IX. DEFINING A HUMAN INTELLECTUAL PROPERTY RIGHT FOR EDUCATORS' ONLINE CREATIONS

Dr. Atty. Ramiscal's human rights approach on the nexus between academic freedom and intellectual property rights ownership is informed by certain principles noted from the general literature on human rights, philosophical theories on intellectual property rights, social theories and the CESCR Comment. These principles are utilized and extended to define the terms of what Dr. Atty. Ramiscal advances as the "human intellectual property right" of educators relative to their online creations.

30. Treatment of Rights: Economic v. Human? Economic and Human

One of the most significant and fundamental differences between the human rights instruments discussed earlier with trade agreements, treaties or conventions that deal with intellectual property rights, lies in the treatment of rights.

The TRIPS Agreement and the WTO Treaty present what Dr. Atty. Ramiscal calls "economic intellectual property rights", where intellectual property and the rights over them are considered nothing more than commodities and are thus reduced to their economic value. The States that are parties to this Agreement, who are members of the WTO, use intellectual property rights purely for trade negotiations, as trade conditions or bases for impositions of trade sanctions. This approach has been found wanting by the Sub-Commission on the Promotion and Protection of Human Rights [157].

The ADRDM, the UDHR, the ICESCR and the Protocol of San Salvador are diametrically opposed to trade treaties or agreements like the TRIPS Agreement. These human rights instruments have given rise to what Dr. Atty. Ramiscal defines as a "human intellectual property right". Intellectual property rights ownership under these documents "inhere" in the essence of human beings. The ADRDM states, "(a)ll men are born free and equal, in dignity and in rights" [158]. The UDHR reaffirms "the dignity and worth of the human person" [159]. The ICESCR hold these rights to be "equal" and "inalienable" and belong to all members of the human family [160]. The Protocol of San Salvador recognizes that this forms part of the "essential rights of man [which] are not derived from one's being a national of a certain State, but are based upon attributes of the human person" [161].

The earlier discussion of the philosophical and sociological theories and their relationship with legal frameworks for human rights and intellectual property rights by Dr. Atty. Ramiscal makes it clear that intellectual property rights are both economic and human rights. These rights are considered universal and worthy of protection by states. They are international norms that apply to "all countries and all people living today" [162]. They are not subject to the changing conditions of the economy, or the whims and caprices of political dispensations, that affect the trade conditions between market economies. These rights are, or should be immune, to the pressures of globalization and digitization.

It must also be emphasized that the intellectual property rights mentioned in the human rights instruments are at par with the more developed and understood civil and political rights which are made subject of the ICCPR [163]. This is an important point that deserves full appreciation. The Protocol of San Salvador made this clear when it declared the existence of a close relationship –

> between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified [164].

31. Nature of the Human Intellectual Property Right in E-learning

In the not too distant past, educators' creations were not considered worthy of appropriation by universities because of their relatively minimal value [165]. But globalization and e-learning have changed that with the adoption by universities of corporatist models of operation that look at the process of learning as a commercial enterprise. Instead of the original focus of intellectual property rights in learning, which was to provide incentives and protection to creators of intellectual property, the focus has shifted to the protection of the investors in the learning capital, which primarily consist of universities and their commercial partners.

Dr. Atty. Ramiscal submits that the economic intellectual property right model cannot serve as the basis to protect the rights of educators over their creations from the clutches of corporatist universities and their partners. Educators' rights over their intellectual property can only find stable grounding in the human intellectual property right model. This right proceeds first and foremost from their dignity and value as human beings. That dignity and worth extend to their creations, which serve the higher purposes of freedom, justice and peace [166]. Their creations also further the cause of higher education which is "directed to the full development of the human personality and to the strengthening of respect for human rights" [167].

Educators are sources of intellectual products that resist "commodification" of knowledge which the distance learning business model imposes [168]. These academic creations are personal and unique to the educators who create them. These works contain not only the knowledge educators have amassed, but more importantly, their continuing, dynamic, understanding, interpretation and application of such knowledge, which they transmit to their students and peers by teaching, research endeavors, publications and other forms of academic dissemination.

For example, videotaping and streaming lectures over the internet are an important means of reaching out to distance learners all over the world. But the streamed lecture, while fixed in form, cannot be said to be the final work of the lecturer. The state of knowledge is always in flux and the lecturer continuously revises the content of his or her lecture to accommodate new understandings revealed in the pursuit of truth, which is the crux of academic freedom.

The human element, the human intellect, the human performance will all vary to some degree in each lecture, even if it is on the same subject, by the same educator at different times [169].

Granting to the universities, ownership of online lectures that educators *will* deliver in the course of their employment is in effect, granting to universities ownership of the human element, the human intellect, the human character of educators that imbue the individuality of their performances.

To a great extent, the same can be said of scholarly works that include journal and conference articles and lecture notes incorporated in textbooks or uploaded on websites. Each educator has their own writing style and the content they write will necessarily reflect their learning and their experiences. No two educators will have the same learning and experiences. And even the same educator has the right and prerogative to eschew his or her previous learning and experiences for new ones that reflect his or her search for the truth in his or her teaching and research.

Granting to universities ownership of these works will necessarily intrude on the educators' human right and prerogative to think and change their minds. The revision, alteration, even destruction of educators' works, will require the consent of their employers, and endangers the educators' independence of judgment and academic freedom. This also strips educators of the dignity and privileges of authorship which are granted to other classes of authors who are not bound to universities.

These are the logically necessary, philosophically and legally unconscionable results that will ensue if the works of educators are owned by the university by the mere fact of employment and similar reasons.

 Dr. Atty. Ramiscal acknowledges the University of the Philippines Institute of Government and Law Reform (UP IGLR) for the research grant it awarded that allowed him to complete part of this research project. The UP IGLR has waived any claims over this research, except the right to be acknowledged as research funder.

32. Recognition and Nature of Authorship in E-Learning

The CESCR Comment emphasizes that only human beings or an unincorporated community of human beings can be considered as "author" of an intellectual property work and are the ones entitled to enjoy the moral and material rights of authorship [170].

This is just in keeping with the nature of "human rights" as rights possessed by human beings not juridical entities. Universities, by the very nature of their institution, as corporate bodies, are thus disqualified from owning the human intellectual property right over academic creations even if they were made in the course of employment of the academic staff. This principle, Dr. Atty. Ramiscal opines should be qualified. While the CESCR Comment excludes universities from being the first owners of the copyright in educators' works, it does not necessarily prohibit them from having the copyrights over these works, if specifically assigned or licensed to them in writing, and signed by the pertinent authors and university representatives.

The practice of some universities of arrogating to themselves automatically, the copyright over the works of their academic staff by employment contracts and Intellectual Property Policies, without even negotiating with the staff concerned, is therefore violative of this principle.

33. Moral Rights and Material Rights in General

Only human beings can have moral claims and interests in their works. The CESCR Comment recognizes several rights of creators that fulfill the requirement for the observance of their moral interests. These rights include the right to be attributed as the author of their creations, and the right to object to any modification, distortion, mutilation, or other derogatory act in connection with their work that is prejudicial to their honor or reputation [171]. The purpose of this is to recognize the personal character of the creator that is stamped on the creation and to maintain the link between the creator and the creation [172].

The recognition of the protection of the material interests of creators by the ICESCR and the CESCR Comment, over their creations is not a concession to the economic intellectual property rights model that the TRIPS Agreement espouses.

The human intellectual property right of creators which include their material interests stems from the fundamental needs of its creators. One of these is the elemental need to survive while creating, or after the opus is created. The CESCR Comment linked this with the right to own property contained in UDHR [173] and the rights to adequate remuneration [174] and adequate standard of living [175] contained in ICESCR [176].

34. Importance of Material and Moral Rights to Educators in E-learning

The right of educators to earn a living ultimately proceeds from the most basic human right to life [177]. The ICESCR enshrined this as a Covenant right when it required the participating States to "recognize the right to work, which includes the right of everyone to have the opportunity to gain his living by work which he freely chooses or accepts" [178]. The States were obliged to take steps to realize this right while safeguarding the "fundamental political and economic freedoms to the individual" [179].

The teaching materials, lectures, lecture notes and scholarly works produced by educators in the course of their employment are the means by which their right to earn a living is ensured in any setting, real or virtual. These are their "tools of the trade". Securing to the educators the copyright ownership over their works will arm them with the means to control, re-invent or refashion their works to meet the demands of consumerist learning that universities seek to cater and address.

Employment relationships are never equal. Educators as knowledge workers only have their intellectual products and skills to negotiate. The protection of their moral rights assure that these educators are given proper credit for their intellectual work, enhance their standing in the academic community and bolster their employment opportunities. Since their knowledge

products are valuable, giving them ownership rights to these products would secure their moral and material interests and give them some kind of bargaining power when they negotiate with universities that are interested in their services.

Pertinent to this is what Blackstone articulated relative to the first publication right as the common law of England: When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right [180]. Greater protection of the economic rights consisting of the copyright of educators would give them a leverage to demand for their rightful academic position and to secure their moral rights over their works.

Educators should not be encumbered with restrictions from their former university employers not to teach or disseminate the knowledge they have created during their period of employment with other universities or institutions of e-learning. This will also ensure that they can develop the ideas and research that they were working on in their previous employment in their future employment posts. The pursuit of truth should not stop with the change of employers.

Copyright ownership then serves to protect the continued enjoyment of the educator's academic freedom to teach, research and disseminate the results of his or her scholarship as he or she transfers from one academic institution to another.

In contrast, giving the copyright ownership over these works automatically to university employers, by virtue of the educators' employment, may be detrimental to the educators' economic and even personal freedom which the ICESCR proscribes. As observed in *Williams v. Weisser*, universities having copyright ownership of fundamental teaching materials like lectures, would make an educator nothing more than an indentured slave "for the university would have a right to his lectures and he could only go to another institution if he were to turn his attention to a new subject" [181].

Lastly, there is always the danger that granting universities intellectual property ownership over the works of educators will arrogate to these institutions the current and future monopoly of knowledge in the area that an educator specializes in and its dissemination. This is rife with dangers to the academic freedoms of educators. Universities would potentially be given the power to dictate the direction of the educators' research and the power to dictate the boundaries of the educators' expression.

35. Interrelationship between Individual and Community Rights

The economic approach to intellectual property rights focuses on the individual's right to assert, trade, barter, assign or license the intellectual property rights over the work, with little or no accountability to third parties. Dr. Atty. Ramiscal submits that just because the human rights approach is centered on the "human", such does not countenance the abuse of the use of these rights by individuals. The ICESCR firmly declares "that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" [182].

The human rights documents delved on the interrelationships between the good of the individual or group of creators and the good of the public. Intellectual property rights must not be seen merely and solely for their economic value to the individual, but should be linked with the preservation of the cultural freedom of the community and the public's participation in the benefits of science and technology that an individual contributes. Both the individual and the community must be made partners as stakeholders to these rights. The challenge therefore is to strike a balance where the public's interest and the rights of individuals' to their creations can both be accommodated without grave impairment to both sides.

36. Failure of the CESCR Comment to Address the Balance Between an Individual's Material Interest and the Community's Rights of Use and Access

The CESCR Comment has been criticized for directly borrowing concepts, particularly the "material interest" of creators from existing intellectual property rights models that reflect what Dr. Philippe Cullet stated as "a bias in favor of a conception of authors and inventors based on the monopoly right model…(which) restricts any broader interpretations that… would take into account the relevance and need for open access policies" [183] that benefit the public.

Dr. Atty. Ramiscal agrees that this criticism has some validity. Nowhere in the Comment can one find any discussion of the connection between the societal influences that are crucial in the creative process and the implications of these for the author and the public.

Creators do not create out of a vacuum. The creation of works is said to be a social process, wherein the work produced by the author was not conjured from 'thin air' but arose from the creator's own thoughts and relationships with other people, institutions, and entities that he or she has encountered and concepts, ideas and pre-existing knowledge that he or she has absorbed.

It is in this context that the creator is said to be an appropriator or borrower of ideas that are already in the public domain. What differentiates his/her activity from a common 'plagiarizer' or 'intellectual property thief" is that he or she acknowledges and invests what he or she borrowed with his or her own understanding, personal insights and expression that cannot be said to come from the public [184]. Since creation results from the "communal interchange" between the author and society [185], this connection fuels the debate between the right of the public to have reasonable access to the works and the right of the author to control certain aspects of the work including its dissemination and use.

37. The Alternative Movements

During recent years, the internet's capability to reproduce and disseminate creative works globally has increased exponentially. Several movements have sprouted which to some degree contribute as well to further lessen the actual and legal control of authors over their works. These movements have been characterized by one commentator as misguided "main source(s) of obstruction" to the adherence of all citizens of member States to the WIPO treaties [186]. One can choose to see these movements as bridging the gap between the author and the public.

38. The Copyleft Movement

The movement that started all these is the Free Software or Copyleft Movement founded by Richard Stallman. According to popular account, it came about due to a Xerox printer in the Massachusetts Institute of Technology that was jammed which Stallman wanted to fix but could not because he was not given the source code [187]. The incident led to Stallman's development of a free software called GNU [an acronym for GNU's Not Unix] and the GNU General Public License which aimed to make software, particularly their source code available to the public on a share and share alike basis. The license is not limited to sharing. It allowed the licensee the freedom to run the program, for any purpose; study how it works, and adapt it to one's needs; redistribute copies; and better the program, and release the improvements to the public. Improvement of the software therefore comes with its adoption, modification and further dissemination of the source code and the improvements to the public for free. It requires that the licensee does not derive any profit by turning essentially the free software he or she receives into a proprietary software. It also warns those who participate in the free software movement from distributing and redistributing patented software, the patents for which do not allow the freedoms stated under the General Public License terms. Although the movement led by Stallman was originally confined to computer programs, the concept of licensing works to the public for free soon expanded to other creative works.

39. Free Art License Movement

In France, the Free Art License sprang up among collectives of artists who are also well versed in computer technology. This license relies on the significant concept that the creation of art does not owe its existence to a single origin, and the created work is the "collective property of humanity". Thus, the license allows anyone "to copy, disseminate, interpret, and modify the original work [provided that] (t)he license must accompany each new copy of the work and indicate the name of the (original) author and the manner by which the subsequent user may have access to the original work…Consequently, it is forbidden to integrate the original work into a derivative work that is not subject to the Free Art License or to distribute the derivative work under more restrictive licensing conditions" [188].

40. Creative Commons

Another iteration of the copyleft phenomenon is the establishment of a "creative commons", the objective of which is to lessen or release the stranglehold of ownership rights that many copyright laws grant to creators. It seeks to establish in a digitized world, what Henry A. Smith termed as "semicommons" which described "real property in which there is not only a mix of private ownership rights and common property rights, but where both common and private rights are important and dynamically interact" [189]. It is revolutionary because it offers an alternative

view of what a copyright owner can impart to the public, *despite* the standard copyright system. It operates by way of legal notices, licenses and common deeds that authors and the licensees of their works must abide. The Creative Commons Organization which was set up to oversee the movement formulated the "Legal Code" [190] of the Creative Commons Licenses that contain several important stipulations relative to access to works by the general public.

The Legal Code allows Licensors to release to the public their individual works, collective works [191], and derivative works [192]. The Licenses are of several types depending on the permissiveness of usage that the author desires to allow to the public over his or her creation [193]. The most restrictive of these is the "Attribution-NonCommercial-NoDerivs" type which allows only the rights of reproduction, distribution of copies and public performance of the work (including webcast) by members of the public [194]. No modifications of the works are allowed except if such "are technically necessary to exercise the rights in other media and formats" [195] and the right to create derivative works is specifically prohibited. The most accommodating of the public's interest is the "Attribution" License which basically allows anyone to use the work in the manner they desire as long as they observe the author's right of attribution over the work.

The licensee of a work under the license must abide by certain rules which include the provision of a copy of the License or its Uniform Resource Identifier on every copy of the work that is distributed, publicly displayed, publicly performed, digitally or otherwise; non-restriction and

non-alteration of the license's terms; non-subleasing of the license; and non-usage of technological measures that control access to or use of the works that is inconsistent with the License. The realization of commercial gain or private monetary consideration by the licensee (including digital file-sharing) is prohibited in some licenses [196].

The extent by which these licenses accommodate the public's interest can be seen in their duration and termination. The license is perpetual, that is, it exists for the "duration of the applicable copyright" [197]. Its termination is predicated on the licensee's violation of the terms of the license [198]. The licensor can vary the terms of the license and can also stop distributing the work at any time. However, if the licensor decides to cease the distribution of the work, that will not terminate the existing licenses already issued. These licenses can only be terminated if it can be shown that the licensees violated the provisions of the License [199].

In Australia, versions of the Creative Commons Licenses were modified to suit Australian conditions under a project hosted at the Queensland University of Technology [200].

In the Philippines, the e-Law Center of the Arellano University Law School runs the Creative Commons License system that gives licensees the rights to reproduce the work, and incorporate it in one or more collections; create and reproduce adaptations; distribute and publicly perform work, including those in collections; and distribute and publicly perform adaptations. The right

of modification is only allowed in case where such is technically necessary to exercise these other rights in other media and formats [201].

41. Legal Recognition for these Movements

It is important to note that the legality of the licenses in some of these movements have been recognized in several jurisdictions. For example, the Copyleft Movement's cause was vindicated in a German court which held that a corporation, Sitecom Germany, infringed a copyleft software project that consisted of netfilter firewall and iptables in binary form which it acquired for free and incorporated in its proprietary wireless router that it sold to the public. The corporation did not provide the source code nor the General Public License to its buyers. The court held that such acts were in violation of the terms of the license which it viewed were valid and cannot be construed as waivers of the copyright and related rights to the software project [202].

As for the Creative Commons License, its validity was upheld by a Netherlands court which enjoined the use of photographs under the License by a licensee who failed to comply with the terms of the license [203]. In Spain, a court ruled that a collecting society cannot charge royalties against a bar that played songs that are under the Creative Commons License [204].

42. Recasting "Material Interest"

It is quite unfortunate that the ICESCR Committee never considered these movements in discussing what it termed as the "material interests" of creators. As mentioned before, the ICESCR Committee's General Comment considered "the right to property" as a human right and restricted its interpretation of the "material interests" of authors to the economic concept of property. It is also interesting to note that the traditional dichotomy that is usually maintained between the moral rights and economic rights of creators over their copyright, which the ICESCR Committee appeared to have adopted, had been questioned. Some critics have maintained that the moral rights of attribution, integrity and *droite de suite* have economic implications and can properly be viewed or analyzed as economic rights [205].

Dr. Atty. Ramiscal desires to point out that the success of software programs like the Linux kernel, and other creative works based on these "free" movements, entail the reasonable conclusion that these movements thrive with the support of creators because they are not focused entirely on the remuneratory aspects of copyright or patents, as the incentive to create. Rather, these movements' success lays in their incorporation of human values like sharing and giving and access to works to perpetuate the creation of further works, which serve the personal interests of the creators and accommodate the interests of the public.

In view of this, Dr. Atty. Ramiscal submits that the term "material interest" in the CESCR Comment formulation should be reformulated if one is to take into account the contribution made by these movements in understanding what drives many educators, artists and authors to create and share their creations to the public and what they consider to be "material".

"Material interest" in the context of these movements must be construed on two levels.

First, authors have a material interest in the preservation and access to the tangible form of their original creation. This interest is reflected in varying levels in these licenses.

In the Copyleft Movement, the original authors of source codes and the subsequent modifiers of these codes are all obligated to post their source codes to the public. The importance of this can be appreciated on two grounds. One, the posting of source codes provides an educational purpose. They show the evolution or metamorphosis of a particular software product and contain valuable information as to how such product can be further improved. Second, and as important, the preservation, posting of, and access to the source codes can provide important evidence of prior art that can be presented against a later proprietary claim on the same software. The repository of source codes can therefore potentially prevent the illegal appropriation of knowledge by unscrupulous, misguided or ignorant entities.

In the Free Art License, while an original artist's work can be modified or placed in a derivative work, it is a condition of the license that the modifier or deriver must provide the artist's name and access information to the original work, that is actualized on a canvas, installation, sculpture, digital medium, and other media which constitute the derivative work.

In the Creative Commons License of the Creative Commons Organization, the original author largely maintains the right over the possession of the original work. The license to the public can extend to the rights of reproduction, modification, distribution and performance of the work. The original content as transcribed or realized in its original physical or digital form is safeguarded to favor the author.

As can be seen in these instances, the original author's "material interest" over his or her work can be taken to pertain to the original work itself, as an *object*, a thing that is embodied in a tangible form or contained in a physical or virtual vessel or channel. Such "material interest" will include the preservation of the work itself through the preservation of the medium in which it is contained, and the perpetuation of knowledge about the work through its physical or digital publication, reproduction, distribution and performance (if applicable) to the interested public.

On the second level, what is "material" to an author in his or her creation can be interpreted to lie in the palpable development of the work itself when it is shared to the public, or the tangible contribution of the work to some public purpose that also benefits the author.

This is the case with free software source codes which are released to the public for the purposes of having them tested and improved to answer certain needs the original author may or may not have envisioned. This is also the case with the free art license, where an original work can be developed, modified and even incorporated in another work to say something about a significant human condition, which the original author may not have thought of addressing, since his or her concerns and the choices he or she made in projecting the purpose of the original artwork were different.

Works disseminated under the Creative Commons or its "cousin" the Science Commons License system, can contribute to the theoretical and practical applications of knowledge across disciplines. An educator, say a mathematician, publishes a paper under this License on the Langland Program of the unity of all mathematical disciplines and sets to prove the connections between differential geometry and game theory. A physicist who accessed a free copy of the paper, under the license was able to extrapolate a principle from the connections made by the mathematician, which provided the missing link in the physicist's theory about differential geometry and cryptography. This principle leads to the further understanding of encryption

techniques, an area that the mathematician is also working on. The practical application of the physicist's theory on encryption has crucial significance in safeguarding the security of Internet transactions and those conducted with automated teller machines (ATMs). These consequences of the mathematician sharing the original work are indeed beneficial not only to him, but to the relevant public that use ATMs and the internet for their commercial transactions.

In all these cases, the original works as distributed by licensees and accessed by the public may have undergone crucial transformations, radical interpretations and curious connections between different areas of human knowledge caused by the activities of their users, adopters, modifiers and derivers. Nonetheless, these activities contribute to the greater appreciation by the public of the original works, and can point to the discovery of their new applications to fields of human endeavors that materially benefit, directly or indirectly, everyone, including the original authors.

Lest it be misconstrued, the authors who license their original works are not prohibited from earning from their creations. In the Copyleft Movement's General Public License, licensors who physically distribute copies of source codes are given the option to charge a minimal fee for the distribution. This is a one time fee. They can also charge for service fees, warranties and indemnification for the software. However, these cannot be properly considered akin to copyright and patent royalties [206]. Whatever the original licensors or authors earn by way of these charges are incidental, or even almost accidental to their primary motivations for creating their works.

43. Consequences of the Alternative Movements to the Human Intellectual Property Right of Educators over their Digital Creations

Dr. Atty. Ramiscal is of the view that the human intellectual property right delineated above would not prevent creators like educators from adopting any of the licenses that these alternative movements endorse or stand for, in the propagation of their works. These movements' principles are in accord with the obligation of the creator to the community in which he or she belongs, and do not violate the human rights and economic rights of the educators over their creations.

These movements rely in the identification or recognition of the author. While the licenses generated in these movements may entitle the licensees to modify the original work (as chosen by the creator), to better it or produce a better derivative work, the licensees are not entitled to profit or stamp any restrictions on the original work that the original creator did not impose.

The alternative legal movements rely on the creators to have at least the very first copyright over the work they created in order to grant licenses over these works to others, so they can legally distribute, alter, or modify the works for the benefit of the community.

Educators being the first copyright owners of their creations would entitle them to have the right to choose from three valid options:

First, educators can opt to avail of their right to commercialize their works on their own initiative. In doing this, they can apply and enforce all the economic and moral rights they are granted under the intellectual property laws in their own countries.

Second, they can intentionally give up their claims to their works in favor of the university. The transfer of rights must be accompanied by a written instrument that reflects the true, voluntary nature of the transaction or agreement between the educators and their universities.

Third, educators can choose to release their works to the public under either a General Public License, a Free Art License, or a Creative Commons License, depending on the type of work they created. In doing so, educators acknowledge the importance of the creative community in supporting, fostering and developing creations that benefit not only the public, but also serve to develop, enrich and perpetuate knowledge over the original work, and mirror the state of knowledge over the subject that the original work contains.

 Dr. Atty. Ramiscal acknowledges the University of the Philippines Institute of Government and Law Reform (UP IGLR) for the research grant it awarded that allowed him to complete part of this research project. The UP IGLR has waived any claims over this research, except the right to be acknowledged as research funder.

All these options may not be equally possible or feasible, particularly the third one, if a strict interpretation of "material interest" is relegated to the economic standard of "adequacy of living" that the ICESCR Committee made in the General Comment which is scrutinized subsequently in this author.

The general public, including online learning communities, are benefited from the first copyright ownership of educators over their works. Since educators possess the academic freedom to publish their works, they can choose to disseminate them in online journals or in other digital formats under a Creative Commons License, Free Art License or GNU General Public License that make them accessible to the interested public. Moreover, the participation of these educators in online public forums, e-lectures, e-groups and e-conferences, and in extension or outreach programs, where they disseminate and contribute their knowledge and works, is made possible because of their copyright ownership and their academic freedom to disseminate the results of their research.

Depriving educators of their human intellectual property right ownership, specifically their first copyright ownership, over their teaching materials and scholarly works, in favor of universities may prejudice the development and public dissemination of knowledge, particularly in disciplines which are crucial to human development.

The ICESCR, for instance, requires States which are parties to it to take measures to "improve methods of production, conservation and distribution of food by making full use of technical and

scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources" in order to realize the fundamental right of everyone "to be free from hunger" [207].

Universities that own the intellectual property of its faculty can impede or prohibit the online publication and dissemination of important research done by academic staff in these areas, while they explore the commercial value and application of such work.

Instead of risking their livelihoods, educators as creators of these materials should be given the first copyright over their works and the concomitant opportunity to decide what they want to do with the materials, including for example, releasing them under a Creative Commons or Scientific Commons License. They should not be automatically bound to any decision made by the university just because it is their employer who claims the intellectual property.

44. Term of Protection for Material Interests Under the CESCR Comment

Another important issue that distinguishes the human intellectual property right from the purely economic intellectual property right is the term of protection for the creator with respect to the material interests over the work. Economic intellectual property rights have specific terms. Under the Berne Convention for example, copyright protection for works other than photograph,

cinematographic works, applied art and anonymous or pseudonymous works, exists generally for the lifetime of the author plus fifty years [208]. This term has been extended in a number of countries, including the United States and Australia, to 70 years after the lifetime of the author [209].

The CESCR Comment expressly advocated that intellectual property rights "need not extend over the entire lifespan of an author" if the author's right to an adequate standard of living can be realized through other means. It gave as an example "one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production" [210].

45. Evaluation of the CESCR Term of Protection for Material Interests

Dr. Atty. Ramiscal differs with the CESCR Comment. Since the CESCR Comment did not qualify the application of this term, it is assumed that it applies to all intellectual property. With the realization of "adequate standard of living" as the rationale for the term [211], it is clear that the CESCR Comment is animated purely with economic concerns that may not be the sole or main concerns of creators.

Dr. Atty. Ramiscal maintains that this term may not be suitable for all types of intellectual property. Indigenous educators and community holders of indigenous ecological knowledge claim perpetual protection due to the evolving state of this knowledge that has been with them since time immemorial. The protection of their knowledge is linked with their cultural and spiritual identity and self-determination, which are not economic in nature [212]. Thus, intellectual property rights in indigenous ecological knowledge will not be properly protected under the CESCR's limited terms of protection.

Even from a purely economic standpoint, one time payments may not be able to shield creators for future contingencies that affect their well being. Limited exploitation times (akin to patents) may not work for copyright holders. For instance, royalties for books accumulate over time and their amount depends on many factors over which the author may have no control. Fixing a limited term to collect royalties may not yield an amount that is enough to sustain the material needs of the author or recover the author's investments on the work. In advocating time limitations on the exploitation of economic interests over the work by the author, the CESCR Comment missed an important point in the creative process.

Creation is a confluence of the existential, experiential, environmental, educational and economic factors that comprise the creator's life. The created work embodies the creator's thoughts, aspirations, dreams, sorrows, triumphs, being. In this sense, creators create because

their lives depend on it. The primary motivation may not be economic, but economic considerations may become important, especially when the creator is forced to subsist on the earnings from his or her creation. The personal integrity of creators and the authenticity of their vision may be compromised by a system of one-off payments and limited terms that do not appreciate the talent, resources and commitment that creators pour into their creations. This may lead to a diminution in the quality and quantity of copyrightable works produced. Moreover, the right to an adequate standard of living that the ICESCR provides is a right that resists meaningful definition and standardization.

In the case of educators, the CESCR Comment's term is inapplicable and unacceptable. Educators create works which they use for their teaching. These works are the tools of their profession. Giving them limited exploitation times to use their works will, in effect, curtail their professional lives and limit their personal quest for knowledge in the specific areas they have chosen to specialize.

If the right to earn a living is indeed a human right, then no law or international document should be given effect which imposes conditions that work to limit this right unnecessarily. Thus, for educators, at the very least, they should be allowed to use and exploit their works, in the manner they choose, for the whole length of their professional lives, or at the most, for the duration of their lifetime. This should not and will not stop them from permitting others to use their works

during their lifetime, if they so desire. What must be underscored is the fact that educators should not be prevented from using their own teaching materials and other intellectual works because of some university policy that vests the copyright on the university automatically by virtue of employment.

In the context of the alternative movements that were examined earlier, the CESCR Comment can be seen as inadequate and ineffective. These movements make it a valid legal option via licenses, not to commercially exploit one's works and prevent others from exploiting commercially the same works. This arose from the share and share alike consciousness of the members of these movements which the CESCR Comment never considered.

Seen in this way, Dr. Atty. Ramiscal submits that the moral and economic interests of creators in their copyrightable works are ultimately grounded on the right to life and liberty enshrined in the UDHR [213], and these interests proceed from the same source, that is, the creator.

The CESCR Comment's advocacy for one off payments and fixed term exploitations are thus incomplete and do not adequately address the plethora of ways by which the interests of the community and the protection of the rights of authors in this digital age can be met and balanced. Licenses, assignments and contractual arrangements that shorten the term of protection are all valid legal options as long as the creator's consent, free will and judgment are not impaired and

the terms of these arrangements can be the subject of negotiation. Dr. Atty. Ramiscal must emphasize that these arrangements should not be made the *de facto* automatic standards that educators are forced to accept because they desire employment in a university.

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