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**FORUM ON
CREATIVITY AND INVENTIONS – A BETTER FUTURE FOR
HUMANITY IN THE 21ST CENTURY**

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THE ROLE OF COPYRIGHT AND FUTURE CHALLENGE TO CREATORS,
INDUSTRY, LEGISLATORS AND SOCIETY AT LARGE – INVENTORS' AND
CREATORS' RIGHTS AS BASIC HUMAN RIGHTS

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Background

1. The knowledge-based society that we are discussing here is based simply on knowledge and information, and how to use them for the benefit of either private economic interests or the interests of society at large. Knowledge and information are terms that relate to facts and ideas, which are precisely the material that intellectual property aims at preserving and protecting. This brings intellectual property to the forefront of the discussions and also makes it much more controversial than before because the interests at stake are so much more important than in the "old" economy. It also brings to the forefront issues of intellectual property acceptance. It is undoubtedly true moreover that development in both industrialized and developing countries poses important challenges in the relations both between countries and between different groups within a society (the creators, the legislators, the consumers and all those who have to implement the legislation). The recent Napster legislative battle in the United States illustrates clearly some of the controversies that appear in this context. It turns legal issues into political issues and political issues into legal issues and thus creates a completely new landscape.
2. The title of this afternoon's session includes and illustrates all these different elements. It therefore covers the issue of the importance of creativity in society, and the challenges and the basic human rights involved. I shall volunteer some comments on the challenges that we all may have to face.
3. One basic consideration is what the basic legal and political rationales are for the protection of intellectual property.
4. Obviously the general underlying rationale is the need to organize human, economic and social relations in the best possible way, and thus provide for a fair and reasonable distribution of the limited resources available.
5. Working on that basic consideration, legislators have found three basic rationales for granting protection to intellectual property. Those are, in my understanding, the need to stimulate creativity and inventiveness in society, those being two decisive factors in the social, economic and cultural development of any nation, the need to give protection to the considerable investment that is necessary for the creation and dissemination of works of the mind and also, for instance, that of complex pharmaceutical substances and medicines, and the need to give some recognition to the moral interests of those who invent and create and protect them against the misappropriation of the results of their creativity by other persons.
6. This protection of intellectual property is intended to be beneficial to society. The protection should result in greater disclosure and dissemination of works and inventions. For instance, an inventor is given patent protection for his invention in return for making it known to society through publication in a register. This in fact is the beauty of the system: exclusive rights are granted in return for a wide dissemination of the results of inventiveness and creativity, while society at large benefits because the protected productions can then be used as a basis for further creative and inventive work.
7. The need to protect inventors and authors and other creators was most eloquently expressed in Article 27 of the Universal Declaration of Human Rights of 1948. This provision calls upon States to recognize the right of any person to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he

is the author. This is the fundamental principle which must underlie all considerations on the protection of intellectual property, including not only authors' rights but also the rights of inventors and other creators.

8. There is bound to be some friction in the system, of course, and it will become more and more severe as the importance of the intellectual property system grows. For instance, there are grey areas where conflicting interests are set against each other; and in some contexts what are regarded as excessive effects of the practical application of certain provisions. And then there are areas where new provisions need to be introduced and where economic and moral interests are sharply opposed. The discussions on biotechnological inventions are a good example of this.

9. Such friction is a challenge not only to the legislators but also to you and me - as we all have to face it. It is likewise a challenge to the intergovernmental organizations that operate in this field, especially the World Intellectual Property Organization (WIPO). In the following I shall venture some comments on these problems.

The challenges

10. In recent times globalization and its effects, and the influence of the "civil society" on national and international decision-making, have become popular topics of discussion. Another such topic is intellectual property law and its effects, and the role of intergovernmental organizations such as WIPO. The discussions seem to turn on two major issues.

11. One is the relation to the "civil society" and the other on the decision-making process in international organizations and, within it, the influence or lack of influence of important groups of countries. It has been said, for instance, that the controversy surrounding the World Trade Organization (WTO) could also afflict other intergovernmental organizations and take the form of challenges to the "legitimacy" of their decision-making.

12. Other discussion topics are the challenges to WIPO and WTO in the information age, and the role of those two organizations. All the opinions expressed and the developments that have occurred deserve to be taken seriously, even without agreement on the criticism: as they concern broad political issues it does seem appropriate that they should be discussed, the purpose of course being to ascertain whether any special action is needed in order to meet future political and other challenges arising from the developments described.

13. Globalization may be inevitable, but it is being challenged, including its effects in the intellectual property field. Someone has even compared the present adverse reaction to globalization with the environmental protection movement in the 1950s, which no one took very seriously at the time. The inherent risk, as we all know, is that there could be more and more resistance to the rapid imposition of high standards of protection for intellectual property rights in all countries, regardless of their traditions and stage of development and the "civil society" interests that may be in jeopardy. The question is how to deal with this growing sentiment, how to assess the situation and determine whether any actions should be taken to counter it.

14. There seem to be two main areas of concern in this debate. One consists of a number of areas that are particularly controversial, calling for reflection on how the process should be

conducted. The other has to do with the ways in which intergovernmental organizations such as WIPO should approach the general issue of the development of intellectual property law.

The “controversial issues”

15. One general background fact is that, as a consequence of globalization and the development of technology, intellectual property protection is being strengthened more and more (copyright term extended, patents available in new areas and for both processes and end products, strong protection for crucial technologies such as computer programs and non-original databases).

16. The general concerns in this connection seem to be three:

- A never -stronger intellectual property protection is being seen in some quarters as counterproductive and harmful to society;
- Intellectual property is increasingly seen as a means more of protecting the economic interests of the owners of rights than of stimulating creativity with finite exclusive rights in return for making the results of intellectual creativity available to society (its original purpose);
- Intellectual property is increasingly seen as more protective towards producers than towards creative people.

17. The more specific controversial issues seem at present to be mainly the following:

- Patent protection for pharmaceutical products (for instance someone has even referred to its consequences for certain developing countries as “medical apartheid”);
- Plant variety protection, which is seen as harmful to farmers in developing countries;
- Patent protection for the genome (human and non-human);
- Long, strong protection for high technology;
- Protection for geographical indications (more important to some countries than to others);
- The so-called “cultural exception”;
- The fact that public funds are being used for the fight against piracy and for the protection of private interests.

18. The investment required for setting up efficient enforcement systems in developing countries, for instance, for the benefit of right-owners whose sometimes are in other parts of the world.

19. The possibly counterproductive effects of particularly strong intellectual property protection are offset, at least in most industrialized countries, by competition law, which does not always exist to the same extent in other countries.

20. In view of the complexity of the issues and the difficulty of handling the economic and political effects of development, and after careful consideration of developments in this area, the main remedies available for the time being seem to consist in:

- Improving the provision of information on intellectual property and its effects;
- Offering practical advice and assistance to countries in the handling of intellectual property matters in the international context. Existing examples are the centers set up within WTO to assist developing countries in disputes, the fact that a private law firm has entrusted specialized lawyers with assisting countries in need of advice on WTO matters, and the fact that certain countries have set aside special funds for assisting developing countries in WTO matters. Some thought could usefully be given to the contribution that other intergovernmental organizations, especially WIPO, could make in this connection.

The approach to outstanding issues

21. Quite naturally and inevitably, there has been some criticism of the approach to intellectual property matters adopted by WIPO, among others. The criticism seems to focus on the following main points.

22. Attention should be given to competition law and policy and, in a broader perspective, to the economic justification for and effects of increased intellectual property protection. By way of example, reference could be made to the European Union compilation-decompilation provisions in the field of computer software, which are disputed by the leading software companies but have been introduced just to promote competition. An argument sometimes made is that there has to be an economic analysis of the effects of the intellectual property legal framework and of the various effects of changes made to it.

23. There is a need for a good technological analysis as a basis for proposals for an appropriate legal framework. For an example of that need one could mention the intense debate - and the confusion - within the European Union concerning the nature and legal treatment of incidental copies made in the course of transmissions on the Internet or on other information networks.

24. Attention should also be given to the need for an analysis of the extent to which existing intellectual property frameworks can properly "absorb" new phenomena, notably in the field of high technology and biotechnology. The present patent and copyright systems can be stretched to a certain extent to cover new phenomena, and the law on trade secrets can take care of some problems, but there are limits. An example of this concern is the introduction within WTO of what are called "non-violation complaints" now also in the context of intellectual property, with the effects that it may have. This situation may eventually lead to reflection on the need for specific protection structures outside the traditional systems.

25. Intellectual property should be seen to be integrated in the broader context of the structural organization of a country or region and should be adapted to prevailing

circumstances. A body of law exists and operates in the present specific environment. In this context too the favorable and adverse effects of “non-violation complaints” come to mind.

26. These, then, are some of the critical remarks that have been made. One does not necessarily share the concerns and views expressed in the international discussion, but it is going on, and it is important to be aware of the views being exchanged, to discuss them and to work out what action might be appropriate.

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