

CHALLENGES TO THE DEVELOPMENT OF A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

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I. Introduction

Since the establishment of the World Trade Organization (WTO) and the entering into effect of the Agreement on Trade-Related Aspects of Intellectual Property Rights¹ (TRIPs Agreement), government officials, international bureaucrats, intergovernmental and nongovernmental organizations, courts, and scholars have focused considerable attention on the interplay of intellectual property and human rights. In recent years, scholars have begun to advocate the development of ‘a comprehensive and coherent “human rights framework” for intellectual property law and policy’.² As I pointed out elsewhere, such a framework would not only be socially beneficial, but would also enable countries to develop a balanced intellectual property system that takes into consideration their international human rights obligations.³

To help better understand the interplay of intellectual property and human rights, and how such a framework can be developed, the Committee on Economic, Social and Cultural Rights (CESCR) recently provided an authoritative interpretation of article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ in General Comment No. 17.⁵ At the outset, the Committee distinguished the

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (1994) 33 ILM 1197.

² L.R. Helfer, ‘Toward a Human Rights Framework for Intellectual Property’ (2007) 40 *U.C. Davis Law Review*, 977–1020; P.K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2007) 40 *U.C. Davis Law Review*, 1039–1149.

³ Yu, n. 2 above, at 1123.

⁴ International Covenant on Economic, Social and Cultural Rights art. 15(1)(c), 16 December 1966, (1966) 993 UNTS 3.

right to the protection of interests in intellectual creations ‘from most legal entitlements recognized in intellectual property systems’.⁶ As the Committee elaborated:

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.

In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the 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.⁷

To highlight the distinction and avoid confusion between the right protected in article 15(1)(c) and the 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—this chapter uses throughout 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’. Although these terms seem long and clumsy, they are superior to their shorthand counterparts, as those titles tend to ‘obscure the real meaning of the obligations that these rights impose’.⁸

While the development of a human rights framework for intellectual property is important, sceptics have expressed concern over the danger of an ‘arranged marriage’ between intellectual property and human rights. Their scepticism is not new. During the drafting of article 27(2) of the Universal Declaration of Human Rights (UDHR)⁹ and article 15(1)(c) of the ICESCR, delegates already expressed their concern about including in human rights instruments the protection of interests in intellectual creations. Some delegates found the protection redundant with that offered by the right to private property and other rights in the instruments. Meanwhile, others considered such protection right

⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 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)), para. 35, 12 January 2006, U.N. Doc. E/C.12/GC/17.

⁶ Ibid. para. 1.

⁷ Ibid. para. 2.

⁸ M. Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Antwerp, Intersentia, 2003), p. 8.

⁹ Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. GAOR, 3d Sess., 1st plen. mtg., 10 December 1948, U.N. Doc. A/810.

only secondary to such fundamental human rights as prohibition on genocide, slavery, and torture; the right to life; or the right to freedom of thought, expression, association, and religion. Even today, commentators remain concerned that the continuous proclamation of new human rights will undermine both the fundamental nature of human rights and the integrity of the process of recognizing those rights.¹⁰

Although these concerns are understandable, it may be too late to deny the protection of human rights-based interests in intellectual creations. In the UDHR, the ICESCR, and many other international or regional instruments, for example, the right to the protection of interests in intellectual creations is explicitly recognized as a human right.¹¹ This chapter therefore does not seek to reopen this debate, which has been widely explored and documented elsewhere.¹² Rather, it examines three new challenges that may confront the development of this framework, especially from the pro-development perspective: (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.¹³

To be certain, there are additional challenges. From the standpoint of intellectual property rights holders, there is also a growing concern that the development of a human rights framework for intellectual property will undermine the balance of existing intellectual property systems. Just as public interest advocates are concerned about the *upward* ratchet of intellectual property rights through their association with human rights, rights holders are equally concerned about the *downward* ratchet of intellectual property rights, due to the fact that those attributes or forms of intellectual property rights that do not have human rights basis are likely to be deemed less important through a human rights lens. Notwithstanding this important concern, this chapter focuses primarily on the pro-development concerns raised by the development of human rights framework for intellectual property. It seeks to explain why this framework will benefit not only individual authors and inventors, but also less developed countries and traditional communities.

¹⁰ P. Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American Journal of International Law*, 607–621.

¹¹ See, for example, 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 17 November 1988, O.A.S.T.S. No. 69, (1989) 28 ILM 161; ICESCR, n. 4 above, art. 15(1)(c); Organization of American States, American Declaration of the Rights and Duties of Man art. 13, 2 May 1948, OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948); UDHR, n. 9 above, art. 27(2).

¹² J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999), pp. 217–222; M. Green, Drafting History of the Article 15(1)(c) of the International Covenant, para. 45, 9 October 2000, U.N. Doc. E/C.12/2000/15; Yu, n. 2 above, at 1047–1075.

¹³ This chapter 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. Yu, n. 2 above, at 1047 n. 18.

II. 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. 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 Kal Raustiala recently noted, ‘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’.¹⁴ 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. It might also hamper the growing efforts to use the human rights forum to set maximum limits of intellectual property protection, thereby enriching the public domain and promoting access to information, knowledge, and essential medicines.

While I am sympathetic to these concerns, the existing international instruments have recognized only certain attributes of existing intellectual property rights as human rights.¹⁵ 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.¹⁶

Moreover, although states have obligations to fully realize the right to the protection of interests in intellectual creations, their ability to fulfil these obligations is often limited by the resources available to them and the competing demands of the core

¹⁴ K. Raustiala, ‘Density and Conflict in International Intellectual Property Law’ (2007) 40 *U.C. Davis Law Review*, 1032.

¹⁵ Yu, n. 2 above, at 1079–1092.

¹⁶ Intellectual Property Rights and Human Rights, Sub-Commission on Human Rights Res. 2000/7, para. 3, 17 August 2000, U.N. Doc. E/CN.4/Sub.2/RES/2000/7.

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, 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’.¹⁷ Depending on the jurisdiction, such a right can be translated into *ordre public* exceptions that are similar to those found in article 27(2) of the TRIPs Agreement¹⁸ and article 53(a) of the European Patent Convention.¹⁹

In fact, article 5(1) of the ICESCR states that ‘nothing 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’.²⁰ 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.²¹ As General Comment 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.²²

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,²³ despite 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

¹⁷ R.P. Claude, ‘Scientists’ Rights and the Human Right to the Benefits of Science’ in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, A. Chapman and S. Russell (eds) (Antwerp, Intersentia, 2002), p. 255.

¹⁸ TRIPs Agreement, n. 1 above, art. 27(2).

¹⁹ Convention on the Grant of European Patents art. 53(a), 5 October 1973, as amended by Decision of the Administration Council of the European Patent Organization of 21 December 1978, (1974) 13 ILM 268.

²⁰ ICESCR, n. 4 above, art. 5(1).

²¹ General Comment No. 17, n. 5 above, para. 35.

²² *Ibid.* para. 27.

²³ On the use of the private property rhetoric to expand intellectual property protection, see T.W. Bell, ‘Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights’ (2003) 69 *Brooklyn Law Review*, 273–277; N.W. Netanel, ‘Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing’ (2003) 17 *Harvard Journal of Law and Technology*, 22; S.E. Sterk, ‘Intellectualizing Property: The Tenuous Connections Between Land and Copyright’ (2005) 83 *Washington University Law Quarterly*, 420; R.M. Stallman, ‘Did You Say “Intellectual Property”? It’s a Seductive Mirage’ <<http://www.fsf.org/licensing/essays/not-ipr.xhtml>>, 12 July 2007.

against perpetuities, and the eminent domain, waste, nuisance, and public trust doctrines.²⁴ The property gloss over intellectual property rights has also confused policymakers, judges, jurors, and commentators, even though there are significant differences between the attributes of real property and those of intellectual property.²⁵ Using this line of reasoning, it is, therefore, understandable why some public interest advocates have been concerned about the ‘marriage’ of intellectual property and human 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 at all.

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 Maria 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 holds the patent or the copyright.’²⁶ As pointed out in the beginning of this chapter, the CESCR also emphasized the importance of not equating intellectual property rights with the human right recognized in article 15(1)(c).²⁷ 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’.²⁸ Because corporate entities remain outside the protection of human rights instruments, ‘their entitlements . . . are not protected at the level of human rights’.²⁹

The two strongest claims corporate rights holders could make are as follows: first, because their intellectual property interests were initially derived from the human-rights-based interests of individual authors or inventors, damage to corporate interests would jeopardize these individual interests by reducing the opportunities the individuals have

²⁴ W.W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford, Stanford University Press, 2004), pp. 140–143; J. Boyle, ‘Foreword: The Opposite of Property?’ (2003) 66(1–2) *Law and Contemporary Problems*, 32; M.A. Carrier, ‘Cabining Intellectual Property Through a Property Paradigm’ (2004) 54 *Duke Law Journal*, 52–144; J. Lipton, ‘Information Property: Rights and Responsibilities’ (2004) 56 *Florida Law Review*, 165–189; P.K. Yu, ‘Intellectual Property and the Information Ecosystem’ [2005] *Michigan State Law Review*, 6.

²⁵ On differences between attributes of real property and those of intellectual property, see M.A. Lemley, ‘Property, Intellectual Property, and Free Riding’ (2005) 83 *Texas Law Review*, 1031–1075; Sterk, n. 23 above. On the controversy over the term ‘intellectual property’, see Yu, n. 24 above, at 11–16.

²⁶ Green, n. 12 above, para. 45.

²⁷ General Comment No. 17, n. 5 above, para. 3.

²⁸ *Ibid.* para. 2.

²⁹ *Ibid.* para. 7.

and the remuneration they will receive; and second, because corporate rights holders are seeking protection on behalf of individual shareholders of the human rights-based property interests in their investments, corporate intellectual property rights need to be strongly protected.

These claims are rather weak. However, even if they are to be accepted, there will be at least two counter-responses. First, the reduction of opportunities and remuneration might not reach the level of a human rights violation. As the drafting history of the UDHR has shown, the right to the protection of interests in intellectual creations 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 labour.³⁰ 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.³¹

Second, 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’.³² 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. Article 28 of the American Declaration of the Rights and Duties of Man, for example, states that ‘every 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’.³³ As Chilean delegate Hernan Santa Cruz observed during the UDHR drafting process, ‘[o]wnership of anything more than [what is required under this language] might not be considered a basic right’.³⁴ 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, 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 [ECHR].’³⁵ Although litigants ‘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”’,³⁶ their likelihood of success has been greatly enhanced by the recent

³⁰ Yu, n. 2 above, at 1087–1088.

³¹ C. Krause, ‘The Right to Property’ in *Economic, Social and Cultural Rights: A Textbook*, A. Eide, C. Krause and A. Rosas (eds) (2nd rev. edn, Boston, Martinus Nijhoff Publishers, 2001), p. 201.

³² General Comment No. 17, n. 5 above, para. 2.

³³ American Declaration, n. 11 above, art. 23.

³⁴ Morsink, n. 12 above, at 145.

³⁵ C. Scott, ‘Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights’ in *Economic, Social and Cultural Rights: A Textbook*, A. Eide, C. Krause and A. Rosas (eds) (2nd rev. edn, Boston, Martinus Nijhoff Publishers, 2001), p. 564 n. 3.

³⁶ Ibid. As Uma Suthersanen pointed out, ‘The 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.’ U. Suthersanen, ‘Towards an International Public Interest Rule? Human Rights and International Copyright Law’ in *Copyright and Free Speech: Comparative and*

judgement of *Anheuser-Busch, Inc. v. Portugal*, in which the Grand Chamber of the ECHR held that Article 1 protects both registered marks and trademark applications of a multinational corporation.³⁷

Thus, to ensure that corporate intellectual property rights will not be ratcheted up through their association with human rights, 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 it is acceptable, and socially beneficial at times, to allow corporate actors to bring human rights claims on behalf of individuals whose rights have been violated, it is disturbing that these actors can actually claim that their ‘human’ rights have been violated. As Jack Donnelly put it emphatically, ‘[c]ollectives of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept.’³⁸

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;³⁹ 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’.⁴⁰ 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-centred regime, rather than one that is publisher-centred. 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 under U.S. intellectual property laws. As Laurence 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

International Analyses, J. Griffiths and U. Suthersanen (eds) (Oxford, Oxford University Press, 2005), p. 107.

³⁷ *Anheuser-Busch, Inc. v. Portugal*, [2007] ECHR 73049/01 (Grand Chamber). On the increasing role of the European Court of Human Rights in innovation and creativity policies in Europe, see L.R. Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ (2008) 49 *Harvard International Law Journal* (forthcoming), available at <<http://ssrn.com/abstract=976485>>. On the emerging fundamental rights discourse on intellectual property in Europe, see C. Geiger, ‘“Constitutionalizing” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’ (2006) 37 *International Review of Intellectual Property and Competition Law*, 371–406.

³⁸ J. Donnelly, *Universal Human Rights in Theory & Practice* (2nd edn, Ithaca, Cornell University Press, 2003), p. 25.

³⁹ General Comment No. 17, n. 5 above, para. 2.

⁴⁰ ‘Cassin Draft’ art. 43, reprinted in M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, 2001), pp. 275–280 (emphasis added).

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.⁴¹

When the United States pushed for the TRIPs Agreement, 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'.⁴² 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.

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, General Comment No. 17 included a more stringent test than the three-step test laid out in the Berne Convention, the TRIPs Agreement, and the WIPO Internet Treaties.⁴³ Article 13 of the TRIPs Agreement, 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'.⁴⁴ 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'.⁴⁵

Compared to these two provisions, General Comment No. 17 provided a much more stringent 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'.⁴⁶ In addition, they must be proportionate and compatible with other provisions and must offer a least restrictive means to achieve the goals.⁴⁷ Under certain circumstances, 'the 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'.⁴⁸

⁴¹ Helfer, n. 2 above, at 997.

⁴² TRIPs Agreement, n. 1 above, art. 9(1).

⁴³ Helfer, n. 2 above, at 995.

⁴⁴ TRIPs Agreement, n. 1 above, art. 13.

⁴⁵ *Ibid.* art. 30.

⁴⁶ General Comment No. 17, n. 5 above, para. 22.

⁴⁷ *Ibid.* para. 23.

⁴⁸ *Ibid.* para. 24.

III. Institutional Capture

The second challenge concerns the undesirable capture of the human rights forum by intellectual property rights holders. Because rights holders and their supporting developed countries are rich, powerful, and organized, their greater resources and stronger organization and negotiation skills may enable them 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.

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. As Gregory Shaffer recounted: ‘One London-based environmental NGO, the Foundation for International Environmental Law and Development[,] . . . negotiated a deal with a developing country, Sierra Leone, to represent it before the [WTO Committee on Trade and Environment]’.⁴⁹ Likewise, John McGinnis and Mark Movsesian pointed out that ‘some developing nations lack the resources . . . to send delegates to these fora and thus have resorted to using nongovernmental organizations (NGOs) to represent their interests’.⁵⁰

Rights holders can generally capture the human rights forum in two ways. First, they can lobby their governments to aggressively protect 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 the TRIPs Agreement by the United States and the European Communities. As 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.⁵¹

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:

⁴⁹ G.C. Shaffer, ‘The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters’ (2001) 25 *Harvard Environmental Law Review*, 62–63; V.T. Thamilmaran, ‘Cultural Rights in International Law’ in *Cultural Rights in a Global World*, A. Goonasekera, C. Hamelink and V. Iyer (eds) (Singapore, Eastern Universities Press, 2003), p. 153; A.R. Chapman and S. Russell, ‘Introduction’ in Chapman and Russell, n. 17 above, at 11.

⁵⁰ J.O. McGinnis and M.L. Movsesian, ‘The World Trade Constitution’ (2000) 114 *Harvard Law Review*, 557 n. 256.

⁵¹ S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, Cambridge University Press, 2003), p. 8.

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 because the UN, having very limited resources, may face institutional capture by its more powerful partners.⁵²

Today, ‘the movement towards human rights accountability of corporate actors has [remained] . . . an uphill battle’.⁵³ 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’.⁵⁴

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 manoeuvring and strategic behaviours 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’,⁵⁵ they also try hard to persuade others of approaches that would be beneficial to their 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, ‘[w]hile 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.⁵⁶ For example, states can be found to violate the Covenant by either action (such as when they ‘entic[e] transnational corporations] to invest by providing conditions which violate human rights, including tax-free havens and prohibition of trade union activities’⁵⁷) or inaction (such as when they ‘fail[] to have the regulatory structures

⁵² K. Buse and A. Waxman, ‘Public–Private Health Partnerships: A Strategy for WHO’ (2001) 79 *Bulletin of the World Health Organization*, 750.

⁵³ Scott, n. 35 above, at 563.

⁵⁴ L.R. Helfer, ‘Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking’ (2004) 29 *Yale Journal of International Law*, 59.

⁵⁵ R. Falk, ‘Interpreting the Interaction of Global Markets and Human Rights’ in *Globalization and Human Rights*, A. Brysk (ed.) (Berkeley, University of California Press, 2002), pp. 65–66.

⁵⁶ General Comment No. 17, n. 5 above, para. 55.

⁵⁷ A. Eide, ‘Obstacles and Goals to Be Pursued’ in Eide, Krause and Rosas, n. 31 above, at 559.

in place which prevent or mitigate the harms in question'⁵⁸). As Professor 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.'⁵⁹

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 Professor 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 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.⁶⁰

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.⁶¹ In the 1999 World Economic Forum, U.N. Secretary-General Kofi Annan challenged business

⁵⁸ Scott, n. 35 above, at 568.

⁵⁹ Donnelly, n. 38 above, at 37.

⁶⁰ L.R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 *Minnesota Intellectual Property Review*, 58.

⁶¹ P. 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' (2005) 27 *Human Rights Quarterly*, 767–770. On the relationship between human rights obligations and private actors, see A. Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (New York, Routledge, 2005); A. Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993); M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford, OUP, 2006); S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal*, 443–545.

leaders to join an international initiative called the Global Compact.⁶² This initiative brought hundreds of companies together with U.N. agencies, labour, and civil society to support universal principles in the areas of human rights, labour, the environment, and anti-corruption.⁶³ The following year, the Organisation for Economic Co-operation and Development adopted the Revised OECD Guidelines for Multinational Enterprises in its annual ministerial meeting in Paris.⁶⁴ 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.⁶⁵

While these developments remain in their early stages and their effectiveness has been questioned,⁶⁶ 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-centred 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’.⁶⁷

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-related fora, such as the WTO or WIPO.⁶⁸ Indeed, as Professor Helfer pointed out, the new intellectual property-related lawmaking initiatives completed or currently underway in the United Nations Educational, Scientific and Cultural Organization (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

⁶² U.N. Global Compact, ‘What Is the Global Compact?’ <<http://www.globalcompact.org/AboutTheGC/index.html>>, 12 July 2007.

⁶³ Ibid.; ‘The Ten Principles’ <<http://www.globalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>, 12 July 2007.

⁶⁴ Organisation for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises: Revision 2000* (Paris, Organisation for Economic Co-operation and Development, 2000).

⁶⁵ Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 13 August 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2.

⁶⁶ On the Global Compact and corporate social responsibilities, see ‘Symposium, Holding Multinational Corporations Responsible Under International Law’ (2001) 24 *Hastings International and Comparative Law Review*, 285–506; ‘Symposium, The U.N. Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations’ (2001) 34 *Cornell International Law Journal*, 481–554.

⁶⁷ Responsibilities of Transnational Corporations, n. 65 above, pmb1., recital 12.

⁶⁸ P.K. Yu, ‘Currents and Crosscurrents in the International Intellectual Property Regime’ (2004) 38 *Loyola of Los Angeles Law Review*, 428–429.

statements'.⁶⁹ The drafters of the agreements not only cited to or drew support from international human rights instruments,⁷⁰ but also carried with them the usual scepticism among human rights advocates that strong intellectual property protection has only limited benefits for less developed countries.⁷¹

The language and the dialogue may also help countries in their negotiation of future intellectual property treaties. For example, the CESCR's recommendations in General Comment No. 17 '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'.⁷² In the shadow of these templates, countries may be able to improve their negotiation positions and 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 the TRIPs Agreement 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'.⁷³

Indeed, countries have been relocating to more sympathetic fora to create tactical advantages for themselves.⁷⁴ As a result, intellectual property issues have been explored and discussed in many different regimes, thus forming what I have coined the 'international intellectual property regime complex'.⁷⁵ This regime complex includes not only the traditional international intellectual property regime, but also those other international regimes or fora in which intellectual property issues play a growing role or with which formal or informal linkages have been established.

In addition, there have been increasing activities in the WTO and WIPO exploring the relationship between intellectual property and human rights. For example, in

⁶⁹ Helfer, n. 2 above, at 1001.

⁷⁰ For example, the preamble to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions states that the instrument 'celebrat[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, 20 October 2005. 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.

Ibid. art. 2(1).

⁷¹ Helfer, n. 2 above, at 980.

⁷² Ibid. at 1000.

⁷³ Ibid.

⁷⁴ Ibid. at 974–975; Helfer, n. 54 above, at 59; Raustiala, n. 14 above, at 1027.

⁷⁵ P.K. Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia' [2007] *Michigan State Law Review*, 1 *et seq.* The term 'regime complex' was derived from K. Raustiala and D.G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization*, 279. David Leebron has also used the term 'conglomerate regime'. D.W. Leebron, 'Linkages' (2002) 96 *American Journal of International Law*, 18.

November 1998, WIPO conducted a panel discussion on ‘Intellectual Property and Human Rights’.⁷⁶ 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.⁷⁷ Such attention eventually resulted in the adoption of the Doha Declaration on the TRIPS Agreement and Public Health⁷⁸ and a recent protocol to formally amend the TRIPS Agreement by adding a new article 31*bis*.⁷⁹ 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.⁸⁰

IV. Cultural Bias

The final challenge concerns the framework’s potential bias against non-Western cultures and traditional communities. In recent years, policy makers and commentators have discussed how the human rights instruments have failed to protect the interests of non-Western countries and indigenous communities. As they noted, many of the rights included in the UDHR and the ICESCR articulate and reinforce values that have prior existence in the West and, therefore, have limited applicability in countries in the non-Western world.⁸¹ 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 1993.⁸² Although the 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

⁷⁶ World Intellectual Property Organization, Panel Discussion on Intellectual Property and Human Rights Geneva, 9 November 1998, <<http://www.wipo.int/tk/en/hr/paneldiscussion/papers/index.html>>, 12 July 2007.

⁷⁷ On TRIPS developments in relation to access to medicines, see *Negotiating Health: Intellectual Property and Access to Medicines*, P. Roffe, G. Tansey and D. Vivas Eugui (eds) (London, Earthscan, 2006); F.M. Abbott, ‘The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health’ (2005) 99 *American Journal of International Law*, 317–358; P.K. Yu, ‘The International Enclosure Movement’ (2007) 82 *Indiana Law Journal*, 827–907.

⁷⁸ World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, para. 7, WT/MIN(01)/DEC/2, (2002) 41 ILM 755. The Doha Declaration delayed until January 1, 2016, the formal introduction of patent protection for pharmaceuticals and of the protection of undisclosed regulatory data.

⁷⁹ 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, 6 December 2005. If adopted, article 31*bis* would allow those WTO member states that had insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.

⁸⁰ Yu, n. 68 above, at 414–415.

⁸¹ On the tension between human rights and non-Western cultures, see A.A. An-Naim (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia, University of Pennsylvania Press, 1992), and other sources cited *infra* note 83.

⁸² 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, 7 April 1993, U.N. Doc. A/Conf.157/PC/59.

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'.⁸³

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 the Association's executive board put it in the now infamous 1947 memorandum, 'the primary task confronting those who would draw up a Declaration on the Rights of Man is . . . , in essence, to resolve 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 the values prevalent in the countries of Western Europe and America?'⁸⁴

Notwithstanding these cultural concerns, 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.⁸⁵ 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.⁸⁶ It was, therefore, no surprise that John Humphrey, the director of the Division on Human Rights at the United Nations who was heavily involved in drafting the UDHR, recalled in his memoirs that Chinese delegate Peng-chun Chang 'suggested that [he] put [his] other duties aside for six months and study Chinese philosophy . . . [implying] that Western influences might be too great'.⁸⁷

Indeed, commentators have underscored the diverse cultural and religious backgrounds of governmental representatives participating in the drafting. Based on one

⁸³ Ibid. para. 8. On Asian values and the Bangkok Declaration, see D.A. Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton, Princeton University Press, 2000); W.T. de Bary and W. Tu (eds), *Confucianism and Human Rights* (New York, Columbia University Press, 1998); W.T. de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Cambridge, Harvard University Press, 1998); J.R. Bauer and D.A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999); M.C. Davis (ed.), *Human Rights and Chinese Values: Legal, Philosophical, and Political Perspectives* (New York, Oxford University Press, 1995); M.C. Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values' (1998) 11 *Harvard Human Rights Journal*, 109–147; K. Engle, 'Culture and Human Rights: The Asian Values Debate in Context' (2000) 32 *New York University Journal of International Law and Politics*, 291–333; R. Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates About "Values in Asia"' (2003) 14 *Indiana International and Comparative Law Review*, 1–85; S.S.C. Tay, 'Human Rights, Culture, and the Singapore Example' (1996) 41 *McGill Law Journal*, 743–780.

⁸⁴ American Anthropological Association, 'Statement on Human Rights' (1947) 49 *American Anthropologist*, 539–543.

⁸⁵ Yu, n. 2 above, at 1083–1092.

⁸⁶ Morsink, n. 12 above, at 149.

⁸⁷ J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, Transnational Publishers, 1983), p. 29. Some commentators, however, disagreed with Dr. Humphrey's assessment. Glen Johnson, for example, noted, 'Those 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.' M.G. Johnson, 'A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights' in M.G. Johnson and J. Symonides, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation, 1948–1998* (Paris, UNESCO, 1998), pp. 46–47.

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'.⁸⁸ Moreover, "[w]estern" states . . . made up only about a third of the votes for the Universal Declaration',⁸⁹ 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.⁹⁰ 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, submitting comments, drafts, and amendments, and participating in some of the preliminary voting.⁹¹ Thus, as Lebanese delegate Charles Malik recounted, '[t]he 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'.⁹²

In the end, the documents and their drafting processes were not marred by the delegates' differences, but united by their commonalities. As Mary Ann 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.'⁹³ 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'.⁹⁴

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 groups of individuals'.⁹⁵

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

⁸⁸ Morsink, n. 12 above, at 21.

⁸⁹ Donnelly, n. 38 above, at 22 n. 1; J.W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley, University of California Press, 1987), p. 67.

⁹⁰ Morsink, n. 12 above, at 9.

⁹¹ *Ibid.* at 21.

⁹² Glendon, n. 40 above, at 225.

⁹³ *Ibid.* at 232.

⁹⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Par. 1), para. 8, U.N. Doc. E/1991/23, 14 December 1990.

⁹⁵ General Comment No. 17, n. 5 above, para. 7.

of his or her community,”” also betrayed the framers’ intentions.⁹⁶ As Johannes Morsink observed, ‘[a]rticle 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’.⁹⁷ 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.⁹⁸

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 labour 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’.⁹⁹ 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,¹⁰⁰ references to cultural participation and 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 Co-operation, 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.¹⁰¹

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’.¹⁰² As Donald Kommers pointed out in his comparison of the German and U.S. Constitutions, there can be two visions of personhood: ‘One vision

⁹⁶ Morsink, n. 12 above, at 269.

⁹⁷ Ibid.

⁹⁸ Ibid. at 269–80.

⁹⁹ Bellagio Declaration, reprinted in J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, Harvard University Press, 1996), p. 193.

¹⁰⁰ 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 culture, to profess and practise their own religion, or to use their own language.’ International Covenant on Civil and Political Rights art. 27, 16 December 1966, (1976) 999 UNTS 171.

¹⁰¹ S.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 Chapman and Russell, n. 17 above, at 282.

¹⁰² Ibid. at 288.

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'.¹⁰³ Drawing on this distinction, Professor 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.¹⁰⁴

Moreover, human rights continue to evolve and expand,¹⁰⁵ 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.¹⁰⁶

The CESCR's interpretative comment is strongly supported by international law. As the International Court of Justice declared in the *Namibia Advisory Opinion*, '[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*.'¹⁰⁷ The Vienna Convention on the Law of Treaties also requires subsequent agreement and practice to be taken into account in treaty interpretation.¹⁰⁸

In the context of cultural rights, this comment also makes a lot of sense. As Asbjørn Eide aptly observed, 'the 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'.¹⁰⁹ 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

¹⁰³ D.P. Kommers, 'German Constitutionalism: A Prolegomenon' (1991) 40 *Emory Law Journal*, 867.

¹⁰⁴ Glendon, n. 40 above, at 227.

¹⁰⁵ Sepúlveda, n. 8 above, at 81–84; Chapman and Russell, n. 49 above, at 13.

¹⁰⁶ General Comment No. 17, n. 5 above, paras 1, 8 (emphasis added).

¹⁰⁷ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 ICJ 31, para. 53 (June 21) (emphasis added).

¹⁰⁸ Vienna Convention on the Law of Treaties art. 31(3), entered into force 27 January 1980, (1969) 8 ILM 679.

¹⁰⁹ A. Eide, 'Cultural Rights as Individual Human Rights' in Eide, Krause and Rosas, n. 31 above, at 291.

measures to preserve the distinctive character of minority cultures'.¹¹⁰ 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.¹¹¹

Finally, compared to civil and political rights, economic, social, and cultural rights present the lease 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. In fact, '[w]ithin 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.'¹¹² The drafting history also showed that Britain and the United States remained reluctant to embrace those rights because they seemed foreign to them. As Professor 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.'¹¹³

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 labour outside the Western model.

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 is also continuous tension between human rights protection and economic development.¹¹⁴

¹¹⁰ General Comment No. 17, n. 5 above, para. 33.

¹¹¹ Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft United Nations Declaration on the Rights of Indigenous Peoples art. 29, 26 August 1994, U.N. Doc. E/CN.4/Sub.2/1993/29.

¹¹² A. Eide, 'Economic Social and Cultural Rights as Human Rights' in Eide, Krause and Rosas, n. 31 above, at 11.

¹¹³ Glendon, n. 40 above, at 227.

¹¹⁴ On the tension between human rights and economic development, see Donnelly, n. 38 above, at 109–110, 194–203; P.K. Yu, 'Ten Common Questions About Intellectual Property and Human Rights' (2007) 23 *Georgia State University Law Review* (forthcoming), available at <<http://ssrn.com/abstract=979193>>. On how to recalibrate the concept of intellectual property in light of the development concept, see M. Chon, 'Intellectual Property and the Development Divide' (2006) 27 *Cardozo Law Review*, 2821–2912.

In addition, there is a growing concern that the development of a human rights framework for intellectual property will lead to the creation of the notorious one-size-fits-all templates that have been used to transplant intellectual property laws from developed to less developed countries. Fortunately, the ECHR has advanced a deferential approach that respects a considerable ‘margin of appreciation’.¹¹⁵ As Professor Helfer noted:

[T]he ECHR gives significant deference to “the legislature’s judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation.” It also stresses the “wide margin of appreciation” that states enjoy “with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”¹¹⁶

If this approach is incorporated into the framework, countries are likely to be able to develop a balanced intellectual property system that takes into consideration their international human rights obligations while at the same time maintaining the policy space needed for the development of a system that appreciates their local needs, national interests, technological capabilities, institutional capacities, and public health conditions.¹¹⁷

V. Conclusion

With the continuous expansion of intellectual property rights, there is a growing need to develop a human rights framework for intellectual property. However, considerable conceptual and practical challenges remain. If policy makers are to ensure that these challenges will not ultimately undermine the development of the framework, they need to anticipate the challenges while at the same time advancing a constructive dialogue at the intersection of intellectual property and human rights. The successful development of this framework 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.

¹¹⁵ On the margin of appreciation doctrine embraced by the ECHR, see Laurence R. Helfer, ‘Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy’ (1998) 39 *Harvard International Law Journal*, 404-05.

¹¹⁶ Helfer, n. 37 above.

¹¹⁷ On the enclosure of the policy space less developed countries have in designing intellectual property systems that fit their needs, interests, and goals, see Yu, n. 77 above.