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# Reconceptualizing Intellectual Property Interests in a Human Rights Framework

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## INTRODUCTION

*Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.*<sup>1</sup>

Since the establishment of the World Trade Organization (“WTO”) and the entering into effect of the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>2</sup> (“TRIPS”), government officials, international bureaucrats, intergovernmental and nongovernmental organizations, courts, and scholars have focused more attention on the interplay of human rights and intellectual property rights. For example, the U.N. Sub-Commission on the Promotion and Protection of Human Rights recently noted the considerable tension and conflict between these two sets of rights. To avoid these conflicts, the Sub-Commission recommended “the primacy of human rights obligations over economic policies and agreements.”<sup>3</sup> In her report assessing the impact of TRIPS on human rights, the High Commissioner of Human Rights also reminded governments that “human rights are the first responsibility of Governments,” citing the Vienna Declaration and Programme of

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<sup>1</sup> Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 47 (2003); see also AUDREY CHAPMAN, A HUMAN RIGHTS PERSPECTIVE ON INTELLECTUAL PROPERTY, SCIENTIFIC PROGRESS, AND ACCESS TO THE BENEFITS OF SCIENCE 3 (1998) (“Intellectual property lawyers tend to have little involvement with human rights law, and few human rights specialists deal with science and technology or intellectual property issues.”), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/chapman.pdf>.

<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

<sup>3</sup> Intellectual Property Rights and Human Rights, Sub-Comm’n on Human Rights Res. 2000/7, ¶ 3, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) [hereinafter Resolution 2000/7], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>. For a detailed discussion of the origin of Resolution 2000/7, see David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (2003).

Action adopted by representatives of 171 states at the 1993 World Conference on Human Rights.<sup>4</sup>

While this hierarchy of rights appears straightforward, the situation is actually more complicated because some attributes of intellectual property rights are protected in international or regional human rights instruments. For example, article 27(2) of the Universal Declaration of Human Rights (“UDHR” or “Declaration”) states explicitly that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>5</sup> Closely tracking the Declaration’s language, article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR” or “Covenant”) requires each state party to the Covenant to “recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>6</sup> In light of these human rights instruments, it is difficult to argue that intellectual property laws and policies should always be subordinated to human rights obligations in the event of a conflict between the two. Instead, a careful and nuanced analysis of the various attributes of intellectual property rights is in order.

In his article in this Symposium,<sup>7</sup> Professor Laurence Helfer adopted this type of careful and nuanced approach by explaining in detail how the Committee on Economic, Social and Cultural Rights (“CESCR” or “Committee”) interpreted article 15(1)(c) of the ICESCR in its recently-adopted General Comment No. 17. He also explored the important institutional developments that have taken place or are

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<sup>4</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, ¶ 60, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter *High Commissioner’s Report*] (“Members should therefore implement the minimum standards of the TRIPS Agreement bearing in mind both their human rights obligations as well as the flexibility inherent in the TRIPS Agreement, and recognizing that ‘human rights are the first responsibility of Governments.’”) (citing World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*]), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca/590516104e92e87bc1256aa8004a8191/\\$FILE/G0114345.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.pdf).

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR].

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights art. 15(c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>7</sup> Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971 (2007).

currently evolving at the intersection of human rights and intellectual property rights. As he aptly noted, there is a strong need for the development of “a comprehensive and coherent ‘human rights framework’ for intellectual property law and policy.”<sup>8</sup> If we are to set up this framework, Helfer pointed out, we need to acquire a better understanding of the different attributes of the rights protected in the human rights and intellectual property regimes, the nature of the relevant standards of conduct, the application of those standards to governments and private actors, and the rules that can be used to resolve inconsistencies among overlapping international and national laws and policies.<sup>9</sup>

This Article picks up from where Helfer left us. It discusses the various attributes of intellectual property rights that are protected by international human rights instruments and distinguishes these human rights attributes from others that have no human rights basis at all. It also explores approaches that have been used to resolve the conflicts between human rights and the non-human rights aspects of intellectual property protection and highlights the challenges confronting the development of a human rights framework for intellectual property. By putting front and center the human rights attributes of intellectual property, this Article explores the scope and complexities of protection afforded to authors and inventors in the human rights regime.

To avoid confusion with the terms “intellectual property rights” and “*droit d’auteur*” (which some find confusingly similar to the term “authors’ rights”), the term “the right to the protection of moral and material interests in intellectual creations” — or its shorter form “the right to the protection of interests in intellectual creations” — is used throughout the Article.<sup>10</sup> Even though some may find these two terms

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<sup>8</sup> *Id.* at 977.

<sup>9</sup> *See id.*

<sup>10</sup> In his article, Helfer used the term “authors’ rights.” Nevertheless, he noted the distinction between “authors’ rights” and “*droit d’auteur*”:

The Anglophone phrases “the rights of authors” and “authors’ rights” are confusing similar to, but legally distinct from, the Francophone *droit d’auteur*, which refers to legal rights granted to authors and creators in countries that follow the civil law tradition of protection for literary and artistic works. . . . By contrast, the references to “authors’ rights” and similar phrases in this Article describe the legal entitlements for creators and inventors that are recognized in international human rights law. These legal protections are not coterminous with those of *droit d’auteur*.

*Id.* at 989 n.62.

long and clumsy, I refrain from using shorthand titles because they tend to “obscure the real meaning of the obligations that these rights impose.”<sup>11</sup>

This Article proceeds in three parts. Part I provides a brief history of the drafting of article 27(2) of the UDHR and article 15(1)(c) of the ICESCR, the two provisions that are commonly identified as the internationally recognized basis of the right to the protection of interests in intellectual creations. By recapturing the politically charged environment under which the two instruments were created and the controversy surrounding the protection of moral and material interests in intellectual creations, this Part provides insight into the intentions of and challenges confronting the framers of the UDHR and the ICESCR. It also demonstrates that the existence of the right to the protection of interests in intellectual creations is far from self-evident and reminds readers that the United States consistently opposed the recognition of this right during the instruments’ formative periods. This Part offers important lessons that will be useful today as we develop a human rights framework for intellectual property.

Part II focuses on the tension and conflict between the two different sets of rights protected under intellectual property and human rights treaties. Taking the view that some attributes of intellectual property rights are, indeed, protected in international or regional human rights instruments, this Part underscores the importance of using different approaches to resolve two different sets of conflicts: external conflicts (conflicts at the intersection of the human rights and intellectual property regimes) and internal conflicts (conflicts between rights within the human rights regime).<sup>12</sup>

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<sup>11</sup> MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 8 (2003).

<sup>12</sup> The use of the internal conflict/external conflict dichotomy in this Article may remind one of Professor Michael Birnhack’s interesting discussion of the “distinction between two kinds of copyright-free speech conflicts. One is *internal* to copyright law, and the other is *external* to it.” Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View* [hereinafter Birnhack, *Copyrighting Speech*], in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION — INTELLECTUAL PROPERTY — PRIVACY* 37, 38 (Paul L.C. Torremans ed., 2004) [hereinafter *COPYRIGHT AND HUMAN RIGHTS*]. See generally Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003) (using *Eldred v. Ashcroft*, 537 U.S. 186 (2003), to illustrate these two sets of conflicts). As he explained, “[T]he American view of the conflict is internal, and the emerging European approach is external. The reason for the different approaches is rooted in the underlying rationale of copyright law on each continent.” Birnhack, *Copyrighting Speech*, *supra*, at 38. While Birnhack looks at the copyright-free speech conflicts from the vantage point of the copyright system, this Article looks at the conflicts between human rights and intellectual property rights

With respect to external conflicts, Part II.A argues that it is important to distinguish between the human rights and non-human rights aspects of intellectual property protection. Focusing on article 27(2) of the UDHR and article 15(1)(c) of the ICESCR, this Part explores the nature and scope of the right to the protection of interests in intellectual creations. This Part states that, under the principle of human rights primacy, the protection of the non-human rights aspects of intellectual property protection should be subordinated to human rights obligations in the event of a conflict between the two.

With respect to internal conflicts, however, Part II.B takes a different approach. Because all of the conflicting rights have human rights bases, the principle of human rights primacy does not apply. To help resolve the conflict, this Part identifies three complementary approaches that have been advanced by policymakers, judges, and scholars: (1) the just remuneration approach, (2) the core minimum approach, and (3) the progressive realization approach. As this Part points out, understanding these approaches is particularly important because, although the right to the protection of interests in intellectual creations coexists with other human rights, it nevertheless poses conflict with those coexistent rights. Thus, if countries are to fulfill their human rights obligations, they need to understand better how they can alleviate these conflicts.

In reading these two parts, it is important to remember that both Parts I and II focus on the right to the protection of interests in intellectual creations *as recognized in international human rights instruments*, rather than a conceptual right that is derived from abstract moral considerations. This distinction is particularly important, because both the former and the latter are often used and at times confused in the policy debates. As Professor Richard Falk explained, there are two jurisprudential schools:

The positivists consider the content of human rights to be determined by the texts agreed upon by states and embodied in valid treaties, or determined by obligatory state practice attaining the status of binding international custom. The naturalists, on the other hand, regard the content of human rights as principally based upon immutable values that endow standards and norms with a universal validity.<sup>13</sup>

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from the vantage point of the human rights system.

<sup>13</sup> Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44, 44 (Abdullahi Ahmed An-Naim ed., 1992) [hereinafter HUMAN RIGHTS IN CROSS-

Although I find both schools attractive for different reasons, this Article focuses mainly on the positivist conception of the right to the protection of interests in intellectual creations. As Part I will show, it was already difficult for states to achieve a political consensus on the rights recognized in the UDHR and the ICESCR.<sup>14</sup> Given the divergent interests, backgrounds, beliefs, and philosophies, it is virtually impossible to achieve an international philosophical consensus on these rights.<sup>15</sup> Thus, because this Article seeks to find out the nature and scope of the right to the protection of interests in intellectual creations, it is more helpful to focus on a right that has attained at least international consensus, if not universal agreement. Indeed, if countries failed to agree on what the rights and obligations are, they are unlikely to be able to resolve the conflict between human rights and the non-human rights aspects of intellectual property protection.

Moreover, the UDHR and the ICESCR, the two instruments discussed in this Article, have received significant attention in the debate about the human rights implications for intellectual property rights. The language of these two instruments, therefore, is likely to have a significant impact on the future development of the international intellectual property regime. While some commentators may still question whether the UDHR has now achieved the status of customary international law,<sup>16</sup> this Article does not directly address this particular issue. Nor does it need to do so. Regardless of the

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CULTURAL PERSPECTIVES].

<sup>14</sup> See *discussion infra* Part I.

<sup>15</sup> The fact that humanity or human nature serves as the source of human rights has made it particularly difficult to achieve this consensus. As Professor Jack Donnelly reminded us, “[F]ew issues in moral or political philosophy are more contentious or intractable than theories of human nature.” JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 16 (2d ed. 2003).

<sup>16</sup> See JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 75-76 (1983) (providing evidence that UDHR “is now part of the customary law of nations”); Richard Pierre Claude, *Scientists’ Rights and the Human Right to the Benefits of Science*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 247, 252 (Audrey Chapman & Sage Russell eds., 2002) [hereinafter *CORE OBLIGATIONS*] (“[A]fter fifty years, the Universal Declaration . . . has begun to take on the qualities of ‘customary international law.’”); Paul Torremans, *Copyright as a Human Right*, in *COPYRIGHT AND HUMAN RIGHTS*, *supra* note 12, at 1, 6-7 (“[W]here initially Member States were not obliged to implement it on th[e] basis [that the Declaration is merely aspirational or advisory in nature], it has now gradually acquired the status of customary international law and of the single most authoritative source of human rights norms.”). See *generally* THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1991).



Declaration's legal status, it is undeniable that the document, along with other international or regional human rights, reflects an international normative consensus on the right to the protection of interests in intellectual creations.<sup>17</sup> This international normative consensus is the main focus of this Article.

Because Parts I and II take the position that a human rights framework for intellectual property is socially beneficial, a premise that some may challenge, Part III addresses the concerns and criticisms from those who are skeptical of this framework. This Part focuses, in particular, on (1) the "human rights" ratchet of intellectual property protection, (2) the undesirable capture of the human rights forum by intellectual property rights holders, and (3) the framework's potential bias against non-Western cultures and traditional communities.<sup>18</sup> By responding to each of these challenges, this Part explains why the challenges, if responded to appropriately, may not undermine the development of a human rights framework for intellectual property.

#### I. DRAFTING HISTORY

The protection of moral and material interests in intellectual creations is mentioned in a number of international and regional human rights instruments. In addition to article 27(2) of the UDHR and article 15(1)(c) of the ICESCR, such protection is available under article 13 of the American Declaration on the Rights and Duties of

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<sup>17</sup> See DONNELLY, *supra* note 15, at 17 ("[T]here is a remarkable international normative consensus on the list of rights contained in the Universal Declaration and the International Human Rights Covenants . . ."); *id.* at 40-41 (discussing concept of "overlapping consensus on international human rights").

<sup>18</sup> This Article uses the term "traditional communities," rather than "indigenous communities," because the former captures a larger group of people who benefit from the protection of folklore and traditional knowledge, innovations, and practices. As one commentator defined:

[T]raditional peoples [are] those who hold an unwritten corpus of long-standing customs, beliefs, rituals and practices that have been handed down from previous generations. They do not necessarily have claim of prior territorial occupancy to the current habitat; that is, they could be recent immigrants. Thus traditional peoples are not necessarily indigenous but indigenous peoples are traditional.

JOHN MUGABE, INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE: AN EXPLORATION IN INTERNATIONAL POLICY DISCOURSE 2 (1998), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf>.

Man (“American Declaration”),<sup>19</sup> which provides that “every person . . . 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 [or she] is the author.”<sup>20</sup> Similarly, article 14(1)(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 repeats the ICESCR’s language by requiring all states parties to “recognize the right of everyone . . . [t]o benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he [or she] is the author.”<sup>21</sup>

To help us understand the origin and meaning of these provisions, this Part provides a brief drafting history of article 27(2) of the UDHR and article 15(1)(c) of the ICESCR. Recounting this piece of important, yet under-explored history serves two primary purposes. First, it traces the long and difficult path through which the right to the protection of interests in intellectual creations found its way into human rights instruments. By clarifying the meaning of the ambiguous words used in the provisions, such as “moral interests” and “material interests,” the drafting history also helps us better understand the nature and scope of the right at issue in this Article.

Under the Vienna Convention on the Law of Treaties, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>22</sup> Parties should focus on not only the “ordinary meaning” of the treaty terms, but also the “object and purpose” of the treaty. In the context of human rights treaties — ICESCR in particular — states parties should interpret the Covenant in a manner favorable to the individual, narrowly construing the limitations and restrictions of the Covenant rights.<sup>23</sup>

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<sup>19</sup> Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration]. Done in Bogotá, Colombia, the American Declaration is sometimes referred to as the Bogotá Declaration.

<sup>20</sup> *Id.* art. 13.

<sup>21</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador,” art. 14(1)(c), *opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 161, 166 (1989).

<sup>22</sup> Vienna Convention on the Law of Treaties art. 31(1), 8 I.L.M. 679, 692 (1969) [hereinafter Vienna Convention] (entered into force Jan. 27, 1980).

<sup>23</sup> See MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 3 (1995) (“[T]he object and purpose of the Covenant, as a human rights treaty, is to be taken into account means that its terms are to be interpreted in a manner favourable to the

Unfortunately, the ordinary meaning and the object and purpose of the treaty often do not provide sufficient information about the rights. As Professor Matthew Craven pointed out, “Although a certain amount may be gained from a textual analysis of the [ICESCR], the obscure and imprecise nature of many of its terms frequently leaves important questions unanswered.”<sup>24</sup> Thus, a good grasp of the drafting history is key to our understanding of such vague, abstract, and imprecise terms. Indeed, such use of the drafting history is endorsed by the Vienna Convention, which stated that “the preparatory work of the treaty and the circumstances of its conclusion” may be used as a supplementary means of interpretation to confirm the meaning of the treaty or to determine its meaning when interpretation “[l]eaves the meaning ambiguous or obscure . . . or . . . [l]eads to a result which is manifestly absurd or unreasonable.”<sup>25</sup>

Nevertheless, one has to be mindful of the additional challenge posed by the evolution of international instruments — human rights treaties, in particular.<sup>26</sup> As Part III points out, human rights treaties have evolved considerably since the adoption of the UDHR in 1948.<sup>27</sup> Thus, some might find the international discussions during the UDHR and ICESCR drafting processes of very limited value to our current understanding of the right to the protection of interests in intellectual creations. As the International Court of Justice declared in the *Namibia Advisory Opinion*, “An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*.”<sup>28</sup> Likewise, the Vienna Convention requires subsequent agreement and practice to be taken into account in treaty interpretation.<sup>29</sup>

Although this Article takes the view that the drafting history remains important and relevant, because the meaning of article 27(2) of the UDHR and article 15(1)(c) of the ICESCR has not changed

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individual and that, in particular, limitations and restrictions on rights are to be construed narrowly.”); SEPÚLVEDA, *supra* note 11, at 74 (“The interpretation of human rights treaties requires that we take into account the specific characteristics of human rights treaties.”).

<sup>24</sup> CRAVEN, *supra* note 23, at 3.

<sup>25</sup> Vienna Convention, *supra* note 22, art. 32.

<sup>26</sup> See generally SEPÚLVEDA, *supra* note 11, at 81-84 (discussing evolutive interpretation of human rights treaties).

<sup>27</sup> See discussion *infra* Part III.C.

<sup>28</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. 31, ¶ 53 (June 21) (emphasis added).

<sup>29</sup> Vienna Convention, *supra* note 22, art. 31(3).

significantly since the adoption of the instruments, it anticipates potential objections from those who question the helpfulness of the drafting history, as well as future developments that might change the provisions' meaning and, therefore, make the drafting history less relevant. Thus, this Part serves another — and for many, an additional — purpose.

By revisiting the closed-door negotiations in the drafting processes and highlighting the delegates' interests and concerns as well as the trade-offs they made, this Part provides important lessons about the ongoing development of international law at the intersection of human rights and intellectual property rights. On the one hand, the drafting history reveals that the right to the protection of interests in intellectual creations is far from self-evident. It also reminds readers of the controversy over the inclusion of that particular right in human rights instruments, not to mention the United States's strong opposition to recognizing such a right in the first place. On the other hand, the drafting history provides insight into the potential tension and conflict between human rights and intellectual property rights. It also foreshadows the challenges confronting the development of a human rights framework for intellectual property. These challenges will be discussed at greater length in Part III.<sup>30</sup>

#### A. *Universal Declaration of Human Rights*

Adopted in 1948, the UDHR was created against a backdrop of aggression and atrocities committed during World War II.<sup>31</sup> Although the war and the Holocaust were not mentioned explicitly in the document, they were often discussed during the drafting process, and they clearly motivated the framers of the Declaration.<sup>32</sup> As declared in the opening recital of the preamble, the “recognition of the inherent

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<sup>30</sup> See discussion *infra* Part III.

<sup>31</sup> See CRAVEN, *supra* note 23, at 6 (“As a reaction to events prior to and during the Second World War, the allies, and later the international community as a whole, came to the belief that the establishment of the new world order should be based upon a commitment to the protection of human rights and fundamental freedoms.”); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT*, at xiv (1999) (“[W]ithout the delegates' shared moral revulsion against [the Holocaust] the Declaration would never have been written.”).

<sup>32</sup> For detailed histories of the drafting of the UDHR, see generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); HUMPHREY, *supra* note 16; M. GLEN JOHNSON & JANUSZ SYMONIDES, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION, 1948-1998* (1998); MORSINK, *supra* note 31.

dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>33</sup> This recital is immediately followed by a reminder that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind” and a proclamation of “freedom of speech and belief and freedom from fear and want . . . as the highest aspiration of the common people.”<sup>34</sup>

The UDHR was drafted in a careful and lengthy process that included “seven formative drafting stages”: “(1) the First Session of the [Human Rights] Commission [“Commission”], (2) the First Session of the Drafting Committee that it created, (3) the Second Session of the Commission, (4) the Second Session of the Drafting Committee, (5) the Third Session of the Commission, (6) the Third Committee of the General Assembly, and (7) the Plenary Session of the same 1948 Assembly.”<sup>35</sup> Except for the Second Session, which focused primarily on the draft and later abandoned the Covenant on Human Rights, and the final Plenary Session, the right to the protection of interests in intellectual creations was discussed in all of the other sessions — the First Session, the Third Session, and the Third Committee. This section focuses only on these relevant sessions.

During its First Session, the Commission established the Drafting Committee and asked it to compile a list of draft provisions for discussion purposes. Based on constitutions, legal codes, rights instruments, and draft submissions from international, regional and private organizations and from individuals, John Humphrey, the newly appointed director of the Division on Human Rights at the United Nations and a former professor at McGill University, put together a

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<sup>33</sup> UDHR, *supra* note 5, pmb., recital 1; *see also* Eleanor Roosevelt, *The Promise of Human Rights*, FOREIGN AFF., Apr. 1948, at 470, 473 (“Many of us thought that lack of standards for human rights the world over was one of the greatest causes of friction among the nations, and that recognition of human rights might become one of the cornerstones on which peace could eventually be based”).

<sup>34</sup> UDHR, *supra* note 5, pmb., recital 2. This proclamation refers to the four essential freedoms for the protection for which the late President Franklin D. Roosevelt called for in his 1941 State of the Union Address. MORSINK, *supra* note 31, at 1. The original wording of the first half of this second recital was even longer and more specifically addressed the war: “[I]gnorance and contempt of human rights have been among the principle [sic] causes of the suffering of humanity and of the massacres and barbarities which outraged the conscience of mankind before and especially during the last world war.” *Id.* at 299-300.

<sup>35</sup> MORSINK, *supra* note 31, at 4.

draft outline of provisions.<sup>36</sup> This draft, however, did not include the right to the protection of interests in intellectual creations. Instead, it only mentioned “the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science,” which eventually was modified as article 27(1) of the UDHR.<sup>37</sup>

The protection of the authors’ moral interests was added, however, when French delegate René Cassin, at the request of other delegates, reorganized the provisions into a more orderly document and redrafted some of the articles based on discussions in the Drafting Committee.<sup>38</sup> In Cassin’s new draft, he included a new provision that stated that “[t]he authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration for their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind.”<sup>39</sup> Although this added provision seemed to focus solely on moral rights, the phrase “in addition to” suggested that Cassin might not have intended such a limitation. Rather, he might have believed that economic rights were already covered by other provisions — presumably those protecting the right to own personal property, the right to just remuneration for work, or even both. The same could also be said of Humphrey’s draft, which did not include a separate provision for the right to the protection of interests in intellectual creations.

During the UDHR drafting process, there was little disagreement over the adoption of article 27(1), which protects the right to cultural participation and development and the right to the benefits of scientific progress.<sup>40</sup> In its current form, article 27(1) provides: “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.”<sup>41</sup> Although some may question the relationship

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<sup>36</sup> See *id.* at 5-6 (discussing first stage of UDHR drafting process). For John Humphrey’s memoirs, see HUMPHREY, *supra* note 16.

<sup>37</sup> The “Humphrey Draft” art. 44, reprinted in GLENDON, *supra* note 32, at 274.

<sup>38</sup> See MORSINK, *supra* note 31, at 8.

<sup>39</sup> The “Cassin Draft” art. 43, reprinted in GLENDON, *supra* note 32, at 275-80.

<sup>40</sup> Although scientific progress seems to refer to progress from natural and biological sciences, Asbjørn Eide suggested that the definition is much broader: “‘Scientific progress’ includes not only natural and biological sciences, but also progress in the social sciences and the humanities.” Asbjørn Eide, *Cultural Rights as Individual Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 229, 235 (Asbjørn Eide et al. eds., 1995) [hereinafter ECONOMIC, SOCIAL AND CULTURAL RIGHTS].

<sup>41</sup> UDHR, *supra* note 5, art. 27(1).

between this provision and intellectual property protection, this Article defines the intellectual property area broadly, taking into account the considerable impact of such protection on culture and science. This section also discusses articles 27(1) and 27(2) together because of their inextricable linkage and interdependent relationship as well as for comparison purposes.

From the beginning, the indisputable nature of rights recognized in article 27(1) was apparent. As Cassin declared, “[E]ven if all persons could not play an equal part in scientific progress, they should indisputably be able to participate in the benefits derived from it.”<sup>42</sup> The only major discussions surrounding the adoption of this article concerned the stipulation that “the development of science must serve the interests of progress and democracy and the cause of international peace and cooperation” and the omission of the words “freely” and “benefits.”<sup>43</sup> As Johannes Morsink noted, the addition of the first phrase was sparked, in part, by the Soviet Union’s concern about how the United States would share its secrets about the atomic bomb, which was used against Japan at the end of World War II.<sup>44</sup> The phrase was, nevertheless, rejected, partly due to the members’ failure to agree on the meaning of the word “democracy” and their general reluctance to tie science to external standards.<sup>45</sup>

By contrast, the words “freely” and “benefits” were quickly added to the final document. The word “freely” was particularly important to Latin American countries. As Peruvian delegate José Encinas contended, it was not sufficient to state that everyone has the right to cultural participation and development; the document should emphasize complete freedom of creative thought “to protect it from harmful pressures which were only too frequent in recent history.”<sup>46</sup> Encinas’s proposal to add the word “freely” was adopted by thirty-eight votes to none, with two abstentions.<sup>47</sup>

The word “benefits” found its way into the document by a different route. The word was originally included in Humphrey’s draft, but was omitted later.<sup>48</sup> Claiming that “not everyone was sufficiently gifted to play a part in scientific advancement,” as compared to the mere enjoyment of the benefits of scientific advancement, Cuban delegate

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<sup>42</sup> MORSINK, *supra* note 31, at 219.

<sup>43</sup> *Id.* at 61-62.

<sup>44</sup> *See id.* at 61.

<sup>45</sup> *See id.* at 61-62.

<sup>46</sup> *Id.* at 218 (quoting Peruvian delegate José Encinas).

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* at 218-19.

Guy Pérez Cisneros moved to restore the original wording by adding the phrase “and its benefits.”<sup>49</sup> His proposal was well-received and unanimously approved.

Although article 27(1) was adopted with very limited discussion and virtually no resistance, the inclusion of article 27(2) was controversial throughout the drafting process. To begin with, at the time of the UDHR’s drafting, there was no international consensus on how interests in intellectual creations were to be protected.<sup>50</sup> While the Anglo American copyright regimes emphasized economic rights, their continental counterparts offered additional protection to moral rights, which seek to protect the inalienable personality interests that are independent from the author’s economic rights. Although the Humphrey draft did not offer any protection to moral rights, Cassin rectified the omission by adding draft article 43.<sup>51</sup> While the additional element of moral rights provided the provision’s *raison d’être*, it raised considerable concern for the United Kingdom and the United States.

When the Declaration was drafted, the United States was outside the Berne Convention for the Protection of Literary and Artistic Works.<sup>52</sup> The primary international copyright treaty at that time, the Berne Convention offered high levels of protection for not only economic rights, but also moral rights. To entice the United States to join the international copyright family, the U.N. Educational, Scientific, and Cultural Organization (“UNESCO”) explored the creation of a middle-of-the-road treaty that would allow the United States to participate without either lowering the existing Convention standards or requiring the United States to offer the higher protection required by the Convention.<sup>53</sup> In light of this concurring development, both U.S.

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<sup>49</sup> *Id.* at 219.

<sup>50</sup> *See id.* (noting that provision “lands us in the middle of a controversy about international copyright law”).

<sup>51</sup> *See* discussion *infra* Part II.A.1.

<sup>52</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>53</sup> *See* Barbara A. Ringer, *The Role of the United States in International Copyright — Past, Present, and Future*, 56 GEO. L.J. 1050, 1061-65 (1968) (describing Universal Copyright Convention as “a new ‘common denominator’ convention that was intended to establish a minimum level of international copyright relations throughout the world, without weakening or supplanting the Berne Convention”). For a brief discussion of the origin of the Universal Copyright Convention, *see id.* at 1060-65. For discussions of the Convention, *see* generally ARPAD BOGSCH, UNIVERSAL COPYRIGHT CONVENTION: AN ANALYSIS AND COMMENTARY (1958); UNIVERSAL COPYRIGHT



delegate Eleanor Roosevelt and British delegate Geoffrey Wilson objected to the inclusion of draft article 43 in the UDHR. As they claimed, “[T]his right belonged more properly ‘to the domain of copyrights.’”<sup>54</sup> Although the Drafting Committee eventually decided not to include the provision after the First Session, it reached a compromise by including a note stating that the matter “should receive consideration for treatment on an international basis.”<sup>55</sup>

When the draft Declaration went to the Third Session, the provision was again discussed. Coincidentally, the revision conference of the Berne Convention was held in Brussels around the same time,<sup>56</sup> and the Berne Union agreed to broaden protection under article 6*bis* of the Convention, which prohibited actions that would be prejudicial to the author’s honor or reputation.<sup>57</sup> Just two months earlier, more than twenty-one Latin American countries, as well as the United States, also adopted the American Declaration,<sup>58</sup> which included a provision on the protection of moral and material interests in intellectual creations.<sup>59</sup>

When the French delegates reintroduced the provision, which smartly incorporated language from the American Declaration,<sup>60</sup> the delegates from Chile and Uruguay were unsurprisingly flattered and immediately supported the proposal.<sup>61</sup> Notwithstanding this French-Latin American “coalition,” Wilson and Indian delegate Hansa Metha found the provision elitist and questioned why it singled out a special group — in this case, authors — for attention.<sup>62</sup> Roosevelt also continued to oppose the proposal, “both because the Declaration

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CONVENTION ANALYZED (Theodore R. Kupferman & Matthew Foner eds., 1955).

<sup>54</sup> MORSINK, *supra* note 31, at 220.

<sup>55</sup> *Id.*

<sup>56</sup> The Third Session of the Commission was held in New York during May 28-June 18, 1948, while the Berne Convention revision conference was held in Brussels during June 5-June 26, 1948. *Id.*

<sup>57</sup> See SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 116 (2d ed. 2005) (stating that article 6*bis* was amended so that “the moral rights granted to the author in that article should be maintained after his death until at least the expiry of the copyright”); see also *id.* at 594-96 (discussing amendment of article 6*bis* in Brussels Revision Conference).

<sup>58</sup> See MORSINK, *supra* note 31, at 48.

<sup>59</sup> See American Declaration, *supra* note 19, art. 13.

<sup>60</sup> See Claude, *supra* note 16, at 251 (“[A]ttachment to [the American Declaration] language helped to ensure that the Latin American delegates were unified in their voting against strong opposition from Soviet allies.”).

<sup>61</sup> See MORSINK, *supra* note 31, at 220.

<sup>62</sup> See *id.*

should be kept short and because her delegation was of the opinion that copyright was a problem of international law.”<sup>63</sup> The French proposal was ultimately rejected by six votes to five, with five abstentions.

By the time the draft Declaration reached the Third Committee of the General Assembly, which was responsible for social, humanitarian, and cultural affairs and for the international bill of rights, the membership had expanded and now included a larger contingent of Latin American countries.<sup>64</sup> Although the drafters did not expect to reopen the debate, each of the articles was nevertheless reanalyzed and redebated. Ultimately, it took more than two months — and eighty-five meetings in the Committee and several others in the Subcommittees — before the draft was finally approved and sent to the Plenary Session of the General Assembly.<sup>65</sup>

During discussion of the cultural rights provision, which included only the right to cultural participation and development and the right to the benefits of scientific progress, Cuban, French, and Mexican delegates reintroduced language to recognize the right to the protection of interests in intellectual creations.<sup>66</sup> The involvement of the Cuban and Mexican delegates was particularly important because Latin American countries provided one of the largest blocs of countries in the Third Committee, and these countries ultimately served as a rallying force for the support of the provision.<sup>67</sup>

Notwithstanding this growing support, there remained two concerns on the floor. First, as the U.S. and Ecuadoran delegates claimed, the provision was redundant and protected what was already covered by

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<sup>63</sup> *Id.* at 221.

<sup>64</sup> The seven committees that were originally set up at the General Assembly dealt with the following matters: “1) political and civil, 2) economic and financial, 3) social, humanitarian, and cultural, 4) trusteeship, 5) administrative and budgetary, 6) legal, and 7) special political.” GLENDON, *supra* note 32, at 28; *cf.* U.N. General Assembly, Background Information, [http://www.un.org/ga/60/ga\\_background.html](http://www.un.org/ga/60/ga_background.html) (last visited Jan. 10, 2007) (listing six main committees of current General Assembly).

<sup>65</sup> See MORSINK, *supra* note 31, at 11.

<sup>66</sup> See *id.* at 221.

<sup>67</sup> See GLENDON, *supra* note 32, at 15 (stating that Latin American states represented “the largest single bloc” at founding conference of United Nations in San Francisco); MORSINK, *supra* note 31, at 130 (“Since the Latin [American] nations often voted as a bloc, the adoption of this regional Declaration heavily influenced the drafting process.”); Maria Green, Int’l Anti-Poverty L. Ctr., *Drafting History of the Article 15(1)(c) of the International Covenant*, ¶ 6, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000) (“At the final count, the highest proportion of proponents of [article 27(2)] were from Latin America.”), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.2000.15.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.2000.15.En?Opendocument).

the right to own property. Second, the provision sought to protect interests that were not generally considered “basic human rights.” As British delegate F. Corbet noted, “[T]he declaration of human rights should be universal in nature and only recognize general principles that were valid for all men.”<sup>68</sup> She also reminded the delegates that “copyright was dealt with by special legislation and in international conventions.”<sup>69</sup> Alan Watt, her Australian colleague, concurred, adding that “the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work.”<sup>70</sup>

The Latin American countries rallied in response. Mexican delegate Pablo Campos Ortiz defended the proposal as one that covered the rights of the individual as “an intellectual worker, artist, scientist or writer” and, therefore, belonged in the Declaration.<sup>71</sup> He also questioned the effectiveness of existing intellectual property protection in national and international legislation. Claiming that such protection “was at best relative and often non-existent,” he noted the need for support of the moral authority from a U.N. resolution to protect both manual and intellectual work.<sup>72</sup> Delegations from Argentina, Venezuela, Peru, Brazil, and Ecuador also quickly added their support to their Mexican and Cuban colleagues.<sup>73</sup> (Apparently, Ecuador’s earlier concern over the redundancy of the provision was not fatal to its support of the provision.)

When the floor turned to Peng-chun Chang, the Chinese delegate and one of the Declaration’s key drafters, he convincingly explained why the provision belonged in a universal document. Independent from the influence of the adoption of the American Declaration, he took a populist approach and noted that “the purpose of the joint amendment [from Cuba, France and Mexico] was not merely to protect creative artists but to safeguard the interests of everyone.”<sup>74</sup> As he explained, “[L]iterary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected.”<sup>75</sup> The Third Committee eventually adopted the provision by eighteen

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<sup>68</sup> MORSINK, *supra* note 31, at 221.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* at 222.

<sup>75</sup> *Id.*

votes to thirteen, with ten abstentions and with the Latin American delegates carrying the floor.<sup>76</sup>

Although there was some discussion in the General Assembly about the overall document and selected provisions, article 27 was adopted as approved by the Third Committee.<sup>77</sup> To this date, it remains unclear what motivated the delegates to vote for article 27(2).<sup>78</sup> Some delegates might have voted for the provision because of the moral rights issue, on which Cassin and Chang elaborated. Others, particularly those from the Latin American countries, might have done so because the rights were already enshrined in the American Declaration.<sup>79</sup> Being outside the Berne Convention at that time, they might also have considered the positive vote “as a step towards the internationalization of copyright law.”<sup>80</sup> In addition, as Audrey Chapman surmised, some delegates might have supported the provision “primarily because of their instrumental character in realizing other rights, which were seen as having a stronger moral basis.”<sup>81</sup> This view is, indeed, supported by the discussion of how the right would ultimately promote intellectual freedom. Regardless of the motivation, and despite the limited voting margin, there was an “overlapping consensus” among the delegates,<sup>82</sup> and the UDHR now expressly protects moral and material interests in intellectual creations.

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<sup>76</sup> *Id.*

<sup>77</sup> The UDHR was adopted on December 10, 1948, by 48 votes to none, with 8 abstentions. *Id.* at 12. The abstentions came from the Soviet Union, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic, Yugoslavia, Poland, South Africa, and Saudi Arabia. *See id.* at 21-28 (discussing eight abstentions).

<sup>78</sup> *See* Audrey R. Chapman, *Core Obligations Related to ICESCR Article 15(1)(c)*, in *CORE OBLIGATIONS*, *supra* note 16, at 305, 315 (“[T]he discussion of the intellectual property provision did not provide a conceptual foundation for it.”); Torremans, *supra* note 16, at 1, 6 (“It is not necessarily clear what motivated those who voted in favour of the adoption of the second paragraph of Article 27 of the Universal Declaration of Human Rights.”).

<sup>79</sup> *See* Chapman, *supra* note 78, at 312 (“Mexican and Cuban members of the UDHR drafting committee, supported by the French delegation, introduced language on authors’ rights so as to harmonise the Universal Declaration with the American Declaration.”).

<sup>80</sup> MORSINK, *supra* note 31, at 221.

<sup>81</sup> Chapman, *supra* note 78, at 314.

<sup>82</sup> DONNELLY, *supra* note 15, at 40-41 (discussing concept of “overlapping consensus on international human rights”).

B. *International Covenant on Economic, Social and Cultural Rights*

When the Commission was charged with the drafting of the International Bill of Rights shortly after its formation, its members were divided as to whether the bill should take the form of a covenant or a declaration. While Britain, Australia, and many smaller countries preferred to create a legally binding covenant, the United States and the Soviet Union favored a declaration, which was only aspirational in nature.<sup>83</sup> Although the Commission initially decided to draft both documents at the same time, it settled on completing only the declaration during the Second Session, after it had proven too difficult to complete both documents within the short timeframe.<sup>84</sup>

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<sup>83</sup> As Johannes Morsink noted:

Most of the delegations felt that the phrase *international bill of rights* meant no less than a covenant, while the two superpowers, the U.S. (most of the time) and the USSR (all the time), insisted that all the Council had meant was for them to draw up a declaration or manifesto of principles without any machinery of implementation attached to it.

MORSINK, *supra* note 31, at 13; *see also id.* at 15 (“[M]ost of the smaller nation-states that were members of the United Nations in 1948 wanted a covenant that would bind small and large nations alike and not a mere declaration.”). Interestingly, the legal effect, in retrospect, might not have been that important. As Professor Jack Goldsmith noted:

[The human rights] rhetoric rarely depends on careful arguments about legality, and both the content and sources of international human rights law are much too diffuse for illegality to be the criterion of opprobrium it is in domestic legal systems. It is the moral quality of the acts in question, not their illegality, that actually triggers the international community’s opprobrium. The successful characterization of an act as “illegal” can of course change perceptions about the moral worth of the act, but it is moral worth, and not legality, that counts.

Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2d 365, 372-73 (1998); *see also* GLENDON, *supra* note 32, at 236 (“The most impressive advances in human rights — the fall of apartheid in South Africa and the collapse of the Eastern European totalitarian regimes — owe more to the moral beacon of the Declaration than to the many covenants and treaties that are now in force.”). Ironically, this question may become moot, as protection in the Declaration achieves status of customary international law. *See* sources cited *supra* note 16.

<sup>84</sup> *See* MORSINK, *supra* note 31, at 11 (recounting Commission’s late decision in Second Session that “it could only deliver a declaration to be acted upon by the Third General Assembly”); *see also id.* at 10 (“[The] choice between just a declaration or both a declaration and a covenant created enormous tension within the Commission and its drafting subsidiary and took a great deal of precious drafting time.”).

Following the adoption of the UDHR in 1948, the Commission returned to its original plan to draft a Covenant on Human Rights.<sup>85</sup> Although the covenant initially included only civil and political rights, the U.N. Economic and Social Council, in 1951, “directed the Commission on Human Rights to include economic, social and cultural rights in the draft ‘covenant on human rights’ that it was then preparing.”<sup>86</sup> Pursuant to this mandate, the covenant included provisions from both the International Covenant on Civil and Political Rights<sup>87</sup> (“ICCPR”) and the ICESCR. The next year, as the debate intensified over whether the Commission could include both sets of rights in a single document, the General Assembly requested the Council to direct the Commission to draft “two covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible.”<sup>88</sup> The portion of the draft covenant that contained economic, social, and cultural rights became the ICESCR, and the rest of the draft covenant became the ICCPR.

Although the ICESCR language tracks closely to the UDHR in its present language, the inclusion of article 15(1)(c) in the instrument was far from automatic. Indeed, delegates had been reluctant to repeat the UDHR language because they feared that the omission of some UDHR language in a legally binding covenant might undercut the authority of those parts of the Declaration that were not included in the covenant. As the Danish delegate Max Sorensen noted:

It would clearly be undesirable merely to transpose the relevant sections from the Universal Declaration to the draft Covenant, for to do so would weaken the authority of the former, and lead to unwarranted conclusions about the significance of those of its provisions which were not reiterated in the latter.<sup>89</sup>

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<sup>85</sup> See *id.* at 19 (“When the Third General Assembly adopted the Declaration it also passed a resolution calling for speedy completion of the covenant the Commission had been unable to finish.”).

<sup>86</sup> Green, *supra* note 67, ¶ 8. For a drafting history of article 15(1), see generally *id.* The discussion in this section benefits tremendously from this background paper.

<sup>87</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1976) [hereinafter ICCPR].

<sup>88</sup> Green, *supra* note 67, ¶ 10; see also CRAVEN, *supra* note 23, at 16-20 (explaining why draft Covenant was split into ICCPR and ICESCR); Asbjørn Eide, *Economic Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 40, at 9, 10 (same).

<sup>89</sup> Green, *supra* note 67, ¶ 18.

Likewise, Roosevelt, who still represented the United States in the Commission, underscored the difference between the UDHR and the draft Covenant on Human Rights:

The [Declaration] consisted of a statement of standards which countries were asked to achieve . . . . But . . . a covenant was a very different kind of document, since it must be capable of legal enforcement. The task of drafting such an instrument was wholly unlike that of setting out hopes and aspirations relating to the rights and freedoms of peoples.<sup>90</sup>

Interestingly, their observations, though correct at the time of the drafting of the Covenant, are questionable today, as the Declaration has gradually acquired the status of customary international law.<sup>91</sup>

When the Commission explored the protection of cultural rights in the draft Covenant on Human Rights, UNESCO presented two draft provisions for what was then a single article covering both education and culture. The longer version reads, in pertinent part:

*Article (d)*

The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:

- (a) By facilitating for all access to manifestations of national and international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;
- (b) By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;
- (c) By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;
- (d) By guaranteeing the free cultural development of racial and linguistic minorities.

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<sup>90</sup> *Id.*

<sup>91</sup> See sources cited *supra* note 16.

*Article (e)*

The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author.<sup>92</sup>

The shorter version, which eventually became the basis for the Commission's discussion, read:

The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture.

They recognize that it is one of their principal aims to ensure conditions which will permit every one:

1. To take part in cultural life;
2. To enjoy the benefits resulting from scientific progress and its applications;
3. To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author.

Each signatory State pledges itself to undertake progressively, with due regard to its organization and resources, and in accordance with the principle of non-discrimination enunciated in paragraph 1, article 1 of the present Covenant, the measures necessary to attain these objectives in the territories within its jurisdiction.<sup>93</sup>

As in the UDHR drafting process, the inclusion of the right to cultural participation and development and the right to the benefits of scientific progress was not controversial. As Maria Green recalled, "From the beginning, there seems to have been little dissension over the notion of including a right to benefit from cultural and scientific advances."<sup>94</sup> According to UNESCO official Jacques Havel:

The right of everyone to enjoy his share of the benefits of science was to a great extent the determining factor for the exercise by mankind as a whole of many other rights . . . .  
Enjoyment of the benefits of scientific progress implied the

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<sup>92</sup> Green, *supra* note 67, ¶ 15.

<sup>93</sup> *Id.* ¶ 16.

<sup>94</sup> *Id.* ¶ 19.



dissemination of basic scientific knowledge, especially knowledge best calculated to enlighten men's minds and combat prejudices, coordinated efforts on the part of States, in conjunction with the competent specialized agencies, to raise standards of living, and a wider dissemination of culture through the processes and apparatus created by science.<sup>95</sup>

Without much disagreement from the delegates, the right to cultural participation and development and the right to the benefits of scientific progress were quickly adopted by fifteen votes to none, with only three abstentions.<sup>96</sup>

By contrast, the discussion of the right to the protection of interests in intellectual creations was controversial. While UNESCO and the French delegates were the main proponents for the inclusion of the right in the draft covenant, others were less enthusiastic.<sup>97</sup> For example, the U.S. delegation remained reluctant to include a provision concerning protection that was already under discussion in the soon-to-be-signed Universal Copyright Convention.<sup>98</sup> As Roosevelt stated:

In her delegation's opinion the subject of copyright should not be dealt with in the Covenant, because it was already under study by UNESCO which . . . was engaged on the collation of copyright laws with the object of building up a corpus of doctrine and in due course drafting a convention. Until all the complexities of that subject had been exhaustively studied, it

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<sup>95</sup> *Id.* ¶ 20.

<sup>96</sup> *Id.*

<sup>97</sup> As Jacques Havet, the representative of UNESCO, declared:

The UNESCO delegation considered that recognition of authors' rights should find a place in the Covenant, since it had already been included in the Universal Declaration, and represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind. Only by such means could international cultural exchanges be fully developed.

*Id.* ¶ 21. Similarly, the French delegation declared:

The relevant passages . . . merely stressed that the moral and material interests of persons taking part in cultural and scientific life should be safeguarded. It would be unfortunate to omit from the Covenant principles already stated in the Universal Declaration regarding protection of the moral and material rights of authors, artists and scientists.

*Id.* ¶ 22.

<sup>98</sup> Universal Copyright Convention, Sept. 6, 1952, revised at Paris July 24, 1971, 25 U.S.T. 1341.

would be impossible to lay down a general principle concerning it for inclusion in the Covenant.<sup>99</sup>

Chilean delegate Hernan Santa Cruz also raised an objection that was similar to the one raised in the Third Committee's review of the UDHR:

[W]hile the protection . . . was useful in certain circumstances and at certain periods in the life of nations, the question was not one involving a fundamental human right . . . . [T]he rights of all individuals enunciated in paragraph 2 of article 3 [presumably referring to the benefits of scientific progress phrase] were of far greater and wider import.<sup>100</sup>

In the end, the right to the protection of interests in intellectual creations was rejected by a tie of seven votes to seven, with four abstentions.

When the Commission reconvened in 1952, this time to consider the ICESCR as one of the two separate instruments derived from the original draft covenant, the French delegation reintroduced the rejected provision. As the delegation stated:

The draft covenant included provisions for the protection of the property and emoluments of professional workers and should therefore be completed by a provision for the protection of the moral and material interests resulting from scientific, literary or artistic production . . . . It was not a matter only of material rights; the scientist and artist had a moral right to the protection of his work, for example against plagiarism, theft, mutilation and unwarranted use.<sup>101</sup>

The U.S. delegation, with support from its British and Yugoslavian colleagues, again "reiterated its position that the issue was too complex to be dealt with in the Covenant, and should be addressed elsewhere."<sup>102</sup> Like the position it took the year before, UNESCO remained in support of the provision, stating that it was desirable despite the complexity of the subject matter.<sup>103</sup>

Interestingly, Chilean delegate Valenzuela raised a point that had yet to be addressed in the drafting sessions of either the UDHR or the

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<sup>99</sup> Green, *supra* note 67, ¶ 23.

<sup>100</sup> *Id.* ¶ 24 (parenthetical information in original).

<sup>101</sup> *Id.* ¶ 27.

<sup>102</sup> *Id.* ¶ 28.

<sup>103</sup> *See id.*

draft covenant — a point that remains relevant today as we consider the increased expansion of intellectual property rights:

He fully sympathized with the praiseworthy intentions of the French delegation and agreed that intellectual production should be protected; but there was also need to protect the under-developed countries, which had greatly suffered in the past from their inability to compete in scientific research and to take out their own patents. As a result, they were in thrall to the technical knowledge held exclusively by a few monopolies. As the French amendment would perpetuate that situation, he would have to vote against it. In general, the subject was so complex that it would have to be dealt with in a separate convention than in a single article of the covenant on human rights.<sup>104</sup>

Although the Latin American countries remained proud of their American Declaration and its contribution to the protection of interests in intellectual creations in the UDHR, they became increasingly concerned about the adverse impact of patents on their economies. The Egyptian delegation supported its Chilean colleagues, while the Australian delegation found it “inadvisable to provide for the protection of the author without also considering the rights of the community.”<sup>105</sup>

Responding to these concerns, French delegate Pierre Juvigny stated that “[h]e did not agree with the Chilean representative that monopoly in the field of patents represented such a grave danger; moreover, the absence of protection was not a remedy for the unfavorable situation in under-developed countries.”<sup>106</sup> His British colleague, Sir Samuel Hoare, expanded on this point at greater length:

The Chilean representative had raised an interesting point: the conflict between the conception that the rights of the creative worker must be protected and the principle that there should be no obstruction to the general utilization of the results of his work in the interests of humanity. In the light of these remarks, sub-paragraph (b) of the original article 30 deserved further examination. He had always understood it to mean that the benefits of scientific progress were to be made available to all within the limits and by use of the machinery

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<sup>104</sup> *Id.* ¶ 29.

<sup>105</sup> *Id.* ¶ 30.

<sup>106</sup> *Id.* ¶ 31.

which already existed. If the Chilean representative believed that the clause was intended to do away with all the intermediaries between the inventor and the general application of his invention, he was proposing to reform the world by one brief article. Such a conception went far beyond the scope of the covenant, and the United Kingdom delegation could not subscribe to it.<sup>107</sup>

Notwithstanding their responses, the provision was again rejected, this time by a vote of seven to six, with four abstentions.<sup>108</sup> As Green recounted, "There is no record of this line of discussion being pursued further,"<sup>109</sup> and it remains unclear whether this exchange had influenced the final voting.

When the draft ICESCR reached the Third Committee, the debate on the cultural rights provision was reopened for the final time. With respect to the paragraphs on the right to cultural participation and development and the right to enjoy the benefits of scientific progress, there was again only limited discussion. As Green observed, "The only reference to that passage was by D'Souza, the Indian representative, who mentioned that 'undoubtedly scientific discoveries should benefit not only all individuals, but also nations, regardless of their degree of development.'"<sup>110</sup> Even that remark seemed to be intended to underscore the importance of the provision, rather than to raise any question or concern about the provision.

The debate then turned to the right to the protection of interests in intellectual creations, which did not exist in the draft. Noticing the lack of such a right, Juvigny again urged the inclusion of the provision in the Covenant.<sup>111</sup> Interestingly, the proposal to include that language was submitted by the Costa Rican and Uruguayan delegations, rather than by the French. Introducing the provision, Uruguayan delegate Tejera stated, "[A] reference to authors' copyright was imperative. For lack of international protection, literary and scientific works, for example, were frequently pirated by foreign countries which paid no royalties to the authors."<sup>112</sup> He also added that "the right of the author and the right of the public were not

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 34.

<sup>111</sup> *See id.* ¶ 35.

<sup>112</sup> *Id.*

opposed to but complemented each other.”<sup>113</sup> Reiterating the point made by Chinese delegate Chang during the Third Committee’s review of the UDHR, he stated that “[r]espect for the right of the author would assure the public of the authenticity of the works presented to it.”<sup>114</sup> Like the position it took in the earlier debates, UNESCO remained supportive of the proposal.<sup>115</sup>

In 1955, two years before the Third Committee reviewed the provision,<sup>116</sup> the Universal Copyright Convention entered into effect. From the standpoint of the ICESCR negotiations, this Convention was particularly important because it enabled the United States to join the international copyright family while allowing members of the Berne Convention to retain their high standards of protection. By removing a major barrier to the recognition of the right to the protection of interests in intellectual creations, the entering into effect of this new middle-of-the-road copyright treaty therefore might have caused delegations to change their positions by the time the Third Committee convened.

For example, although Britain initially supported the U.S. position that it would be desirable to conduct discussions about international copyright law elsewhere, it now noted that the Uruguayan proposal “undoubtedly made good an omission . . . [and] that it was essential to include a provision corresponding to that in article 27, paragraph 2, of the Universal Declaration of Human Rights in the Covenant.”<sup>117</sup> Similarly, the Chilean delegation, which had opposed the inclusion in the earlier session, stated, “As one of the signatories of the Universal Copyright Convention, which was fully in accordance with its own legislation, Chile had no difficulty in supporting that amendment.”<sup>118</sup> Sweden, Israel, and the Dominican Republic also joined in with their support, noting that the protection would provide encouragement to science, creative activity, and cultural development.<sup>119</sup>

The remaining opposition came from Indonesia and the Eastern bloc countries, the latter of which were particularly concerned about

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* ¶ 37.

<sup>116</sup> The Convention entered into effect on September 16, 1955. Ringer, *supra* note 53, at 1061. “The Third Committee reached the draft article on cultural rights at its twelfth session, in late October and early November 1957.” Green, *supra* note 67, ¶ 33.

<sup>117</sup> Green, *supra* note 67, ¶ 36.

<sup>118</sup> *Id.* ¶ 37.

<sup>119</sup> *See id.* ¶ 38.

strengthening the protection of private property and the potential interference with “government control over science and art, and scientists and artists.”<sup>120</sup> The Indonesian delegation noted that “the matter could not be treated adequately in a short provision and that authors’ rights had to be considered in the light of the claims of the public in all countries.”<sup>121</sup> Meanwhile, the USSR delegate Platon Morozov stated:

[B]y inserting a clause of that kind the balance of the Covenant would be upset. An examination of the nature of the rights set forth in that instrument would reveal that they were rights which concerned all mankind, but the clause that it was proposed to add to article 16 [the current article 15] concerned a particular group. The fact that a principle was enunciated in the Universal Declaration of Human Rights did not mean that it should be repeated automatically in the Covenant.<sup>122</sup>

Although he “questioned whether the Covenant clause would ‘[exceed] the scope of existing conventions,’”<sup>123</sup> he later conceded that his delegation might be able to support the provision if it only mandated national level protection and if “the words ‘in accordance with the laws of the States concerned’ or some similar formula [were] added.”<sup>124</sup> The Czechoslovakian delegation further elaborated the points made by its USSR colleagues:

States would find it difficult to adhere both to the existing international instruments concerning copyright [including the Universal Copyright Convention of 1952] and to article 16 [as the article was then numbered] as amended. . . . That Convention and other international agreements on the subject took into account the special conditions in the different countries. If all such agreements were to be superceded by the [amendment] proposal, the position would be far from clear. . . . She was puzzled by the sponsors’ motives in submitting their amendment. If they found the existing agreements on the subject unsatisfactory, it was difficult to see why they had not insisted on a full debate on what was a very

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<sup>120</sup> *Id.* ¶ 42.

<sup>121</sup> *Id.* ¶ 39.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

delicate and complicated question, instead of trying to push through a hastily drafted and unsatisfactory text, which might well be misinterpreted.<sup>125</sup>

In response, Tejera pointed out that the USSR's proposal would contradict the goals of the Covenant and, indeed, virtually every international human rights instrument. As he noted, "To state that authors' rights should be protected in accordance with the laws of each country, would be to introduce a dangerous stipulation, since it was not impossible that certain States might arrogate to themselves the profits accruing from artistic property."<sup>126</sup> He also challenged the view that the ICESCR might require protection in excess of what was already required by current international intellectual property treaties:

The effect of the UNESCO and other international conventions would be gradually to bring the legislation of the contracting countries into line with a minimum acceptable level, but most countries, including his own, were already far ahead of those conventions. Objections to the amendment seemed to come only from countries which did not feel that they could assume the obligation of progressively carrying authors' rights into effect. Finally, there seemed to be every reason to maintain intact the text which appeared in the Universal Declaration of Human Rights.<sup>127</sup>

In the end, thanks to the newly adopted Universal Copyright Convention, the provision was adopted by a wide margin of thirty-nine votes to nine, with twenty-four abstentions. As Green recounted, "The final vote was straight down cold war faultlines, with the opposed roster holding Romania, Ukrainian Soviet Socialist Republic, USSR, Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, and Iraq."<sup>128</sup> In 1966, close to two decades after the introduction of the UDHR, the ICESCR was finally adopted. It took another decade to obtain the requisite thirty-five ratifications, but the ICESCR entered into force on January 3, 1976. Although the United States signed the Covenant the next year, it has yet to ratify it as of this writing.<sup>129</sup>

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<sup>125</sup> *Id.* ¶ 40.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 43.

<sup>129</sup> The United States signed the ICESCR on October 5, 1977.

*C. Lessons from the Drafting History*

Based on the foregoing discussion, one can draw at least six preliminary conclusions about the protection of interests in intellectual creations in international human rights instruments and the future development of such protection in a multilateral forum. First, the existence of the right to the protection of interests in intellectual creations is far from self-evident. Unlike the right to cultural participation and development or the right to the benefits of scientific progress, the right to the protection of interests in intellectual creations has been always controversial. While some delegates found it unworthy of protection as a basic human right, others questioned its overlap with protection already covered under the right to own property, the right to just remuneration for work, or both. Indeed, both articles 27(2) of the UDHR and article 15(1)(c) of the ICESCR did not include the right until after considerable debate and repeated reintroductions. It is therefore no surprise that Audrey Chapman found that the drafting history supported “relatively weak claims of intellectual property as a human right.”<sup>130</sup>

Second, even for the protection of something as fundamental as human rights, the development of international agreements cannot escape from the *realpolitik* of international negotiations. As one commentator noted:

[H]uman rights codifications inevitably convey a somewhat incomplete, or even biased, image of what human rights really are. All of them have been drafted and enacted under specific political and economic circumstances, and therefore reflect the mindsets and specific concerns of their drafters and the time they lived in. They are often the fruit of political compromise — a constraint to which moral truth is not exposed.<sup>131</sup>

In Professor Jack Donnelly’s words, human rights are far from “timeless, unchanging, or absolute; any list or conception of human rights — and the idea of human rights itself — is historically specific and contingent.”<sup>132</sup>

Moreover, developments in regional fora and related international regimes often play an important role in international negotiations.

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<sup>130</sup> Chapman, *supra* note 78, at 314; *see also* Torremans, *supra* note 16, at 9 (“[C]opyright has a relatively weak claim to Human Right status.”).

<sup>131</sup> Jakob Cornides, *Human Rights and Intellectual Property: Conflict or Convergence*, 7 J. WORLD INTELL. PROP. 135, 137 (2004).

<sup>132</sup> DONNELLY, *supra* note 15, at 1.



The inclusion of the right to the protection of interests in intellectual creations in the UDHR and the ICESCR is a good example. There is no doubt that the successful negotiation of the American Declaration, a regional instrument, provided the proponents of the right to the protection of interests in intellectual creations with the needed support from Latin American countries during a critical debate in the Third Committee.<sup>133</sup> Likewise, the successful conclusion of the Universal Copyright Convention, a related instrument outside the human rights regime, had induced many delegations to change their positions, thus removing the final obstacles in the crucial debate, again, in the Third Committee.<sup>134</sup> Had the Latin American countries not joined the Convention, it would have been unlikely that the Costa Rican and Uruguayan delegations would have reintroduced the provision in lieu of the French delegation, which until then had been the sole major champion of the cause of the right to the protection of interests in intellectual creations. In the near future, the developments in bilateral or regional fora and related international regimes will become even more important, in light of the increasing tendency for countries “to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another.”<sup>135</sup>

Third, there is a strong interdependent relationship between articles 27(1) and 27(2) of the UDHR and among articles 15(1)(a), 15(1)(b), 15(1)(c), and 15(3) of the ICESCR. Although the paragraphs concerning these different rights were analyzed, debated, and voted on separately, they were often discussed close in time. They were also included in the same articles for one obvious reason: the paragraphs serve some common goals and are “intrinsically linked” to one another.<sup>136</sup> A misinterpretation of one paragraph, therefore, may

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<sup>133</sup> See MORSINK, *supra* note 31, at 130-34 (discussing importance of Latin American countries in UDHR drafting process).

<sup>134</sup> That debate was crucial, because the delegates had not revisited the provision even though they did not adopt the Covenant until 1966. As Green noted, that debate “was effectively the final discussion of the cultural rights provision, although the General Assembly revisited the ICESCR twice in following years (in 1962 to discuss articles 2-5 and in 1963 to introduce the explicit right to freedom from hunger), before formally adopting the full convention in 1966.” Green, *supra* note 67, ¶ 13.

<sup>135</sup> Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 14 (2004). For discussions of the regime shifting or forum shifting phenomenon, see generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 564-71 (2000); Helfer, *supra*.

<sup>136</sup> See Comm. on Econ., Soc. & Cultural Rights [ICESCR], *General Comment No.*

adversely affect a state's ability to fulfill the objectives of the other paragraphs — either by taking away the synergistic effect or by creating obstacles to the full realization of those objectives. The converse is also true: the proper interpretation of one paragraph will help a state realize the objectives of the other paragraphs. As General Comment No. 17 stated, the paragraphs of article 15 of the ICESCR are “at the same time *mutually reinforcing* and *reciprocally limitative*.”<sup>137</sup> The same can be said of the two paragraphs of article 27 of the UDHR.

Fourth, the instruments do not delineate the scope of the right to the protection of interests in intellectual creations. Nor do they endorse any particular modality of protection. When the UDHR and the ICESCR were drafted, the delegates paid considerable attention to ensuring that each provision of the instruments took account of the diverging interests and cultures of the participating states. As Part III discusses in greater length, the instruments reflect many different interests, economic backgrounds, ideological persuasions, legal values, and cultural traditions.<sup>138</sup>

While the human rights instruments were ultimately adopted based on majority votes with a considerable number of abstentions, virtually none of the provisions in the instruments had been adopted without facing challenge by the delegates. Moreover, the provisions do not necessarily have a commonly agreed-upon purpose (other than a broad one to promote human dignity and respect). As the previous

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17: *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author* (Art. 15(1)(c)), ¶ 4, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter *General Comment No. 17*] (stating that right to protection of interests in intellectual creations “intrinsicly linked to the other rights recognized in article 15 of the Covenant”), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf); see also Chapman, *supra* note 78, at 314 (noting that “the three provisions of Article 15[1] in the ICESCR were viewed by drafters as intrinsicly interrelated to one another” and that “[t]he rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedom and participation and access to the benefits of scientific progress”); E.S. Nwauche, *Human Rights — Relevant Considerations in Respect of IP and Competition Law*, 2 SCRIPT-ED 501, 503-04 (2005) (arguing that private reward components and public benefit components are “equal” and “are so related that regarding them as separate obscures the distinct feature of their equality”), available at <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-4/enyinna.asp>.

<sup>137</sup> *General Comment No. 17*, *supra* note 136, ¶ 4 (emphasis added); see also Torremans, *supra* note 16, at 9 (“The fact that the rights of authors and creators can also stand in their own right is instead an ancillary point.”).

<sup>138</sup> See discussion *infra* Part III.C.

two sections have shown, the delegates had disparate concerns and voted for the provisions based on different motivations, which ranged from the protection of moral rights to international harmonization to collateral realization of other human rights.

Fifth, the debate over both article 27 of the UDHR and article 15 of the ICESCR did not allow for much discussion of the relationship of and the tension between the different paragraphs within the provisions.<sup>139</sup> Most of the discussions in the drafting sessions and the debate “focused primarily on whether an intellectual property provision should be included, rather than on its interpretation.”<sup>140</sup> As Green noted with respect to the ICESCR:

[T]he distinguished men and women who gave us the ICESCR did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property. When the question was raised, they tended to dismiss it almost out of hand. Primarily, they seem to have assumed that the goals of 15(1)(b) were obvious and beyond discussion, the benefits of science being a fundamental human right that belongs to everyone. They seem to have seen article 15(1)(c), however, as a smaller thing, one that served to protect several different potential interests, according to the views of the drafter . . . .<sup>141</sup>

Today, what these drafters ignored or left for another day has become particularly important. From protection of public health to the maintenance of sustainable food supply, the tension between these paragraphs has raised serious concerns among the poor, the vulnerable, the abused, the powerless, and the indigenous — all of whom are in great need of human rights protection. The next Part explores the relationship of and the tension between these paragraphs in the UDHR and the ICESCR and the various approaches that are commonly employed to alleviate this tension.

Finally, although intellectual property issues received only limited attention during the UDHR and ICESCR drafting processes, the delegates explored the interplay of human rights and intellectual property rights. To be certain, the Western delegates, unlike their

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<sup>139</sup> See Green, *supra* note 67, ¶ 43 (“The provision on authors’ rights . . . became associated with protection for authors’ freedom from state intervention. Any substantive issues to be worked out on the relation between the ‘benefits’ clause and the ‘authors’ clause never had a real chance for discussion.”).

<sup>140</sup> Chapman, *supra* note 78, at 315.

<sup>141</sup> Green, *supra* note 67, ¶ 45.

colleagues in the Eastern bloc countries and in Latin America, were primarily concerned with civil and political rights and considered economic, social, and cultural rights of second order.<sup>142</sup> Even today, many consider this latter set of rights the “second generation” of rights,<sup>143</sup> and these rights remain “the least well developed and the least doctrinally prescriptive.”<sup>144</sup> Nevertheless, the drafting history shows that the delegates, despite their different beliefs, philosophies, and orientations, raised many important questions that remain valid in

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<sup>142</sup> See Helfer, *supra* note 7, at 981 (“During [the] gestational period [of the human rights movement following World War II], government officials, international bureaucrats, NGOs, and scholars were occupied with foundational issues. Their most pressing goal was to elaborate and codify legal norms and enhance international mechanisms for monitoring compliance by nation states.”).

<sup>143</sup> DONNELLY, *supra* note 15, at 27 (“We should . . . note that in some Western circles a lingering suspicion of economic and social rights persists.”). As Matthew Craven explained:

That economic, social, and cultural rights have been identified as a discrete category of human rights is most usually explained in terms of their distinct historical origin. Economic, social, and cultural rights are frequently termed “second generation” rights, deriving from the growth of socialist ideals in the late nineteenth and early twentieth centuries and the rise of the labour movement in Europe. They contrast with the “first generation” civil and political rights associated with the eighteenth-century Declarations on the Rights of Man, and the “third generation” rights that encompass the rights of “peoples” or “groups”, such as the right to self-determination and the right to development. In fact the reason for making a distinction between first and second generation rights could be more accurately put down to the ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenants. The Soviet States, on the one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of the socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the “free world”. The conflict was such that during the drafting of the International Bill of Rights the intended treaty was divided into two separate instruments which were later to become the ICCPR and the ICESCR.

Craven, *supra* note 23, at 8-9 (footnotes omitted); see also Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in *Economic, Social and Cultural Rights*, *supra* note 40, at 3, 4 (discussing use of the terms “first generation,” “second generation,” and “third generation” to distinguish between different types of human rights).

<sup>144</sup> Helfer, *supra* note 7, at 987; accord Chapman, *supra* note 1, at 3 (characterizing article 15 of ICESCR “as the most neglected set of provisions within an international human rights instrument whose norms are not well developed”); Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights*, in *Core Obligations*, *supra* note 16, at 279.

today's debate, including those concerning the human rights basis for intellectual property rights, the need for specialized studies of patents, and the economic, social, and cultural implications for intellectual property rights. Unfortunately, these issues have been largely unexplored in the human rights forum in the intervening half-century and did not receive attention until recently, partly in response to the challenges created by the digital revolution and the implementation of TRIPS and partly because of an increasing focus on the rights of indigenous peoples.<sup>145</sup>

## II. THE RIGHT TO THE PROTECTION OF INTERESTS IN INTELLECTUAL CREATIONS

In recent years, there has been a growing discussion of the human rights implications for intellectual property rights. When intergovernmental organizations, policymakers, and commentators discuss intellectual property rights in the human rights context, they usually adopt one of two approaches: the coexistence approach or the conflict approach.<sup>146</sup> As Helfer summarized succinctly the two approaches:

The first approach views human rights and intellectual property as being in fundamental conflict. This framing sees strong intellectual property protection as undermining — and therefore as incompatible with — a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights. The prescription that proponents of this approach advocate for resolving this conflict is to recognize

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<sup>145</sup> See Torremans, *supra* note 16, at 1 (noting that intellectual property and human rights disciplines “seemed to stand on [their] own and had very little interest in the development of the other, let alone in the development of any interaction”); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 *IND. J. GLOBAL LEGAL STUD.* 59, 60 (1998) (“[E]conomic, social, and cultural rights have been juridically marginalized in comparison to civil and political rights, both in terms of the institutional frameworks developed for their implementation and in terms of their judicial interpretation.”); Helfer, *supra* note 7, at 975 (“Intellectual property has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows.”).

<sup>146</sup> For discussions of the two approaches, see Helfer, *supra* note 1, at 48-49; Torremans, *supra* note 16, at 2-3.

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the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict.

The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school views human rights law and intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.<sup>147</sup>

For example, the U.N. Sub-Commission on the Promotion and Protection of Human Rights took the conflict approach when it noted the following in the preamble of its Resolution 2000/7:

[A]ctual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, *inter alia*, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, “bio-piracy” and the reduction of communities’ (especially indigenous communities’) control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health

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To avoid these conflicts, the Sub-Commission reminded all governments “of the primacy of human rights obligations over

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<sup>147</sup> Helfer, *supra* note 1, at 48-49.

<sup>148</sup> Resolution 2000/7, *supra* note 3, pmb., recital 11; see Intellectual Property and Human Rights, Sub-Comm’n on Human Rights Res. 2001/21, pmb., recital 11, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001) (reiterating that “actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, in particular the rights to self-determination, food, housing, work, health and education, and in relation to transfers of technology to developing countries”), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument); see also Green, *supra* note 67, ¶ 2 (noting that both UDHR and ICESCR “appear to set up an unresolved tension between the provisions protecting access to advancement on the one hand and those protecting individual creators’ rights on the other”).

economic policies and agreements” and the importance of other human rights, such as the rights to food and to health.<sup>149</sup>

By contrast, in a background paper submitted to the Sub-Commission, the WTO embraced the coexistence approach, underscoring the availability of built-in flexibilities in existing international trade agreements that permit states to balance intellectual property protection with human rights standards. As the WTO noted:

Rights under article 27.2 of the UDHR and article 15.1(c) of the ICESCR together with other human rights will be best served, taking into account their interdependent nature, by reaching an optimal balance within the IP system and by other related policy responses. Human rights can be used — and have been and are currently being used — to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing rights or by creating new rights.<sup>150</sup>

In her report, the High Commissioner of Human Rights also noted that “[t]he balance between public and private interests found under article 15 [of the ICESCR] — and article 27 of the Universal Declaration — is one familiar to intellectual property law.”<sup>151</sup> To those who took this coexistence approach, human rights and intellectual property rights are “essentially compatible,” notwithstanding their continued disagreement over where to strike the appropriate balance between protecting interests in intellectual creations and enabling public access to protected materials.<sup>152</sup>

While these two approaches have their benefits and disadvantages, they ignore the fact that some attributes of intellectual property rights are protected in international or regional human rights instruments, while other attributes do not have any human rights basis at all. By encouraging a focus on specific situations and problems, the use of

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<sup>149</sup> Resolution 2000/7, *supra* note 3, ¶ 3.

<sup>150</sup> WORLD TRADE ORGANIZATION, PROTECTION OF INTELLECTUAL PROPERTY UNDER THE TRIPS AGREEMENT ¶ 9, E/C.12/2000/18 (Nov. 27, 2002), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/292864197888d603c12569ba00543291?Opendocument>.

<sup>151</sup> *High Commissioner's Report*, *supra* note 4, ¶ 11; *see also* CHAPMAN, *supra* note 1, at 1 (“A human rights approach to intellectual property takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting.”).

<sup>152</sup> *See Helfer*, *supra* note 1, at 48-49.

these approaches has made it difficult for one to engage in a more general discussion of the rights involved and the relationship of the two related fields.<sup>153</sup> While the inclusion of the right to the protection of interests in intellectual creations in the UDHR and the ICESCR was controversial, the two provisions now expressly protect this right. Thus, it is misleading to inquire whether human rights and intellectual property rights coexist or conflict with each other. Because of the overlapping human rights attributes, these two sets of rights both coexist and conflict with each other. A better, and more important, question is how we can alleviate the tension and resolve the conflict between human rights and the non-human-rights aspects of intellectual property protection.

To answer this question, this Part separates the conflicts between human rights and intellectual property rights into two sets of conflicts: external conflicts and internal conflicts. With respect to external conflicts, the key resolution technique is to separate the human rights aspects of intellectual property protection from others that have no human rights basis. To do so, section A explores the scope and normative content of article 27(2) of the UDHR and article 15(1)(c) of the ICESCR. This section then explains how the principle of human right primacy can be used to resolve the external conflict once the human rights attributes of intellectual property have been identified. With respect to internal conflicts, however, this Part points out that the above resolution technique would not work. Because all of the conflicting rights have human rights bases, the principle of human rights primacy does not apply. In lack of an overarching principle, section B identifies three approaches that have been advanced by policymakers, judges, and scholars: (1) the just remuneration approach, (2) the core minimum approach, and (3) the progressive realization approach. Because these approaches are meant to be complementary to each other, this section explains when and how the approaches should be used.

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<sup>153</sup> For example, recent discussions in the human rights forum have focused on the HIV/AIDS pandemic and the plight of indigenous communities. See Helfer, *supra* note 7, at 982 (recounting recent institutional developments in human rights forum); see also Torremans, *supra* note 16, at 2 (contending that conflict approach “focuses, maybe unduly so, primarily on the practical effects of certain forms of intellectual property rights in specific situations” and “does not address the broader picture, involving the function and nature of the elements involved in the interaction”).



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A. *External Conflicts*

Both article 27(2) of the UDHR and article 15(1)(c) of the ICESCR recognize “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>154</sup> However, nowhere in the provisions is anything mentioned about intellectual property rights, although commentators at times have mistakenly described article 27(2) and article 15(1)(c) as the intellectual property provisions of the UDHR and the ICESCR, respectively. Thus, this section focuses on the right to the protection of interests in intellectual creations.

In General Comment No. 17, which provided an exegesis of article 15(1)(c) of the ICESCR, the CESCR opened its comment by stating that the right to the protection of interests in intellectual creations “derives from the inherent dignity and worth of all persons” and that the right is meant to be contrasted with “most legal entitlements recognized in intellectual property systems.”<sup>155</sup> As the Committee explained:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.<sup>156</sup>

Thus, at the outset, the Committee distinguished between the right to the protection of interests in intellectual creations and so-called intellectual property rights, a catch-all term that is used to describe copyrights, patents, trademarks, trade secrets, and other existing and newly created related rights.<sup>157</sup> While the two sets of rights can

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<sup>154</sup> UDHR, *supra* note 5, art. 27(2).

<sup>155</sup> *General Comment No. 17*, *supra* note 136, ¶ 1; *see also* Helfer, *supra* note 7, at 980 (noting that principal justifications for intellectual property rights are “grounded not in deontological claims about the inherent attributes or needs of human beings, but rather arise from efforts to realize the economic and instrumental benefits of protecting intellectual property products across national borders”).

<sup>156</sup> *General Comment No. 17*, *supra* note 136, ¶ 1.

<sup>157</sup> *Cf.* Helfer, *supra* note 7, at 996 (inferring from General Comment existence of

coincide in theory, they are likely to diverge in practice today, given the high level of protection in the existing intellectual property system and the system's continuous expansion at the expense of human rights protection.<sup>158</sup> Examples of intellectual property protection that have no human rights basis are those that protect the economic investments of institutional authors and inventors.<sup>159</sup>

As stated in the UDHR and the ICESCR, the right to the protection of interests in intellectual creations covers two different types of interests: moral interests and material interests. While the former "safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage," the latter "enable[s] authors [and inventors] to enjoy an adequate standard of living."<sup>160</sup> Regardless of the type of interests, the right to the protection of interests in intellectual creations is a "fundamental, inalienable and universal" entitlement. Because human rights "exist independently of the vagaries of state approval, recognition, or regulation,"<sup>161</sup> the right to the protection of

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"a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential requisites for any free society" and that "[l]egal protections in excess of those needed to establish this core zone of autonomy . . . are not required under article 15 of the Covenant," even though these protections "may serve other salutary social purposes"); Nwauche, *supra* note 136, at 502 (noting "a significant difference between the 'right to intellectual property' and 'intellectual property rights'").

<sup>158</sup> See *General Comment No. 17*, *supra* note 136, ¶ 2 ("[T]he scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1(c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.").

<sup>159</sup> See Chapman, *supra* note 78, at 316-17 (noting that there is no "basis in human rights to justify using intellectual property instruments as a means to protect economic investments").

<sup>160</sup> *General Comment No. 17*, *supra* note 136, ¶ 2; cf. ICESCR, *supra* note 6, art. 11(1) (recognizing "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions").

<sup>161</sup> Helfer, *supra* note 7, at 993; accord JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 3 (1987) ("[H]uman rights are held to exist *independently* of recognition or implementation in the customs or legal systems of particular countries."); Torremans, *supra* note 16, at 5 ("[T]he human rights that were articulated in the Universal Declaration of Human Rights are held to exist independently of implementation or even recognition in the customs or legal systems of individual countries."); see also PETER DRAHOS, THE UNIVERSALITY OF INTELLECTUAL PROPERTY: ORIGINS AND DEVELOPMENT 20-22 (1998) (distinguishing between universally recognized rights and universal rights), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>.

interests in intellectual creations exists regardless of the protection offered by current intellectual property laws and treaties. The existing national intellectual property laws, the Paris and Berne Conventions, TRIPS, the World Intellectual Property Organization (“WIPO”) Internet Treaties, and other international, regional, and bilateral agreements serve merely as points of reference.

### 1. The Protection of Moral Interests

With respect to the protection of moral interests in intellectual creations, General Comment No. 17 stated:

The protection of the “moral interests” of authors was one of the main concerns of the drafters of article 27, paragraph 2, of the Universal Declaration of Human Rights . . . . Their intention was to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations.<sup>162</sup>

The protection of moral interests seemed to be what Cassin found wanting in Humphrey’s draft. As stated explicitly in Cassin’s draft, article 43 covered protection “*in addition to* just remuneration for [the authors’] labour,” namely the protection of “a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind.”<sup>163</sup> Such protection is important to human dignity and respect, because it “safeguards the personal link between authors and their creations”<sup>164</sup> and assures the public of the authenticity of the protected works.<sup>165</sup>

Being the French delegate, Cassin was understandably familiar with the strong protection of moral rights traditionally offered in continental Europe, in particular France and Germany. These rights include the right of attribution, the right of integrity, the right of disclosure, and the right of withdrawal, among others.<sup>166</sup> Although

<sup>162</sup> *General Comment No. 17*, *supra* note 136, ¶ 12.

<sup>163</sup> *The “Cassin Draft,” supra* note 39, art. 43.

<sup>164</sup> *General Comment No. 17*, *supra* note 136, ¶ 2.

<sup>165</sup> See MORSINK, *supra* note 31, at 222 (quoting Chinese delegate Peng-chun Chang: “[L]iterary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected.”); Green, *supra* note 67, ¶ 35 (“Respect for the right of the author would assure the public of the authenticity of the works presented to it.” (quoting Uruguayan delegate Tejera)).

<sup>166</sup> The right of attribution is the right to claim authorship of the protected work.

these rights are protected to varying degrees in different jurisdictions, article 6*bis* of the Berne Convention offers international protection of the first two moral rights — the right of attribution and the right of integrity.<sup>167</sup> While there is no indication that the Berne Convention was a major influence on the UDHR, it provides a good indication of the international standard the framers of the UDHR and the ICESCR had in mind. Indeed, the CESCR inferred from the drafting history of these two instruments that the right to the protection of moral interests in intellectual creations “include[s] the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation.”<sup>168</sup>

Compared to continental Europe, the United States offers very limited moral rights protection. As part of its effort to reduce criticism of its noncompliance with the Berne Convention, which the United States joined in 1988,<sup>169</sup> Congress enacted the Visual Artists Rights Act

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The right of integrity is the right to prevent the distortion, mutilation, or other modification of the work in a manner prejudicial to the author’s honor or reputation. The right of disclosure is the right to determine when the work is ready for public dissemination and in what form the work will be disseminated. The right of withdrawal is the right to withdraw the work from public dissemination. For discussions of moral rights, see generally Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997); Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1 (2001) [hereinafter Kwall, *Author-Stories*]; Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795 (2001); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

<sup>167</sup> Berne Convention, *supra* note 52, art. 6*bis* (“[T]he 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.”).

<sup>168</sup> *General Comment No. 17*, *supra* note 136, ¶ 13.

<sup>169</sup> See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.); see also Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 53-59 (1989) (commenting on short-term and long-term international effects of United States’s adherence to Berne Convention); David Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27, 28 (1989) (expressing disappointment with United States’s minimalist approach to implementing Berne Convention).

of 1990 (“VARA”) shortly after it ratified the Berne Convention.<sup>170</sup> The two rights that VARA protects are (1) “the right . . . to claim authorship of that work . . . and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create” and (2) “the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”<sup>171</sup> Because Congress enacted VARA despite its strong reluctance to offer moral rights protection,<sup>172</sup> one could make a very strong case that these two rights represent the minimum essential levels of protection a state has to offer if it is to effectively protect moral interests in intellectual creations. Nevertheless, one can continue to debate whether such protection would satisfy the core minimum obligations required by article 15(1)(c) of the ICESCR.<sup>173</sup>

## 2. The Protection of Material Interests

Unlike “moral interests,” which appeared in Cassin’s draft, the phrase “material interests” was only added to the draft Declaration when the French delegation incorporated the American Declaration in its proposal to reintroduce the right to the protection of interests in intellectual creations in the Third Session of the Commission.<sup>174</sup> That

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<sup>170</sup> 17 U.S.C. § 106A (2004).

<sup>171</sup> *Id.* §§ 106A(a)(1)-(2).

<sup>172</sup> As Professor Roberta Kwall noted, “[W]hen Congress enacted VARA, the legislative process was more likely the product of political realities rather than an express consideration of the relative importance of the author’s personality-based narrative of creation.” Kwall, *Author-Stories*, *supra* note 166, at 41. As Kwall recounted:

[O]n the last day of the 101st Congress, Republican senators ultimately agreed to approve VARA in light of their desire to pass a major bill authorizing eighty-five new federal judgeships, a bill to which VARA had become attached. Sponsors of the federal judgeships bill were forced to include several unrelated measures in order to appease senators who otherwise would have opposed it. One such measure was VARA, which had already been passed by the House of Representatives but had been blocked in the Senate Judiciary Committee by some Republican senators. Thus, VARA was passed by the full Senate only because those Republican senators acquiesced in light of their desire to pass the federal judgeships bill. VARA thus was passed with little fanfare or debate.

*Id.* at 27 n.112 (citation omitted).

<sup>173</sup> See *id.* at 22-43 (showing limited protection of moral rights in United States despite enactment of VARA).

<sup>174</sup> See discussion *supra* Part I.A.

phrase was reintroduced in the joint amendment by the Cuban, French, and Mexican delegations during the article-by-article review by the Third Committee. Today, the phrase “material interests” can be found in article 27(2) of the UDHR, article 15(1)(c) of the ICESCR, and other international and regional human rights instruments.

On its face, the phrase seems to cover all forms of economic interests. As the CESCR noted in its General Comment No. 17, the phrase “reflects the close linkage of this provision with the right to own property, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments.”<sup>175</sup> Indeed, commentators and the intellectual property industries have often equated the protection of economic interests in intellectual creations with the protection of private property. As two advocates for strong property rights stated emphatically:

IP protection has long been recognized as a basic human right, and the tension between the rights of the creators and the rights of consumers has been successfully resolved by the development and modification of intellectual property protections over the years.

Those who want to weaken IP protections are really tapping into a failed and discredited economic theory that the public doesn't benefit from privately owned goods. However, expropriation of others' property not only undermines creation and invention, it also undermines economies and societies. It is, ironically, one of the most “anti-human rights” actions governments could take.<sup>176</sup>

Likewise, the entertainment industries have repeatedly condemned the unauthorized use of copyrighted materials as “theft” and illegal file-sharers as “shoplifters.”<sup>177</sup> As Frances Preston, the former

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<sup>175</sup> *General Comment No. 17*, *supra* note 136, ¶ 15.

<sup>176</sup> Tom Giovanetti & Merrill Matthews, *Intellectual Property Rights and Human Rights*, IDEAS, Sept. 2005, available at [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/00393D8B1791936F862570EE00779CFC/\\$File/IPandHumanRights.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/00393D8B1791936F862570EE00779CFC/$File/IPandHumanRights.pdf?OpenElement); see also Robert L. Ostergard Jr., *Intellectual Property: A Universal Human Right?*, 21 *HUM. RTS. Q.* 156, 175 (1999) (“The basis for such a claim without doubt lies in the Western conception of property rights.”).

<sup>177</sup> See Press Release, Recording Indus. Ass'n of Am., Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File “Sharers” Who Illegally Offer Music Online (June 25, 2003) [hereinafter RIAA Press Release], available at [www.riaa.com/News/newsletter/062503.asp](http://www.riaa.com/News/newsletter/062503.asp) (including quotes that described unauthorized use of copyrighted materials as “theft” and illegal file-sharers as “shoplifters”); see also Peter K. Yu, *P2P and the Future of Private Copying*, 76 *U. COLO.*

president and CEO of Broadcast Music, Inc., a U.S. performing rights organization, stated: “Illegal downloading of music is theft, pure and simple. It robs songwriters, artists and the industry that supports them of their property and their livelihood. Ironically, those who steal music are stealing the future creativity they so passionately crave. We must end this destructive cycle now.”<sup>178</sup>

When viewed closely in light of the drafting history of both the UDHR and the ICESCR, however, the phrase “material interests” seems to cover a type of economic interests that is narrower than those usually protected under the right to private property. Due to Cold War politics and concerns raised by socialist countries, the ICESCR notably does not include a provision on the right to own property.<sup>179</sup> Although the Cold War ended, it remains unclear whether countries would agree readily to a provision on the right to private property. Thus, construed in light of the omission of this provision in the

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L. REV. 653, 667-68 (2005) (discussing why recording industry did not make right analog when it compared individual file-sharers to shoplifters).

<sup>178</sup> RIAA Press Release, *supra* note 177 (quoting Frances Preston, former president and CEO of Broadcast Music, Inc.).

<sup>179</sup> “During the drafting of the CESCPR and the CCPR, considerable efforts were made to include the right to property, but these attempts failed owing to disagreements concerning the restrictions of the right.” Catarina Krause, *The Right to Property*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 40, at 191, 194; accord CRAVEN, *supra* note 23, at 25 & n.146 (“A draft article based upon article 17 of the Universal Declaration of Human Rights had been put forward for inclusion in the Covenant but disagreement over the issues of expropriation and compensation meant that agreement upon a text was never possible. Although the constituent parts of the Sub-Committee proposal were agreed upon, the text as a whole was rejected by 7 votes to 6 with 5 abstentions.”) (footnote omitted).

Compared to protection at the international level, attempts to include such a right was more successful at the regional level. Although “the attempts failed to include the right to property in the ECHR [European Convention on Human Rights], . . . the right to property is found in Protocol No. 1 of 1952.” Krause, *supra*, at 194-95; *see also id.* at 195 n.14 (explaining why Committee of Ministers chose to exclude right to property from ECHR but include it in Protocol). Article 1 of the Protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262.

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ICESCR and the lack of evidence to suggest that the delegates agreed to make a special exception for property rights in intellectual creations, the right protected in article 15(1)(c) of the Covenant should be considered a right that exists independently of property rights.

Similarly, although article 17 of the UDHR covers the right to own property, it does not protect the right to own *private* property.<sup>180</sup> In fact, due to similar concerns raised by the Soviet Union and other Eastern bloc countries, and a strong push by the Latin American countries, the delegates eventually reached a compromise by omitting the word “private” and by including the phrase “alone as well as in association with others.”<sup>181</sup> As Professor Mary Ann Glendon recounted:

The United States strongly supported a right to own private property and to be protected against public taking of private property without due safeguards. The United Kingdom’s Labour government representatives, however, took the position that the article should be omitted, arguing that regulation of property rights was so extensive everywhere in the modern world that it made no sense to speak of a right to ownership. Many Latin Americans took an entirely different tack: they wanted the article to specify a right to enough private property for a decent existence. The Soviets, for their part, objected to the idea that a decent existence should be grounded in private property and insisted that the article should take account of the different economic systems in various countries.<sup>182</sup>

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<sup>180</sup> See Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 563, 564 (Asbjørn Eide et al. eds., 2d ed. 2001), (“[P]ost-war notions of the redistributive role of modern states, as well as newly-decolonized states’ reactions to Western corporate power, meant that the right to property in its classical liberal form did not survive as a self-standing right within a United Nations’ human rights treaty order.”).

<sup>181</sup> UDHR, *supra* note 5, art. 17(1).

<sup>182</sup> GLENDON, *supra* note 32, at 182-83; see also MORSINK, *supra* note 31, at 139-52 (discussing drafting of right to property provision); Chapman, *supra* note 78, at 314 (“The socialist bloc’s opposition to property rights had already played a major role in the decision of the Covenant’s drafting committee not to include the text of Article 17 of the UDHR recognizing the right to tangible forms of property in the Covenant.”).



In the end, article 17 omitted the word “private” and was reduced to “a high level of generality.”<sup>183</sup> It now reads: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”<sup>184</sup> While “the right to own property alone” undoubtedly provides a strong basis for unqualified intellectual property rights, the “right to own property . . . in association with others” provides an equally compelling basis for the creation of a rich public domain and for unrestricted access to protected materials. Because of this dual nature, article 17 is at best ambiguous about whether property rights provide the basis for the right to the protection of material interests in intellectual creations in article 27(2). In fact, the drafting history seems to suggest otherwise: countries appear free to decide whether they want to offer strong intellectual property protection or whether they want to promote the creation of a rich public domain.

To understand the meaning of article 27(2), it is instructive to revisit the provision in Cassin’s draft. When Cassin drafted the original article 43, it included the phrase “just remuneration for [the authors’] labour.”<sup>185</sup> Given the wide use of conscripted scientists and engineers in Nazi Germany and Stalinist Russia, just remuneration for intellectual labor was particularly important at that time.<sup>186</sup> Indeed, the delegates repeatedly condemned forced intellectual labor during the drafting process. The only reason why Cassin failed to include the right to just remuneration for intellectual labor seemed to be his belief that such a right was already covered by another provision in his draft. Instead, he only made an implicit endorsement of the right by stating

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<sup>183</sup> GLENDON, *supra* note 32, at 183.

<sup>184</sup> UDHR, *supra* note 5, art. 17.

<sup>185</sup> *The “Cassin Draft,” supra* note 39, art. 43.

<sup>186</sup> See Claude, *supra* note 16, at 249-50 (discussing abuse of science and scientists for purposes of power aggrandizement). Article 2 of the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind specifically states:

All States shall take appropriate measures to prevent the use of scientific and technological developments, particularly by the State organs, to limit or interfere with the enjoyment of the human rights and fundamental freedoms of the individual as enshrined in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant international instrument.

Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, G.A. Res. 3384, at 86, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/Res./3384 (Nov. 10, 1975).

in draft article 43 that moral rights were protected “in addition to just remuneration for their labour.”<sup>187</sup>

By the time the provision was reintroduced in the Third Session (and later in the Third Committee), the protection of “material interests” was already added to the protection of “moral interests” (thanks to the incorporation of article 13 of the American Declaration).<sup>188</sup> Although it remains unclear why the delegates voted to adopt article 27(2), one can surmise that at least some delegates might have interpreted the phrase “material interests” to mean just remuneration for intellectual labor, something they had discussed and understood in previous drafting sessions. Thus, the drafting history seems to suggest that the phrase “material interests” should not be interpreted broadly to cover all forms of economic rights as protected in the existing intellectual property system, but rather narrowly to cover the limited interests in obtaining just remuneration for one’s intellectual labor.

Obviously, a property-based intellectual property system would offer the needed protection to material interests in intellectual creations. Commentators, including Professors Wendy Gordon, Adam Mossoff, and Alfred Yen, have used John Locke and other natural rights philosophers to provide justifications for intellectual property protection.<sup>189</sup> As Locke wrote in his *Second Treatise of Government*, “Whatsoever then he removes out of the state that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.”<sup>190</sup> The U.S. Supreme Court also stated in *Mazer v. Stein* that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the *best* way to advance public

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<sup>187</sup> See *The “Cassin Draft,” supra* note 39, art. 43.

<sup>188</sup> See discussion *supra* Part I.A.

<sup>189</sup> For discussions of the Lockean justifications, see generally Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 *VA. L. REV.* 149 (1992); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371 (2003); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517 (1990). *But see* Carys J. Craig, *Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law*, 28 *QUEEN’S L.J.* 1 (2002) (criticizing Lockean approach to copyright).

<sup>190</sup> John Locke, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 27 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698).

welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>191</sup>

However, a property-based regime is not the only acceptable modality of protection that can be used to realize the right to the protection of material interests in intellectual creations. Nor is it the best. Instead, it merely provides an option. As General Comment No. 17 acknowledged:

The term of protection of material interests under article 15, paragraph 1(c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through 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.<sup>192</sup>

To satisfy article 15(1)(c) obligations, states can consider using such other alternative systems as liability rules, prize funds, or even non-property-based authorship protection. As the CESCR explained, “[T]he protection under article 15, paragraph 1(c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions.”<sup>193</sup> Thus, the key criterion for satisfying the material interests obligation is not whether the offered protection meets the level of protection required by existing international intellectual property agreements or whether such protection is based on the property rights model. Rather, one has to inquire whether the existing system provides meaningful protection of material interests in the creations by authors and inventors.

Professor Jerome Reichman is the leading proponent for using liability rules to address problems concerning the protection of traditional knowledge and subpatentable inventions. Under his proposed compensatory liability scheme, second comers will be required “to pay equitable compensation for borrowed improvements over a relatively short period of time.”<sup>194</sup> As Reichman explained, such

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<sup>191</sup> 347 U.S. 201, 219 (1954) (emphasis added).

<sup>192</sup> *General Comment No. 17*, supra note 136, ¶ 16; see also Torremans, supra note 16, at 8 (“[A] lot of freedom is left to Contracting States in relation to the exact legal format of th[e] protection [for the interests of authors and creators].”).

<sup>193</sup> *General Comment No. 17*, supra note 136, ¶ 10.

<sup>194</sup> J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in*

an alternative regime has several benefits. For example, it “could stimulate investment without chilling follow-on innovation and without creating legal barriers to entry.”<sup>195</sup> Such a regime “would also go a long way toward answering hard questions about how to protect applications of traditional biological and cultural knowledge to industry, questions that are of increasing importance to developing and least-developed countries.”<sup>196</sup>

Although commentators continue to debate whether liability rules or property rights would be preferable in the intellectual property context, the institution of a liability rules-based model certainly would satisfy article 15(1)(c) obligations.<sup>197</sup> In fact, that model not only protects material interests in intellectual creations, but also promotes right to cultural participation and development and the right to the benefits of scientific progress by providing future authors and users with the much-needed access to protected materials. In times of growing expansion of intellectual property rights, such a model may even ensure the adequate accommodation of human rights interests in the intellectual property system, especially in situations where human rights obligations have mandated access to protected materials — such as those related to food production, public health, education, free expression, and cultural preservation and development.

Prize funds provide another human rights-compliant model. In recent years, commentators have widely discussed how patent prizes can be used to promote creativity and innovation.<sup>198</sup> To address the

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*Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1777 (2000).

<sup>195</sup> *Id.* at 1746.

<sup>196</sup> *Id.* at 1746-47.

<sup>197</sup> Compare *id.* with Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) (questioning expediency of use of liability rules licenses in intellectual property context and arguing against creation of compulsory licenses for digital media content). For a classic discussion of property and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>198</sup> On the use of prizes or rewards to promote creativity and innovation, see, for example, Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, in INNOVATION POLICY AND THE ECONOMY 2 (Adam B. Jaffe et al. eds., 2002); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Steve P. Calandrillo, *An Economic Analysis of Intellectual Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1998); Douglas Gary Lichtman, *Pricing Prozac: Why the Government Should Subsidize the Purchase of Patented Pharmaceuticals*, 11 HARV. J.L. & TECH. 123 (1997); Michael Polanvyi, *Patent Reform*, 11 REV. ECON. STUD.

massive unauthorized copying problem on the Internet, copyright scholars have also proposed the use of a similar model to replace the existing method of generating incentives for creations.<sup>199</sup> While these proposals seem radical, the prize-fund model has been widely practiced in the United States and in other countries under limited conditions. The Copyright Act, for example, does not give protection to government works; instead, government-employed “intellectual workers” obtain “just remuneration” in the form of salaries and fringe benefits.<sup>200</sup> In a similar vein, U.S. legislators have recently proposed the Federal Research Public Access Act of 2006,<sup>201</sup> which, if adopted, would require online publication of results of selected federally funded research accepted for publication in peer-reviewed journals. Although the proposed statute would prohibit researchers from obtaining exclusive exploitation rights in the affected federally funded projects, it compensates them with awards of federal funds and career-related recognition that comes with those awards.

The final model concerns non-property-based protection of authors. In her recent work, Professor Mira Sundara Rajan offers an interesting analysis of how the Russian Copyright Act of 1928 granted limited recognition to authors’ property interests by “plac[ing] them within the broader context of a non-property theory of authorship.”<sup>202</sup> As she illustrated with the following quote from a 1938 commentary on the Russian Law:

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61 (1944); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

<sup>199</sup> See Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85 (2004) (proposing reward system based on virtual markets); Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1126 (2003) (citing Open Culture as example for model that allows authors to be compensated, but requires them to release works subject to permanent free-use licenses). *But see* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 80-83 (2003) (criticizing creation of government rewards).

<sup>200</sup> See 17 U.S.C. § 105 (2004) (“Copyright protection under this title is not available for any work of the United States Government.”).

<sup>201</sup> S. 2695, 109th Cong. (2006).

<sup>202</sup> Mira T. Sundara Rajan, *Copyright and Free Speech in Transition: The Russian Experience*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* 315, 333 (Jonathan Griffiths & Uma Suthersanen eds., 2005) [hereinafter *COPYRIGHT AND FREE SPEECH*].

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In bourgeois society, the author's right is a monopoly, establishing the exclusive right to distribute the products of science, literature and art. . . .

[It] is characteristic that, except for a small group of bourgeois authors, the author's right is the property, in bourgeois society, not of the author, but of the publisher, of a big capitalist, an industrialist. . . . [T]he author's right in capitalist countries is made into a tool of the interests of the monopolist-publisher, a means of exploiting the author and retarding the cultural growth of the masses of the people. . . .

The basic principles of the Soviet author's right are completely different. . . . [It] has the objective of protecting to the maximum the personal *and property* interests of the author, coupled with the assurance of the widest distribution of the product of literature, science and the arts among the broad masses of the toilers.<sup>203</sup>

In sum, all of these models would enable a state to discharge its obligation concerning the right to the protection of material interests in intellectual creations. Concerned with results, rather than "institutional specifics,"<sup>204</sup> the UDHR and the ICESCR dictate neither the level nor modality of protection. Therefore, states are free to adopt any of these models.

### 3. The Principle of Human Rights Primacy

Once the human rights attributes of intellectual property rights have been identified, the principle of human rights primacy will require that the protection of these attributes take precedence over other protection offered under the current intellectual property system, including the protection of the non-human-rights attributes of intellectual property rights and those forms of intellectual property rights that have no human rights basis. As the U.N. Sub-Commission on the Promotion and Protection of Human Rights stated in its *Statement on Intellectual Property Rights and Human Rights*, human rights obligations have primacy over economic policies and

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<sup>203</sup> *Id.* at 333-34 (emphasis added by Professor Rajan) (quoting *A Text Writer's Opinion*, in 1 GRAZHDANSKOE PRAVO (CIVIL LAW) 254-55 (1939), translated in J.N. HAZARD, MATERIALS ON SOVIET LAW 35 (1947)).

<sup>204</sup> *Cf.* NICKEL, *supra* note 161, at 153 ("The right to life concerns results, not institutional specifics.").

agreements,<sup>205</sup> and “[g]overnments and national, regional and international economic policy forums [need] to take international human rights obligations and principles fully into account in international economic policy formulation.”<sup>206</sup>

Notwithstanding this principle of human rights primacy, there remains a question as to whether the built-in flexibilities, or the so-called “safety valves,” of the intellectual property system would permit states to balance the non-human-rights aspects of intellectual property protection with their human rights obligations. Because the principle of human rights primacy does not require states to abandon the coexistence approach, the state therefore still has to choose between the coexistence approach or the conflict approach, the dilemma that started the discussion in this section.

While the resolution technique advanced in this section concededly does not resolve this dilemma, the main attraction of the technique is not to resolve all of the conflicts between human rights and intellectual property rights. In fact, states always have to examine whether their intellectual property systems adequately accommodate human rights interests. Rather, this technique aims to ensure that the human rights attributes of intellectual property rights receive their well-deserved recognition. In doing so, states will be able to fully discharge their human rights obligations concerning the right to the protection of interests in intellectual creations, while individual authors and inventors will be able to obtain protection the human rights treaties afforded to them.

Moreover, after an analysis of the human rights basis of intellectual property rights, the dilemma states face is quite different from the one at the beginning of this Article. Once they identify the human rights attributes of intellectual property rights, they no longer need to inquire whether human rights and intellectual property rights coexist or conflict with one another. Instead, they explore whether the non-human-rights aspects of intellectual property protection coexist or conflict with human rights — a question that is more consistent with their human rights commitments. How they answer that question will depend on how much human rights protection has been built into their intellectual property system.

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<sup>205</sup> See Resolution 2000/7, *supra* note 3, ¶ 3 (articulating principle of human rights primacy).

<sup>206</sup> *Id.* ¶ 4.

### B. *Internal Conflicts*

While the undefined scope and ambiguous meaning of the right to the protection of interests in intellectual creations have made the resolution of external conflicts difficult, the resolution of internal conflicts is equally, if not more, difficult because there is no easy way to resolve the conflicts between the different rights within the human rights system.<sup>207</sup> Although the principle of human rights primacy can be used to resolve conflicts at the intersection of human rights and intellectual property systems, such a principle would not be helpful to resolving internal conflicts.

To be certain, articles 4 and 25 of the ICESCR provide some guidance on when Covenant rights can be restricted. Article 4 provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>208</sup>

Article 25 also states, "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."<sup>209</sup> However, those provisions are unsurprisingly vague. The fact that human rights are universal, indivisible, interdependent, and

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<sup>207</sup> As Professor James Nickel noted, there are at least three barriers that have made it difficult to redraw boundaries or insert exceptions to minimize conflicts between the different rights:

One is that we cannot anticipate all conflicts between rights and with other norms, and we are often uncertain about what we should do in the cases we can imagine. A second barrier is that a right containing sufficient qualifications and exceptions to avoid all possible conflicts would probably be too complex to be generally understood. Third, relieving a conflict by building in an exception will sometimes incorrectly imply that the overridden right did not really apply and that we need feel no regret about our treatment of the person whose right was overridden. In the most awful moral dilemmas there are conflicts not at the edges of rights or other norms but at their very centers.

NICKEL, *supra* note 161, at 49-50.

<sup>208</sup> ICESCR, *supra* note 6, art. 4.

<sup>209</sup> *Id.* art. 25.



interrelated has made the resolution of internal conflicts even more difficult.<sup>210</sup>

Over the years, policymakers, judges, and scholars have advanced three different approaches to reduce conflicts within the system: (1) the just remuneration approach; (2) the core minimum approach; and (3) the progressive realization approach. Although this section discusses these approaches in turn, they are not mutually exclusive and, therefore, can be used together or in different ways depending on the circumstances. The just remuneration approach is ideal for situations involving an inevitable conflict between two human rights — for example, between the right to freedom of expression and the right to the protection of interests in intellectual creations. The core minimum approach provides guidance on the minimum essential levels of protection a state has to offer to comply with its human rights obligations. And the progressive realization approach offers insight into the noncompeting relationship among the different human rights and how states can fulfill their many obligations under various international and regional human rights instruments.

#### 1. The Just Remuneration Approach

The just remuneration approach is commonly used by courts in constitutional law cases in which the constitution mandates free access to a work.<sup>211</sup> As Professors Alain Strowel and François Tulkens observed:

[T]he German Constitutional Court has held that, although the protection of property rights

implies that the economic exploitation of the work in principle vests with the author, the constitutional protection of property rights does not extend to all such exploitations. It is a matter for the legislature to determine the limits of copyright by imposing appropriate criteria, taking into account the nature and social function of copyright and ensuring that the author participates fairly in the exploitation of his work.

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<sup>210</sup> See Vienna Declaration, *supra* note 4, ¶ 5 (“All human rights are universal, indivisible and interdependent and interrelated.”).

<sup>211</sup> See Torremans, *supra* note 16, at 18 (“[T]he suggestion of the German Constitutional Court that the freedom of access to information can still be guaranteed in those cases where whoever seeks access does not get that access for free but against the payment of a fee in respect of the copyright in the information.”).

Thus, according to the Constitutional Court, while the legislature is competent to remove the exclusive aspect of copyright in the case of compilations of protected works for use in school textbooks, it is obliged nonetheless to ensure that authors receive fair remuneration for such exempted use.<sup>212</sup>

This approach is also recommended by the CESCR in situations where states have to establish limits to the right to the protection of interests in intellectual creations. As General Comment No. 17 stated, “The imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.”<sup>213</sup> Under the just remuneration approach, individuals are free to use creative works in the enjoyment or exercise of their human rights. Authors and inventors cannot prevent them from doing so, but they can seek economic compensation for any injury to the moral and material interests in their creations. The key lesson about this approach is that human rights grant to the individual a compulsory license, as compared to a free license, and to the right holder a right to remuneration, rather than exclusive control.

Consider, for example, the case of *Ashdown v. Telegraph Group Ltd.*,<sup>214</sup> which concerned the publication by the *Sunday Telegraph* of a yet-to-be-published minute written by Paddy Ashdown, the former leader of the Liberal Democrats in the United Kingdom, of his secret meeting with Prime Minister Tony Blair shortly after the 1997 general elections. Ashdown sued the newspaper for breach of confidence and copyright infringement. In its defense, the newspaper invoked both the usual defenses of fair dealing and public interest and a novel

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<sup>212</sup> Alain Strowel & François Tulkens, *Freedom of Expression and Copyright Under Civil Law: Of Balance, Adaptation, and Access*, in *COPYRIGHT AND FREE SPEECH*, *supra* note 202, at 287, 293 (quoting German Constitutional Court, July 7, 1971, 1972 GRUR 481).

<sup>213</sup> *General Comment No. 17*, *supra* note 136, ¶ 24.

<sup>214</sup> *Ashdown v. Tel. Group, Ltd.*, [2002] EWCA (Civ) 1142, [2001] W.L.R. 967 (Eng.). For discussion of the case, see Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 2003 ENT. L. REV. 24; Kevin Garnett, *The Impact of the Human Rights Act 1998 on U.K. Copyright Law*, in *COPYRIGHT AND FREE SPEECH*, *supra* note 202, at 171. For collections of articles exploring the tension between copyright and freedom of expression, see *COPYRIGHT AND FREE SPEECH*, *supra* note 202; *COPYRIGHT AND HUMAN RIGHTS*, *supra* note 12. For sources discussing the relationship between copyright law and the First Amendment to the Constitution, see Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 927 n.145 (2004).

defense based on the newly enacted Human Rights Act of 1998.<sup>215</sup> As the newspaper contended, the new statute, which incorporated into British law the protection of freedom of expression in article 10 of the European Convention on Human Rights,<sup>216</sup> establishes “a new ‘freedom of expression’ exception to copyright law in addition to the existing statutory exceptions.”<sup>217</sup>

At trial before the Chancery Division, the court rejected the newspaper’s human rights defense (as well as other common defenses). As Vice-Chancellor Sir Andrew Morritt explained:

The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ

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<sup>215</sup> Human Rights Act, 1998, c. 42 (U.K.).

<sup>216</sup> Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221; *see also* ICCPR, *supra* note 87, art. 19 (providing for right to freedom of expression and delineating corresponding duties and responsibilities); UDHR, *supra* note 5, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

<sup>217</sup> Birnhack, *supra* note 214, at 26. As Birnhack explained:

In no previous reported case had such an argument been made, though freedom of expression had previously been mentioned in some copyright cases without explication. The invocation of this claim can be explained due to the constitutional changes, which were caused by the enactment of the HRA [Human Rights Act]. Human rights which previously were recognised by the Common Law now enjoy an explicit statutory status. This important change raises many questions as to the workings of English constitutional law.

*Id.*

of the democratic state itself in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question.<sup>218</sup>

The court granted a summary judgment on the copyright claim, awarding Lord Ashdown both an injunction on further infringement and a choice of remedy of either damages or an account of profits.<sup>219</sup>

On appeal, the Civil Court of Appeals provided a lengthier and more nuanced analysis of the impact of the new Human Rights Act on copyright. As the court elaborated, intellectual property rights may sometimes be in conflict with human rights:

Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.<sup>220</sup>

To resolve conflict on these “rare” occasions and to accommodate the right to freedom of expression, the court embraced the just remuneration approach by suggesting, in dicta, that courts should decline discretionary injunctive relief in the event of a conflict between copyright and human rights. As Lord Chief Justice Nicholas Phillips explained:

If a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another’s work.<sup>221</sup>

By making this recommendation, the appellate court opened the possibility for the future creation of human rights-based compulsory licenses. Nevertheless, because the appellant did not challenge the appropriateness of injunctive relief, the court did not have an

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<sup>218</sup> Ashdown v. Tel. Group Ltd., [2001] Ch. 685, 696 (Ch.) (Eng.).

<sup>219</sup> See *id.* at 701-02.

<sup>220</sup> Ashdown v. Tel. Group Ltd., [2002] EWCA (Civ) at 1142.

<sup>221</sup> *Id.*

opportunity to review the discretion exercised by the lower court.<sup>222</sup> Concluding that the newspaper infringed on Lord Ashdown's copyright in the reproduced minute, the court dismissed the appeal.<sup>223</sup>

The approach taken by the *Ashdown* court provides a stark contrast to the approach usually taken by the U.S. Supreme Court. In *Eldred v. Ashcroft*,<sup>224</sup> for example, the Court found that the copyright scheme "incorporates its own speech-protective purposes and safeguards" and therefore declined to impose the "uncommonly strict scrutiny" usually found in First Amendment cases.<sup>225</sup> As the Court explained, "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression."<sup>226</sup> Among the various "built-in First Amendment accommodations" in the Copyright Act that the Court listed were the idea-expression dichotomy, the fair use privilege, and the various statutory exceptions in the Sonny Bono Copyright Term Extension Act, which extended the copyright term at issue in the case.<sup>227</sup>

In addition to courts, legislatures have equally embraced the just remuneration approach. A case in point in the European context is the European Community Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.<sup>228</sup> Article 2(a) of the Directive allows EC member states to provide for exceptions or limitations to the reproduction right in respect of reproductions on paper or any similar medium using photographic or equivalent techniques.<sup>229</sup> Article 2(b) enables member states to provide for similar exceptions or limitations in the context of noncommercial, private use and require them to "take[] account of the

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<sup>222</sup> See *id.* ("This appeal has been founded on the contention that [the Vice-Chancellor] erred in law in holding that the Telegraph Group had infringed the [Copyright Act]. No separate attack was made upon the exercise of his discretion in granting injunctive relief.").

<sup>223</sup> See *id.*

<sup>224</sup> 537 U.S. 186 (2003). The case concerned a challenge to the constitutionality of the Sonny Bono Copyright Term Extension Act, which extended for 20 years the copyright term of both future and existing works.

<sup>225</sup> *Id.* at 219.

<sup>226</sup> *Id.*

<sup>227</sup> See *id.* at 219-20.

<sup>228</sup> Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society art. 2, May 22, 2001, 2001 O.J. (L 167) 10.

<sup>229</sup> *Id.* art. 2(a).

application or non-application of technological measures referred to . . . the work or subject-matter concerned.”<sup>230</sup> Finally, article 2(e) permits member states to provide for exceptions or limitations to enable social institutions, such as hospitals or prisons, to make noncommercial reproductions of broadcasts.<sup>231</sup> All three provisions are conditioned on the provision of “fair compensation” to the rights holders. From the human rights standpoint, this condition is particularly important, because it provides important accommodation of human rights interests of individuals residing in the European Union.

Although courts and legislatures have embraced the just remuneration approach, the creation of human rights-based compulsory licenses is sometimes hindered by the high transaction costs of negotiating and enforcing individual licenses. To reduce these transaction costs, some states have actively promoted the establishment of collective rights organizations. Such efforts have been welcomed by the CESCR, which noted in its General Comment No. 17 that the establishment of “systems of collective administration of authors’ rights” is considered an acceptable means to “prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies . . . [and to] ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the unauthorized use of their productions.”<sup>232</sup> Today, collective rights organizations are so important in the business environment that Helfer has described these organizations as the “essential features of human rights-compliant, 21st century copyright systems.”<sup>233</sup>

In sum, the just remuneration approach provides a good solution to the inevitable conflict between two important human rights. However, it has several drawbacks. While the approach may work well with wealthy businesses in developed countries, it is less effective

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<sup>230</sup> *Id.* art. 5(2)(b).

<sup>231</sup> *Id.* art. 5(2)(e).

<sup>232</sup> *General Comment No. 17*, *supra* note 136, ¶ 31.

<sup>233</sup> Laurence R. Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 99 (Daniel Gervais ed., 2006). Nevertheless, he reminds us that government regulation is sometimes needed to prevent these organizations from undermining human rights protection through abuses of their monopoly or oligopoly positions. *See id.* at 101 (discussing “the need for governments to regulate (1) the licensees that CROs [collective rights organizations] offer to users, (2) the relationships between CROs and their members, and (3) the relationships among the members themselves”).

in regards to poor individuals and less developed countries. As *The New Yorker* essayist A.J. Liebling reminded us, freedom of the press belongs only to those who own one.<sup>234</sup> A primary concern about this approach is that the level of remuneration can be set so high that renders human rights protection meaningless.<sup>235</sup> The compensation level that is considered “just” from the rights holders’ viewpoints may be grossly unjust from the standpoint of the poor individuals who seek to use the works to enjoy and exercise their human rights. Thus, if human rights are to be effectively and meaningfully protected, states not only need to broker human rights-based compulsory licenses, but also have to introduce legislation and institutions to prevent exorbitant pricing, anticompetitive behavior, and other market abuses. Examples of such remedial measures include compulsory licensing, price control, competition laws, government procurement and subsidies, voluntary cooperation,<sup>236</sup> and international assistance and cooperation. If there is considerable disparity between the rich and the poor in the country, the state may also have a duty to make resources available to those who are economically unable to enjoy and exercise their human rights.

Although the United States and other developed countries remain critical of many of these remedial measures and have actively dissuaded their less developed trading partners from adopting such measures,<sup>237</sup> all of these measures, ironically, have been and continue to be practiced in the developed world.<sup>238</sup> As the U.K. Commission on

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<sup>234</sup> See A.J. LIEBLING, *THE WAYWARD PRESSMAN* 265 (1947).

<sup>235</sup> See Garnett, *supra* note 213, at 179 (“It is obvious that the threat of having to pay damages and possibly legal costs is a ‘chilling’ factor when deciding whether or not to publish, particularly in the case of a publisher of limited means.”).

<sup>236</sup> Uma Suthersanen, *Towards an International Public Interest Rule? Human Rights and International Copyright Law*, in *COPYRIGHT AND FREE SPEECH*, *supra* note 202, at 97, 118 (discussing voluntary codes of conduct). *But see* Richard Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in *GLOBALIZATION AND HUMAN RIGHTS* 61, 65-66 (Alison Brysk ed., 2002) (expressing skepticism of efforts by multinational corporations to promote human rights commitments and noting that “[c]orporate performance is still predominantly measured by bottom-line profits as recorded in quarterly reports to stockholders”).

<sup>237</sup> For discussion of TRIPS-plus bilateral and regional agreements, see generally Peter K. Yu, *The International Enclosure Movement*, 82 *IND. L.J.* (forthcoming 2007).

<sup>238</sup> See Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in PhRMA v. Walsh and the TRIPS Agreement*, 38 *U. RICH. L. REV.* 777, 796-812 (2004) (discussing use of compulsory licensing and price control mechanisms by United States under circumstances less threatening than national emergencies); Yu, *supra* note 237 (noting that developed countries criticized their less developed counterparts even though they had been using similar mechanisms in their

Intellectual Property Rights noted in the pharmaceutical context, “Canada used compulsory licensing extensively in the pharmaceutical field from 1969 until the late 1980s. This resulted in prices of licensed drugs being 47% lower than in the US in 1982. The UK also used compulsory licensing until the 1970’s, including for important drugs such as Librium and Valium.”<sup>239</sup> Even in the United States, many states, including Florida, Hawaii, Illinois, Maine, Michigan, North Carolina, Oregon, and Vermont have introduced cost-saving programs to reduce the prices of patented pharmaceuticals purchased by Medicaid recipients and other low-income patients.<sup>240</sup> Although the pharmaceutical industry challenged the legality of the Maine program before the U.S. Supreme Court, the Court ultimately affirmed the decision by the lower appellate court to reverse the district court’s grant of a preliminary injunction.<sup>241</sup>

The second weakness of the just remuneration approach is that it may unduly focus on economic compensation (and the protection of material interests), thus ignoring the equally important protection of moral interests in intellectual creations. To be certain, there are many benefits to a weakening of the personal link between authors and their creations. For example, commentators, notably Professors William Fisher and Lawrence Lessig, have explained how the loosening of control of copyrighted works can facilitate the reuse and recoding of existing creative works, which, in turn, will promote creativity and cultural diversity.<sup>242</sup> As Fisher explained, collective creativity is important because it transforms listeners and viewers from passive consumers to active producers (or reproducers); it creates a “more collaborative and playful, less individualist or hierarchical” creative

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own countries).

<sup>239</sup> COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 42 (2003) (footnote omitted).

<sup>240</sup> See Ragavan, *supra* note 238, at 801-07.

<sup>241</sup> See *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003).

<sup>242</sup> See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28-31 (2004) (discussing benefits of collective creativity and potential for development of semiotic democracy); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (articulating needs for development of free culture); Lawrence Lessig, *Creative Economies*, 2006 MICH. ST. L. REV. 33 (discussing remixing of culture).



environment<sup>243</sup> and promotes what he (and Professor John Fiske) describes as “semiotic democracy.”<sup>244</sup>

Notwithstanding the importance of such reuse and recreations, human rights — in particular, the right to the protection of moral interests in intellectual creations — seem to require some form of protection of the personal link between authors and their creations.<sup>245</sup> If that link is to be protected, states not only have to require “just remuneration,” but also need to ensure that the work is properly identified and attributed and that the work not be recoded or otherwise modified in a manner that would be prejudicial to the author’s honor or reputation. At the very least, states have the obligation to introduce laws that require “recreators” to include an attribution to the original author and work and, if appropriate, a disclaimer that the work has been subsequently modified.<sup>246</sup> After all, authors have the right to the protection of not only material interests in their intellectual creations, but also the accompanying moral interests. Using the just remuneration approach alone would not suffice for the latter obligation.

The just remuneration approach is equally ineffective in protecting traditional creations, such as folklore and traditional knowledge, innovations, and practices. While some in the traditional communities have called for reforms of the intellectual property system to provide for informed consent and benefit sharing, others in

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<sup>243</sup> FISHER, *supra* note 242, at 31.

<sup>244</sup> Borrowing from Fiske, Fisher defined semiotic democracy as “the ability of ‘consumers’ to reshape cultural artifacts and thus to participate more actively in the creation of the cloud of cultural meanings through which they move.” *Id.* at 184.

<sup>245</sup> See *General Comment No. 17*, *supra* note 136, ¶ 12 (stating that intention of article 27(2) “was to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations”); see also Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 928 (1999) (exploring situations in which “the utility derived by passive non-owners from the stability of propertized cultural objects [may be] greater than the utility that would accrue to non-owners who want to recode cultural objects so much that those non-owners need to be freed from existing legal constraints”).

<sup>246</sup> Cf. Roberta Rosenthal Kwall, *Contract Options for Individual Artists: Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author’s Perspective on § 108*, 29 COLUM.-VLA J.L. & ARTS 343, 359 (2006) (“[R]equiring attribution and a disclaimer as to the reproduction’s accuracy promotes public interest in knowing the original source of a work and understanding the work in the context of the author’s original message.”); Netanel, *supra* note 199, at 4 (offering proposal under which “[i]ndividuals’ noncommercial adaptations and modifications of such content would also be noninfringing as long as the derivative creator clearly identifies the underlying work and indicates that it has been modified”).

the communities are concerned about the increasing abuse, misappropriation, and commercial exploitation of their creations and practices.<sup>247</sup> To the latter, economic compensation alone does not satisfy their needs.<sup>248</sup> If the right to the protection of interests in traditional creations is to be effectively protected, states need to protect the intrinsically personal and cultural character of traditional creations and the ensuing durable link between traditional communities and their creations,<sup>249</sup> taking into account the right to self-determination of the individuals in the traditional communities.<sup>250</sup> As General Comment No. 17 stated:

With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific,

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<sup>247</sup> See Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT'L & COMP. L. 239, 244-45 (2003) (noting concern of traditional communities due to "the secretive nature of some of the indigenous creations and practices, such as sacred symbols and religious rituals"); see also Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 5 (1997) (discussing how some aboriginal designs are so sacred that "they are viewed only during certain ceremonies, and only by those who have attained the requisite level of initiation"); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 356 (1989) (noting that some cultural objects "are secret in nature, intended to be seen only by a restricted group of people at particular times or exposed only in a specific place"); Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 100 (2005) (observing that "tribes may elect not to identify sacred sites, plants used in traditional Indian medicines, or burial practices to protect such property from desecration or theft"); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 829-30 (2001) (discussing how newspaper photographer "violated and upset the Pueblo's balance of life" by taking photographs of ceremonial dance while flying at low altitude over Pueblo of Santo Domingo).

<sup>248</sup> See Weissbrodt & Schoff, *supra* note 3, at 18 ("In many cases, pecuniary gain could never fully compensate for the cultural harm suffered in these situations, and does little to deter future offenses."); see also Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 281 (2001) ("Any new alienable right, however, is only as valuable as the position its holder occupies in a market; for this reason many indigenous peoples' NGOs view commitments to local capacity-building and self-governance as more important than the creation of new intellectual property rights.").

<sup>249</sup> Cf. *General Comment No. 17*, *supra* note 136, ¶ 12 (stating that UDHR framers intended "to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations").

<sup>250</sup> See Riley, *supra* note 247, at 100 ("When tribes themselves define the parameters of cultural property laws, they are in the best position to determine whether and/or how to reveal culturally sensitive information. In this way, tribes may balance the drawbacks of written law by keeping secret certain specific elements of their cultural heritage.").

literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences.<sup>251</sup>

## 2. The Core Minimum Approach

Specially designed for the ICESCR, the core minimum approach was developed to deal with the inherent difficulty in determining whether a country has taken sufficient steps “to the maximum of its available resources” to fulfill its treaty obligations of fully realizing economic, social, and cultural rights.<sup>252</sup> It is the one taken by the CESCR in its General Comment No. 17 and the one Helfer emphasized in his approach to develop a human rights framework for intellectual property. As he explained, General Comment No. 17 suggested “the existence of an irreducible core of rights — a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives, all of which are essential requisites for any free society.”<sup>253</sup> Because not all attributes of intellectual property rights protect this “core zone of autonomy,” “any *additional* intellectual property protections the country provides ‘must be balanced with the other rights recognized in the Covenant,’ and must give ‘due consideration’ to ‘the public interest in enjoying broad access to’ authors’ productions.”<sup>254</sup> Under the core minimum approach, states will not violate the ICESCR if they modify or roll back excess protection required under TRIPS, the WIPO treaties, and other international, regional, and bilateral treaties provided that such protection does not have any human rights basis. They can also do so if the protection

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<sup>251</sup> *General Comment No. 17*, *supra* note 136, ¶ 32.

<sup>252</sup> Although article 2 requires states parties “to take steps’ . . . ‘to the maximum of its available resources[,]’ . . . no guidance is provided for judging [sic] the adequacy or sufficiency of the steps taken, or for determining a State’s ‘maximum available resources’ or whether they have been fully deployed in meeting the obligations in the Covenant.” Audrey R. Chapman & Sage Russell, *Introduction to CORE OBLIGATIONS*, *supra* note 16, at 1, 5.

<sup>253</sup> Helfer, *supra* note 7, at 996.

<sup>254</sup> *Id.*

already exceeds what is required under their core minimum obligations and if they offer compelling evidence of the competing demands of other human rights obligations.<sup>255</sup>

When the UDHR and the ICESCR were drafted, the delegates understood that some countries might not have sufficient resources to fully realize the protection granted under the instruments.<sup>256</sup> Article 22 of the UDHR, for example, specifically states that “the economic, social and cultural rights indispensable for [one’s] dignity and the free development of his [or her] personality” are to be realized “in accordance with the organization and resources of each State.”<sup>257</sup> Likewise, article 2 of the ICESCR states that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures.”<sup>258</sup>

To explain how states should allocate their limited resources to realize rights protected in the Covenant, the CESCR provided the following guidance in an earlier interpretive comment. As General Comment No. 3 stated:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State

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<sup>255</sup> *Accord id.* (stating that ICESCR “gives each of its member states the discretion to eschew these additional protections altogether or, alternatively, to shape them to the particular economic, social, and cultural conditions within their borders”).

<sup>256</sup> See Chapman & Russell, *supra* note 252, at 4-5 (“The concept of progressive realization reflected the drafters’ recognition that most State parties, the countries which ratified the Covenant and thereby became legally obligated to implement its standards, would not be able to realise fully all economic, social and cultural rights immediately upon ratification or even in a short period of time.”).

<sup>257</sup> UDHR, *supra* note 5, art. 22. As Professor Mary Ann Glendon explained:

The reference in the chapeau to the “organization” of each state is key, because it leaves room for choice among a range of *means* of striving toward the common social and economic goals — state programs and policies, international initiatives, market dynamics, voluntary action, or various combinations of approaches. The reference to “resources” is equally crucial — a response to the fears of Egypt, India, and other poor countries about arousing unrealistic expectations. They needed to clarify that the right to social security could be implemented gradually as resources permitted.

GLENDON, *supra* note 32, at 188.

<sup>258</sup> ICESCR, *supra* note 6, art. 2(1).

party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>259</sup>

This interpretive comment emphasized the interaction and interdependence of the different human rights protected in the ICESCR. It stated that, even in times of resource constraint, states could not pick and choose which human rights they wanted to realize.<sup>260</sup> Instead, they need to provide the “minimum essential levels” of protection of *all* of the human rights covered by the ICESCR. Commentators have defined such levels as “the essential element or elements without which [a right] loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.”<sup>261</sup> Once they have satisfied these core minimum

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<sup>259</sup> CESCR, *General Comment No. 3: The Nature of States Parties Obligations* (Art. 2, Par. 1), ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument).

<sup>260</sup> See CRAVEN, *supra* note 23, at 141 (noting that core minimum approach “does not entail the division of the rights according to their priority, but rather that each right should be realized to the extent that provides for the basic needs of every member of society”) (footnote omitted); DONNELLY, *supra* note 15, at 23 (“[I]nternationally recognized human rights are treated as interdependent and indivisible whole, rather than as a menu from which one may freely select (or choose not to select.)”); see also GLENDON, *supra* note 32, at xviii (lamenting that Cold War politics and bad habits of states and interests groups have reduced UDHR to “a kind of menu of rights from which one can pick and choose according to taste”).

<sup>261</sup> Chapman & Russell, *supra* note 252, at 9.

obligations, they have to take “deliberate, concrete and targeted” steps toward the full realization of the rights in the Covenant.<sup>262</sup> The Committee did not explain further how the competing demands of these obligations were to be balanced or whether some of these rights were to be protected to a greater extent or with more deliberate speed. The ICESCR only states that, without a compelling justification, states cannot take retrogressive measures that would lower the existing protection.<sup>263</sup>

The CESCR did anticipate the situation in which a state did not have adequate resources to satisfy even its core minimum obligations. Under that scenario, the Committee placed on the resource-deficient state the burden of proving that “every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”<sup>264</sup> By creating this burden, the CESCR took a pragmatic approach that closed the loophole created by the potential excuse of resource constraints<sup>265</sup> while refraining from making an unrealistic assumption that every country would necessarily have the resources to fully comply with all of its core minimum obligations.

This core minimum approach is important to authors and inventors. When it is used in relation to the right to the protection of interests in intellectual creations, it provides them with the minimum essential levels of protection even in situations where states need resources to realize other human rights. Meanwhile, it also benefits future authors and users as well as individuals in less developed countries, poorer neighborhoods, and traditional communities. When such an approach is used in relation to other human rights, such as the right to food, the right to health, the right to education, and the right to self-determination, it creates the maximum limits of intellectual property

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<sup>262</sup> *General Comment No. 3, supra* note 259, ¶ 2; *see also* ICESCR, *supra* note 6, art. 2(1) (requiring each state party “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”).

<sup>263</sup> *See* ICESCR, *supra* note 6, art. 5(1) (“[A]ny State, group or person . . . [may not] engage in any activity or . . . perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”).

<sup>264</sup> *General Comment No. 3, supra* note 259, ¶ 10.

<sup>265</sup> *See* Chapman & Russell, *supra* note 252, at 5 (“The standard of progressive realisation . . . provides a loophole large enough in practical terms to nullify the Covenant’s guarantees: the possibility that States will claim lack of resources as the reason they have not met their obligations.”).

protection that are needed but are often omitted in international treaties.<sup>266</sup> Such limits, in turn, will facilitate greater access to protected materials and will thereby promote creativity, innovation, and cultural participation and development. As Chapman noted:

[H]uman-rights considerations impose conditions on the manner in which author's rights are protected in intellectual property regimes. To be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote the other components of Article 15. Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on one side and broad access to the benefits of scientific progress on the other.<sup>267</sup>

Notwithstanding these benefits, the core minimum approach has several limitations. First, it is difficult to determine precisely how much protection is required under the core minimum obligation. As commentators have noted, "[I]t is one thing to assert that there is a core content of each of the rights enumerated in the Covenant and quite another to define its scope."<sup>268</sup> Indeed, defining the scope of protection is not easy; it does not matter whether it is the scope of the right to the protection of interests in intellectual creations or that of broader intellectual property rights. Since the establishment of the modern intellectual property system, policymakers and commentators have worked hard to calibrate the balance between providing protection for authors and inventors to create and enabling public access to protected information. Despite centuries of lawmaking activities and academic and policy debates, states are no closer to

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<sup>266</sup> See, e.g., Rochelle Cooper Dreyfuss, *TRIPS — Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 27 (2004) ("[T]he WTO system must begin to recognize substantive maxima on the scope of available protection."); Helfer, *supra* note 1, at 58 (noting need to articulate "maximum standards" of intellectual property protection because "treaties from Berne to Paris to TRIPS are all concerned with articulating 'minimum standards'"); Helfer, *supra* note 135, at 24-25 (discussing how less developed countries can use strategy of "regime shifting" to develop counterregime norms that set up maximum standards of intellectual property protection); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 168 (2000) (proposing to develop international fair use doctrine as "ceiling"); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 402 (2006) (noting that "international intellectual property regime, to some extent, is handicapped by its lack of maximum standards").

<sup>267</sup> Chapman, *supra* note 78, at 314-15.

<sup>268</sup> Chapman & Russell, *supra* note 252, at 6.

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finding that proverbial balance. With the introduction of new subject matters and technologies, that balance has become even harder to find. Thus, if the core minimum obligations need to reflect the appropriate balance of the intellectual property system, determining the scope of those obligations is likely to be very difficult. In fact, had we been able to find that balance, the development of a human rights framework for intellectual property would not have been as urgent as it is today.

In General Comment No. 3, the CESCR listed some non-exhaustive examples of what core minimum obligations entail: “[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>269</sup> Although General Comment No. 3 focused on such basic human needs as food, housing, and education, one could extrapolate the Committee’s observation to the intellectual property area. Read in that context, this interpretive comment seems to suggest that states have an obligation to ensure that authors and inventors receive sufficient remuneration to allow them to enjoy an adequate standard of living. At the very least, a significant number of authors and inventors need to have “essential foodstuffs, . . . essential primary health care, . . . basic shelter and housing, [and] . . . the most basic forms of education.” That comment also suggests that states have a core minimum obligation to ensure that the works are not misattributed or distorted in a manner that would be prejudicial to the honor or reputation of authors or inventors, because such misattribution or distortion may affect the authors and inventors’ ability to enjoy an adequate standard of living.

In addition, as the CESCR stated in General Comment No. 17, articles 2 and 3 of the ICESCR prohibit against discrimination and promote the equal enjoyment and exercise of Covenant rights. Because the antidiscrimination obligation is considered an immediate obligation, as compared to a progressive one, states are prohibited from conditioning “access to an effective protection of the moral and material interests of authors, including administrative, judicial and other remedies, . . . [on] race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>270</sup> Although international intellectual property treaties generally do not specify protection for local authors and inventors,

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<sup>269</sup> *General Comment No. 3*, *supra* note 259, ¶ 10.

<sup>270</sup> *General Comment No. 17*, *supra* note 136, ¶ 19.



these articles prevent states from adopting laws or policies that would penalize authors and inventors as a group, such as those in China during the Cultural Revolution.<sup>271</sup> Thus, the antidiscrimination protection the ICESCR offers far exceeds the protection generally required by the national treatment provisions of the Berne Convention, the Paris Convention, and TRIPS.<sup>272</sup> States realizing obligations under the ICESCR not only cannot discriminate against the relevant foreign authors and inventors, but they also have to protect individuals throughout the world.

Second, because the core minimum approach focuses on a single right at a time, it does not provide guidance on how states can expand protection as resources become available. It also does not provide any guidance on the maximum limits of such protection, which are particularly needed when the system interferes with the protection of other important human rights. As the CESCR stated in its General Comment No. 17, article 15(1)(c) does not “prevent[] States parties from adopting higher protection standards in international treaties on the protection of the moral and material interests of authors or in their domestic laws, provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant.”<sup>273</sup> Stated differently, the limits of a right do not come from the core minimum

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<sup>271</sup> See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 63-64 (1995) (describing plight of scientists, writers, artists, and intellectuals during Cultural Revolution); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 21-22 (2001) (“During the Cultural Revolution, the government heavily criticized scientists, writers, artists, lawyers, and intellectuals and routinely condemned them to harsh prison terms.”).

<sup>272</sup> As Helfer stated: “A human rights framework for authors’ rights encompasses a rule of equality between domestic and foreign owners of intellectual property products. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for ‘disadvantaged and marginalized groups.’” Helfer, *supra* note 7, at 993; see also SILKE VON LEWINSKI, *INTELLECTUAL PROPERTY, NATIONALITY AND NON-DISCRIMINATION* 19 (1998) (questioning whether countries that are members of both relevant human rights treaty and relevant intellectual property law treaty, “would . . . be obliged, on the basis of the human rights treaty, to grant non-discriminatory intellectual property protection, even if such obligation does not exist, in a particular case, under the intellectual property treaty”), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf>. For provisions requiring the national treatment of foreign intellectual property rights holders, see Berne Convention, *supra* note 52, art. 5(1); Paris Convention for the Protection of Industrial Property art. 2(1), Mar. 20, 1883, revised at Stockholm July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305; TRIPS, *supra* note 2, art. 3.

<sup>273</sup> *General Comment No. 17*, *supra* note 136, ¶ 11 (footnote omitted).

obligations of the right itself, but from the core minimum obligations of other human rights. As a result of these interdependent relationships, states cannot determine whether the intellectual property protection they offer has exceeded its maximum limits until they are able to determine whether such protection would create an impediment to their ability to discharge the core minimum obligations of other human rights.

Thus, some commentators have been disappointed with the inability of the CESCR to focus its General Comment No. 17 on the tension between human rights and intellectual property rights, as compared to what the Committee did in its earlier *Statement on Intellectual Property Rights and Human Rights*.<sup>274</sup> To their consolation, the CESCR has already made plans to prepare general comments on the other paragraphs of article 15(1), which cover the right to cultural participation and development and the right to the benefits of scientific progress. The Committee also has drafted general comments on many other rights that are affected by strong intellectual property protection, including the right to health, the right to food, and the right to education.<sup>275</sup>

Finally, the core minimum approach does not explain the relationship of the different paragraphs of the provisions in human rights instruments or that of those provisions. An understanding of these relationships is particularly important, because although the core minimum obligation was intended to be the floor of the right, it could be easily transformed to the ceiling. Indeed, one of the biggest concerns of human rights activists about this approach “is that the identification of minimum core content will reveal to State parties how little they have to do in order to be in compliance with their

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<sup>274</sup> See Philippe Cullet, *Human Rights and Intellectual Property Rights: Need for a New Perspective I* (Int'l Env't Law Research Centre, Working Paper No. 2004-4, 2004) (“Unlike the 2001 Statement, the [then-]proposed General Comment focuses mostly on the rights of individual contributors to knowledge and gives little space to questions concerning the impacts of intellectual property rights on human rights.”), available at <http://www.ielrc.org/content/w0404.pdf>.

<sup>275</sup> See CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, U.N. Doc. E/C.12/1999/5 (May 12, 1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?Opendocument); CESCR, *General Comment No. 13: The Right to Education (Art. 13)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument); CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument).

obligations, and that States will do that minimum and nothing more.”<sup>276</sup>

Given the rapid expansion of intellectual property rights and the current imbalance in the existing intellectual property system, it is no surprise that some commentators and human rights activists are indifferent, or even find it appealing, to transform the “floor” of the right to the protection of interests in intellectual creations into its “ceiling.” However, those same commentators and activists would be gravely concerned if states chose to expand intellectual property protection by transforming into ceilings the floors of other important human rights, such as the right to food, the right to health, the right to education, and the right to self-determination. Thus, it is important to articulate the interdependent relationship between the different rights.

### 3. The Progressive Realization Approach

The progressive realization approach, which also has its basis in the UDHR and the ICESCR, was specially designed to address the increased allocation of resources to the realization of economic, social, and cultural rights as these resources become available. Unlike the core minimum approach, which seeks to identify the minimum obligations of each party, the progressive realization approach focuses on how each party can use additional resources to improve its human rights protection. Under this approach, states will undertake their best efforts based on the availability of resources to comply with all of their obligations under human rights instruments.<sup>277</sup> As stated in the ICESCR, they not only agree to refrain from taking retrogressive measures, but strive to improve on the protection of human rights until they have fully discharged their obligations.<sup>278</sup>

Commentators have widely embraced the use of this approach to develop human rights protection. For example, in this Symposium, Helfer advocated the development of the human rights framework for

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<sup>276</sup> Chapman & Russell, *supra* note 252, at 9; cf. Geraldine Van Bueren, *The Minimum Core Obligations of States Under Article 10(3) of the International Covenant on Economic, Social and Cultural Rights*, in CORE OBLIGATIONS, *supra* note 16, at 147, 160 (“The minimum core of States’ obligations must never be used as a reason for inertia. The justification for adopting a minimum core approach is to view it as a springboard for further action by the State.”).

<sup>277</sup> See ICESCR, *supra* note 6, art. 2; UDHR, *supra* note 5, art. 22.

<sup>278</sup> See *id.* art. 5(1) (“[A]ny State, group or person . . . [may not] engage in any activity or . . . perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”).

intellectual property in two steps: first, by protecting the “core zone of autonomy,” and then by adding protection that is balanced against other human rights obligations and that takes into account the public interest in enjoying broad access to new knowledge.<sup>279</sup> Separately, Professor Paul Torremans noted that “[n]ot only do [intellectual property rights] need to exist to facilitate cultural participation and access to the benefits of scientific progress, they should also make sure that the other components of the relevant articles in the international Human Rights instruments are respected and promoted.”<sup>280</sup> In his view, “the rights of authors and creators should not only enable, but also facilitate rather than constrain cultural participation and access to scientific progress.”<sup>281</sup> In earlier works, I also noted the need to interpret the paragraphs of article 27 of the UDHR and article 15 of the ICESCR as noncompeting clauses that offer guarantees of what I called “intellectual human rights”<sup>282</sup> — the fundamental, inalienable, and universal rights to develop an individual’s intellectual faculties.

What is attractive about all of these approaches is that they not only ask what should be protected, but also how it can be protected in a way that would allow for the progressive, or even full, realization of other human rights. While Helfer calls for a balancing of the right to the protection of interests in intellectual creations against other human rights, taking into account the public interest in enjoying broad access to new knowledge, Torremans and I see the right not only as a universal entitlement, but also as an “empowerment” right — a “right that enables a person to experience the benefit of other rights.”<sup>283</sup> Notwithstanding our different focuses and perspectives, the three proposals strive to achieve the same goal — they seek to enable individuals to progressively realize their economic, social, and cultural rights by resolving the conflicts between human rights and the non-

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<sup>279</sup> See Helfer, *supra* note 7, at 995-97.

<sup>280</sup> Torremans, *supra* note 16, at 9-10.

<sup>281</sup> *Id.* at 10; see also Chapman, *supra* note 78, at 314-15 (“To be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote the other components of Article 15.”).

<sup>282</sup> Peter K. Yu, *The Trust and Distrust of Intellectual Property Rights*, 18 REVUE QUEBECOISE DE DROIT INT’L 107, 127 (2005); see also Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 18-19 [hereinafter Yu, *Intellectual Property and the Information Ecosystem*] (discussing need to read articles 27(1) and 27(2) of UDHR as fulfilling two noncompeting objectives).

<sup>283</sup> Cf. Fons Coomans, *In Search of the Core Content of the Right to Education*, in CORE OBLIGATIONS, *supra* note 16, at 217, 219 (characterizing right to education as “empowerment” right).

human-rights aspects of intellectual property protection.

The biggest challenge to this approach is that international human rights treaties generally do not provide any guidance on how resources are to be allocated to achieve a progressive realization of the specified rights. As one commentator has noted:

[I]t is worth stressing that the Covenant does not provide any rules for prioritising the allocation of resources to specific rights, nor has the Committee provided any concrete rules in this regard. In general, the Committee seems to analyse the issue of allocation of resources in a very broad and tentative manner. Although it is true that in general the Committee has paid more attention to the need for increased resources devoted to the right to adequate housing and the right to education, it does not follow that these rights should be given preference over others. Arguably, the attention that the Committee pays to these issues is a consequence of the fact that it has received more information about them.<sup>284</sup>

To help provide some guidelines on the progressive realization of the right to the protection of interests in intellectual creations, this section proposes a three-step balancing process: (1) intra-provision balancing, (2) priority inter-provision balancing (with a focus on rights that directly conflict with the non-human rights aspect of intellectual property protection), and (3) general inter-provision balancing. The process begins when states balance the different paragraphs within the same cultural or intellectual rights provisions — between articles 27(1) and 27(2) of the UDHR and among articles 15(1)(a), 15(1)(b), 15(1)(c), and 15(3) of the ICESCR. Such balancing is important, but nonetheless difficult, because the various rights are “intrinsically linked” to one another and serve some common objectives.

As Chapman and Torremans suggested, that particular article was created in response to the abuse of science and technology and of copyright-based propaganda for atrocious purposes during World War II.<sup>285</sup> To be certain, there is insufficient evidence to indicate that the

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<sup>284</sup> SEPÚLVEDA, *supra* note 11, at 335 (footnotes omitted).

<sup>285</sup> As Torremans stated:

The first paragraph of Article 27 clearly has historical roots. The Universal Declaration of Human Rights was drafted less than three years after the end of the Second World War and science and technology as well as copyright based propaganda had been abused for atrocious purposes by those who lost the war. Such an abuse had to be prevented for the future and it was felt

framers of the Declaration considered protection of interests in intellectual creations the best means to promote intellectual freedom, or that they were motivated by the protection of intellectual freedom when they adopted article 27. However, Chapman and Torremans's observations are, at least, consistent with the discussions of the UDHR and ICESCR during their drafting processes. During the Third Committee's review of article 27 of the UDHR, Peruvian delegate Encinas stated that "it seemed pertinent now [after discussing an article that dealt with freedom of thought] to recognize freedom of creative thought, in order to protect it from harmful pressures which were only too frequent in recent history."<sup>286</sup> Similarly, during the discussion of the ICESCR in the Third Committee, several delegates noted the relation of article 15(1)(c) to science, creative activity, and cultural development. While the Swedish delegation stated that "the protection of those rights would be an encouragement to science and creative activity,"<sup>287</sup> the Israeli delegation maintained that "[i]t would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected."<sup>288</sup> It is, therefore, no surprise that the CESCR described the obligations in articles 15(1)(c) and 15(3) as "a material safeguard for the freedom of scientific research and creative activity."<sup>289</sup>

While recent scholarship has focused on corporate censorship and increasing consolidation of the copyright industries, many countries remain troubled by government censorship. Intellectual property therefore provides an important safeguard against such censorship while promoting the right to freedom of expression. As Justice Sandra Day O'Connor reminded us in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, "it should not be forgotten that the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression."<sup>290</sup> Likewise, former Register of Copyright Barbara Ringer stated, "Copyright provides the inducement for creation and

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that the best way forward was to recognize that everyone had a share in the benefits and that at the same time those who made valuable contributions were entitled to protection.

Torremans, *supra* note 16, at 5; *accord* CHAPMAN, *supra* note 1, at 6 ("Like other provisions of the UDHR, the context for drafting Article 27 was the widespread reaction to the Nazi genocide and the brutality of World War II.").

<sup>286</sup> See MORSINK, *supra* note 31, at 218.

<sup>287</sup> Green, *supra* note 67, ¶ 38.

<sup>288</sup> *Id.*

<sup>289</sup> *General Comment No. 17*, *supra* note 136, ¶ 4.

<sup>290</sup> 471 U.S. 539, 558 (1985).

dissemination of the works that shape our society and, in an imperfect and almost accidental way, represents one of the foundations upon which freedom of expression rests.”<sup>291</sup> Professor Neil Netanel also underscored the ability of the copyright system to “foster[] the dissemination of knowledge, support[] a pluralist, nonstate communications media, and highlight[] the value of individual contributions to public discourse.”<sup>292</sup>

In light of this common goal, I have suggested elsewhere the need to facilitate the sustainable development of the rights recognized in article 27 of the UDHR and article 15 of the ICESCR by reading those paragraphs as fulfilling noncompeting objectives.<sup>293</sup> As the Brundtland Commission declared, “In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.”<sup>294</sup> I use this concept specifically because societies not only need to meet their current needs by striking an appropriate balance in the intellectual property system, but they also need to preserve the potential for future generations to meet their own needs. Thus, such a concept not only provides insight into the relationship among the different rights in a human rights instrument, but also guides us to find solutions that help us meet both our current needs and those of future generations.

Indeed, the concept has become particularly appealing in light of the immense potential for scientific advancement, creative activity, and cultural development brought about by the digital revolution and the emergence of new technologies. Because cultural heritage cannot be

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<sup>291</sup> Ringer, *supra* note 53, at 1050.

<sup>292</sup> Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 220 (1998) (developing new paradigm in which copyright law serves fundamentally to underwrite democratic culture); see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (proposing democratic paradigm for copyright law); see also William W. Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 175 (Stephen R. Munzer ed., 2001) (describing social planning justification for intellectual property protection, which “advance[s] a vision of a just and attractive culture”).

<sup>293</sup> See Yu, *Intellectual Property and the Information Ecosystem*, *supra* note 282, at 19 (discussing need to read articles 27(1) and 27(2) of UDHR as fulfilling two noncompeting objectives); see also Strowel & Tulkens, *supra* note 212, at 292 (“Perhaps [the] two paragraphs of Article 27 of the UDHR should be considered complementary, as the first grants a passive right to culture (a right of enjoyment) awhile the second grants an active right (the right to become an author).”).

<sup>294</sup> WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 46 (1987).

preserved and developed by focusing on the present generations alone, the concept may also provide guidance on how states can improve their protection of traditional communities and their knowledge, innovations, and practices. It is therefore no surprise that this concept, despite its elusiveness, was highlighted in the U.N. Conference on Environment and Development (or the “Earth Summit”) held in Rio de Janeiro in 1992,<sup>295</sup> and has since inspired the Convention on Biological Diversity<sup>296</sup> and many other international and regional instruments.<sup>297</sup>

Alternatively, states could adjust the level of protection of the right to the protection of interests in intellectual creations by striking a balance within article 27 of the UDHR and article 15 of the ICESCR, keeping in mind the common, noncompeting objectives of the different paragraphs within the provisions. In making this adjustment, they may be able to increase the resources available for the realization of other human rights in the provisions or even in the entire instrument. After all, a reduction of intellectual property protection that exceeds the core minimum obligations would provide more access to protected materials that are needed for the enjoyment of the right to cultural participation and development and the right to the benefits of scientific progress. Such reduction may also free up resources for the realization of the right to food (in terms of patented seeds, agrochemicals, and foodstuffs), the right to health (in terms of patented pharmaceuticals), the right to education (in terms of copyrighted textbooks and software), and the right to freedom of expression (in terms of copyrighted works in general).

Once states complete the intra-provision part of the balancing process, they need to expand the process to cover other human rights.

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<sup>295</sup> U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992), 31 I.L.M. 874 (1992) (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).

<sup>296</sup> Convention on Biological Diversity art. 1, *opened for signature* June 5, 1992, 1760 U.N.T.S. 143 (considering among its objectives “the conservation of biological diversity, the *sustainable use* of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”); *see also* Coombe, *supra* note 145, at 92 (stating Convention on Biological Diversity “embraces the idea that traditional indigenous techniques and knowledge are essential to the preservation of biodiversity and sustainable development”).

<sup>297</sup> For comprehensive discussion of sustainable development law and policy, *see generally* MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES AND PROSPECTS* (2004).



In what I term “priority inter-provision balancing,” they need to begin with rights that directly conflict with the right to the protection of interests in intellectual creations. After they balance these conflicting rights, they should continue to expand the process to cover all of the remaining provisions, including those that recognize rights that pose limited conflicts with the right to the protection of interests in intellectual creations.

To some extent, this three-step balancing process is similar to what the CESCR had in mind when it listed a set of “obligations of comparable priority” in the draft General Comment No. 17.<sup>298</sup> Although the Committee later correctly rephrased the comment to avoid that prescriptively misleading term, it provided states guidance on how to implement the right to the protection of interests in intellectual creations in areas in which the right posed considerable conflicts with other human rights. As General Comment No. 17 stated in its final version:

Ultimately, intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights. States parties should, in particular, consider to what extent the patenting of the human body and its parts would affect their obligations under the Covenant or under other relevant international human rights instruments. States parties should also consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions.<sup>299</sup>

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<sup>298</sup> Cullet, *supra* note 274, at 5 n.17 (quoting then-paragraph 42 of Draft General Comment No. 17 to read “Core obligations — The Committee also confirms that the following are obligations of comparable priority”).

<sup>299</sup> *General Comment No. 17*, *supra* note 136, ¶ 35 (footnotes omitted).

One may question the appropriateness of differential treatment in this three-step balancing process in light of the organic unity of the UDHR<sup>300</sup> and the “universal, indivisible and interdependent and interrelated” nature of human rights.<sup>301</sup> However, the balancing process advocated in this section does not presume a hierarchy of rights, which drafters of human rights instruments have rejected. Rather, it presumes a hierarchy of priorities, suggesting that some rights need more urgent attention than other equally important rights.<sup>302</sup> It therefore sets its primary focus on areas in which the right to the protection of interests in intellectual creations creates the greatest conflict before taking into account the needs of protection for other human rights. While it is true that the right to the protection of interests in intellectual creations may create tension with many different human rights, there is no denial that it poses greater challenges to the realization of some of these rights than to that of the others. These challenges are further amplified by the fact that many states do not have sufficient resources to fully discharge all of their human rights obligations, and some do not even have resources to fully discharge their core minimum obligations. In times of resource constraints, some type of balancing is inevitable. This test, therefore, seeks to provide guidance on how states can use their resources to resolve the conflicts between the right to the protection of interests and intellectual creations and other human rights.

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<sup>300</sup> See MORSINK, *supra* note 31, at 232-38 (discussing organic unity of UDHR).

<sup>301</sup> See Vienna Declaration, *supra* note 4, ¶ 5 (“All human rights are universal, indivisible and interdependent and interrelated.”); GLENDON, *supra* note 32, at 239 (highlighting UDHR’s “message that rights have conditions — that everyone’s rights are importantly dependent on respect for the rights of others, on the rule of law, and on a healthy civil society”); *id.* at 174 (stating that UDHR is “declaration of interdependence — interdependence of people, nations, and rights”). As the General Comment stated, the full realization of the right to the protection of interests in intellectual creations is:

[D]ependent on the enjoyment of other human rights guaranteed in the International Bill of Human Rights and other international and regional instruments, such as the right to own property alone as well as in association with others, the freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, the right to the full development of the human personality, and rights of cultural participation, including cultural rights of specific groups.

*General Comment No. 17*, *supra* note 136, ¶ 4 (footnotes omitted).

<sup>302</sup> Cf. NICKEL, *supra* note 161, at 133-35 (developing three tests to determine priority and proper weight of rights: (1) consistency, (2) importance, and (3) cost efficiency).

There remains a question about how much deference the CESC should give to the states that undertake the balancing exercise. This Article takes the position that the Committee should give strong deference to the states, because each state would be in the best position to determine its priority of obligations due to its understanding of the national conditions.<sup>303</sup> As General Comment No. 17 stated, “Every State has a considerable margin of discretion in assessing which measures are most suitable to meet its specific needs and circumstances.”<sup>304</sup> Such discretion is also recognized by the European Court of Human Rights, which has developed the “margin of appreciation” doctrine.<sup>305</sup>

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<sup>303</sup> The Committee, however, should give less deference to the state if there is sufficient evidence to indicate that the state undertaking the balancing exercise has ignored the interests of the majority, or a considerable portion, of its population.

<sup>304</sup> *General Comment No. 17*, *supra* note 136, ¶ 47; *see also* Helfer, *supra* note 7, at 998 (“[G]overnments retain — at least in the near term — a fairly broad ‘margin of appreciation’ within which to reconcile human rights guarantees, intellectual property protection rules, and other policy objectives . . . .”) (footnote omitted).

<sup>305</sup> As Helfer explained:

The doctrine is essentially the degree of discretion that the ECHR is willing to grant national decision makers who seek to fulfill their human rights obligations under the treaty. Although initially framed as requiring a decision in favor of a state where a government’s decision to declare a public emergency (and thus to suspend most of its human rights obligations) was “on the margin” of compatibility with the treaty, the margin of appreciation doctrine has, over time, become a more limited tool by which the Court permits states a modicum of breathing room in balancing the protection of civil and political liberties against other pressing societal concerns. What is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states. Although partially in tension with autonomous and effective interpretations of the treaty, the doctrine has become an essential ingredient of the ECHR’s success in fashioning an effective system of adjudication. Given that most of the rights and freedoms protected by the European Convention are not protected unconditionally, but rather expressly permit states to impose restrictions for specified reasons and under certain conditions, the Court must be sensitive to the fact that different acts of national balancing may be compatible with the treaty. Thus, although the effectiveness principle requires that restrictions on protected liberties must be construed narrowly, the ECHR has held that states “enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary.” Only after granting such discretion will the Court exercise its independent “European supervision” to the relevant legislation and the decisions applying it.

In the earlier General Comment No. 3, the CESCR also recognized the depressing reality that some resource-deficient states may not be able to fulfill even their core minimum obligations. The Committee, therefore, did not dictate to them which obligations they have to fulfill given their limited resources. Nor did it assume that international assistance and cooperation would always be available.<sup>306</sup> The CESCR's approach is understandable, because it is very unlikely that states parties would be able to agree on the priority of different obligations in the Covenant once states have provided essential foodstuffs, essential primary health care, basic shelter and housing, and the most basic forms of education.<sup>307</sup> It would also be ill-advised for the Committee to make a blanket determination without taking into account the specific conditions of each state party.

Like the previous two approaches, the progressive realization approach has its limitations. For example, it holds the unrealistic assumption that the competing demands of different human rights can

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*Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 404-05 (1998) (footnotes omitted).

<sup>306</sup> *Accord UDHR*, *supra* note 5, art. 22 ("Everyone, as a member of society, . . . is entitled to realization, through national effort and *international co-operation* . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.") (emphasis added); see Claude, *supra* note 16, at 255 ("[T]he beneficial applications promised by the right cannot be attained among countries 'where science had made little progress' without serious co-operative efforts at the national and international levels, according to Article 2 of the Covenant."). As the General Comment stated:

States parties should recognize the essential role of international cooperation for the achievement of the rights recognized in the Covenant, including the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions, and should comply with their commitment to take joint and separate action to that effect.

*General Comment No. 17*, *supra* note 136, ¶ 36; see also *id.* ¶ 38 ("[I]t is essential that any system for the protection of the moral and material interests resulting from one's scientific, literary and artistic productions facilitates and promotes development cooperation, technology transfer, and scientific and cultural cooperation."); cf. ICESCR, *supra* note 6, art. 2(1) ("Each State Party to the present Covenant undertakes to take steps, individually and *through international assistance and co-operation*, especially economic and technical, . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.") (emphasis added).

<sup>307</sup> See *General Comment No. 3*, *supra* note 259, ¶ 10; cf. DRAHOS, *supra* note 161, at 22 ("Having one's artwork copied is not the same as being stripped of one's bedding, food, medicines or other personal possessions that form the essentials of a daily existence.").

always be balanced. Compromises are sometimes needed, and the “hard” balancing endorsed by the just remuneration approach sometimes may be helpful in achieving these compromises. Compared to the core minimum approach, the progressive realization approach also fails to guarantee the minimum protection essential to human dignity and respect. While it is important to understand how states can eventually fully discharge all of their human rights obligations, it is also important to know what obligations they have to discharge even in times of resource constraints. After all, an individual deserves basic dignity and respect regardless of the resources his or her state has.

In sum, there are different approaches to resolving internal conflicts. Which approach a state should use will depend on the nature of the conflict, the type of rights involved, the amount of resources available, and the urgency of the situation. Because the approaches discussed in this section complement each other, a combination of these approaches may sometimes be effective in resolving conflicts within the human rights system.

### III. CHALLENGES

Thus far, this Article has focused primarily on the development of a human rights framework for intellectual property. It holds an underlying premise that such a framework is socially beneficial and that it will enable the development of a balanced intellectual property system that takes into consideration a state’s human rights obligations. However, some may challenge this premise, while others may entertain concerns about the dangers of developing such a framework. Thus, the remainder of this Article focuses on concerns and criticisms raised by the skeptics of this framework.

As Part I demonstrated, when the framers of the UDHR and the ICESCR explored the right to the protection of interests in intellectual creations during the drafting processes, many delegates found such a right to be overly complex, redundant, and secondary to basic human rights.<sup>308</sup> Some even advocated discussion of such a right outside the human rights regime. While there is no doubt that some of these arguments can be, and will be, rehashed when intellectual property rights are discussed in the human rights context, this Part does not seek to reopen the debate in the previous UDHR and ICESCR discussions. Instead, this Article takes the view that the debate is

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<sup>308</sup> See discussion *supra* Parts I.A-B.

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already settled. Today, the right to the protection of interests in intellectual creations is recognized as a human right in the UDHR, the ICESCR, and many other international or regional instruments.

Thus, this Part focuses on three new challenges that confront the development of a human rights framework for intellectual property. First, a greater emphasis on the human rights attributes of intellectual property rights could result in the undesirable elevation of the status of all attributes or forms of intellectual property rights to that of human rights, regardless of whether these attributes or forms have any human rights basis. Such elevation would exacerbate the already severe imbalance in the existing intellectual property system. Second, because rights holders and their supporting developed countries are rich, powerful, and organized, they may be able to capture the human rights forum to the detriment of less developed countries, traditional communities, and the disadvantaged. Such institutional capture would make the human rights forum less appealing for voicing concerns and grievances in the intellectual property area and for mobilizing resistance to increased intellectual property protection. Third, as the cultural relativism debate has shown, the existing human rights instruments may sit uneasily with countries and communities subscribing to non-Western cultures. Thus, a human rights discourse of intellectual property — or, more precisely, a discourse based on “Western” human rights — is likely to perpetuate the author-centered Western worldview that ignores important interests in non-Western countries and traditional communities. This Part responds, in turn, to these three concerns and challenges.

#### A. *The “Human Rights” Ratchet*

As intellectual property rights become increasingly globalized, there is a growing concern about the “one-way ratchet” of intellectual property protection.<sup>309</sup> As critics have claimed, the growing protection of intellectual property not only jeopardizes access to information, knowledge, and essential medicines throughout the world, but it also has heightened the economic plight and cultural deterioration of less developed countries and indigenous communities. To these critics, it would be highly undesirable to elevate the status of all attributes or forms of intellectual property rights to that of human rights regardless of whether these attributes or forms have any human rights basis. As

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<sup>309</sup> See Dreyfuss, *supra* note 266, at 22; see also LESSIG, *supra* note 242, at 123-24; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 43-44.

Professor Kal Raustiala noted in his article in this Symposium, “the embrace of [intellectual property] by human rights advocates and entities . . . is likely to further entrench some dangerous ideas about property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community.”<sup>310</sup> An emphasis of the human rights attributes in intellectual property rights is also likely to further strengthen intellectual property rights, especially in civil law countries where judges are more likely to uphold rights that are considered human rights. As a result, the development of a human rights framework for intellectual property would result in the undesirable “human rights” ratchet of intellectual property protection. Such development would exacerbate the already severe imbalance in the existing intellectual property system and would ultimately backfire on those who seek to use the human rights forum to enrich the public domain and to set maximum limits of intellectual property protection.

While I am sympathetic to these concerns, Part II pointed out that the existing international instruments have recognized only *certain* attributes of existing intellectual property rights as human rights.<sup>311</sup> Although states have obligations to fully realize the right to the protection of interests in intellectual creations, their ability to fulfill these obligations is often limited by the resources available to them and the competing demands of the core minimum obligations of other human rights. Indeed, the right to the protection of interests in intellectual creations has been heavily circumscribed by the right to cultural participation and development, the right to the benefits of scientific progress, the right to food, the right to health, the right to education, and the right to self-determination, as well as many other human rights. For example, some commentators have suggested that the right to the benefits of scientific progress “carries the inference that the right involved should promote socially beneficial applications and safeguard people from harmful applications of science that violate their human rights.”<sup>312</sup> Depending on the jurisdiction, such right can be translated into *ordre public* exceptions that are similar to those

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<sup>310</sup> Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021, 1032 (2007).

<sup>311</sup> See discussion *supra* Part II.A.

<sup>312</sup> Claude, *supra* note 16, at 255.

found in article 27(2) of TRIPS<sup>313</sup> and article 53(a) of the European Patent Convention.<sup>314</sup>

In addition, because only some attributes of intellectual property rights can be considered human rights, international human rights treaties do not protect the remaining non-human-rights attributes of intellectual property rights or those forms of intellectual property rights that have no human rights basis. Thus, in a human rights framework for intellectual property, the human rights attributes of intellectual property rights will receive its well-deserved recognition as human rights. However, the status of those attributes or forms of intellectual property rights that have no human rights basis will not be elevated to that of human rights. As the CESCR reminded governments in its *Statement on Intellectual Property Rights and Human Rights*, they have a duty to take into consideration their human rights obligations in the implementation of intellectual property policies and agreements and to subordinate these policies and agreements to human rights protection in the event of a conflict between the two.<sup>315</sup>

Moreover, article 5(1) of the ICESCR states that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”<sup>316</sup> Thus, the ICESCR presumes that states would not be able to expand their protection of interests in intellectual creations at the expense of both existing protection and the core minimum obligations of other human rights.<sup>317</sup> As General Comment

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<sup>313</sup> TRIPS, *supra* note 2, art. 27(2) (“Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality.”).

<sup>314</sup> Convention on the Grant of European Patents art. 53(a), Oct. 5, 1973, *as amended by* Decision of the Administration Council of the European Patent Organization of Dec. 21, 1978, 13 I.L.M. 268, 286 (1974) (excluding from patent protection those inventions “the publication or exploitation of which would be contrary to *ordre public* or morality”).

<sup>315</sup> See Resolution 2000/7, *supra* note 3, ¶ 3 (articulating principle of human rights primacy).

<sup>316</sup> ICESCR, *supra* note 6, art. 5(1).

<sup>317</sup> As the General Comment stated:

States parties should . . . ensure that their legal or other regimes for the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits



No. 17 stated:

As in the case of all other rights contained in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to the protection of the moral and material interests of authors are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after careful consideration of all alternatives and that they are duly justified in the light of the totality of the rights recognized in the Covenant.<sup>318</sup>

Notwithstanding these limitations, there remains a strong possibility that the status of all intellectual property rights, regardless of their bases, will be elevated to that of human rights in rhetoric even if that status will not be elevated in practice. Indeed, intellectual property rights holders have widely used the rhetoric of private property to support their lobbying efforts and litigation,<sup>319</sup> notwithstanding the many limitations, safeguards, and obligations in the property system, such as adverse possessions, easements, servitudes, irrevocable licenses, fire and building codes, zoning ordinances, the rule against perpetuities, and the eminent domain, waste, nuisance, and public trust doctrines.<sup>320</sup> Policymakers, judges, jurors, and commentators

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of scientific progress and its applications, or any other right enshrined in the Covenant.

*General Comment No. 17, supra* note 136, ¶ 35.

<sup>318</sup> *Id.* ¶ 27; see also CRAVEN, *supra* note 23, at 132 (“Certainly some adverse effects may flow from well-intentioned measures [by the states parties], but where retrogressive measures were the result of deliberate policy, the Committee would do better to consider it a *prima facie* violation of the Covenant in the absence of further justificatory evidence.”).

<sup>319</sup> See, e.g., Netanel, *supra* note 199, at 22 (“The copyright industries regularly employ the rhetoric of private property to support their lobbying efforts and litigation.”); see also Tom W. Bell, *Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 273-77 (2003) (discussing why copyright rhetoric matters); Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 420 (2005) (“One might surmise then, that introduction of the property label into copyright and patent was not accidental.”); Richard M. Stallman, *Did You Say “Intellectual Property”? It’s a Seductive Mirage*, <http://www.fsf.org/licensing/essays/not-ipr.xhtml> (last modified Feb. 12, 2005) (“[T]he term systematically distorts and confuses these issues, and its use was and is promoted by those who gain from this confusion.”).

<sup>320</sup> See FISHER, *supra* note 242, at 140-43 (discussing many limitations on real property rights, such as fire and building codes, zoning ordinances, common law doctrine of “nuisance” and various restrictions on right of “quiet enjoyment,” right to

have also been confused by the property gloss over intellectual property rights, notwithstanding the significant differences between attributes of real property and those of intellectual property.<sup>321</sup> Using this line of reasoning, it is, therefore, understandable why some advocates of intellectual property reforms have been concerned about the “marriage” of human rights and intellectual property rights.

While their concerns are valid and important, the best response to alleviate these concerns is not to dissociate intellectual property rights from human rights or to cover up the fact that *some* attributes of intellectual property rights are, indeed, protected in international or regional human rights instruments. Rather, it is important to clearly delineate which attributes of intellectual property rights would qualify as human rights and which attributes or forms of those rights should be subordinated to human rights obligations due to their lack of any human right basis. In doing so, a human rights framework will highlight the moral and material interests of individual authors and inventors while exposing the danger of increased expansion of those attributes or forms of intellectual property rights that have no human rights basis.

Consider, for example, the growing expansion of corporate intellectual property rights. None of these rights would qualify as human rights, because they do not have any human rights basis. As Green noted with respect to the ICESCR, “[T]he drafters do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that

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convey property, right to exclude, and privilege of self-help); James Boyle, *Foreword: The Opposite of Property?*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1, 32 (noting importance of “look[ing] at the opposite of property with the same historical care, analytical precision, and occasional utopian romanticism that we display when looking at property”); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 52-144 (2004) (discussing use of limits in property law to cabin intellectual property rights); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 165-89 (2004) (underscoring need to go beyond these limits to locate affirmative legal duties on information property holders in effort to facilitate competing interests in their property); Yu, *Intellectual Property and the Information Ecosystem*, *supra* note 282, at 6 (“[R]eal property law contains many limitations, safeguards, and obligations, such as adverse possessions, eminent domain, easements, servitudes, nuisance, zoning, irrevocable licenses, the Rule Against Perpetuities, and the waste and public trust doctrines.”).

<sup>321</sup> For discussions of these differences, see generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); Sterk, *supra* note 319. See also Yu, *Intellectual Property and the Information Ecosystem*, *supra* note 282, at 111-16 (discussing controversy over term “intellectual property”).

holds the patent or the copyright.”<sup>322</sup> The CESCR also emphasized the importance of not equating intellectual property rights with the human right recognized in article 15(1)(c).<sup>323</sup> In distinguishing between the two, General Comment No. 17 pointed out that, while human rights — including the right to the protection of interests in intellectual creations — focus on individuals, groups of individuals, and communities, “intellectual property regimes primarily protect business and corporate interests and investments.”<sup>324</sup> Because corporate entities remain outside the protection of human rights instruments, “their entitlements . . . are not protected at the level of human rights.”<sup>325</sup> They also do not have access to the human-rights-based compulsory licenses described in Part II.<sup>326</sup>

The strongest claim corporate rights holders could make is that, because their intellectual property interests were initially derived from human-rights-based interests of individual authors or inventors, damage to corporate interests, in turn, would jeopardize these individual interests by reducing the opportunities they have and the remuneration they will receive. There are two counter-responses, however. First, the reduction of opportunities and remuneration might not reach the level of a human rights violation. As discussed earlier, the right was not designed to protect the unqualified property-based interests in intellectual creations, but rather to protect the narrow interest of just remuneration for intellectual labor. Thus, it is important to distinguish between *full* and *just* remuneration, as the right holder may not receive the full value of the use of his or her protected content.<sup>327</sup>

Moreover, the core minimum obligation focuses mainly on protecting the “basic material interests which are necessary to enable authors to enjoy an adequate standard of living.”<sup>328</sup> Even if one subscribes to the view that property rights are the best means to protect these basic interests, there remains a need to define the amount of property rights needed to protect these basic interests.

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<sup>322</sup> Green, *supra* note 67, ¶ 45.

<sup>323</sup> *General Comment No. 17, supra* note 136, ¶ 3 (“It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c).”).

<sup>324</sup> *Id.* ¶ 2.

<sup>325</sup> *Id.* ¶ 7.

<sup>326</sup> See discussion *supra* Part II.B.1.

<sup>327</sup> See Krause, *supra* note 179, at 201 (noting distinction between “full compensation” and “just compensation”).

<sup>328</sup> *General Comment No. 17, supra* note 136, ¶ 2.

Article 28 of the American Declaration, for example, states 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.”<sup>329</sup> As Chilean delegate Santa Cruz observed during the UDHR drafting process, “Ownership of anything more than [what is required under this language] might not be considered a basic right.”<sup>330</sup> In other words, the right to the protection of interests of intellectual creations only require the protection of sufficient intellectual property-based interests; it does not cover those additional interests that are generally not required to meet the essential needs of decent living or to maintain human dignity.

To be certain, even though the protection of human rights is limited to individuals, countries are free to extend through national legislation “human rights”-like protection to corporations or other collective entities. As Craig Scott pointed out: “[W]ithin the European regional human rights system, powerful companies no less than wealthy individuals may bring, and have indeed brought, claims of violation of their ‘human’ rights before the European Court of Human Rights.”<sup>331</sup> Nevertheless, these litigants thus far “have had very limited success invoking Article 1 of Protocol No. 1 due to the European Court’s relatively ‘social conception of both the state and the function of property.’”<sup>332</sup>

It is important to distinguish between corporate actors that have standing to bring human rights claims and those that actually claim that their “human” rights have been violated. While I find it acceptable, and socially beneficial at times, to allow corporate actors to bring human rights claims on behalf of individuals whose rights have been violated, I find it disturbing that these actors can actually claim that their “human” rights have been violated. As Donnelly put it emphatically, “Collectives of all sorts have many and varied rights. But these are not — cannot be — human rights, unless we

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<sup>329</sup> American Declaration, *supra* note 19, art. 23.

<sup>330</sup> MORSINK, *supra* note 31, at 145; *see also* NICKEL, *supra* note 161, at 100 (denying that “there is a good case on moral grounds for a secure claim to property rights in land and other major productive resources” and that “the expropriation of such property, when it does not threaten one’s ability to obtain the necessities of life, is a violation of human rights”).

<sup>331</sup> Scott, *supra* note 180, at 564 n.3.

<sup>332</sup> *Id.*; *see also* Suthersanen, *supra* note 236, at 107 (“[T]he property provision under the [European Convention on Human Rights] is qualified in that deprivation or third-party use of property is expressly allowed for ‘public interest’ or ‘general interest’ reasons.”).

substantially recast the concept.”<sup>333</sup>

Second, General Comment No. 17 clearly distinguished between fundamental, inalienable, and universal human rights and temporary, assignable, revocable, and forfeitable intellectual property rights. In making this distinction, the comment seems to suggest that human rights instruments do not cover the protection of transferable interests,<sup>334</sup> and, instead, it focuses on what Cassin described as the right that would survive “*even after such a work or discovery has become the common property of mankind.*”<sup>335</sup> Thus, the recognition of the human rights attributes of intellectual property rights may challenge the structure of the traditional intellectual property system. In the copyright context, for example, such recognition will encourage the development of an author-centered regime, rather than one that is publisher-centered.<sup>336</sup> Many publishers, therefore, are likely to find unappealing the human rights framework for intellectual property.

Indeed, the recognition of the human rights attributes of intellectual property rights may further strengthen the control of the work by individual authors and inventors, thus curtailing corporate control of intellectual creations as recognized by the ICESCR. The right to the protection of *moral* interests in the intellectual creations, for example, already exceeds the standards of protection offered in the U.S. intellectual property regime. As Helfer put it:

A human rights framework for authors' rights is . . . both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy [that is protected by the human rights instruments] are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws. It is also less protective, however, in that a state need not recognize any authors' rights lying outside of this zone or, if it does recognize such additional rights, it must give appropriate weight to other social, economic, and cultural rights and to the public's interest in access to knowledge.<sup>337</sup>

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<sup>333</sup> DONNELLY, *supra* note 15, at 25.

<sup>334</sup> See *General Comment No. 17*, *supra* note 136, ¶ 2 (“In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.”).

<sup>335</sup> *The “Cassin Draft,” supra* note 39, art. 43 (emphasis added).

<sup>336</sup> Thanks to Professor Teresa Scassa for pointing this out.

<sup>337</sup> Helfer, *supra* note 7, at 997.

When the United States pushed for TRIPS, it paid special attention to ensure that “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.”<sup>338</sup> In doing so, it successfully avoided being subjected to the mandatory dispute resolution process on disputes over inadequate protection of moral rights, even though it continues to bear moral rights obligations under the virtually unenforceable Berne Convention.<sup>339</sup>

While the strong protection of moral interests in intellectual creations may surprise corporate rights holders, it may also limit access to protected materials and frustrate projects that facilitate greater unauthorized recoding or reuse of existing creative works. Indeed, as Helfer pointed out, General Comment No. 17 included a more stringent test than the three-step test laid out in the Berne Convention, TRIPS, and the WIPO Internet Treaties.<sup>340</sup> Article 13 of TRIPS, for example, outlined the three-step test by stating that the WTO member states “shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”<sup>341</sup> Likewise, article 30 permits member states to “provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”<sup>342</sup> General Comment No. 17, however, provided a much more stringent

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<sup>338</sup> TRIPS, *supra* note 2, art. 9(1).

<sup>339</sup> As Professor Daniel Gervais noted: “The two fundamental perceived flaws of the Paris and Berne Conventions were (a) the absence of detailed rules on the enforcement of rights before national judicial administrative authorities; and (b) the absence of a binding and effective dispute settlement mechanism (for disputes between states).” DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 10 (2d ed. 2003).

<sup>340</sup> See Helfer, *supra* note 7, at 995 (observing that CESCR’s test for assessing legality of state restrictions on right to protect interests in intellectual creations “is far more constraining than the now ubiquitous ‘three step test’ used to assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws”) (footnote omitted). For the incorporation of the three-step test in international intellectual property treaties, see WIPO Copyright Treaty art. 10, *adopted* Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art. 16(2), *adopted* Dec. 20, 1996, 36 I.L.M. 76; TRIPS, *supra* note 2, arts. 13, 30; Berne Convention, *supra* note 52, art. 11.

<sup>341</sup> TRIPS, *supra* note 2, art. 13.

<sup>342</sup> *Id.* art. 30.

test. As the Committee stated, the limitations “must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant.”<sup>343</sup> In addition, they must be proportionate and compatible with other provisions and must offer a least restrictive means to achieve the goals.<sup>344</sup> Under certain circumstances, “[t]he imposition of limitations may . . . require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.”<sup>345</sup>

### B. *Institutional Capture*

Rights holders and their supporting developed countries are rich, powerful, and organized. As a result, their greater resources and stronger organization and negotiation skills may enable them to capture the human rights forum. Indeed, it is not infrequent to hear that some governments of small countries have to give up participation in international fora due to their lack of resources.<sup>346</sup>

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<sup>343</sup> *General Comment No. 17*, *supra* note 136, ¶ 22.

<sup>344</sup> *See id.* ¶ 23.

<sup>345</sup> *Id.* ¶ 24 (footnote omitted).

<sup>346</sup> As Professor Gregory Shaffer recounted:

One London-based environmental NGO, the Foundation for International Environmental Law and Development (“FIELD”), even negotiated a deal with a developing country, Sierra Leone, to represent it before the CTE [WTO Committee on Trade and Environment]. Sierra Leone, beset by violent civil conflict, did not have the resources or the priority to represent its “stakeholder” interests before the CTE. A northern NGO, though with serious conflicts of interest, offered to do so in its stead. FIELD supported the cost of attending and reporting in meetings in exchange for direct access to CTE meetings.

Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 62-63 (2001); *see also* John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 557 n.256 (2000) (“[S]ome developing nations lack the resources even to send delegates to these fora and thus have resorted to using nongovernmental organizations (NGOs) to represent their interests.”); V.T. Thamilmaran, *Cultural Rights in International Law*, in CULTURAL RIGHTS IN A GLOBAL WORLD 139, 153 (Anura Goonasekera et al. eds., 2003) (expressing fear that “the chief executives of some . . . transnational companies . . . wield greater control over international activities than the prime ministers of many states”); *cf.* Chapman & Russell, *supra* note 252, at 11 (“In an era of increasing

Rights holders can capture the human rights forum in two ways. First, they can lobby their governments to protect aggressively their interests. Indeed, because intellectual property remains one of the key export items for many developed countries, the governments of these countries are likely to find a coincidence of their interests with those of the rights holders. A case in point is the aggressive push for the establishment of TRIPS by the United States and the European Communities.<sup>347</sup> As Professor Susan Sell described:

In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors: domestic interindustry counterparts, domestic governments, foreign governments, foreign private sector counterparts, domestic and foreign industry associations, and international organizations. They vigorously pursued their IP objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue.<sup>348</sup>

Second, rights holders can influence developments in the human rights forum through direct participation, indirect participation (via financial support or the establishment of front organizations), or even collaboration efforts. As two commentators related concerns over the establishment of public-private partnerships in the public health area:

In relation to the UN, fears arise that inadequately monitored relations with the commercial sector may subordinate the values and reorient the mission of its organs, detract from their abilities to establish norms and standards free of commercial considerations, weaken their capacity to promote and monitor international regulations, displace organizational priorities, and induce self-censorship, among other things. Interaction, it is argued, may result in these outcomes, not just because the sectors pursue opposing underlying interests, but

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globalisation large corporations often have more power than the governments of the countries within which they are located or incorporated, and this can further frustrate the State's ability to mobilise private sector resources.”).

<sup>347</sup> See generally SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003) (discussing how multinational corporations have lobbied in both United States and European Communities for creation of TRIPS). For discussions of the influence of rights holders on positions taken by the U.S. government in the international intellectual property area, see generally PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002); Yu, *supra* note 237.

<sup>348</sup> SELL, *supra* note 347, at 8.



because the UN, having very limited resources, may face institutional capture by its more powerful partners.<sup>349</sup>

Today, “the movement towards human rights accountability of corporate actors has [remained] . . . an uphill battle.”<sup>350</sup> Thus, it is understandable why many commentators and activists are concerned that intellectual property rights holders might be able to capture the human rights forum, thus taking away from less developed countries an important venue to voice their concerns and grievances in the intellectual property area. Such institutional capture also would make it difficult for them to have access to a forum “to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO.”<sup>351</sup>

There are several responses, however. First, to the extent that the rights holders, transnational corporations, and other hostile players are exploring strategies to create tactical advantages in the human rights forum, such political maneuvering and strategic behaviors have already been taking place. Although rights holders and transnational corporations continue to prefer such fora as the WTO and WIPO, they have paid more attention to other fora, such as the human rights forum. Although they “insist on the sufficiency of their own efforts, that is, self-implementation of human rights standards, and [remain] strongly resistant to establishment of enforcement or even accountability and transparency procedures,”<sup>352</sup> they also try hard to persuade others of approaches that would be beneficial to their

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<sup>349</sup> Kent Buse & Amalia Waxman, *Public-Private Health Partnerships: A Strategy for WHO*, 79 BULL. WORLD HEALTH ORG. 748, 750 (2001), available at [http://whqlibdoc.who.int/bulletin/2001/issue8/79\(8\)748-754.pdf](http://whqlibdoc.who.int/bulletin/2001/issue8/79(8)748-754.pdf), quoted in Remigius N. Nwabueze, *What Can Genomics and Health Biotechnology Do for Developing Countries?*, 15 ALB. L.J. SCI. & TECH. 369, 406 n.192 (2005).

<sup>350</sup> Scott, *supra* note 180, at 563. *But see* ALISON BRYSK, HUMAN RIGHTS AND PRIVATE WRONGS: CONSTRUCTING GLOBAL CIVIL SOCIETY 117 (2005) (“[H]uman rights abuse by private actors . . . is increasingly challenged and intermittently checked. A new wave of global consciousness and transnational struggle has introduced new norms and strategies that chart possibilities for safeguarding human dignity across public-private borders.”).

<sup>351</sup> See Helfer, *supra* note 135, at 59 (describing how regime shifting from intellectual property or trade regime to, say, human rights regime “function[s] as an intermediate strategy that allows developing countries to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO”).

<sup>352</sup> Falk, *supra* note 236, at 66; *see also id.* at 65-66 (describing and expressing skepticism of Shell’s efforts to promote its commitment to human rights).

interests while at the same time seeking to reduce the impact of human rights instruments on their business activities.

Their actions are understandable, because governments have duties to regulate activities of private actors as part of their international human rights obligations. As General Comment No. 17 stated, "While only States parties to the Covenant are held accountable for compliance with its provisions, they are nevertheless urged to consider regulating the responsibility resting on the private business sector, private research institutions and other non-State actors to respect the rights recognized in" article 15(1)(c) of the ICESCR.<sup>353</sup> For example, states can be found to violate the Covenant by either action (such as when they "entic[e multinational corporations] to invest by providing conditions which violate human rights, including tax-free havens and prohibition of trade union activities"<sup>354</sup>) or inaction (such as when they "fail[] to have the regulatory structures in place which prevent or mitigate the harms in question"<sup>355</sup>). As Donnelly noted, "[A] state that does no active harm itself is not enough. The state must also include protecting individuals against abuses by other individuals and private groups."<sup>356</sup>

Second, even if the rights holders are trying to capture the forum, it is unclear if they will succeed. The human rights forum is more robust than one would expect, and institutional capture of a robust forum has not been easy. At present, the forum provides significant safeguards to protect the poor, the marginalized, and the less powerful. Thus far, nongovernmental organizations and less developed countries are well-represented in the human rights forum. They also have been more active than transnational corporations and their supporting developed countries, which often find alien the human rights language and the forum structure. Moreover, the discussion of human rights norms may even help less developed countries make a convincing case to their developed counterparts of the need for recalibration of interests in the existing intellectual property regime. As Helfer pointed out:

By invoking norms that have received the imprimatur of intergovernmental organizations in which numerous states are members, governments can more credibly argue that a

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<sup>353</sup> *General Comment No. 17*, *supra* note 136, ¶ 55.

<sup>354</sup> Asbjørn Eide, *Obstacles and Goals to Be Pursued*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 40, at 553, 559.

<sup>355</sup> Scott, *supra* note 180, at 568.

<sup>356</sup> DONNELLY, *supra* note 15, at 37.

rebalancing of intellectual property standards is part of a rational effort to harmonize two competing regimes of internationally recognized “rights,” instead of a self-interested attempt to distort trade rules or to free ride on foreign creators or inventors.<sup>357</sup>

Third, it may not necessarily be bad to include corporations and other rights holders in the forum. The human rights forum includes many different issues, which range from the right to health to the right to food to the right to education. Today, the development of intellectual property laws and policies is no longer just about intellectual creations; it has, indeed, affected many areas that are related to other human rights, including agriculture, health, the environment, education, culture, free speech, privacy, and democracy. The inclusion of intellectual property rights holders in the human rights forum, therefore, would create an opportunity to educate them on the adverse impact of an unbalanced intellectual property system. It would also broaden their horizon by encouraging them to develop a holistic perspective of issues concerning many different human rights — a perspective that is quite different from the one that narrowly focuses on profit maximization.

Fourth, even though states remain the central players in the human rights system, that system has been changing. As a result, there is a growing and conscious effort to directly engage private actors, in particular transnational corporations.<sup>358</sup> In the 1999 World Economic Forum, U.N. Secretary-General Kofi Annan challenged business leaders to join an international initiative called the Global Compact.<sup>359</sup> This initiative brought hundreds of companies together with U.N. agencies, labor, and civil society to support universal principles in the areas of human rights, labor, the environment, and anti-corruption.<sup>360</sup>

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<sup>357</sup> Helfer, *supra* note 1, at 58.

<sup>358</sup> See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 767-70 (2005) (discussing extension of human rights to private actors in context of U.N. Millennium Development Goals). For discussions of the relationship between human rights obligations and private actors, see generally BRYSK, *supra* note 350; ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

<sup>359</sup> See U.N. Global Compact, *What Is the Global Compact?*, <http://www.globalcompact.org/AboutTheGC/index.html> (last visited Feb. 7, 2007).

<sup>360</sup> See *id.*, *The Ten Principles*, <http://www.globalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Feb. 7, 2007).

The next year, the Organisation for Economic Co-operation and Development ("OECD") adopted the Revised OECD Guidelines for Multinational Enterprises in its annual ministerial meeting in Paris.<sup>361</sup> In August 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights established the Norms on the Responsibilities of Transnational Corporations and Other Businesses, which states:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.<sup>362</sup>

While these developments remain in their early stages and their effectiveness has been questioned,<sup>363</sup> it is very likely that this trend will continue and expand as the world becomes increasingly globalized and as transnational corporations become more important in the present state-centered system. Indeed, as the Sub-Commission recognized, "new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future."<sup>364</sup>

Finally, despite the foregoing challenges, there are tremendous benefits to advancing a dialogue with intellectual property rights holders in the human rights forum. For example, the language used in this dialogue may eventually find its way to other intellectual property

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<sup>361</sup> ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES MULTINATIONAL ENTERPRISES: REVISION 2000 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>362</sup> ECOSOC, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003) [hereinafter *Responsibilities of Transnational Corporations*], available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument).

<sup>363</sup> For symposia on the Global Compact and corporate social responsibilities, see Symposium, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001); Symposium, *The U.N. Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT'L L.J. 481 (2001).

<sup>364</sup> *Responsibilities of Transnational Corporations*, supra note 362, pmb., recital 12.

related fora, such as the WTO or WIPO.<sup>365</sup> Indeed, the new intellectual property related lawmaking initiatives completed or currently underway in UNESCO, the World Health Organization, and WIPO have already utilized approaches that “are closely aligned with the human rights framework for intellectual property reflected in the CESCR Committee’s recent interpretive statements.”<sup>366</sup> The drafters of the agreements not only cited to or drew support from international human rights instruments,<sup>367</sup> but also carried with them the usual skepticism among human rights advocates that strong intellectual property protection has only limited benefits for less developed countries.<sup>368</sup>

The language and the dialogue may also help countries in their negotiation of future intellectual property treaties. As Helfer pointed out, the CESCR’s recommendations “provide a template for countries whose governments already oppose expansive intellectual property protection standards to implement more human rights-friendly standards in their national laws.”<sup>369</sup> In the shadow of these templates, countries may be able to improve their negotiation positions and

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<sup>365</sup> See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 428-29 (2004) (discussing how laws made in one forum may influence those made in another); see also Helfer, *supra* note 135, at 66 (“In a document distributed prior to the June 2001 meeting, the coalition cited to resolutions in other international fora (and to policy papers by NGOs) to support a clarification of TRIPS-compatible options to enhance access to medicines.”).

<sup>366</sup> Helfer, *supra* note 7, at 1001.

<sup>367</sup> For example, the preamble to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions states that the instrument “[c]elebrat[es] the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments.” Convention on the Protection and Promotion of the Diversity of Cultural Expressions, pmbl., recital 5, Oct. 20, 2005, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>. Article 2(1) of the Convention lists the principle of respect for human rights and fundamental freedoms among one of its guiding principles. Article 2(1) states further:

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

*Id.* art. 2(1).

<sup>368</sup> See Helfer, *supra* note 7, at 980.

<sup>369</sup> *Id.* at 1000.

demand more access to protected materials. Those recommendations also “may influence the jurisprudence of WTO dispute settlement panels, which are likely to confront arguments that TRIPS should be interpreted in a manner that avoids conflicts with nonbinding norms and harmonizes the objectives of the international intellectual property and international human rights regimes.”<sup>370</sup>

Indeed, as Helfer and Raustiala described in this Symposium, countries have been relocating to more sympathetic fora to create tactical advantages for themselves.<sup>371</sup> As a result, intellectual property issues have been explored and discussed in many different regimes, thus forming what other commentators and I have described as the “intellectual property regime complex.”<sup>372</sup> In addition, there have been increasing activities in the WTO and WIPO exploring the relationship between human rights and intellectual property. For example, in November 1998, WIPO conducted a panel discussion on “Intellectual Property and Human Rights.”<sup>373</sup> The WTO, in particular the TRIPS Council, has also paid closer attention to the lack of access to patented pharmaceuticals in light of HIV/AIDS, tuberculosis, and malaria pandemics in Africa and other less developed countries.<sup>374</sup>

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<sup>370</sup> *Id.*; accord Helfer, *supra* note 135, at 77-79.

<sup>371</sup> See Helfer, *supra* note 135, at 59 (stating that less developed countries have used regime shifting “as an intermediate strategy . . . to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO”); Helfer, *supra* note 7, at 974-75 (“Developing countries and their like-minded [NGO] allies have decamped to more sympathetic multilateral venues . . . where they have found more fertile soil in which to grow proposals that seek to roll back intellectual property rights or at least eschew further expansions of the monopoly privileges they confer.”); Raustiala, *supra* note 310, at 1027 (discussing regime shifting phenomenon, in which less developed countries shifted to other more sympathetic fora).

<sup>372</sup> See Raustiala, *supra* note 310, at 1025-29 (discussing intellectual property “regime complex”); Symposium, *The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1. The term “regime complex” was derived from Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004). Helfer also used the term “conglomerate regime.” See Helfer, *supra* note 135, at 17; see also David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5, 19 (2002) (discussing how issue linkage may result in formation of “conglomerate type of regime”).

<sup>373</sup> World Intellectual Property Organization, Panel Discussion on Intellectual Property and Human Rights Geneva (Nov. 9, 1998), <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/index.html>.

<sup>374</sup> Cf. Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria, Comm’n on Human Rights Res. 2004/26, U.N. Doc. E/CN.4/2004/127 (Apr. 16, 2004), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2004-26.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-26.doc). For discussions of TRIPS developments in

Such attention eventually resulted in the Doha Declaration on the TRIPS Agreement and Public Health<sup>375</sup> and the subsequent adoption of the proposal for an amendment to TRIPS.<sup>376</sup> Had these alternative activities not raised concerns and provided the needed counterbalancing language, the Doha Declaration that sparked off a number of changes to the international intellectual property system might not have been adopted.<sup>377</sup>

### C. *The Cultural Relativism Debate*

In recent years, policymakers and commentators have discussed how the human rights instruments have failed to protect the interests of non-Western countries and indigenous communities. Similar concerns have been raised in the human rights area. As some commentators have noted, many of the rights included in the UDHR and the ICESCR articulate and reinforce values that have prior existence in the West and that, therefore, have limited applicability in countries in the non-Western world.<sup>378</sup> The climax of this cultural relativist movement came when Asian countries adopted the Bangkok Declaration at the Asian preparatory regional conference before the World Conference on Human Rights in 1993.<sup>379</sup> Although the

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relation to access to medicines, see generally NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES (Pedro Roffe et al. eds., 2006); Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317 (2005); Yu, *supra* note 237.

<sup>375</sup> World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, ¶ 7, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002). The Doha Declaration delayed until January 1, 2016, the formal introduction of patent protection for pharmaceuticals and of the protection of undisclosed regulatory data.

<sup>376</sup> If adopted, article 31bis would allow those WTO member states that had insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals. See Council for Trade-Related Aspects of Intellectual Property Rights, *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Proposal for a Decision on an Amendment to the TRIPS Agreement*, IP/C/41 (Dec. 6, 2005), available at [http://www.wto.org/english/news\\_e/news05\\_e/TRIPS\\_decision\\_e.doc](http://www.wto.org/english/news_e/news05_e/TRIPS_decision_e.doc).

<sup>377</sup> See Yu, *supra* note 365, at 414-15.

<sup>378</sup> For a collection of essays discussing the tension between human rights and non-Western cultures, see HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES, *supra* note 13. See also sources cited *infra* note 380.

<sup>379</sup> World Conference on Human Rights, Regional Meeting for Asia, 29 March-2 April 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. Doc. A/Conf.157/PC/59 (Apr. 7, 1993), available at <http://www.unhchr.ch/html/menu5/wcbangk.htm>.

Bangkok Declaration did not articulate the oft-discussed “Asian values,” it states explicitly that, “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”<sup>380</sup>

This plea for cultural sensitivity is not new. Indeed, when the UDHR was being drafted, the American Anthropological Association sent a long memorandum to the Human Rights Commission, expressing their concern, or even fear, that the Declaration would become an ethnocentric document. As they put it in the now infamous 1947 memorandum, “[T]he primary task’ the drafters faced was to find a solution to the following problem: ‘How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?’”<sup>381</sup>

Notwithstanding these cultural concerns, as Part II has shown, the human rights instruments do not seem to dictate a certain level or modality of protection, as far as the right to the protection of interests in intellectual creations is concerned.<sup>382</sup> In fact, the drafting history strongly suggests that the drafters were determined to create a universal document and reluctant to introduce language that was tailored toward a particular form of political or economic system.<sup>383</sup> It was, therefore, no surprise that Humphrey recalled in his memoirs

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<sup>380</sup> *Id.* ¶ 8. For discussions of Asian values and the Bangkok Declaration, see generally DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999); *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* (Michael C. Davis ed., 1995); Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 *HARV. HUM. RTS. J.* 109 (1998); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 *N.Y.U. J. INT’L L. & POL.* 291 (2000); Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia,”* 14 *IND. INT’L & COMP. L. REV.* 1 (2003); Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 *MCGILL L.J.* 743 (1996).

<sup>381</sup> MORSINK, *supra* note 31, at ix (quoting 1947 memorandum from American Anthropological Association to U.N. Human Rights Commission).

<sup>382</sup> See discussion *supra* Part II.A.2.

<sup>383</sup> See MORSINK, *supra* note 31, at 149 (“It is this dual character [in article 17] that makes the Universal Declaration condone both the capitalist and socialist ways of organizing a national economy.”).



that Chinese delegate Chang “suggested that [he] put [his] other duties aside for six months and study Chinese philosophy . . . [implying] that Western influences might be too great.”<sup>384</sup>

Indeed, commentators have underscored the diverse cultural and religious backgrounds of governmental representatives participating in the drafting. Based on one commentator’s calculation, “thirty-seven of the member nations stood in the Judeo-Christian tradition, eleven in the Islamic, six in the Marxist, and four in the Buddhist tradition.”<sup>385</sup> Moreover, “Western’ states . . . made up only about a third of the votes for the Universal Declaration,”<sup>386</sup> and the Soviet and Latin American countries dominated the discussion in economic, social, and cultural rights. A diverse array of governments, intergovernmental and nongovernmental organizations, and private entities also participated widely in the drafting process.<sup>387</sup> Even when countries, in particular those from the Eastern bloc, abstained from voting for the final adoption of article 27 of the UDHR and article 15 of the ICESCR, they were able to influence the outcome by joining the discussions,

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<sup>384</sup> HUMPHREY, *supra* note 16, at 29. *But see id.* at 32 (“With two exceptions, all of [the draft documents he relied on in putting together his draft outline of UDHR provisions] came from English-speaking sources and all of them from the democratic West.”); M. Glen Johnson, *A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights*, in JOHNSON & SYMONIDES, *supra* note 32, at 19, 46-47 (“[T]hose members of the [Human Rights] Commission who represented non-European countries were, themselves, largely educated in the European tradition, either in Europe or the United States or in the institutions established in their own countries by representatives of European colonial powers. Although there were occasional references to relevant ideas in non-European traditions such as Confucian or Islamic thought, a European and American frame of reference dominated the deliberations from which the Universal Declaration emerged.”).

<sup>385</sup> MORSINK, *supra* note 31, at 21 (citing PHILIPPE DE LA CHAPPELLE, *LA DÉCLARATION UNIVERSELLE DES DROITS DE L’HOMME ET LE CATHOLICISME* 44 (1967)).

<sup>386</sup> DONNELLY, *supra* note 15, at 22 n.1 (defining Western states as “the states of Europe plus the United States, Canada, Australia, and New Zealand”). As Donnelly described:

There simply was no North-South split in 1948. Quite the contrary, countries from what would later be called the Third World were at least as enthusiastic about the Universal Declaration as Western countries. The only serious disagreement was *within* the West, as the Soviet bloc countries abstained because they wanted greater emphasis on economic and social rights.

*Id.*; see also NICKEL, *supra* note 161, at 67 (“[W]hen the International Covenants were finally approved by the General Assembly in 1966, they clearly reflected the concerns of Third World members in a way that the Universal Declaration did not.”).

<sup>387</sup> See MORSINK, *supra* note 31, at 9 (noting presence of large number of nongovernmental organizations in Second Session of Human Rights Commission).

submitting comments, drafts, and amendments, and participating in some of the preliminary voting.<sup>388</sup> Thus, as Lebanese delegate Charles Malik recounted, “The genesis of each article, and each part of each article, [in the UDHR] was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.”<sup>389</sup>

In the end, the documents and their drafting processes were not marred by the delegates’ differences, but united by their commonalities. As Glendon pointed out, what was crucial for the principal framers of the UDHR “was the *similarity* among all human beings. Their starting point was the simple fact of the common humanity shared by every man, woman, and child on earth, a fact that, for them, put linguistic, racial, religious, and other differences into their proper perspective.”<sup>390</sup> Thus, it is no surprise that General Comment No. 3 stated that the ICESCR is neutral “in terms of political and economic systems . . . and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach.”<sup>391</sup>

While the drafting history provides important evidence to dispel complaints about the fact that the right to the protection of interests in intellectual creations has ignored interests in non-Western countries, the concerns about its inability to accommodate the needs and interests of traditional communities require a different response. After all, indigenous groups are not what the drafters of the International Bill of Rights had in mind when they drafted the documents. As General Comment No. 17 noted, the words “everyone,” “he,” and “author” “indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without at that time realizing that they could also be

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<sup>388</sup> See *id.* at 21 (“Even the abstaining delegations had cooperated in the procedures. They too had sent delegates to the sessions and these representatives had made comments, voted numerous times, and even submitted drafts or amendments.”).

<sup>389</sup> GLENDON, *supra* note 32, at 225 (quoting Charles Habib Malik, *Introduction to O. FREDERICK NOLDE, FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE* 12 (1968)).

<sup>390</sup> *Id.* at 232.

<sup>391</sup> *General Comment No. 3, supra* note 259, ¶ 8; see also GLENDON, *supra* note 32, at xviii (“One of the most common and unfortunate misunderstandings today involves the notion that the Declaration was meant to impose a single model of right conduct rather than to provide a common standard that can be brought to life in different cultures in a legitimate variety of ways.”).

groups of individuals.”<sup>392</sup> The double use of the definite article in “the right freely to participate in *the* cultural life of *the* community,” as compared to “a right ‘to participate in the cultural life of *his or her* community,’” also betrayed the framers’ intentions.<sup>393</sup> As Morsink observed, “Article 27 seems to assume that ‘the community’ one participates in and with which one identifies culturally is the dominant one of the nation state. There is no hint here of multiculturalism or pluralism.”<sup>394</sup> In fact, Morsink has shown convincingly why historical memories, political circumstances, concerns of the colonial powers, and the lack of political organization had caused the UDHR drafters to omit a provision on the right to protect minorities.<sup>395</sup>

To make things more complicated, many commentators have pointed out accurately that the existing intellectual property regime has ignored the interests of those performing intellectual labor outside the Western model, such as “custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties.”<sup>396</sup> By emphasizing individual authorship and scientific achievement over collective intellectual contributions, the drafters of the UDHR and the ICESCR seemed to have subscribed to the traditional Western worldview of intellectual property protection.

Nevertheless, the fact that the drafters might not have foreseen the extension of article 27 of the UDHR and article 15(1)(c) of the ICESCR to traditional communities or other groups of individuals does not mean that the documents cannot be interpreted to incorporate collective rights. To begin with, human rights instruments contain considerable language that allows one to explore collective rights. Although article 27 of the ICCPR, as compared to a provision in the UDHR or the ICESCR, is the only article in the International Bill of Rights that specifically addresses the cultural rights of minorities,<sup>397</sup> references to cultural participation and

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<sup>392</sup> *General Comment No. 17*, *supra* note 136, ¶ 7 (footnote omitted).

<sup>393</sup> See MORSINK, *supra* note 31, at 269 (discussing double use of definite article in article 27).

<sup>394</sup> *Id.*

<sup>395</sup> See *id.* at 269-80.

<sup>396</sup> Bellagio Declaration, *reprinted in* JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192, 193 (1996).

<sup>397</sup> Article 27 of the ICCPR provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

development appear in many international and human rights instruments, including the U.N. Charter, the UNESCO Constitution, the Declaration of the Principles of International Cultural Cooperation, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>398</sup>

In addition, the International Bill of Rights has undertaken a collective approach to specific rights, including “self-determination, economic, social and cultural development, communal ownership of property, disposal of wealth and natural resources, and intellectual property rights.”<sup>399</sup> As Professor Donald Kommers pointed out in his comparison of the German and U.S. Constitutions, there can be two visions of personhood: “One vision is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other vision is partial to the city perceived as a public realm where individual and community are bound together in some degree of reciprocity.”<sup>400</sup> Drawing on this distinction, Glendon suggested that the drafters of the UDHR might have embraced the latter vision:

In the spirit of [this] vision, the Declaration’s “Everyone” is an individual who is constituted, in important ways, by and through relationships with others. “Everyone” is envisioned as uniquely valuable in himself (there are three separate references to the free development of one’s personality), but “Everyone” is expected to act toward others “in a spirit of brotherhood.” “Everyone” is depicted as situated in a variety of specifically named, real-life relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order. Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in “a spirit of brotherhood” and ends with community, order, and society.<sup>401</sup>

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culture, to profess and practise their own religion, or to use their own language.” ICCPR, *supra* note 87, art. 27.

<sup>398</sup> See Hansen, *supra* note 144, at 282.

<sup>399</sup> *Id.* at 288 (footnote omitted).

<sup>400</sup> Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 867 (1991), *quoted in* GLENDON, *supra* note 32, at 227.

<sup>401</sup> GLENDON, *supra* note 32, at 227.

Moreover, human rights continue to evolve and expand,<sup>402</sup> and there has been a growing trend to extend human rights to groups, despite the original intentions of the framers of the UDHR and the ICESCR. As General Comment No. 17 stated:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, *under certain circumstances, groups of individuals and communities*. . . . Although the wording of article 15, paragraph 1(c), generally refers to the individual creator (“everyone”, “he”, “author”), the right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions can, under certain circumstances, also be enjoyed by groups of individuals or by communities.<sup>403</sup>

This interpretive comment makes a lot of sense, especially in the context of cultural rights. After all, “[t]he basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up. The preservation of that identity can be of crucial importance to well-being and self-respect.”<sup>404</sup> Thus, it is no surprise that General Comment No. 17 stated that “States parties in which ethnic, religious or linguistic minorities exist are under an obligation to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures.”<sup>405</sup> As the Draft Declaration on the Rights of Indigenous Peoples recognized:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral tradition, literatures, designs and visual and performing arts.<sup>406</sup>

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<sup>402</sup> See Chapman & Russell, *supra* note 252, at 13 (“[H]uman rights standards evolve over time and in the direction of expansiveness.”); see also SEPÚLVEDA, *supra* note 11, at 81-84 (discussing evolutive interpretation of human rights treaties).

<sup>403</sup> *General Comment No. 17*, *supra* note 136, ¶¶ 1, 8 (emphasis added).

<sup>404</sup> Eide, *supra* note 40, at 291.

<sup>405</sup> *General Comment No. 17*, *supra* note 136, ¶ 33.

<sup>406</sup> ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, art. 29, U.N. Doc.

Finally, compared to civil and political rights, economic, social, and cultural rights present the least tension between Western and non-Western cultures and between traditional and non-traditional ones. Indeed, during the UDHR drafting process, many Western countries, in particular Britain and the United States, were reluctant to recognize economic, social, and cultural rights as human rights. It is no accident that those rights were left out of the initial discussions of the now-abandoned Covenant on Human Rights. As Asbjørn Eide noted, “Within some societies in the West, cultural traditions persist based on a strong faith in full economic liberalism and a severely constrained role for the state in matters of welfare.”<sup>407</sup> The drafting history also showed that Britain and the United States remained reluctant to embrace those rights because they seemed foreign to them. As Glendon noted, “[T]he [relativist] label ‘Western’ obscures the fact that the Declaration’s acceptance in non-Western settings was facilitated by the very features that made it seem ‘foreign’ to a large part of the West: Britain and the United States.”<sup>408</sup>

In sum, as far as the right to the protection of interests in intellectual creations is concerned, the human rights regime is not as biased against non-Western countries and traditional communities as the critics have claimed. As indigenous rights strengthen, the use of the human rights regime may even help reduce the existing bias against those performing intellectual labor outside the Western model.<sup>409</sup>

Nevertheless, there remains a considerable challenge concerning whether less developed countries and indigenous communities would be able to consider the right to the protection of interests in intellectual creations as important as such other human rights as the right to food, the right to health, the right to education, the right to cultural participation and development, the right to the benefits of scientific progress, and the right to self-determination (notwithstanding the universal, indivisible, interdependent, and interrelated nature of human rights). There also remain continuous tension between human rights protection and economic development.<sup>410</sup>

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E/CN.4/Sub.2/1993/29 (Aug. 26, 1994), *reprinted in* 34 I.L.M. 541 (1995).

<sup>407</sup> Eide, *supra* note 88, at 11.

<sup>408</sup> GLENDON, *supra* note 32, at 227.

<sup>409</sup> Thanks to Katja Weckstrom for making this suggestion.

<sup>410</sup> For discussion of the tension between human rights and economic development, see generally DONNELLY, *supra* note 15, at 109-10, 194-99. For an excellent discussion of how to recalibrate the concept of intellectual property in light

## CONCLUSION

With the continuous expansion of intellectual property rights, there is a growing need to develop a human rights framework for intellectual property. Notwithstanding its importance, considerable conceptual and practical challenges remain. If we are to overcome these challenges, we need to understand better the different attributes of intellectual property rights, the relationship between the right to the protection of interests in intellectual creations and other human rights, and the various approaches that can be used to resolve conflicts between these different sets of rights. We also need to be able to assuage the concerns of the skeptics of this framework, thereby advancing a constructive dialogue at the intersection of human rights and intellectual property rights. The successful development of a human rights framework for intellectual property not only will offer individuals the well-deserved protection of their moral and material interests in intellectual creations, but also will allow states to harness the intellectual property system to protect human dignity and respect as well as to promote the full realization of other important human rights.

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of the development concept, see generally Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821 (2006).