Economic, social and cultural rights in India: Opportunities for advocacy in intellectual property rights

Synthesis overview

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This synthesis provides an overview of a three-part case study that considers the International Covenant on Economic, Social and Cultural Rights (ICESCR) through aspects of intellectual property in India, namely, mobile patents, free and open source software, and India's Traditional Knowledge Digital Library. The case studies demonstrate the potential of these technologies in realising ESCRs. The synthesis below should be read in conjunction with the case studies. These case studies have been produced as part of the Association for Progressive Communications (APC) research project Connecting your rights: Economic, social and cultural rights (ESCRs) and the internet.[1] This is a three-year project funded by the International Development Research Centre (IDRC).

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[1]For more information, see: https://www.apc.org/en/projects/connecting-your-rights-economic-cultural-and-socia

Synthesis of findings of case studies

The rights established in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are socioeconomic rights and are easily mapped onto rights to education, work, science and culture. These rights, however, are not as easily mapped onto intellectual property rights. This three-part case study contemplates the ICESCR through aspects of intellectual property in India, namely, mobile patents, free and open source software (FOSS), and India's Traditional Knowledge Digital Library. Through these, it demonstrates the potential of these technologies in realising ESCRs.

A distinguishing factor of the ICESCR is the emphasis on the progressive realisation of rights within the Covenant, which indicates the necessity of parties to take steps for the realisation of ESCRs to the best of their ability given the resources available, with a view to fully realising these rights in the long term. This is particularly relevant in India, where the large population and scarcity of resources require gradual realisation and sustained planning. This case study advocates for the progressive realisation of the rights outlined below, and sheds light on the current state of progress in India, as well as providing an overview of the framework within which these rights will be realised.

Although these three case studies focus on distinct areas – mobile patents, FOSS and open standards, and traditional knowledge – they can also be understood as tied together through the central theme of a mobile phone. The first case study on mobile patents deals with the hardware of the phone, the second deals with the software in discussing open software and standards, and the third case study on traditional knowledge focuses on the person holding the phone who consumes information-embedded products such as traditional foods and medicines.

In each of these case studies, we have tried to understand the most critical Articles from the ICESCR, and have mapped these rights onto each of the case studies, as illustrated by Table 1.

Table 1: Mapping of the rights enshrined in ICESCR articles and case studies

ICESCR article	Access to mobile technologies	FOSS and open standards	Traditional knowledge
Article 1 – Right to self-determination	As a means to pursue economic, social, financial, and cultural goals.		
Article 6 – Right to work	As a means to be more visible to prospective employers, and to grow enterprises.		
Article 11 – Right to adequate standard of living			Plant species developed over centuries are traditional knowledge; bio-pirates can privatise some species, undermining food security.

Article 13 – Right to education	Through informal means like digital platforms screening educational material, as well as introducing technology into formal education, keeping in mind that laptops and mobiles require the same patents. Sometimes formal education is available informally through mobile and digital education.	By mandating the use of FOSS and open standards, the students become computer scientists rather than computer operators, because they are able to access and read the source code.	
Article 15(1)(a) – Right of everyone to take part in cultural life		FOSS can help communities build software that is free from proprietary control and licences, and can instead focus on building software whose source code is freely available, and can be changed according to the needs, culture and language of particular societies. This also offers flexibility in societies that have more than one language.	
Article 15(1)(b) – Right to enjoy the benefits of scientific progress	By enabling access to education, these technologies help realise this right.	Making software and source code of publicly funded projects publicly available encourages widespread adoption and usage and consequently fosters progress and inclusion.	Community engagement is at the heart of traditional knowledge, and the general public must be allowed to benefit from traditional knowledge.
Article 15(1)(c) – Protection of moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author	The tension between this and Article 15(1)(b) implies that solutions have to be explored that simultaneously protect the interests of the patent holder, the manufacturer and the end-consumer.	FOSS licences are made possible thanks to the copyright regimes as software is granted automatic protection. The moral interests of free software developers are protected thanks to the attribution requirement in all FOSS licences. Their material interests, however, may or may not be protected based on the specific business model adopted.	Traditional communities are considered the "authors" of traditional knowledge. Should traditional knowledge be part of the global commons or should these communities earn royalty income from usage of traditional knowledge?.
Article 15(2) – States to take necessary steps for the conservation, development and diffusion of science and culture.			Traditional knowledge is "science".

There is an overlap between policy targets and policy actors in all three case studies, with mobile technology having significant overlaps with both the other case studies. While a link is not drawn with such ease between traditional knowledge and FOSS, a link is easily traceable between the case studies dealing directly with intellectual property: mobile technology and traditional knowledge. There are three common policy actors – the Controller General of Patents, Designs and Trademarks (CGPDT), the Intellectual Property Appellate Board (IPAB) and the Department of Indian Policy and Promotion (DIPP) – with a direct nexus with these two case studies, and which bear only an indirect nexus with the FOSS and open standards movement and government bodies capable of promoting and procuring open source software. A link is also easily distinguishable between mobile technologies and FOSS and open standards, as the Ministry of Electronics and Information Technology (MeitY) has a direct impact on both, but no significant impact on traditional knowledge.

The policy targets for access to mobile technologies are almost identical to the targets for FOSS and open standards: students, the population using mobile phones and computers both at work and personally, and industries that have the potential to leverage technology. In this sense, traditional knowledge is a very different policy battle, as it has an additional layer of complication involving the rights holder being the community and not the individual. This distinction makes it an issue that must be approached differently but which speaks to the same rights framework as the first two.