Chapter 3

Challenges to the Development of a Human Rights Framework for Intellectual Property

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3.1. 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 Rights (TRIPS Agreement), government officials, international intergovernmental organizations, civil society groups, judges, academic commentators, and the media have focused considerable attention on the interplay of intellectual property and human rights. In the mid-2000s, scholars have begun advocating the development of a human rights framework for intellectual property law and policy.[1] As I pointed out in earlier works, such a framework will not only be socially beneficial, but will also enable countries to develop a balanced intellectual property system that takes international human rights obligations into consideration.[2]

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) provided an authoritative interpretation of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2006. In *General Comment No. 17*, the Committee distinguished the right to the protection of interests in intellectual creations 'from most legal entitlements recognized in intellectual property systems'.[3] 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.
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> 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,

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

[2] Yu, n. 1 above, at 1123.

[3] UN 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 (Article 15, Paragraph 1(c), of the Covenant)', para. 1, UN Doc. E/C.12/GC/17 (2006).

> 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.[4]

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, which tend to 'obscure the real meaning of the obligations that these rights impose'.[5]

While the development of a human rights framework for intellectual property is important, sceptics have warned about 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) and Article 15(1)(c) of the ICESCR, delegates already expressed concern over the inclusion of the protection of interests in intellectual creations in human rights instruments. Some delegates found such protection redundant with the protection offered by the right to private property and other rights in the instruments. Meanwhile, other delegates considered such protection 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 divided over whether 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.[6]

Although the commentators' concerns are understandable, it may be too late to deny the protection of human rights–based interests in intellectual creations. The UDHR, the ICESCR, and many other international and regional instruments have all explicitly recognized the right to the protection of interests in intellectual creations as a human right.[7] This chapter therefore does not seek to reopen this debate, which has been widely

[4] *Ibid*., para. 2.

[5] M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 8.

[6] P. Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', *American Journal of International Law* 78 (1984): 607–621.

[7] See, for example, Art. 14(1)(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Art. 15(1)(c) of the ICESCR; Art. 13 of the American Declaration of the Rights and Duties of Man; and Art. 27(2) of the UDHR.

explored and documented elsewhere.[8] Rather, it examines three new challenges that may confront the development of this framework, especially from a 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.[9]

To be certain, there are additional challenges. From the standpoint of intellectual property rights-holders, there is 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 worried about the *downward* ratchet of intellectual property rights – that is, the potential degrading of the non–human rights aspects of intellectual property rights. Notwithstanding this worry, this chapter focuses primarily on the pro-development concerns raised by the development of a human rights framework for intellectual property. It seeks to explain why this framework will benefit not only individual authors and inventors, but also developing countries and traditional communities.

3.2. 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 Laurence Helfer and Graeme Austin observed in their widely used textbook:

> Some in the human rights community … fear that intellectual property owners – in particular, multinational corporations – will invoke the creators' rights and property rights provisions of international instruments to lock in maximalist intellectual property rules that will further concentrate wealth in the hands of a few at the expense of the many.[10]

According to critics, the growing protection of intellectual property not only jeopardizes access to information, knowledge, and essential medicines throughout the world, but also heightens the economic plight and cultural deterioration of developing countries and traditional communities. To these critics, it would be highly undesirable to elevate the status of all aspects of intellectual property rights to that of human rights regardless of whether these aspects have human rights basis.

As Kal Raustiala noted, 'the embrace of [intellectual property] by human rights advocates and entities … is likely to further entrench some dangerous ideas about

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

[9] 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. 1 above, at 1047, fn. 18.

[10] L.R. Helfer & G.W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011), 504–505.

property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community'.[11] An emphasis on 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 an 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 on intellectual property protection. Such hampered efforts would impoverish the public domain while impeding 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.[12] Because international and regional human rights treaties protect these attributes but not the remaining aspects, a human rights framework for intellectual property will recognize only these attributes as human rights. In the meantime, the status of those non–human rights aspects of intellectual property rights will not be elevated to that of human rights. As the UN Sub-Commission on Human Rights reminded governments in Resolution 2000/7 on 'Intellectual Property Rights and Human Rights', they have a duty to take human rights obligations into consideration in their implementation of intellectual property policies and agreements. In the event of a conflict between the two, they have the additional duty to subordinate these policies and agreements to human rights protection.[13]

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 these States 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, the right to self-determination, as well as many other human rights. For instance, 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'.[14] 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 Agreement and Article 53(a) of the European Patent Convention.

In fact, Article 5(1) of the ICESCR states:

> 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

[11] K. Raustiala, 'Density and Conflict in International Intellectual Property Law', *U.C. Davis Law Review* 40 (2007): 1032.

[12] Yu, n. 1 above, at 1079–1092.

[13] UN Sub-Commission on Human Rights, 'Intellectual Property Rights and Human Rights', Resolution 2000/7, para. 3, UN Doc. E/CN.4/Sub.2/RES/2000/7 (2000).

[14] 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*, ed. A. Chapman & S. Russell (Antwerp: Intersentia, 2002), 255.

> 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.

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.[15] As *General Comment No. 17* declared:

> 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.[16]

Notwithstanding these limitations, there remains a strong possibility that the status of all intellectual property rights, regardless of whether they have human rights bases, will be elevated to that of human rights in rhetoric even if not in practice. Indeed, intellectual property rights-holders have widely used the rhetoric of private property to support their lobbying efforts and litigation,[17] despite the many limitations, safeguards, and obligations in the property system. These limitations and safeguards include adverse possessions, easements, servitudes, irrevocable licenses, fire and building codes, zoning ordinances, the rule against perpetuities, and doctrines concerning the eminent domain, waste, nuisance, and public trust.[18] The property gloss over intellectual property rights has also confused policy makers, judges, jurors, commentators, and the public at large, even though there are significant differences between real and intellectual property.[19] Using this line of reasoning, it is therefore understandable why some public interest advocates have been concerned about an 'arranged 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 ignore 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

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[15] 'General Comment No. 17', n. 3 above, para. 35.

[16] *Ibid*., para. 27.

[17] 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', *Brooklyn Law Review* 69 (2003): 273–277; N.W. Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing', *Harvard Journal of Law and Technology* 17 (2003): 22; S.E. Sterk, 'Intellectualizing Property: The Tenuous Connections between Land and Copyright', *Washington University Law Quarterly* 83 (2005): 420; R.M. Stallman, 'Did You Say "Intellectual Property"? It's a Seductive Mirage', www.fsf.org/licensing/essays/not-ipr.xhtml, 12 July 2007.

[18] W.W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004), 140–143; J. Boyle, 'Foreword: The Opposite of Property?', *Law and Contemporary Problems* 66, no. 1–2 (2003): 32; M.A. Carrier, 'Cabining Intellectual Property through a Property Paradigm', *Duke Law Journal* 54 (2004): 52–144; J. Lipton, 'Information Property: Rights and Responsibilities', *Florida Law Review* 56 (2004): 165–189; P.K. Yu, 'Intellectual Property and the Information Ecosystem', *Michigan State Law Review* 2005: 6.

[19] On the differences between real and intellectual property, see M.A. Lemley, 'Property, Intellectual Property, and Free Riding', *Texas Law Review* 83 (2005): 1031–1075; Sterk, n. 17 above. On the controversy over the term 'intellectual property', see Yu, n. 18 above, at 11–16.

inventors while exposing the danger of the increased expansion of the non–human rights aspects of intellectual property rights.

Consider, for example, the growing expansion of corporate intellectual property rights. Without any human rights basis, none of these rights would qualify as human rights. 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'.[20] 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).[21] 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'.[22] Because corporate entities remain outside the protection of human rights instruments, 'their entitlements … are not protected at the level of human rights'.[23]

The two strongest rebuttals 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 protected individuals have and the remuneration they will receive. Second, corporate rights-holders aggregate the disparate human rights interests of individuals, such as those of their shareholders. Because corporate rights-holders are seeking protection on behalf of their individual shareholders of the human rights–based property interests in their investments, corporate intellectual property rights need to be strongly protected.

These rebuttals are rather weak, however. As *General Comment No. 17* reminded us in no uncertain terms:

> [O]nly the 'author', namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1(c). … Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, … their entitlements, because of their different nature, are not protected at the level of human rights.[24]

The CESCR's position is understandable. Given the considerable disparity in power between transnational corporations and individuals – and oftentimes between these corporations and developing country governments – it is indeed repulsive to have a system whereby corporate actors can demand human rights protection at the expense of individuals.

Even if the corporate rights-holders' claims are to prevail, there will be at least two counter-responses. The first counter-response concerns the fact that the reduction of opportunities and remuneration may not have reached the level of a human rights violation. As the drafting history of the UDHR has shown, the right to the protection of

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[20] Green, n. 8 above, para. 45.

[21] 'General Comment No. 17', n. 3 above, para. 3.

[22] *Ibid*., para. 2.

[23] *Ibid*., para. 7.

[24] *Ibid*.

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.[25] 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.[26]

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'.[27] Thus, 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 23 of the American Declaration of the Rights and Duties of Man, for instance, 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'. 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'.[28] In other words, the right to the protection of interests of intellectual creations only requires 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'.[29] 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"',[30] their likelihood of success has been greatly enhanced by the 2007 judgment of *Anheuser-Busch, Inc. v. Portugal*, in which the Grand Chamber of the Court extended the coverage of Article 1 to both registered trademarks and trademark applications of a multinational corporation.[31] *Anheuser-Busch* concerned a dispute over Portugal's cancellation of a multinational brewery's application for the BUDWEISER trademark in an effort to protect

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[25] Yu, n. 1 above, at 1087–1088.

[26] C. Krause, 'The Right to Property', in *Economic, Social and Cultural Rights: A Textbook*, ed. A. Eide, C. Krause & A. Rosas, 2nd rev. ed. (Boston: Martinus Nijhoff Publishers, 2001), 201.

[27] 'General Comment No. 17', n. 3 above, para. 2.

[28] Morsink, n. 8 above, at 145.

[29] C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights', in Eide, Krause & Rosas, n. 26 above, 564, fn. 3.

[30] *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 International Analyses*, ed. J. Griffiths & U. Suthersanen (Oxford: Oxford University Press, 2005), 107.

[31] 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', *Harvard International Law Journal* 49 (2008): 1–52. 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', *International Review of Intellectual Property and Competition Law* 37 (2006): 371–406.

the appellation of origin BUDĚJOVICKÝ BUDVAR, which is owned by Budweiser's longstanding Czech rival.

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 may even be socially beneficial, 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'.[32]

Moreover, if corporate actors have human rights, they should also have human rights responsibilities. As *General Comment No. 17* declared:

> 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, paragraph 1(c), of the Covenant.[33]

In the public-health context, the preamble to the Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines further states that '[p]harmaceutical companies, including innovator, generic and biotechnology companies, have human rights responsibilities in relation to access to medicines'.[34] Guideline 26, in particular, stipulates that these companies 'should make and respect a public commitment not to lobby for more demanding protection of intellectual property interests than those required by TRIPS, such as additional limitations on compulsory licensing'.

The second counter-response concerns the distinction *General Comment No. 17* made between fundamental, inalienable, and universal human rights and temporary, assignable, revocable, and forfeitable intellectual property rights. In making this distinction, the CESCR seemed to suggest that human rights instruments do not cover the protection of transferable interests.[35] Instead, the ICESCR focuses on what French delegate René Cassin, a key UDHR drafter, described as the right that would survive 'even after such a work or discovery has become the common property of mankind'.[36] 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 may therefore find a human rights framework for intellectual property unappealing.

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,

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[32] J. Donnelly, *Universal Human Rights in Theory & Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003), 25.

[33] 'General Comment No. 17', n. 3 above, para. 55.

[34] Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health', UN Doc. A/63/263 (2008), 15–25.

[35] 'General Comment No. 17', n. 3 above, para. 2.

[36] '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), 275–280 (emphasis added).

thus curtailing corporate control of intellectual creations as recognized by the ICESCR. The right to the protection of moral interests in intellectual creations, for instance, already exceeds the standards of protection offered under most intellectual property laws. As Professor Helfer noted in relation to US laws:

> 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 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.[37]

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'.[38] In doing so, it successfully prevented the mandatory dispute resolution process from being used to resolve disputes over inadequate protection of moral rights, even though WTO Member States continue 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.[39] 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.[40] Article 13 of the TRIPS Agreement expressly stipulates that 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'. Article 30 further permits the 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.

Compared to these two provisions, *General Comment No. 17* provided a much more stringent test. As the CESCR 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'.[41] In addition, these limitations must be proportionate and compatible with other provisions and must offer a least

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[37] Helfer, n. 1 above, at 997.

[38] TRIPS Agreement, Art. 9(1). Art. 6*bis* is the specific TRIPS provision providing for the protection of moral rights.

[39] On the recoding or reuse of copyrighted works, see P.K. Yu, 'Moral Rights 2.0', *Texas A&M Law Review* 1 (2014): 881–895.

[40] Helfer, n. 1 above, at 995.

[41] 'General Comment No. 17', n. 3 above, para. 22.

restrictive means to achieve the goals.[42] Thus, in 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'.[43]

3.3. INSTITUTIONAL CAPTURE

The second challenge to the development of a human rights framework for intellectual property concerns the undesirable capture of the human rights forum by intellectual property rights-holders. Because these rights-holders and their supportive developed countries are rich, powerful, and organized, their greater resources, tighter organization, and stronger negotiation skills may enable them to capture the human rights forum to the detriment of developing countries, traditional communities, and other disadvantaged groups. 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 learn that the lack of resources has forced governments of small developing countries to give up participation in international fora. 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]'.[44] 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 … to represent their interests'.[45]

Intellectual property 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-based goods and services remain key exports for many developed countries, the governments of these countries are likely to find a coincidence of their interests with those of intellectual property 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 [intellectual property] objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue.[46]

Second, intellectual property rights-holders can influence developments in the human rights forum through direct participation, collaborative efforts, or indirect participation – for example, through financial support or the establishment of front

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[42] *Ibid*., para. 23.
[43] *Ibid*., para. 24.
[44] 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', *Harvard Environmental Law Review* 25 (2001): 62–63.
[45] J.O. McGinnis & M.L. Movsesian, 'The World Trade Constitution', *Harvard Law Review* 114 (2000): 557, fn. 256.
[46] S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003), 8.

organizations. As two commentators noted 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 because the UN, having very limited resources, may face institutional capture by its more powerful partners.[47]

Today, 'the movement towards human rights accountability of corporate actors has [remained] … an uphill battle'.[48] Thus, it is understandable why many commentators and activists are concerned that intellectual property rights-holders may be able to capture the human rights forum, thus taking away from developing countries an important venue to voice concerns and grievances in the intellectual property area. Such institutional capture would also significantly undermine a forum that countries can use 'to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO'.[49]

There are several responses, however. First, to the extent that intellectual property 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 taken place. Although the rights-holders and transnational corporations continue to prefer such fora as the WTO and WIPO, they have paid growing attention to other fora, including the human rights forum. Although these corporations have thus far 'insist[ed] on the sufficiency of their own efforts, that is, self-implementation of human rights standards, and [remained] strongly resistant to establishment of enforcement or even accountability and transparency procedures',[50] they also try hard to persuade others of approaches that would benefit their interests while at the same time seeking to reduce the impact of human rights instruments on their business activities.

Their actions are understandable, considering that international and regional human rights instruments have created governmental duties to regulate the activities of private actors. 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.[51] For example, States can be found to violate the Covenant by action, such as when they 'entic[e transnational corporations] to invest by providing conditions which violate human rights, including tax-free havens and

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[47] K. Buse & A. Waxman, 'Public–Private Health Partnerships: A Strategy for WHO', *Bulletin of the World Health Organization* 79 (2001): 750.
[48] Scott, n. 29 above, at 563.
[49] L.R. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', *Yale Journal of International Law* 29 (2004): 59.
[50] R. Falk, 'Interpreting the Interaction of Global Markets and Human Rights', in *Globalization and Human Rights*, ed. A. Brysk (Berkeley: University of California Press, 2002), 65–66.
[51] 'General Comment No. 17', n. 3 above, para. 55.

prohibition of trade union activities'.[52] States can also be found to violate the Covenant by inaction, such as when they 'fail[] to have the regulatory structures in place which prevent or mitigate the harms in question'.[53] As Professor Donnelly rightly observed, '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'.[54]

Second, even if intellectual property rights-holders try to capture the forum, it is unclear if they will ever succeed. The human rights forum is more robust than one would expect, and capturing a robust forum is not easy. At present, the forum provides significant safeguards to protect the poor, the marginalized, and the powerless. Thus far, non-governmental organizations and developing countries are well represented in the human rights forum. They have also been more active than transnational corporations and their supportive developed countries, which often find the structure of the human rights forum and the language used therein alien. Moreover, the discussion of human rights norms may even help developing 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.[55]

Third, it may not necessarily be bad to include intellectual property rights-holders and transnational corporations 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 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 would therefore 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 has a narrow focus 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.[56] In the 1999

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[52] A. Eide, 'Obstacles and Goals to Be Pursued', in Eide, Krause & Rosas, n. 26 above, at 559.
[53] Scott, n. 29 above, at 568.
[54] Donnelly, n. 32 above, at 37.
[55] L.R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?', *Minnesota Intellectual Property Review* 5 (2003): 58.
[56] 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', *Human Rights Quarterly* 27 (2005): 767–770. On the relationship between human rights obligations and private actors, see R.C. Bird, D.R. Cahoy & J.D. Prenkert (eds), *Law, Business and Human Rights: Bridging the Gap* (Cheltenham: Edward Elgar Publishing, 2014); 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*

World Economic Forum, UN Secretary-General Kofi Annan challenged business leaders to join an international initiative called the United Nations Global Compact. This initiative brought hundreds of companies together with UN agencies and labour and civil society organizations to support universal principles in the areas of human rights, labour, the environment, and anti-corruption.[57] The following 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.[58] In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights established the Norms on the Responsibilities of Transnational Corporations and Other Businesses, which state:

> 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.[59]

While these developments remain in their early stages and their effectiveness has been questioned,[60] they are very likely to continue. They are also likely to expand as the world becomes increasingly globalized and as transnational corporations become more important in the present State-centred system. Indeed, as the UN 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'.[61]

Finally, despite the foregoing challenges, there are tremendous benefits to advancing a dialogue with intellectual property rights-holders in the human rights forum. For instance, the language used in this dialogue may eventually find its way to other intellectual property–related fora, such as the WTO or WIPO.[62] Indeed, the new intellectual property law-making initiatives 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's] recent interpretive statements'.[63] The drafters of instruments developed in these initiatives not only cited to or drew support

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(Oxford: Oxford University Press, 2006); S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law Journal* 111 (2001): 443–545.

[57] UN Global Compact, 'The Ten Principles', www.globalcompact.org/AboutTheGC/TheTenPrinciples/index.html, 12 July 2007.

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

[59] UN 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', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

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

[61] UN Sub-Commission on the Promotion and Protection of Human Rights, n. 59 above, Preamble, Recital 12.

[62] P.K. Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime', *Loyola of Los Angeles Law Review* 38 (2004): 428–429.

[63] Helfer, n. 1 above, at 1001.

from international human rights instruments,[64] but also carried with them the usual scepticism among human rights advocates toward the benefits of strong intellectual property protection in the developing world.[65]

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[d] a template for countries whose governments already oppose expansive intellectual property protection standards to implement more human rights–friendly standards in their national laws'.[66] 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.[67]

Indeed, countries have been relocating to more sympathetic fora to create tactical advantages for themselves.[68] 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'.[69] 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, a growing number of WTO and WIPO activities have explored the relationship between intellectual property and human rights. For instance, in November 1998, WIPO conducted a panel discussion on 'Intellectual Property and Human Rights' as part of the effort to commemorate the fiftieth anniversary of the UDHR.[70] 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 developing countries.[71] Such attention eventually resulted in the

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[64] For example, the preamble to the UNESCO 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'. Art. 2(1) lists the principle of respect for human rights and fundamental freedoms among one of its guiding principles. That provision further states: '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.'

[65] Helfer, n. 1 above, at 980.

[66] *Ibid*., at 1000.

[67] *Ibid*.

[68] *Ibid*., at 974–975; Helfer, n. 49 above, at 59; Raustiala, n. 11 above, at 1027.

[69] P.K. Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia', *Michigan State Law Review* 2007: 1–291. The term 'regime complex' was derived from K. Raustiala & D.G. Victor, 'The Regime Complex for Plant Genetic Resources', *International Organization* 58 (2004): 279. David Leebron has also used the term 'conglomerate regime'. D.W. Leebron, 'Linkages', *American Journal of International Law* 96 (2002): 18.

[70] World Intellectual Property Organization, *Intellectual Property and Human Rights: A Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, November 9, 1998* (Geneva: World Intellectual Property Organization, 1999).

[71] On TRIPS developments in relation to access to medicines, see O. Aginam, J. Harrington & P.K. Yu (eds), *The Global Governance of HIV/AIDS: Intellectual Property and Access to Essential Medicines* (Cheltenham: Edward Elgar Publishing, 2013); P. Roffe, G. Tansey & D. Vivas Eugui (eds), *Negotiating Health: Intellectual Property and Access to Medicines* (London: Earthscan, 2006); F.M. Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of

adoption of the Doha Declaration on the TRIPS Agreement and Public Health, which delayed the formal introduction of the protection for pharmaceutical patents and undisclosed regulatory data for ten years. This Declaration, in turn, paved the way for the adoption of a protocol to formally amend the TRIPS Agreement by adding Article 31*bis*, which, if ratified by two-thirds of the WTO membership, would allow countries with insufficient or no manufacturing capacity to import generic versions of patented pharmaceuticals.[72] Had the human rights–related 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.[73]

3.4. CULTURAL BIAS

The final challenge to the development of a human rights framework for intellectual property concerns the framework's potential bias against non-Western cultures and traditional communities. In recent years, policy makers and commentators have discussed how human rights instruments have failed to protect the interests of non-Western countries and traditional 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 limited applicability in non-Western countries.[74] 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.[75] Although the Bangkok Declaration did not articulate the oft-discussed 'Asian values', it stated 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'.[76]

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 UN

Public Health', *American Journal of International Law* 99 (2005): 317–358; P.K. Yu, 'The International Enclosure Movement', *Indiana Law Journal* 82 (2007): 827–907.

[72] Although the initial deadline for ratification was 1 December 2007, that deadline has since been extended four times to 1 December 2015. As of this writing, slightly less than a third of the 161 WTO Member States have ratified the proposed amendment.

[73] Yu, n. 62 above, at 414–415.

[74] 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 in note 83.

[75] World Conference on Human Rights, 'Report of the Regional Meeting for Asia of the World Conference on Human Rights', UN Doc. A/Conf.157/PC/59 (1993).

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

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:

> [T]he 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?[77]

Notwithstanding these cultural concerns, 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.[78] In fact, the drafting history of the UDHR strongly suggests that the drafters were determined to create a universal document and therefore reluctant to introduce language that was tailored toward a particular form of political or economic system.[79] As John Humphrey, a key drafter of the UDHR and the director of the UN Division on Human Rights at the time, recalled in his memoirs, Chinese delegate Chang Peng-chun 'suggested that [he] put [his] other duties aside for six months and study Chinese philosophy … [implying] that Western influences might be too great'.[80] The drafters' eagerness and determination to create a universal document despite their cultural differences were indeed quite obvious.

Moreover, commentators have underscored the diverse cultural and religious backgrounds of governmental representatives participating in the drafting process. 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'.[81] In addition, '"Western" states … made up only about a third of the votes for the Universal Declaration',[82] and the Soviet and Latin American countries dominated the discussion on economic, social, and cultural rights. A diverse array of governments, intergovernmental and nongovernmental organizations, and private entities also participated widely in the drafting process.[83] Even when countries, in particular those from the Eastern bloc, abstained from voting on the final adoption of Article 27 of the UDHR and Article 15 of the ICESCR, they were able to influence the outcome by engaging in the discussions, participating in some of the preliminary voting, and submitting comments, drafts, and amendments.[84] As Lebanese delegate Charles Malik

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[77] American Anthropological Association, 'Statement on Human Rights', *American Anthropologist* 49 (1947): 539–543.

[78] Yu, n. 1 above, at 1083–1092.

[79] Morsink, n. 8 above, at 149.

[80] J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry: Transnational Publishers, 1983), 29. Some commentators, however, disagreed with Dr Humphrey's assessment. Glen Johnson, for example, noted, 'Those members of the [UN 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 & J. Symonides, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation, 1948–1998* (Paris: UNESCO, 1998), 46–47.

[81] Morsink, n. 8 above, at 21.

[82] Donnelly, n. 32 above, at 22, fn. 1. James Nickel also observed: 'When 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.' J.W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), 67.

[83] Morsink, n. 8 above, at 9.

[84] *Ibid*., at 21.

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'.[85]

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'.[86] 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 laisser-faire economy, or upon any other particular approach'.[87]

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 the interests of 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'.[88]

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.[89] As Johannes 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.'[90] In fact, Morsink, in his widely cited book, 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.[91]

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'.[92] By emphasizing individual

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[85] Glendon, n. 36 above, at 225.
[86] *Ibid*., at 232.
[87] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)', para. 8, UN Doc. E/1991/23 (1990).
[88] 'General Comment No. 17', n. 3 above, para. 7.
[89] Morsink, n. 8 above, at 269.
[90] *Ibid*.
[91] *Ibid*., at 269–280.
[92] Bellagio Declaration, reprinted in J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996), 193.

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 is the only article in the International Bill of Rights that specifically addresses the cultural rights of minorities,[93] references to cultural participation and development appear in many international instruments, including the UN 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.[94]

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'.[95] As Donald Kommers pointed out in his comparison of the German and US 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'.[96] 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.[97]

Moreover, human rights continue to evolve and expand,[98] and there has been a growing trend to extend human rights to groups, despite the original intentions of the UDHR and ICESCR drafters. As *General Comment No. 17* stated:

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[93] Art. 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'.

[94] 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 & Russell, n. 14 above, at 282.

[95] *Ibid*., at 288.

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

[97] Glendon, n. 36 above, at 227.

[98] Sepúlveda, n. 5 above, at 81–84; A.R. Chapman & S. Russell, 'Introduction', in Chapman & Russell, n. 14 above, at 13.

> 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.[99]

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*'.[100] Article 31(3) of the Vienna Convention on the Law of Treaties also requires subsequent agreement and practice to be taken into account in treaty interpretation.

In the context of cultural rights, the CESCR's interpretative 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'.[101] 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'.[102] As Article 31(1) of the Declaration on the Rights of Indigenous Peoples recognized:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. *They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions*.[103]

Likewise, *General Comment No. 21*, the CESCR's recent authoritative interpretation of Article 15(1)(a) of the ICESCR, declared:

> Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.[104]

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[99] 'General Comment No. 17', n. 3 above, paras 1, 8 (emphasis added).

[100] 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).

[101] A. Eide, 'Cultural Rights as Individual Human Rights', in Eide, Krause & Rosas, n. 26 above, at 291.

[102] 'General Comment No. 17', n. 3 above, para. 33.

[103] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, Art. 31(1), UN Doc. A/RES/61/295 (2007) (emphasis added).

[104] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)', para. 37, UN Doc. E/C.12/GC/21 (2009).

Finally, compared to civil and political rights, economic, social, and cultural rights present less 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, which was later split into the ICCPR and the ICESCR. 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'.[105] 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, 'The [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'.[106]

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 developing countries and traditional 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. This challenge exists notwithstanding the 'universal, indivisible and interdependent and interrelated' nature of human rights, as recognized in the Vienna Declaration and Programme of Action. There is also continuous tension between human rights protection and economic development.[107]

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 developing countries. Fortunately, the European Court of Human Rights has advanced a deferential approach that respects a considerable 'margin of appreciation'.[108] As Professor Helfer noted:

> [T]he [Court] 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

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[105] A. Eide, 'Economic Social and Cultural Rights as Human Rights', in Eide, Krause & Rosas, n. 26 above, at 11.

[106] Glendon, n. 36 above, at 227.

[107] On the tension between human rights and economic development, see Donnelly, n. 32 above, at 109–110, 194–203; P.K. Yu, 'Ten Common Questions about Intellectual Property and Human Rights', *Georgia State University Law Review* 23 (2007): 709–753. On how to recalibrate the concept of intellectual property in light of the development concept, see M. Chon, 'Intellectual Property and the Development Divide', *Cardozo Law Review* 27 (2006): 2821–2912.

[108] On the margin of appreciation doctrine embraced by the European Court of Human Rights, see Laurence R. Helfer, 'Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy', *Harvard International Law Journal* 39 (1998): 404–405.

> consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.'[109]

If this deferential approach is incorporated into the framework, countries are likely to be able to develop a balanced intellectual property system that takes international human rights obligations into consideration while at the same time maintaining the policy space needed for the development of a system that appreciates the divergent local needs, national interests, technological capabilities, institutional capacities, and public health conditions.[110]

3.5. 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 this 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 the framework will not only offer individuals the well-deserved protection of their moral and material interests in intellectual creations, but will also 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.

[109] Helfer, n. 31 above, at 10–11.

[110] On the enclosure of the policy space developing countries have in designing intellectual property systems that fit their needs, interests, conditions, and priorities, see Yu, n. 71 above.