th Meeting, held on Wednesday, August 25, 1948: 25/08/1948 at pp. 649–650.
[63] A/C.3/SR.150 records the deliberations and votes of the Third Committee on Article 25.
[64] A/C.3/266 (Mexico); A/C.3/261 (Cuba), A/C.3/244/Rev.l)- (France).

Third Committee's meeting. The joint amendment proposed to add the following text to Article 25:

> Everyone has, likewise, the right to the protection of his moral and material interests in any inventions or literary) scientific or artistic works of which he is the author.[65]

Cassin's persistence paid off as the three delegations were now able to convince a majority of the delegates of the Third Committee to accept the amendment.

Campos Ortiz (Mexico) explained that the Mexican amendment was based on the text on the protection of intellectual property proposed by Mexico in Bogota which had been unanimously adopted.[66] In Campus Ortiz's view, only a small number of artists, scientists, writers, and independent researchers were salaried workers. Without recognition of their work, no social progress was possible. National and international legislation safeguarding the rights of authors' and inventors' patents was not always effective. Likewise, Cassin claimed that although royalties and patents might provide some reward for authors and inventors the aim of the amendment was to go further and protect the spiritual and moral interests of authors who are often not interested in profits but want recognition by posterity and for their work to be free from distortion. His amendment, he said, took account not only of the "material" aspect of the question but was also designed to protect the spiritual and moral interests of artists and inventors.[67]

On their face, Cassin's arguments were based on a double conflation or confusion of:

(1) the economic rights of exploitation protected by international IP law with the material/physical well-being of authors in Bogota and
(2) the "moral" rights of authors (in Berne) directed at legal protection of the integrity of creative works with the "spiritual" well-being of intellectuals in Bogota.

A similar conflation between the legal conceptions of intellectual property protection in Berne and the moral objective of encouraging and protecting intellectual creativity is evident in the contributions of the South American delegates who supported Cassin. Perez Cisneros (Cuba), who had expressed reservations on the counterpart addition to Article XIII in the Bogota Declaration, said that Cuba had submitted an amendment in the same spirit as Mexico, which Perez Cisneros praised for being the first to raise the question of protection of intellectual property rights in Bogota.[68] Protection of intellectual property was new and important and should be included in the UDHR.[69] The "material" conditions of "men of learning"

[65] A/C.3/360.
[66] A/C.3/SR.150 at p. 617.
[67] Ibid. p. 620.
[68] A/C.3/SR.150 at p. 618.
[69] Perez Cisneros (Cuba) said that Cuba's amendment was similar in substance to the amendment proposed by the French delegation "phrased with admirable perfection and style." Cuba withdrew its amendment in favor of the French.

and artists were limited and required equitable protection. Artistic and scientific works should be made accessible to the people directly in their original form, but for this to happen it was necessary that "the moral rights of the creative artist are protected."[70] Zuloaga (Venezuela) supported the joint amendment of France, Cuba, and Mexico because the government "regarded as one of its most important duties the development of the cultural level of the masses in order to enjoy scientific, literary and artistic works" and the terms were identical to the American Declaration of the Rights of Man.[71] Jimenez de Arechaga (Uruguay) noted with satisfaction that the French, Mexican, and Cuban amendment were based on a principle adopted by the Uruguay government in Bogota. Artistic property was covered by special laws in most countries and did not therefore fall into Article 15 which protected rights to property in general.[72] The delegate from Belgium (Count Carton de Wiart) concurred. The right to property protected by Article 15 was not applicable because, he claimed, the right in question was "an intellectual right."[73] Beaufort (Netherlands) agreed. Intellectual works were not adequately safeguarded by a general right to property as illustrated by Marie Curie's works. They were more abstract and liable to infringement.[74]

By contrast, Carrera Andrade (Ecuador) was concerned that, as amended, the article was one of the most confused and contradictory that the committee had had to examine but recalled that South American Republics had recently taken measures to protect artistic and literary ownership which were defined in a very flexible manner which did not restrict cultural development. The aim of the article was to make arts and culture freely accessible to all by granting access to museums and libraries and to further education. Rights of authors and inventors were a form of property right which would curtail humanity's access to books and scientific works. He proposed that 25 should be deleted in its entirety.[75]

Roosevelt (USA) was opposed because the proposed amendment "reproduced almost word for word the article in the Bogota Declaration" which she thought dealt with patents and copyright. The USA thought that patents and copyright were out of place in the Declaration and, as an aspect of the right to property, were covered in Article 15 UDHR.[76] Similarly, Corbet (UK) argued that Cassin had run together two very different concepts. On the one hand, proprietary rights of ownership which attached to an invention and on the other, rights of attribution and recognition due to the author of an invention. She thought it was unwise to have a provision which had already been dealt with by international conventions on copyright, in an Article on the right of an individual to participate in cultural life. Copyright was not a basic

[70] A/C.3/SR.151 at p. 628.
[71] A/C.3/SR.151 at p. 627.
[72] A/C.3/SR.150 at p. 621.
[73] Ibid. at p. 622.
[74] A/C.3/SR.151 at p. 630.
[75] A/C.3/SR.150 at p. 618.
[76] Ibid. at p. 621.

human right.[77] Likewise Carter (Canada) thought that copyright and patents did not belong in a declaration but in a covenant and, for that reason, rejected the joint amendment. Lunde (Norway) also voted against the second paragraph for the same reason. Watt (Australia) opposed the amendment on the grounds that the rights of artists and scientists were the concern of national and international conventions and should not appear together with fundamental rights of a more general nature.[78] It was not appropriate to include rights of intellectual workers alongside freedom of thought, religious freedom, and the right to work.[79] Santa Cruz (Chile) concurred, adding that protection of the rights of intellectual workers "conflicted to a certain extent with that of freedom of access to all literary, artistic or scientific output" and affected a special category of persons only.[80] Ecuador too thought it inappropriate to include in a declaration a right to which only a small minority of mankind was entitled.[81]The same was true of Kayaly (Syria) who voted against the second paragraph and Azkoul (Lebanon) who voted in favour of the first paragraph but considered it inappropriate to include rights applying to a minority and abstained.[82]

The first and second paragraph as amended were put to separate votes. The first paragraph was adopted unanimously.[83] Eighteen countries voted in favour, the majority from Latin America. Thirteen countries voted against: Sweden, Syria, UK, USA, Yemen, Australia, Canada, Chile, Denmark, Ecuador, India, Norway, and Pakistan. Ten countries including the USSR and most soviet satellite countries abstained on the second paragraph: Saudi Arabia, Ukrainian Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia, Afghanistan, Byelorussian Soviet Socialist Republic, Czechoslovakia, Lebanon, New Zealand, and the Philippines.

The whole of Article 25 as amended, was put to a separate vote and adopted by thirty-six votes to none with four abstentions.[84] Santa Cruz, who had voted against the second paragraph, voted in favour of the article as a whole as he thought it was not sufficiently important to warrant rejection of the whole article. The same was true of Roosevelt (USA) who also voted against the second paragraph but in favour of article as a whole. New Zealand also voted in favour of the whole article having

[77] Ibid. at p. 624.
[78] A/C.3/SR.151 at p. 630.
[79] Ibid.
[80] A/C.3/SR.151 at p. 632.
[81] A/C.3/SR.152 at p. 635.
[82] Pavlov, the Soviet delegate, supported the principle on which the original Article 25 was based, namely, that everyone had the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement. But the USSR's main concern was to press for the inclusion of amendments which would require that science should be used for peaceful purposes or in the interests of progress and democracy only. These were endorsed by Poland and Ukraine but overwhelmingly rejected by countries fearing that it would provide a platform for state control of science and interfere with freedom of research.
[83] A/C.3/SR.152 at p. 634.
[84] A/C.3/361.

abstained on the second paragraph which was viewed as belonged to Article 15. . The overall text adopted by the overwhelming majority thus read:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The final text included Peru's amendment to include the word "freely" in the first paragraph and the Chinese delegate's amendment to add the words "and its benefits" after "share in scientific advancements" in acknowledgment that whilst not everyone has the ability to take part in the creation of artistic, literary, and scientific works everyone had the right to enjoy the benefits of science and the arts.[85] It was this core ideal of free, universal access to the arts and science which animated the inclusion of the original Article 25 on which delegates were unanimously agreed. It was also this core ideal of the universal right of every human being to access the benefits of human creativity which facilitated the adoption of the final text notwithstanding the confusions, tensions and contradictions introduced by the second paragraph.

3.6 CONCLUSION

The analysis of the historical record reveals the original rationale for the inclusion of of "moral" rights om in the Berne Convention revisions of 1928 and the very different purpose of its mirror wording in Article XIII of the Bogota Declaration which inspired the inclusion of Article 27 in the UDHR. Thanks to the recent publication of the *Travaux Preparatoires* of the Bogota Declaration it is now possible to understand how he constructive ambiguity of the terms "moral" and "material" resonated with the Latin American ideals of social justice who understood these terms to refer to the "spiritual/mental" and "material/physical" *well-being* of each human being to which fundamental rights are directed. The humanistic ideals of spiritual and physical human self-development, were thought by advocates of Article 27(2) to be sufficiently clear if Article 27(2) was read as an integral part of the full, interconnected spectrum of social and economic rights in the UDHR. An integrative, contextual reading would displace the risk of conflating time-bound, exclusionary proprietary IP rights with universal human rights centered on development of the human personality.

In retrospect, it seems that regional political alliances prevailed over clear analytical thinking and won the day in Bogota and in the final stages of the drafting of the UDHR in Paris. Nonetheless, in the midst of the conceptual fog introduced by

[85] A/C.3/SR.151 at 627 and A/C.3/361.

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Article 27(2) it is also true that those who insisted on its inclusion were not moved by an individualist, Western, liberal vision of human rights. On the contrary, their overarching vision of human rights, as reflected in Bogota, was founded on a vision of the interdependence of the individual and society and on the idea that fulfilment of human rights in democratic States has a cooperative basis which entails individual duties as well as individual rights. Their vision of human rights stood in contrast with the Western liberal classical conception of human rights of the Enlightenment, as negative rights, limited to civil and political liberties. The Bogota Declaration self-consciously sought to distance itself from that vision in its explicit embrace of social and economic rights and ideals of distribute justice. The same ideals found their way in the full spectrum of rights enunciated in the Universal Declaration of Human Rights and are captured in the first paragraph of Article 27. It is in the light of these ideals that Article 27(2) should ultimately be read and not as an affirmation that intellectual property is a fundamental human right.