2018

Socially Responsible Corporate IP

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ABSTRACT

Many companies practice corporate social responsibility (CSR) as part of their branding and public relations efforts. As part of their CSR strategies, some companies adopt voluntary codes of conduct in an effort to respect human rights. This Article contemplates the application of CSR principles to trade-related intellectual property (IP). In theory, patent and copyright laws promote progress and innovation, which is why IP rights are beneficial for both IP owners and for the public. Trademark rights encourage businesses to maintain certain standards and allow consumers to make more efficient choices. Though IP rights are often discussed in relation to the value they provide for business purposes, trade-related IP can also promote human progress, including as it relates to health, education and culture. A CSR model for international intellectual property offers an additional strategy to support ongoing efforts to make IP-related trade agreements more sensitive to human needs.

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[*] Associate Professor of Law, Florida International University. My thanks to Professor Gervais, and the organizers of the JETLaw symposium on intellectual property, international trade, and human rights, for a terrific symposium. I would also like to thank the symposium participants for their comments and suggestions. Finally, I am grateful to Adrian Karborani, Genesis Martinez, and Sam Shahidi for their able research assistance, and to Alyx Eva, Erin Meyers, Reem Blaik, and the other editors of this journal for their dedication and hard work. All opinions, errors and omissions are mine.

I. INTRODUCTION

Oil spills that devastate communities, such as the Ogoni community in Nigeria;[1] factories with poor working conditions;[2] or African "blood diamonds"[3] trigger calls for corporations to implement socially responsible business practices. We expect corporations to change their profit-maximizing behaviors when their actions start to cause harm to human well-being.[4] In other words, we increasingly expect corporations to behave in a socially responsible manner. Definitions of corporate social responsibility (CSR) vary, but for the purposes of this Article, CSR is defined as "actions that further some social good, beyond that which is required by the law."[5]

CSR does not typically evoke thoughts of intellectual property (IP) rights, such as patents, copyrights, and trademarks. Yet, the effects of IP rights on human well-being have become a global issue. This is because IP standards have been harmonized in the last few decades. Most states are members of the World Trade Organization

1. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113–14 (2013); U.N. Env't Programme, Environmental Assessment of Ogoniland (2011), https://wedocs.unep.org/bitstream/handle/20.500.11822/22169/EA_Ogoniland_ES.pdf?sequence=1&isAllowed=y [https://perma.cc/NZE5-KRWX]; *The Ogoni Issue*, SHELL NIGERIA, https://www.shell.com.ng/sustainability/environment/ogon-issue.html [https://perma.cc/5939-4BWL] (last visited Oct. 18, 2018); John Vidal, *Ogoni King: Shell Oil Is Killing My People*, GUARDIAN (Dec. 3, 2016, 2:45 PM), https://www.theguardian.com/world/2016/dec/03/ogoni-king-shell-oil-is-killing-my-people [https://perma.cc/8C8M-3759].

2. *See* Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES (Jan. 25, 2012), https://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html [https://perma.cc/6CUM-3S8V]; Jamie Fullerton, *Suicide at Chinese iPhone Factory Reignite Concerns About Apple's Working Conditions*, TELEGRAPH (Jan. 7, 2018, 4:36 PM), https://www.telegraph.co.uk/news/2018/01/07/suicide-chinese-iphone-factory-reignites-concern-working-conditions/ [https://perma.cc/JMY9-RC4F]; Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2013, 10:00 PM), https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 [https://perma.cc/TL2D-V6MS].

3. Christian Locka, *Threat of 'Blood Diamonds' Returns as Exports Flow from Central African Republic*, WASH. TIMES (Dec. 26, 2017), https://www.washingtontimes.com/news/2017/dec/26/blood-diamonds-threat-returns-to-africa/ [https://perma.cc/TM5T-JCVJ].

4. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 734 (2005).

5. Abagail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. MGMT. REV. 117, 117 (2001).

(WTO). These member states are therefore obligated to provide minimum standards of IP protection in accordance with the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).[6] IP rights—such as copyright, trademarks, geographical indications, and patents—can have implications for access to knowledge, culture, and medicines.[7] Without an appropriate balance, copyright can limit access to educational and cultural materials;[8] trademarks can be used to disseminate messages that promote racial stereotypes;[9] and the lack of protection for intergenerational indigenous cultural works can lead to allegations of biopiracy.[10]

Several commentators have expressed concerns about the potentially detrimental effects of harmonized international IP standards on human rights.[11] Some observers have also questioned the duties of corporations in the area of access to medicines.[12]

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6. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. The TRIPS Agreement took effect on January 1, 1995. *Overview: The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [https://perma.cc/9E8H-JSQD] (last visited Oct. 18, 2018) ("The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property."). The WTO has 164 member states. *See Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/R9X7-E46X] (last updated Oct. 18, 2018).

7. *See* J. Janewa OseiTutu, *Corporate "Human Rights" to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 3 (2015); *accord* Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 127, 128 (1998), http://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf [https://perma.cc/MZQ4-8WSS]; Cristian Timmermann & Henk van den Belt, *Intellectual Property and Global Health: From Corporate Social Responsibility to the Access to Knowledge Movement*, 34 LIVERPOOL L. REV. 47, 49 (2013).

8. *See* Deidre A. Keller & Anjali Vats, *Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi*, 54 DUQ. L. REV. 173, 174 (2016).

9. *See* Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, *in* DIVERSITY IN INTELLECTUAL PROPERTY LAW: IDENTITIES, INTERESTS, AND INTERSECTIONS 105, 113 (Irene Calboli & Srividhya Ragavan eds., Cambridge Univ. Press 2014) (discussing racially disparaging marks).

10. *See* Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 48 (1998).

11. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 35 (2001); Amir Attaran, *How Do Patents and Economic Policies Affect Access to Essential Medicines in Developing Countries?*, 23 HEALTH AFF. 155, 159, 161 (2004); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37–40 (2003) (describing the expansion of intellectual property rights); Cynthia M. Ho, *An Overview of "TRIPS-Plus" Standards*, *in* ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS 223, 237–38, 243–44 (2011); Kal Raustiala, Commentary, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1030–32 (2007); Timmermann & van den Belt, *supra* note 7, at 48.

12. *See* Timmermann & van den Belt, *supra* note 7, at 60–61, 69.

In theory, patent and copyright laws promote progress and innovation. Trademark rights encourage businesses to maintain certain standards and allow consumers to make efficient choices. In addition to promoting business interests and efficiency, trade-related IP should promote human progress, which could be encouraged through socially responsible corporate practices. However, CSR, as a strategy, has been not been given much consideration in the international IP context. One incentive for corporations to engage in CSR is to enhance their reputation and branding. Furthermore, companies might find CSR practices to be cost effective. Consider Philip Morris, for example. As Parts III and IV discuss, after unsuccessful legal efforts to challenge Australia's plain packaging laws, which limited the use of trademarks on cigarette packaging, the multinational cigarette company began working to re-brand itself as a good corporate citizen.

Corporations have an important role to play in balancing the international IP system. The existing international IP system is structured to protect corporate profits.[13] Still, corporations can choose to be socially responsible IP actors. The CSR movement contends that corporations have rights and duties within international law and calls on them to be good global citizens.[14] It encourages corporations to respect and promote human rights, even if domestic laws do not require them to do so.[15] In the short term, CSR may be a practical strategy for ensuring that IP rights promote human flourishing. Respect for IP rights can be part of socially responsible corporate practice. However, CSR, as it relates to IP, could also include refraining from fully exercising IP rights in order to protect human rights, such as the right to health.

This Article applies CSR principles to international IP law. Although this is a preliminary exploration of this issue, which will be developed elsewhere, it seeks to make two main contributions. First, it explains why a CSR model for IP could offer an effective short-term strategy in helping to remold the international IP system into one that

13. *See* Antonina Bakardjieva Engelbrekt, *The WTO Dispute Settlement System and the Evolution of International IP Law: An Institutional Perspective*, *in* INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 106, 119 (Annette Kur ed., 2011).

14. *See* Rep. of the Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 11, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles on Business and Human Rights*] ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."); McWilliams & Siegel, *supra* note 5, at 117; Lauren Verseman, *Corporate Social Responsibility: Are Franchises off the Hook, or Can a Treaty Catch Them?*, 16 WASH. U. GLOBAL STUD. L. REV. 221, 225–26 (2017).

15. *See* McWilliams & Siegel, *supra* note 5, at 117; Verseman, *supra* note 14, at 225–26.

is more sensitive to human rights considerations. Secondly, it presents original reflections on a CSR model for IP that requires self-imposed voluntary restraint where IP rights are already well established and positive action where existing IP laws are inadequate. This Article takes, as a starting point, the position expressed in the United Nations Guiding Principles on Business and Human Rights—that corporations have a responsibility to respect human rights.[16] Part II defines CSR in the context of international IP, while Part III explains the value of the CSR model to international IP. Part IV then discusses what should guide a CSR model for IP and how it might be applied. Part V briefly concludes.

II. DEFINING "SOCIALLY RESPONSIBLE" IP

The essential goals of CSR are to protect human rights, to respect human rights, and to remedy human rights violations.[17] Corporations are not directly obligated to protect human rights.[18] In contrast, states have the legal obligation under international law to protect human rights.[19] This means that in order to comply with their international obligations, states must take measures to ensure that human rights abuses do not occur within their territory without any investigation or redress.[20]

16. *Guiding Principles on Business and Human Rights*, *supra* note 14, ¶ 11 ("The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.").

17. *See id.*; Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 330 (2004).

18. *Guiding Principles on Business and Human Rights*, *supra* note 14, ¶ 1 ("The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.").

19. *Id.*

20. *Id.* ("The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) ("International human rights law principally contemplates two sets of actors who may be held liable for abuses - states, through the concept of state (primarily civil) responsibility, and individuals, through the concept of individual (primarily criminal) responsibility. States are dutyholders for the full range of human rights, whether defined in treaties or customary law. Individual responsibility applies to a far smaller range of abuses, principally characterized by the gravity of their physical or spiritual assault on the individual.").

The international legal obligation to protect human rights does not typically extend to corporations.[21] However, corporations can respect human rights, even if governments do not, and they can remedy any human rights violations for which they are responsible.[22] As the United Nations Guidelines on Business and Human Rights, commonly referred to as "the Ruggie Report," notes, corporations have a responsibility to respect human rights, as part of a global standard.[23] This means that corporations should refrain from violating human rights and that they should address adverse human rights impacts arising from their own actions.

CSR within an IP framework would, at a minimum, place some moral obligation on corporations that own IP.[24] As IP owners, corporations have the power to manage their IP rights in a socially responsible manner. In some international IP disputes, we see states, such as Australia, fighting to protect public health in the face of resistance from corporations who seek to enforce their IP rights.[25] In such circumstances, the state may be attempting to fulfill its obligations, despite resistance from corporations. Meaningful change, therefore, requires that, in addition to any possible legal reforms, these IP owners manage and enforce their IP in ways that promote respect for human rights.[26]

A critical aspect of CSR is that it asks corporations to respect human rights and to engage in socially responsible behaviors, regardless of what the law does or does not require.[27] For example, a

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21. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter UDHR]; *International Human Rights Law*, UNITED NATIONS HUMAN RTS. OFF. HIGH COMMISSIONER, https://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx [https://perma.cc/9ANT-BNWZ] (last visited Oct. 19, 2018) ("By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights.").

22. *See* McWilliams & Siegel, *supra* note 5, at 117.

23. *See Guiding Principles on Business and Human Rights*, *supra* note 14, ¶¶ 11–12.

24. Some scholars argue that corporations have a legal obligation to respect human rights. *See, e.g.*, David Bilchitz, *A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESSES: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 107, 111–12 (Surya Deva & David Bilchitz eds., 2013) ("Indeed, if the third parties were not bound by international law to comply with such requirements, then there would be no reason for the state to ensure that they do so.").

25. *See* Christopher Knaus, *Philip Morris Cigarettes Charged Millions After Losing Plain Packaging Case Against Australia*, GUARDIAN (July 9, 2017, 8:47 PM), https://www.theguardian.com/business/2017/jul/10/philip-morris-cigarettes-charged-millions-after-losing-plain-packaging-case-against-australia [https://perma.cc/4L6H-HLCD]; *infra* Parts III, IV.

26. *See* Verseman, *supra* note 14, at 225–26, 228, 242–43.

27. *See Guiding Principles on Business and Human Rights*, *supra* note 14, ¶¶ 11–12.

multinational corporation could conduct business in a country with very few labor standards, but still decide to treat its workers in accordance with human rights principles. In doing so, it could maintain working conditions or wages that exceed what is required or typical in that particular nation.[28]

CSR is often seen as a good for corporate branding. Socially responsible international IP, as discussed here, is not about using IP to brand oneself as a good corporate citizen, although this may be one of the incentives and one of the effects. For example, IP could be used to identify good corporate practices—such as supporting rural farmers—through branding.[29] This type of "good citizen branding" may in fact increase corporate profits.[30] This could be an important motivating factor for corporations to manage their IP with a view to promoting human rights. However, the focus here is not on the use branding to signal that one is a good corporate citizen.

Managing IP in socially responsible ways means managing the IP in a manner that promotes human well-being. For instance, what are the practices of the corporation in relation to the IP that it owns? Is the corporation a good global citizen in this regard? An obvious example relates to the pricing on patented medicines and the way this can limit access to those medicines. Patent exclusivity could, absent government regulation or some guiding values, enable a company to charge high prices for medicines. This is not a legal question, but a question of which values guide one's conduct.

A CSR approach to IP, therefore, engages norms rather than legal obligations.[31] This means that while some companies have been willing to embrace human rights norms, others have ignored the business and human rights framework.[32] However, in addition to any

28. *See* Elhauge, *supra* note 4, at 741; Paul Redmond, *Corporate Sustainability Through a Human Rights Lens*, 23 N.Z. BUS. L.Q. 219, 222–23 (2017).

29. *See* Margaret Chon, *Trademark Goodwill as a Public Good: Brands and Innovations in Corporate Social Responsibility*, 21 LEWIS & CLARK L. REV. 277, 286–87 (2017).

30. *See id.*; Ann Juergens & Diane Galatowitsch, *Fostering Client Altruism and the Common Good in the Practice of Law: Learning from Emerging Movements in Business and Economics*, 44 MITCHELL HAMLINE L. REV. 1, 39 (2018) ("Advising corporate clients to utilize voluntary CSR standards promotes the common good and improves relationships with stakeholders, local communities, customers, governments, regulators, and its own employees.").

31. *See* Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?*, 20 CARDOZO J. INT'L & COMP. L. 437, 442 (2012) ("Contemporary standards and practices governing corporate responsibility and accountability for human rights violations have been dominated by the state duty to protect, accountability for international crimes, and soft law and self-regulation.").

32. George G. Brenkert, *Business, Respect, and Human Rights in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 145 (Jena Martin & Karen E. Bravo, eds., 2016).

human rights considerations, IP laws are intended to provide some public benefit. International IP and human rights laws provide a starting point, but socially responsible IP extends beyond legal requirements to promote human flourishing. Corporations can take positive steps to promote human rights, even where they are not clearly required to do so. In other instances, they may need to simply refrain from vigorously asserting their legal rights. The next Part explains why a CSR model, which is based on norms, can do work that the law cannot.

III. CSR AS AN ADDITIONAL STRATEGY

Beyond the more readily observable health-related concerns, it is increasingly apparent that IP rights can have a significant impact on human well-being, including human flourishing and creativity.[33] Human flourishing, as used here, refers to the ability of human beings to develop their capabilities and to fulfill their potential.[34] As such, CSR is closely related to human development and human rights[35] because human beings can develop and flourish in an environment where there is respect for human rights.[36]

A CSR model for IP can complement efforts to revise or reinterpret existing international legal obligations. This model offers an additional strategy in the effort to create an international IP system that is more sensitive to effects of IP rights on human rights. There are two reasons why a CSR model is worth considering, especially given the state centric nature of international law. First, changing international

33. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 4 (2012); *see also* Estelle Derclaye, *Eudemonic Intellectual Property: Patents and Related Rights as Engines of Happiness, Peace, and Sustainability*, 14 VAND. J. ENT. & TECH. L. 495, 506–07 (2012); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 986–87 (2007); J. Janewa OseiTutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1647–49 (2012).

34. *See* John Kleinig & Nicholas Evans, *Human Flourishing, Human Dignity, and Human Rights*, 32 L. & PHIL. 539, 541 (2013) ("Most moral theories work with a conception of human development—whether it is the possession and maintenance of physical and mental well-being, the opportunity for and nurture of rational and social capacities, the development of capabilities, or the formation and execution of diverse life plans. These can be seen as ways of referring to human flourishing.").

35. *See id.* ("The metaphor of flourishing gets us to focus on humans as developing, natural objects. Moreover, flourishing bespeaks normatively laden development and change—a qualitative assessment of the developmental passage and accomplishment of a living thing.").

36. *See id.* at 547, 559 ("[T]he recognition of human dignity, understood not only as the expressed capacity to acknowledge the moral status of others, but also as a social environment in which moral norms and attitudes generally prevail, is an important element in human flourishing. True, the recognition of dignity does not exhaust the conditions of human flourishing; yet, without its recognition, the ability for humans to flourish tends to be extremely limited. . . . Human dignity, we suggest, grounds human rights.").

legal obligations is a slow and challenging process.[37] Second, multinational corporations can influence legislative and political processes at both the national and international levels.[38] As such, appealing to these corporations to change their behavior could help address weaknesses or gaps in the legal regime. Corporations could be encouraged or pressured to take the lead by changing norms. There may be business incentives and rewards, such as increased consumer support or tax breaks, for taking the lead in this regard. Some corporations are led by individuals who publicly embrace certain values and belief systems. Indeed, some corporate actors seek to engage with the community in socially responsible ways, even when there is no immediate financial gain.[39]

A CSR model for international IP is not intended to replace efforts to reform laws and international obligations. It does not mean that nations should not pursue changes to international legal rules. Revising laws is essential for lasting and enforceable change to take place. However, particularly when it comes to multilateral international agreements, change can be slow. For instance, TRIPS, a multilateral agreement, required several years of negotiation and has over 160 nations that are parties to the agreement.[40] Law making at the national level can be a slow process, but at the international level, the difficulty is exacerbated by the simple fact that so many nations with divergent goals must reach some consensus.[41]

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37. *See* Patricia L. Judd, *Toward a TRIPS Truce*, 32 MICH. J. INT'L L. 613, 614–15 (2011) ("While various regional and bilateral agreements have attempted to build on or clarify TRIPS provisions, there is no realistic possibility of replacing or significantly amending the Agreement in the near term." (footnote omitted)); John Ruggie, *Treaty Road Not Travelled*, ETHICAL CORP., May 2008, at 42, 42.

38. *See* Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1283–84, 1304–06 (2004) ("[G]lobal companies, as powerful economic, social, and political actors, must increasingly be brought within the law's domain."); David Weissbrodt, *Corporate Human Rights Responsibilities*, 6 ZEITSCHRIFT FÜR WIRTSCHAFTS UND UNTERNEHMENSETHIK [J. BUS., ECON. & ETHICS] 279, 287 (2005) ("Further, TNCs [transnational corporations] have the mobility and power to evade national laws and enforcement, because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses.").

39. *See* Juergens & Galatowitsch, *supra* note 30, at 18–19, 20 (describing how CSR initiatives may result in nonfinancial gain for corporations).

40. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 154 n.1 [hereinafter Marrakesh Agreement]; DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 12–13 (3d ed. 2008); WORLD TRADE ORG., MODULE I: INTRODUCTION TO THE TRIPS AGREEMENT 1, 3–5 (2013) [hereinafter MODULE I], https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules1_e.pdf [https://perma.cc/2K5T-NSMQ]. *See generally* TRIPS Agreement, *supra* note 6.

41. *See* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1208 (2007); *Policy*, WIPO, http://www.wipo.int/policy/en/ [https://perma.cc/XNP9-DM6Z] (last visited Oct. 19, 2018).

Thus, if critics of TRIPS aim to create change in international IP law and policy in the short to medium term, that change may have to first take place through shifting norms. In such an instance, the law would follow rather than lead. Shifting social norms can effectively prompt change, which can make it easier to achieve meaningful modifications to the relevant laws.[42] This is particularly true for international law matters because changes in law require agreement among many differently situated states that may not necessarily perceive key issues in the same way.

Admittedly, CSR, as a framework, has its limitations. Most of this socially responsible behavior on the part of corporate actors is voluntary and cannot be enforced by governments or private individuals. By comparison, states are legally obligated to protect both human rights and IP.[43] Additionally, with regard to IP rights, states are obligated to provide minimum standards of protection under international law.[44] For example, IP rights are protected under multilateral agreements, such as TRIPS, and other trade agreements, including BITs.[45] As such, state actors play a critical role with respect to the obligation to respect human rights, as well as the obligation to protect IP rights.

However, a CSR model for IP would have the effect of redirecting some responsibility to address imbalances in the global IP regime from states to the IP owners, many of which are corporations. After all, rights holders are the ones who benefit most from the international IP rules.[46] This framing provides an additional tool to use alongside efforts

42. *See generally* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003) (discussing the United Nations Sub-Commission on the Promotion and Protection of Human Rights' approval of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, or the Norms, and approaches to implementing them).

43. *See* OseiTutu, *supra* note 7, at 5; *International Human Rights Law*, *supra* note 21 ("By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights.").

44. *See* TRIPS Agreement, *supra* note 6, art. 1; MODULE I, *supra* note 40, at 10.

45. *See* TRIPS Agreement, *supra* note 6, art. 7; Aziz Choudry, *Corporate Conquest Global Geopolitics: Intellectual Property Rights and Bilateral Investment Agreements*, SEEDLING, Jan. 2005, at 7, 8.

46. *See* URL DADUSH ET AL., WORLD ECON. FORUM, WHAT COMPANIES WANT FROM THE WORLD TRADING SYSTEM 6–7 (2015)*;* Irene Kosturakis, *Intellectual Property 101*, 46 TEX. J. BUS. L. 37, 40–41 (2014) (describing the financial value of IP rights); *see, e.g.*, PATENT TECH. MONITORING TEAM, U.S. PATENT & TRADEMARK OFFICE, PATENTING BY ORGANIZATIONS (UTILITY PATENTS), at tbl. A1–1b (2015), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/topo_15.htm [https://perma.cc/WV5E-ZTJ8] (showing that in 2015, US corporations were granted 133,434 patents and foreign corporations were granted 144,719 patents, but only 13,463 US patents were granted to US nationals and 5,256 to foreign individuals); MICHAEL PERELMAN, STEAL THIS IDEA: INTELLECTUAL PROPERTY RIGHTS AND THE CORPORATE CONFISCATION OF CREATIVITY 194 (2002); *Top 300 Patents Owners*, INTELL. PROP. OWNERS ASS'N,

to create permanent regulatory changes to the international legal regime.

Further, adopting CSR principles to IP broadens the discussion about changing the international IP system to embrace non-institutional approaches. In other words, change is not limited to what organizations, such as the WTO or the World Intellectual Property Organization, can do to promote balanced international IP policies. A CSR approach to international IP puts greater responsibility on the private actors who use the IP system.

As the beneficiaries of global regulation that promotes their economic interests, it is reasonable to expect corporations to manage their IP with a view to promoting the public benefit, including human flourishing. This model also broadens the focus beyond the opportunities for financial gain that IP protection can offer to incorporate the concept of duty to the community.[47]

A. The Importance of Multinational Corporations

Admittedly, corporations operate with the goal of maximizing profits.[48] However, multinational corporations are critical actors in the global community, often having more wealth and power than many states.[49] Corporations also own a great deal of IP.[50] Due to their wealth and power, these companies can intimidate states that seek to limit IP rights. This can be done through trade regimes, including through investor-state dispute resolution.[51] Moreover, corporations are frequently the bad actors in international disputes and complaints

https://www.ipo.org/index.php/publications/top-300-patent-owners/ [https://perma.cc/2957-JCNM] (last visited Oct. 29, 2017) (showing an increase over time in patents per corporation for top patent owning corporations).

47. *See* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility*?, 34 SEATTLE U. L. REV. 1351, 1361–62 (2011).

48. *See* Elhauge, *supra* note 4, at 736–37; Page & Katz, *supra* note 47, at 1356.

49. *See* Oliver Krackhardt, *Beyond the Neem Tree Conflict: Questions of Corporate Behaviour in a Globalised World*, 21 N.Z.U. L. REV. 347, 348 (2005) ("With ever-growing multinational corporations gaining more and more power and influence, to the extent that some have a bigger gross income than most States, their role has to be redefined.").

50. *See* JUSTIN ANTONIPILLAI & MICHELLE K. LEE, U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE 1, 39–41 (2016), https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf [https://perma.cc/JP5M-E5VB].

51. *See, e.g.*, Cynthia M. Ho, *Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions*, 30 BERKELEY TECH. L.J. 213, 284 (2015). *See generally* Eli Lilly & Co. v. Gov't of Can., ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf [https://perma.cc/TN2W-3R7W] [hereinafter *Eli Lilly*, Final Award].

about IP-related human rights issues.[52] Multinational companies have championed their IP rights in the face of health legislation that seeks to limit them;[53] they have brought legal challenges to court decisions that invalidated patents and claimed expropriation of their covered investments.[54] They have also claimed that they have human rights to IP protection.[55]

Corporations are the primary beneficiaries of global minimum standards for IP protection.[56] As such, when there is a WTO complaint or major investor-state dispute settlement involving IP, the interests of large corporations are usually at stake.[57] Private entities cannot be litigants in WTO disputes, but states pursue WTO IP disputes to protect industry interests.[58] Some of these recent disputes involved industrialized, well-resourced states, such as Canada[59] and Australia.[60] Small states and developing nations do not have as much financial capacity to resist the demands of multinational corporations.

Importantly, large corporations wield such power that even if laws require balance in favor of human rights, the corporations can

52. *See, e.g.*, Tania Phipps-Rufus, *Companies Accused of Exploiting Cultural Identity of Kenya's Maasai*, GUARDIAN (Aug. 8, 2013, 5:08 PM), https://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai [https://perma.cc/9KBL-47K6] (discussing Louis Vuitton's clothing line that was based on traditional Maasai dress); *The Maasai Cultural Brand*, LIGHT YEARS IP, http://lightyearsip.net/the-maasai/ [https://perma.cc/F9X3-8GDD] (last visited Oct. 19, 2018).

53. *See* OLUFEMI AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES 225 (2011) ("[T]he WTO Agreement on Trade-Related Aspects of Intellectual Property Rights allows states to provide remedies aimed at preventing patent rights from having adverse effect on the transfer of technology vital to medical care and economic development of least developed countries."); Knaus, *supra* note 25.

54. *See, e.g.*, Eli Lilly & Co. v. Gov't of Can., ICSID Case No. UNCT/14/2, Notice of Arbitration, ¶ 4 (Sept. 12, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1582.pdf [https://perma.cc/HH9Q-KDVW] [hereinafter *Eli Lilly*, Notice of Arbitration].

55. *See* Anheuser-Busch Inc. v. Portugal [GC], 2007-I Eur. Ct. H.R. 39 (2007) (describing the company's grounds for a claim to a trademark interest based on European human rights law); OseiTutu, *supra* note 7, at 4.

56. *See* OseiTutu, *supra* note 33, at 1663.

57. *See* Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 344, 346–48 (2009).

58. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *Introduction to the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm [https://perma.cc/K4AQ-FU9U].

59. *See* Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 1.1, WTO Doc. WT/DS114/R (adopted Mar. 17, 2000) [hereinafter *Canada—Patent Protection*].

60. *See* Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 1.1, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted June 28, 2018) [hereinafter *Australia—Plain Packaging*].

challenge these laws, and often at great expense to the public.[61] If corporations do not feel that they have any obligation to the public or any interest in promoting human rights, there is little reason for them to refrain from pursuing their IP rights in a manner that is detrimental to human well-being.[62]

B. International Legal Disputes

Among the examples of international legal disputes where a CSR lens could be applied is a challenge by the cigarette manufacturer, Philip Morris International (Philip Morris)[63] to Australian legislation that required graphic warnings about the health risks of smoking.[64] This eventually led to a WTO dispute between states, but—as is often the case with such disputes—it was not necessarily brought to help the state, but seemingly to protect the IP interests of a multinational corporation.[65]

In this case, Australia had to defend its health policy against corporate interests.[66] Australia enacted the Australia Plain Packaging Act of 2011 (Plain Packaging Act), which was designed to protect public health by limiting the use of cigarette trademarks and visually emphasizing the health consequences of smoking.[67] More specifically, the Australian regulations required graphic health warnings on cigarette packaging, including images of the damage caused by

61. *See Eli Lilly*, Notice of Arbitration, *supra* note 54, ¶ 85.

62. *See* Ho, *supra* note 51, at 219; Knaus, *supra* note 25.

63. Philip Morris International and Philip Morris, as used here, refer to the various iterations of the multinational corporation—for instance, the arbitration claims against Australia were formally brought by Philip Morris Asia. *See* Philip Morris Asia Ltd v. Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 5–6 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf [https://perma.cc/RQ7R-NM87].

64. *See Australia—Plain Packaging*, *supra* note 60, ¶¶ 2.1, 2.2, 2.3, 2.8.

65. *See id.* ¶¶ 2.1., 2.3.3, 7.2.3 (outlining the ability of the Australian government to limit the ability of cigarette companies to use their trademarks on cigarette packaging and to emphasize health warnings.).

66. *See id.* ¶ 7.35.

67. *See Tobacco Plain Packaging Act 2011* (Cth) s 3 (Austl.) [hereinafter *Plain Packaging Act*] (explaining that the purpose of the legislation is to protect public health); *Health Warnings*, AUSTL. GOV'T: DEP'T HEALTH (Apr. 24, 2018), http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn [https://perma.cc/2K2Q-ZBVC] ("Health warnings are required on all tobacco product packaging for retail in Australia. The graphic health warnings provide a strong and confronting message to smokers about the harmful health consequences of tobacco products and convey the 'quit' message every time a person reaches for a cigarette. The graphics, in combination with the warning statements and explanatory messages, are intended to increase consumer knowledge of health effects relating to smoking, to encourage cessation and to discourage uptake or relapse.").

smoking.[68] In addition, the health warnings had to cover the majority of the front and back of the cigarette packaging.[69] The use of trademarks was limited to word marks, without any designs.[70] Philip Morris, a large multinational cigarette manufacturer,[71] objected to Australia's laws and unsuccessfully attempted to challenge these laws under a BIT.[72] Eventually, the matter led to a dispute between WTO member states, with the complaint being that the Australian laws and regulations were inconsistent with obligations under the WTO TRIPS Agreement.[73]

The complaining WTO member states made various arguments to support the contention that the Plain Packaging Act interfered with trademark rights.[74] Ultimately, Australia prevailed in the dispute.[75] Among other reasons for reaching its conclusion, the WTO Panel rejected the argument that a nation could not limit trademark owners in the use of their marks.[76]

In addition, where corporations have been able to litigate IP issues directly, they have done so. For instance, Eli Lilly challenged a decision by the Canadian courts through investor-state dispute resolution under NAFTA Chapter 11, which is the chapter on investment.[77] Eli Lilly claimed that decisions of the Canadian Federal Court that invalidated two of its patents were inconsistent with Canada's obligations to protect patents under NAFTA Chapter 17. The

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68. *See Competition and Consumer (Tobacco) Information Standard 2011* (Cth) s 1.4 (Austl.) [hereinafter *Competition and Consumer (Tobacco) Standard*]; *Health Warnings*, supra note 67; *infra* notes 69, 154 and accompanying text.

69. *See Competition and Consumer (Tobacco) Standard* ss 9.13–9.14, 9.19–9.20 (Austl.). According to Sections 9.13 and 9.14 of the Competition and Consumer (Tobacco) Standard, the health warning must cover at least 75 percent of the front of the cigarette packaging. *Id*. Per sections 9.19 and 9.20, the health warnings must cover at least 90 percent of the back of the cigarette packaging. *Id.*

70. *See Plain Packaging Act*, s 20 (Austl.).

71. *See Who We Are*, PHILIP MORRIS INT'L, https://www.pmi.com/who-we-are [perma.cc/77XE-T2K8] (last visited Oct. 20, 2018).

72. *See Investment Tribunal Dismisses Philip Morris Asia's Challenge to Australia's Plain Packaging*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, http://untobaccocontrol.org/kh/legal-challenges/investment-tribunal-dismisses-philip-morris-asias-challenge-australias-plain-packaging/ [http://perma.cc/CP8S-HREC] (last visited Oct. 20, 2018).

73. *See, e.g.*, *Australia—Plain Packaging*, *supra* note 60, ¶ 7.16.

74. *See, e.g.*, *id.* ¶ 6.66.

75. *See, e.g.*, *id.* ¶¶ 7.404, 7.927, 7.1024, 7.1732, 7.1913.

76. *See id.* ¶¶ 7.2025–7.2026 ("The above assessment indicates, in our view, that while use of the registered trademark may be the typical scenario anticipated by the TRIPS provisions, an absence of such use does not render the right to exclude provided by Article 16.1 'legally inoperative' or redundant. As described above, the purpose of Article 16.1 is to provide the essential means for owners of registered—and thus already distinctive—trademarks to prevent infringement by unauthorized third parties.").

77. *Eli Lilly*, Final Award, *supra* note 51, ¶¶ 4–5.

company further alleged that this amounted to an expropriation of its investment contrary to Chapter 11 of NAFTA.[78] According to Eli Lilly, the utility requirement under Canadian patent law had changed significantly, which violated its legitimate expectations under NAFTA.[79] The tribunal rejected Eli Lilly's arguments and decided in favor of the Canadian government.[80]

In this dispute, Eli Lilly sought a minimum of $500 million in damages from the Canadian government.[81] This would be a significant transfer of wealth from a government to a multinational corporation. The multinational pharmaceutical company, in effect, attempted to pressure Canada to reach a decision that was more favorable to the company's business.[82]

C. International Controversies

Global corporations also engage in behaviors that do not violate any IP law, but involve the use of cultural IP and cultural heritage from various nations. For the purpose of this Article, the term "cultural IP" refers to cultural products that are legally protected as part of the cultural heritage of a nation, but that receive no protection under international law.[83] Thus, cultural IP "refers to a narrow category of intangible cultural goods that could be protected under modern IP law, more specifically, copyright or trademark law, if temporal limitations or commercial requirements were removed."[84]

The use of cultural IP seems to occur without much—or any—investigation of whether this cultural IP is protected domestically or whether the names, symbols, or artwork in question have some cultural significance.[85] This can result in negative publicity and allegations of cultural misappropriation. For example, Louis Vuitton generated controversy when the company adopted the Maasai name and distinctive colors for its fashion line.[86] The Maasai are an identifiable

78. *Id.* ¶ 5.

79. *Id.* ¶¶ 233–35.

80. *Id.* ¶¶ 324, 351.

81. *Id.* ¶ 95.

82. *See* Ho, *supra* note 51, at 242.

83. *See* J. Janewa OseiTutu, *Harmonizing Cultural IP Across Borders: Fashionable Bags & Ghanaian Adinkra Symbols*, 51 AKRON L. REV. 1197, 1202 (2017).

84. For a more detailed discussion of this concept, see *id.* at 1201–02.

85. *See Traditional Knowledge*, WIPO, http://www.wipo.int/tk/en/tk/ [https://perma.cc/48CF-EXAY] (last visited Oct. 20, 2018); International Covenant on Economic, Social and Cultural Rights art. 15(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; UDHR, *supra* note 21, art. 27.

86. *See* Sarah Young, *Maasai People of East Africa Fighting Against Cultural Appropriation by Luxury Fashion Labels*, INDEPENDENT (Feb. 7, 2017, 11:22 AM),

indigenous group located in East Africa.[87] Louis Vuitton's use of the Maasai name occurred without any consultation or collaboration with the Maasai tribe.[88] In order to protect their name and distinctive cultural identity, the Maasai subsequently had to contemplate whether to commercialize their identity, and are pursuing their legal options.[89] Commercializing their name would enable the Maasai to potentially benefit from trademark protection.[90] But their identifiable cultural products and name would otherwise remain unprotected by IP law.

Kente cloth from Ghana is an example of cultural IP because it is protected under Ghana's Copyright Act.[91] However, primarily due to its intergenerational nature, there is no international requirement for copyright protection.[92] Using this cultural IP without permission can make it more difficult to protect it internationally. This is because such use increases the common usage and generic nature of the cultural IP.[93]

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https://www.independent.co.uk/life-style/fashion/maasai-people-cultural-appropriation-luxury-fashion-retailers-louis-vuitton-east-africa-intellectual-a7553701.html [http://perma.cc/W2Y6-QQZM].

87. For more information about the Maasai, see *The Maasai People*, MAASAI ASS'N, http://www.maasai-association.org/maasai.html [http://perma.cc/Y8GD-X6AL] (last visited Oct. 20, 2018).

88. *See* Cordelia Hebblethwaite, *Brand Maasai, Why Nomads Might Trademark Their Name*, BBC NEWS (May 28, 2013), http://www.bbc.com/news/magazine-22617001 [http://perma.cc/626C-JLM2] ("Those companies may be using the Maasai brand in ways that really do enhance their business, so it's reasonable for the Maasai to say, 'Well, why aren't you coming to talk to us? Why aren't you asking [for] our permission? Why don't you engage with us?'"); Young, *supra* note 86.

89. *See* David Pilling, *Warrior Tribe Enlists Lawyers in Battle for Maasai "Brand"*, FIN. TIMES (Jan. 19, 2018), https://www.ft.com/content/999ad344-fcff-11e7-9b32-d7d59aace167 [http://perma.cc/8DU6-SU4U]; MASSAI INTELLECTUAL PROP. INITIATIVE, http://maasaiip.org/about-us/ [https://perma.cc/WC82-RZCU].

90. *See* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 13 n.50 (1997) ("It should be noted at the outset, however, that having legal rights to intellectual property does not necessarily translate into reaping the financial rewards of its exploitation. What it does mean is that marketers would be legally obligated to purchase the rights to use this property [from indigenous groups], although the price of such a license may more closely resemble the bargaining positions of the parties than the expected return on the use."); Pilling, *supra* note 89.

91. *See* Copyright Act § 4 (Act No. 690/2005) (Ghana); OseiTutu, *supra* note 83, at 1224.

92. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 7.1, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (revised July 24, 1971) [hereinafter Berne Convention]; OseiTutu, *supra* note 83, at 1199.

93. Once a name or a mark is considered part of common parlance, it is no longer protectable under trademark. It would be considered generic. A work that was once subject to copyright is considered "public domain" and free for all to use once the term of protection ends. *See* Ralph H. Folsom & Larry L. Teply, *Trademarked Generic Words*, 89 YALE L.J. 1323, 1323–24 (1980) ("One of the most important limitations on the legal protection of a word adopted as a trademark is that it cannot be a term that refers, or has come to be primarily understood by the consuming public as referring, to a product category. At common law, such terms are known as 'generic' words and cannot be exclusively appropriated. Similarly, under the Lanham Trademark Act, generic words are intended to be denied federal registration. Moreover, the federal registration of a word is subject to cancellation if at any time it 'becomes the common descriptive name of an article or substance.' Some notable examples of generic words denied exclusive

As Part IV discusses, a socially responsible approach to cultural IP might involve seeking permission from, or working collaboratively with, the cultural group in question.

D. The Need for Socially Responsible IP

The international IP regime has, to some extent, operated in ways that run counter to CSR and human rights. This has been described by many observers as an upward ratchet.[94] Commentators have expressed concerns about the potentially detrimental effects of high IP standards on global health, education, and human development.[95] These concerns spurred the access to medicines movement,[96] the WTO Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration on Health),[97] and changes to the WTO TRIPS Agreement to provide greater flexibility to nations dealing with public health crises.[98]

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trademark rights under American and British law are 'aspirin,' 'brassiere,' 'cellophane,' 'cola,' 'escalator,' 'lanolin,' 'linoleum,' 'shredded wheat,' 'thermos,' 'trampoline,' and 'yoyo.'"). Indigenous people's works are often seen as part of the public domain. *See* Madhavi Sunder & Anupam Chander, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1334–35 (2004) ("But we are also concerned that the increasingly binary tenor of current intellectual property debates—in which we must choose either intellectual property or the public domain—obscures other important interests, options, critiques, and claims for justice that are embedded in many new claims for property rights. By presuming that leaving information and ideas in the public domain enhances 'semiotic democracy'—a world in which all people, not just the powerful, have the ability to make cultural meanings, law turns a blind eye to the fact that for centuries the public domain has been a source for exploiting the labor and bodies of the disempowered—namely, people of color, the poor, women, and people from the global South. Native peoples once stood for the commons. But in the advent of an awareness of the valuable genetic and knowledge resources within native communities and lesser developed nations, the advocates for the public domain—and, in turn, propertization—have flipped. Now, corporations declare the trees and the shaman's lore to be the public domain, while indigenous peoples demand property rights in these resources.").

94. *See, e.g.*, Margaret Chon et al., *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV., 71, 87 (2007) ("As many have noted, these turn the non-discrimination most-favored nation (MFN) principle of TRIPS into a ratchet-upwards for rights holders."); OseiTutu, *supra* note 7, at 128 n.176.

95. *See* Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165, 171 (2000) (noting the patent-related health concerns of developing country members); Helfer, *supra* note 33, at 984–86; Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547, 548–51 (2003) (discussing the North-South division and the negative reaction of farmers in India to the TRIPS Agreement).

96. *See* Attaran, *supra* note 11, at 155 ("[I]nternational concern has focused on whether pharmaceutical patents interfere with access to 'essential medicines' in lower-income countries. The question has spawned an international debate, engaging the United Nations (UN), World Trade Organization (WTO), and of course activists and pharmaceutical companies.").

97. *See generally* World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration on Public Health].

98. *See* Ho, *supra* note 51, at 253.

For instance, the Doha Declaration on Health clarified that TRIPS obligations should not interfere with efforts to protect public health.[99] Article 31 of TRIPS provides an exception to the patent right by allowing TRIPS member states to engage in compulsory licensing of patented medicines when there is a public health crisis.[100] Paragraph 6 of the Doha Declaration recognized that WTO member states without sufficient manufacturing capacity would have difficulty making use of the compulsory licensing provision in article 31 of the TRIPS Agreement.[101] This is because the article 31(f) exception limited production in such circumstances to supply from the domestic market.[102] As a result, states without a pharmaceutical manufacturing industry could not avail themselves of this exception. Thus, many developing countries could not, in the event of a public health crisis, use the compulsory licensing provision to supply their populations with the necessarily medication. This changed after the Doha Declaration on Health and the Paragraph 6 implementation decision, which eventually led the TRIPS Agreement being modified.[103]

In addition, scholars and activists have also sought to protect access to knowledge and educational materials.[104] Traditional knowledge advocates are working to create legal mechanisms to prevent the misappropriation of intergenerational cultural knowledge—whether medicinal or artistic—and have been negotiating an international legal instrument to protect traditional knowledge and traditional cultural expressions for several years.[105]

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99. *See* Doha Declaration on Public Health, *supra* note 97, ¶ 4 ("We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.").

100. TRIPS Agreement, *supra* note 6, art. 31.

101. *See* Doha Declaration on Public Health, *supra* note 97, ¶ 6; TRIPS Agreement, *supra* note 6, art. 31 (amended Jan. 23, 2017).

102. Prior to the amendment, article 31(f) of the TRIPS Agreement limited production of compulsory licensing in cases of public health emergencies to the domestic market. *See* Brin Anderson, *Better Access to Medicines: Why Countries are Getting "Tripped" Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 166, 167 (2010).

103. *See* General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, art. 2, WTO Doc. WT/L/540 (Sept. 1, 2003); Anderson, *supra* note 102, at 167.

104. *See, e.g.*, Timmermann & van den Belt, *supra* note 7, at 48 (analyzing the access to knowledge movement and how to improve the informational gap).

105. *See* Daniel Austin Green, *Indigenous Intellect: Problems of Calling Knowledge Property and Assigning It Rights*, 15 TEX. WESLEYAN L. REV. 335, 352–55 (2009) (exploring how to protect indigenous IP rights).

Several scholars have also offered suggestions for preserving flexibility in international IP agreements.[106] For example, various commentators have discussed the importance of the flexibility within the TRIPS Agreement, such as that found articles 7 and 8 of the TRIPS Agreement in promoting an IP system that balances the rights of the IP owner against the interests of the general public and the users of IP-protected goods.[107] Article 7 of the TRIPS Agreement addresses the need for IP rights to be beneficial to both users and producers of IP,[108] while Article 8 of the TRIPS Agreement recognizes that nations may need to implement laws designed to protect public health or to promote the public interest as it relates to the nation's technological and socioeconomic development.[109]

The policy flexibility that is built into the TRIPS Agreement and other international IP agreements is essential to creating and maintaining a balanced IP system. These flexibilities allow countries space to implement IP policies that account for national interests.[110] Legal analyses of international IP focus, therefore, on IP obligations that states have agreed to as a condition of their membership in the WTO, or regional arrangements, such as the North American Free Trade Agreement.[111] Hence, the literature on strategies for addressing the negative effects of enforceable global minimum standards for IP protection center on international agreements, such as TRIPS or other trade-related agreements.[112]

As this Article explains, the changes that critics of the international IP system seek could be furthered by adopting a CSR approach to international IP law, particularly in the short run. A CSR model would require corporations to respect human rights, in addition to the legal obligation states have to protect human rights under

106. *See* Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95, 95 (2004) (arguing that nations need flexibility in their IP rights); Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 525–34 (2005) (discussing how IP norms may be changed to benefit developing nations); Molly Land, *Rebalancing TRIPS*, 33 MICH. J. INT'L L. 433, 438 (2012) ("Given the importance of tailored intellectual property policies, academics and activists have developed a variety of different proposals for increasing the policy space available to states to tailor innovation policy to local needs.").

107. *See, e.g.*, Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1000, 1009–10 (2009).

108. *See* TRIPS Agreement, *supra* note 6, art. 7.

109. *See id.* art. 8.

110. *See id.*

111. *See, e.g.*, Weissbrodt & Kruger, *supra* note 42, at 918–19.

112. *See generally* Yu, *supra* note 107; sources cited *supra* note 106.

international law.[113] Although international law does not obligate corporations to take positive steps to protect the rights of individuals, corporations are the major holders of IP in the global system and it is the actions of corporate IP owners that affect human well-being. Multinational corporations, therefore—not just state actors—can take the lead in achieving an international IP system that respects human rights and promotes human development. The next Section explains how this framing underscores the natural alignment between CSR and IP.

E. The Natural Alignment Between CSR and IP

CSR and IP align naturally, although it may not be immediately obvious. Typically, IP rights are thought of in relation to private actors. Certainly, public entities, such as governments, also have IP rights.[114] Still, IP rights—including trademarks, patents, copyrights, and geographic indications—are private rights that are predominantly owned by private enterprises or by institutions, such as universities.

Though IP rights are important in the marketplace, IP protection is not necessarily dependent on the market value of a creative work. Trademarks must be used in commerce to obtain and retain legal protection.[115] However, this is not true for all forms of IP. For instance, copyright arises automatically to protect creative works, regardless of whether the works have any market value.[116] As such, many individuals have copyright in their works—even if they do not seek to commercialize those works—and they also enjoy copyright protection without actively applying for protection.[117] Admittedly, in

113. *See* Elhauge, *supra* note 4, at 738 ("[T]he law gives corporate managers considerable implicit and explicit discretion to sacrifice profits in the public interest."); Juergens & Galatowitsch, *supra* note 30, at 16 (arguing for greater CSR to promote human rights).

114. *See* 15 U.S.C. § 1054 (2012) ("Subject to the provisions relating to the registration of trademarks, so far as they are applicable, collective and certification marks, including indications of regional origin, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks, by persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though not possessing an industrial or commercial establishment, and when registered they shall be entitled to the protection provided in this chapter in the case of trademarks, except in the case of certification marks when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services on or in connection with which such mark is used."); 17 U.S.C. § 403 (2012).

115. *See* 15 U.S.C. § 1051(a)(1) ("The owner of a trademark used in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement. . . ."). Pursuant to 15 U.S.C. § 1064(3), a trademark can be cancelled for non-use.

116. *See* 17 U.S.C. § 302(a).

117. *See id.* Some states, such as the United States, require a work to be registered before the copyright owner can commence legal action. *See* 17 U.S.C. § 411(a) ("Except for an action

certain industries, copyright protection is essential for creators to profit from the sale and distribution of their artistic works and creative content.[118] That said, IP protection is not purely about market interests.

CSR and IP merge to the extent that IP rights are used to promote progress and human flourishing, which is consistent with the underlying objective of a human rights framework for IP. One could view IP law as inherently socially responsible to the extent that these laws are supposed to "promote progress"[119] or stimulate innovation.[120] However, the current IP regime is often used as a tool for financial gain by IP owners, who may or may not be the creators.[121] IP laws are theoretically justified as providing economic incentives, rather than as "socially responsible" laws designed to promote progress by improving the human condition.[122] However, this narrow conception of IP rights does not adequately acknowledge the non-economic aspects of IP law.

IV. WHAT SHOULD GUIDE CSR AS IT RELATES TO IP?

This Article contends that corporations have an obligation to manage their IP in a way that promotes human progress. A CSR

brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

118. *See Research & Policy*, MOTION PICTURE ASS'N AM., https://www.mpaa.org/research-policy/ [https://perma.cc/765X-CU3Z] (last visited Oct. 21, 2018) ("Maintaining and growing a thriving U.S. film and television industry requires the continuation of supportive policies, including strong copyright laws that protect creators, enforcement measures to reduce piracy, and production incentive programs to encourage investment.").

119. U.S. CONST. art. I, § 8, cl. 8.; *see also* Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980) (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974)) (describing the objective of the patent monopoly as existing so that "[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

120. *See* TRIPS Agreement, *supra* note 6, art. 7 ("The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. . . .").

121. The creator or inventor of a copyright or patented work is not always the owner of that work. The creator-inventor may assign their work to another. *See* 17 U.S.C. § 201(d). If the work is done in the course of employment, the employer may be the owner "author" of the IP right. *See* § 201(b). In the case of trademarks and geographical indications, creation of a mark or name does not give rise to any rights. Instead, the question is whether a particular mark or symbol was used in commerce in association with a particular product or service. *See* 15 U.S.C. §§ 1051(a)(1), 1127.

122. *See* Chon, *supra* note 29, at 277, 285–86 ("[T]rademark goodwill performs a critical public, communicative function and therefore is a key public good within a regulatory governance framework."); Juergens & Galatowitsch, *supra* note 30, at 16–17.

approach to IP means that, in the management of their IP rights, corporations should be guided by human rights principles. In addition to human rights, corporations could embrace a human development oriented perspective to the objectives of IP law and policy, rather than a predominantly market-oriented approach.[123]

To the extent that any widely accepted objectives for IP law and policy can be identified in international IP law, they would be best located in multilateral agreements. As such, TRIPS, though imperfect, along with IP theory, provides a basis to conclude that one of the goals of trade-related IP law is to promote human progress.[124] In theory, IP rights, such as patent and copyright, are intended to promote innovation and progress. The key provision in a multilateral IP agreement is the objectives, which is found in article 7 of TRIPS.[125] This TRIPS obligation calls for protection and enforcement of IP that will "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[126] There must, therefore, be a balance in the IP system between the interests of creators of IP protected goods and the interests of the public.

Furthermore, from a human rights perspective, there are various provisions that one could draw on to support a CSR approach to IP. For example, the Universal Declaration of Human Rights (UDHR), which is widely accepted as customary international law, contains many pertinent provisions.[127] The relevant human rights principles include the duty to the community,[128] the right to material and moral interests in one's creative work,[129] the right to freedom of expression,[130] the right to participate in cultural life,[131] and the right to health.[132] Some commentators have also suggested that the right to material and moral interests in one's creative work means that there is

123. As the Author has previously argued, human development should be seen as one of the core objectives of global IP law. *See* J. Janewa OseiTutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1, 1 (2016).

124. *See id.* at 6, 8, 43–47.

125. *See* TRIPS Agreement, *supra* note 6, art. 7.

126. *Id.*

127. *See, e.g.*, UDHR, *supra* note 21, arts. 19, 25, 27, 29.

128. *Id.* art. 29(1).

129. *Id.* art. 27(2).

130. *Id.* art. 19.

131. *Id.* art. 27(1).

132. *Id.* art. 25.

a human right to some aspects of IP protection.[133] Even if IP owners could claim such rights, they are not absolute.[134]

Balance is required in the exercise of one's rights—one cannot trample on the rights of others while advancing one's own interests. This concept is expressed in various human rights instruments.[135] The duty to community, found in article 29 of the UDHR, requires that in exercising one's own rights and freedoms, each person is limited by her duty to respect the rights and freedoms of others.[136] Since this is a duty that each right bearer has, it applies to individuals, including corporations, and is not limited to state actors. Article 30 of the UDHR also clarifies that nothing in the UDHR should be interpreted as enabling states or individuals to carry out activities that destroy the human rights of others.[137] Nearly identical language can be found in article 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[138]

Other human rights instruments also expressly address the duties of the individual in relation to others in the community. The African Charter on Human and People's Rights also outlines the duties

133. *See, e.g.*, Peter K. Yu, *Ten Common Questions about Intellectual Property and Human Rights*, 23 GA. ST. UNIV. L. REV. 709, 711 (2007) (arguing that a human rights framework calls for protection of an individual's "intellectual creations").

134. For exceptions and limitations to IP rights, see, e.g., TRIPS Agreement, *supra* note 6, art. 17 (limited exception to trademark rights); *id.* art. 30 (limited exception to the patent right); Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 13–19 (2005) (discussing WTO treatment of the "three-step test" copyright exception).

135. *See, e.g.*, ICESCR, *supra* note 85, art. 5; UDHR, *supra* note 21, art. 29.

136. Article 29 of the UDHR states the following:

> 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

UDHR, *supra* note 21, art. 29.

137. Article 30 of the UDHR states, "Nothing in this Declaration 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 and freedoms set forth herein." *Id.* art. 30.

138. Article 5 of the ICESCR states the following:

> 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.

ICESCR, *supra* note 85, art. 5(1).

of the individual in relation others.[139] For example, article 27(2) states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[140] The American Convention on Human Rights, article 32 states, "Every person has responsibilities to his family, his community, and mankind."[141] It also clarifies that each person's rights are limited by the rights of others, but also by "the just demands of the general welfare, in a democratic society."[142]

With regard to cultural IP, article 27 of the UDHR and article 31 of the United Nations Declaration on the Rights of Indigenous Peoples[143] (UN DRIP) are particularly relevant.[144] Article 31 of UN DRIP clarifies that indigenous peoples have the right to control their cultural heritage, their traditional knowledge, and any related IP rights.[145] Article 27 of the UDHR and article 15 of the ICESCR recognize the right to participate in cultural life.[146] The right to development and the right to self-determination are also pertinent.[147] This right to development is related to the right to self-determination, including sovereignty over one's resources.[148] The right to insist on

139. *See* African Charter on Human and Peoples' Rights art. 27, *opened for signature* June 1, 1981, 1520 U.N.T.S. 217.

140. *Id.* art. 27(2).

141. American Convention on Human Rights "Pact of San José, Costa Rica" art. 32(1), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123.

142. *Id.* art. 32(2).

143. *See* UDHR, *supra* note 21, art. 27; G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 31 (Sept. 13, 2007) [hereinafter UN DRIP].

144. *See* UN DRIP, *supra* note 143, art. 31.

145. Article 31 of the UN DRIP states the following:

> 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.

Id.

146. *See* ICESCR, *supra* note 85, art. 15; UDHR, *supra* note 21, art. 27.

147. Article 1 of the Declaration on the Right to Development states the following:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
>
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

G.A. Res. 41/128, Declaration on the Right to Development, art. 1 (Dec. 4, 1986).

148. *See id.*

recognition for cultural boundaries—including respect for any limitations on the use of cultural symbols, such as adinkra symbols or kente cloth, can be characterized as an assertion of sovereignty.[149]

Other pertinent human rights provisions include the right to heath in article 25 of the UDHR, and the right to education in article 26 of the UDHR.[150] ICESCR articles 11–13, as well as various other human rights instruments, contain similar provisions.[151] Certainly, some of these human rights instruments, such as the UN DRIP, reflect aspirational statements and do not have the force of international law.[152] But as part of CSR goals, they could help shift international IP closer to a model that better promotes human flourishing and human development.

A. Applying a CSR Lens to Refrain from Action

Applying a CSR lens to IP may have resulted in different management of some international IP disputes. For example, the dispute at the WTO regarding Australia's plain packaging cigarette laws could have been avoided.[153] As discussed above, Australia implemented legislation designed to discourage smoking.[154] The law limited the use of trademarks and required health warnings and graphic photos on cigarette packaging.[155] Ultimately, despite expensive efforts to challenge the Australian legislation, Philip Morris was unsuccessful.[156] Presumably due in part to negative publicity, it appears that an important part of company branding after the dispute

149. *See id.*; G.A. Res. 1803 (XVII), ¶ 1 (Dec. 14, 1962) ("The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."). For a detailed discussion regarding the cultural IP of adinkra symbols and kente cloth, see Section IV.B.

150. *See* UDHR, *supra* note 21, arts. 25–26.

151. *See* ICESCR, *supra* note 85, arts. 11–13; *see, e.g.*, UN DRIP, *supra* note 143.

152. *See, e.g.*, UN DRIP, *supra* note 143; ASIA PAC. FORUM, INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 13 (2012), https://nhri.ohchr.org/EN/IHRS/Documents/International%20HR%20System%20Manual.pdf [https://perma.cc/XN8C-MXZ4].

153. *See generally Australia—Plain Packaging*, *supra* note 60.

154. *See* OseiTutu, *supra* note 123, at 4 ("With a view to improving public health, Australia enacted legislation ('Plain Packaging Legislation') to severely limit the way cigarette companies can market their products. The Australian law was designed to discourage the public from smoking by requiring cigarette packaging to include photographs and messages about the negative health effects of cigarette smoking. For instance, some of the packaging states, 'smoking causes mouth and throat cancer,' and includes a graphic photograph of a mouth and teeth that appear to be ill and in some state of decay."); *supra* Section III.B.

155. *See Competition and Consumer (Tobacco) Information Standard 2011*, *supra* note 68; *supra* Section III.B.

156. *See* Knaus, *supra* note 25; *Philip Morris: Tobacco Giant Ordered to Compensate Australia*, BBC NEWS (July 10, 2017), https://www.bbc.com/news/world-australia-40552304 [http://perma.cc/GL28-HU47].

is to portray Philip Morris as "a good corporate citizen" that strives "to be socially responsible."[157]

Philip Morris and other cigarette manufacturers had a legitimate interest in using their trademarks on cigarette packaging. They appear to have had a sound legal basis for challenging the Australian law. But, from a socially responsible perspective, a corporation might make a different choice. Why insist on the use of trademarks at the expense of public health? This is not a legal question, but rather one about choosing how and when to enforce IP rights. For example, Philip Morris could have made a socially responsible choice to protect IP interests in a manner that promotes human rights, such as the right to health. This could mean, for example, that the cigarette manufacturer would not have challenged the Australian legislation, or may not have challenged for as long and as hard as it did.

Australia enacted the legislation to protect its citizens and residents. Australia's actions seemed reasonable in light of reports about the effects of smoking on human health. The World Health Organization (WHO) continues to encourage states to take measures to prevent smoking, since cigarette smoke—first or second hand—is a leading cause of death.[158] According to the WHO, "[t]he tobacco epidemic is one of the biggest public health threats the world has ever faced."[159] From a human rights perspective, this effort to reduce smoking is a positive development.

The UDHR and various human rights instruments recognize a human right to health. Article 25 of the UDHR states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."[160] The ICESCR refers to the right of everyone to enjoy the "highest attainable standard of physical and mental health."[161] The right to health has been interpreted to include not just a right to health care, but also as encompassing a range of socioeconomic conditions that affect one's

157. *Who We Are*, *supra* note 71 ("We are committed to being a great employer and a good corporate citizen. We strive to be environmentally and socially responsible. We are dedicated to fighting the illicit cigarette trade. And we proudly support the communities where we source tobacco and where our employees live and work.").

158. *See Tobacco*, WORLD HEALTH ORG. (Mar. 9, 2018), http://www.who.int/news-room/fact-sheets/detail/tobacco [https://perma.cc/P3AY-7CBL].

159. *Id.*

160. UDHR, *supra* note 21, art. 25.

161. ICESCR, *supra* note 85, art. 12.

ability to lead a healthy life.[162] Australia's policies and related legislation aimed to reduce smoking-related illnesses, thereby increasing the likelihood that Australian citizens and residents would live a healthy life.[163]

The Australian legislation, therefore, was passed in support of the human right to health. Challenging that legislation to protect a trademark interest was, in effect, seeking to protect IP interests by limiting the right to health. Legally, the IP challenge to the Australian plain packaging legislation was perfectly acceptable.[164] The Australian legislation severely limited the ability of the cigarette companies to use their trademarks.[165] The effect, however, was that a private corporation engaged in litigation that sought to prevent a state from achieving its health objectives and complying with its human rights obligations.

Using a CSR model, Philip Morris may have chosen to approach the dispute differently. The cigarette manufacturer was under no legal obligation to refrain from litigating as it did. Admittedly, cigarette companies are in a business that is inherently incompatible with improving health outcomes. Still, taking into consideration the human right to health and the WHO efforts to discourage smoking, the company may have decided to work with the Australian government to address the public health concerns. It could do this even as it sought to protect its business. Its efforts to work with the government to protect public health, even if it meant limiting the use of its trademarks, might have comprised part of the company's CSR program. Ultimately, Philip Morris was not successful in its attempt to secure legislative changes, even with states litigating the cases at the WTO, and the company came out looking like a bad corporate citizen—one that was fighting to prevent efforts to promote public health.[166]

Imagine if, instead of suing Australia, Philip Morris had originally taken a CSR approach to its IP. The company may have found ways to partner in promoting the right to health, even though they had IP interests at stake. Philip Morris appears to be rebranding

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162. *See* Office of the High Comm'r for Human Rights, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶¶ 3–4, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

163. *See* Gervais, *supra* note 134, at 6–7.

164. *See id.*

165. *See Tobacco Plain Packaging Act 2011* (Cth) s 20.1 (Austl.).

166. *See* William Savedoff, *Tobacco Companies Fail the Corporate Social Responsibility Test of a Free-Market Advocate*, CTR. FOR GLOB. DEV. (Aug. 17, 2018), https://www.cgdev.org/blog/tobacco-companies-fail-corporate-social-responsibility-test-free-market-advocate [https://perma.cc/L4BS-KGS8].

itself for a "smoke-free" future.[167] On its website, the company emphasizes its responsible corporate behavior. It explains that it is making "the biggest shift" in its history.[168] This shift is likely a good business decision. Still, it is being presented as a decision that is right for various stakeholders: the consumers, the company, the shareholders, and society.[169] With language relating to values—rather than profits or markets—Philip Morris answers the question: "Why are we doing this?"[170] Why move towards a smoke-free future? Philip Morris responds, "Because we should . . . and because now we can."[171] But they also add, "Society expects us to act responsibly. And we are doing just that by designing a smoke-free future."[172]

Similarly, if a CSR approach had been taken in the dispute between Eli Lilly and Canada, Eli Lilly may have chosen not to challenge the decision of a Canadian court to invalidate its patents. In the Eli Lilly case, Canada invalidated two of Eli Lilly's patents in accordance with Canadian patent law.[173] Unlike the WTO—which only allows states to commence disputes—BITs and investment chapters, such as NAFTA Chapter 11, allow companies to directly challenge government action.[174] Eli Lilly challenged the invalidation of its patent as an expropriation of its covered investment under a BIT.[175] Canada successfully defended the challenge but at a significant cost to the taxpayer.[176]

As Professor Cynthia Ho explains, if the tribunal had taken human rights law into account, it might not have made any significant difference.[177] This conclusion is based, in part, on the lack of enforcement mechanisms for human rights law, as well as the possibility that corporations might use human rights to bolster their

167. *Designing a Smoke-Free Future*, PHILIP MORRIS INT'L, https://www.pmi.com/who-we-are/designing-a-smoke-free-future [http://perma.cc/XQ7J-88CP] (last visited Oct. 21, 2018).

168. *Who We Are*, *supra* note 71.

169. *See id.*

170. *See Designing a Smoke-Free Future*, *supra* note 167.

171. *Id.*

172. *Id.*

173. *See Eli Lilly*, Notice of Arbitration, *supra* note 54, ¶ 4.

174. *See* RALPH H. FOLSOM, PRINCIPLES OF INTERNATIONAL TRADE LAW: INCLUDING THE WTO, TECHNOLOGY TRANSFERS, AND IMPORT/EXPORT/CUSTOMS LAW 19 (2d ed. 2018); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 397–98 (3d ed. 2018).

175. *See Eli Lilly*, Notice of Arbitration, *supra* note 54, ¶ 4.

176. *Eli Lilly*, Final Award, *supra* note 51, ¶¶ 478–80.

177. *See generally* Cynthia M. Ho, *Reexamining Eli Lilly v. Canada: A Human Rights Approach to Investor-State Disputes?*, 21 VAND. J. ENT. & TECH. L. 437 (forthcoming Dec. 2018).

claims.[178] As a legal obligation, or an interpretive tool for the tribunals, human rights law may have been of limited assistance in this dispute.

Still, a CSR perspective could have led to a different result. Since CSR asks the corporation to engage in behavior that respects human rights, this framing could have helped Eli Lilly consider its responsibility to the community as well as the right to health. Consider, for instance, that one of the patents invalidated was for a new use on an existing drug.[179] The litigation arose because Eli Lilly sought to prevent the generic manufacture of the drug.[180] From a health perspective, the decision to litigate neither advanced the right to health, nor was it spurring any innovation. To the contrary, if Eli Lilly had been successful, it would have limited access to medication that should have been coming off patent soon thereafter. And, the litigation, even though Eli Lilly was not successful, required the Canadian government to redirect its resources to defending the challenge from the multinational corporation over several years.[181]

B. Applying a CSR Lens to Provide Protection

A less obvious example of how CSR might apply is with respect to cultural IP. Unlike the two prior examples—where corporations could respect human rights by refraining from asserting their IP rights—in the case of cultural IP, corporations may need to take positive steps to promote human rights in the exercise of their duty to the community. This is an area where exploring the potential intersection between CSR and IP could be most fruitful, particularly since much cultural IP is not recognized as IP under international law.[182] This cultural IP includes cultural symbols, names, and works

178. *See id.* at 472 ("A tribunal could rely on human rights, including those from only regional agreements, in favor of investors and their rights. In particular, although there is not a right to property under the ICESCR, there is a right to property in the European Court of Human Rights, to which tribunals often refer even if not binding on disputes.").

179. *See Eli Lilly*, Final Award, *supra* note 51, ¶¶ 88–93.

180. *See id.* ¶ 69.

181. *See* Brook K. Baker & Katrina Geddes, *The Incredible Shrinking Victory:* Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS*, 49 LOY. U. CHI. L.J 479, 480 (2017).

182. *See* Ghana Copyright Act of 2005, ss 17, 44, 64 (providing perpetual protection for Ghanaian folklore); New Zealand Trade Mark Act 2002, s 17 (prohibiting the registration of marks that are likely to offend a segment of the community, including the Maori); CÓD. CIV. no. 27811 (2002) (Peru) (providing *sui generis* protection for indigenous knowledge); Law No. 20, Special System for the Collective Intellectual Property Rights of Indigenous Peoples, Junio 26, 2000, GACETA OFICIAL 24,083 (Peru); World Intellectual Property Organization [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, at 20, GRTKF/IC/14/12 (Aug. 26, 2009); *Traditional Cultural Expressions*, WIPO, http://www.wipo.int/tk/en/folklore/ [http://perma.cc/U3ZH-6K2V] (last visited Oct. 21, 2018); *Traditional Knowledge*, *supra* note 85. *See generally* World Intellectual Property

that are not protected under the global trading order, even though multinational companies find them worthy of appropriating and using to sell or market their products.[183]

For example, adinkra symbols and kente cloth are cultural IP of Ghana.[184] Located in West Africa, Ghana is a nation with a proud cultural heritage. It was one of the first sub-Saharan African nations to gain its independence from colonial rule.[185] Adinkra symbols are not merely decorative, but are closely linked to the identity and beliefs of the Asante people and have been handed down through generations.[186] Yet, the adinkra Dwennimmen symbol was reproduced on Vera Bradley handbags and clothing items and sold in the United States.[187]

This symbol is protected under the Ghanaian Copyright Act as part of Ghana's cultural heritage.[188] However, despite several years of negotiating to obtain some kind of protection for some of these works, the current international IP system does not recognize cultural IP as being worthy of protection.[189] There are two reasons that adinkra symbols are not protected under conventional IP law. First, adinrka symbols are too old to be protected by copyright.[190] Second, the adinkra Dwennimmen symbol that was reproduced on Vera Bradley

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Organization [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, GRTKF/IC/9/INF/4, annex II (Mar., 27, 2006) (outlining a comparative summary of TCE *sui generis* legislation).

183. *See* OseiTutu, *supra* note 83, at 1201, 1203; Phipps-Rufus, *supra* note 52.

184. *See* Copyright Act § 76 (Act No. 690/2005) (Ghana) (protecting cultural IP); *supra* Section III.C.

185. *See* Donna J. Maier et al., *Ghana*, ENCYC. BRITANNICA, https://www.britannica.com/place/Ghana [https://perma.cc/489X-4USY] (last visited Oct. 21, 2018).

186. *See* Boatema Boateng, *Adinkra and Kente Cloth in History, Law, and Life*, *in* TEXTILE SOC'Y OF AM. SYMPOSIUM PROCEEDINGS 1–2 (2014), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1885&context=tsaconf [https://perma.cc/G5RX-CDG4]; *Asante Traditional Buildings*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., http://whc.unesco.org/en/list/35 [https://perma.cc/6PNG-URY7] (last visited Oct. 21, 2018) ("As with other traditional art forms of the Asante, these designs are not merely ornamental, they also have symbolic meanings, associated with the ideas and beliefs of the Asante people, and have been handed down from generation to generation.").

187. *Compare Dwennimmen*, W. AFR. WISDOM: ADINKRA SYMBOLS & MEANINGS, http://www.adinkra.org/htmls/adinkra/dwen.htm [https://perma.cc/VK6E-RNUT] (last visited Oct. 21, 2018), *with Sneak Peak: Cuban Tiles*, VERA BRADLEY: INSIDE STITCH (Jan. 9, 2017), https://www.verabradley.com/blog/2017/01/09/sneak-peek-cuban-tiles/ [https://perma.cc/AQU7-48YC].

188. *See* Copyright Act § 76 (Ghana).

189. *See* OseiTutu, *supra* note 83, at 1203.

190. *See* Berne Convention, *supra* note 92, art. 2(1) (defining literary and artistic works to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression"); *id.* art. 5 (setting out the rights guaranteed to every author); *id*. art. 7(1) (stating that the general term of protection is life of the author and 50 years after the death of the author); *Asante Traditional Buildings*, *supra* note 186. These standards have been incorporated into the WTO TRIPS Agreement and are, therefore, binding on all WTO member states. *See* TRIPS Agreement, *supra* note 6, art. 9.

merchandise was not used as a mark in commerce, and so it was not protected as a trademark.[191]

Cultural IP is an important part of national cultural identities.[192] The Nike swoosh is a famous trademark that is worthy of protection because it has significant commercial value. However, adinrka symbols and Ghanaian kente cloth have cultural significance in addition to any commercial value that they may have.[193] IP law currently protects symbols that have commercial vale, but not symbols that have solely cultural value. Indeed, copyright law offers time-limited protection to symbols and other artworks that have cultural value.[194] Still, this copyright time frame of life of the author plus fifty years or seventy years does not protect items of cultural heritage, such as adinkra symbols or kente cloth.[195]

As a result, IP law does not, by itself, offer a clear solution to the protection of cultural IP. The actions of companies that appropriate cultural symbols or names are perfectly legal under international law. Trademark law does not prevent the use of the Maasai name as part of the Louis Vuitton clothing line,[196] nor do trademark or copyright law prevent Vera Bradley from reproducing adinkra symbols on handbags and clothing items.[197] The law may not be an effective tool for addressing these issues.

Corporate IP practices could be guided by CSR principles and by core objectives of IP. For example, rather than simply using the protected cultural symbols, good corporate practice would involve dialogue and possibly partnership with the relevant community. A CSR approach would mean that a corporation would seek consent from that group and perhaps even enter into profit sharing arrangements before using a particular nation's cultural IP. This would be similar to the consent and benefit sharing provisions in the Convention on Biological Diversity.[198]

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191. *See* TRIPS Agreement, *supra* note 6, art. 15 (requirements for trademark protection).

192. *See* Boateng, *supra* note 186, at 4.

193. *See id.*

194. *See* Berne Convention, *supra* note 92, art. 2(1); *id.* art. 7(1).

195. This is due to the time limitation of life of the author plus fifty years, or seventy years in some states. *See* 17 U.S.C. §§ 302, 303 (2012) ("[Copyright] endures for a term consisting of the life of the author and 70 years after the author's death."); Berne Convention, *supra* note 92, art. 7(1); OseiTutu, *supra* note 83, at 1214.

196. *See supra* Section III.C.

197. *See* OseiTutu, *supra* note 83, at 1198, 1200.

198. *See* Convention on Biological Diversity, Dec. 29, 1993, 31 I.L.M 818, arts. 15–19; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from Their Utilization to the Convention on Biological Diversity, October, 12, 2010, https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf [https://perma.cc/YXT4-NE62].

Protecting cultural IP can help promote human rights of the affected group, such as the Maasai, without necessarily interfering with corporate profits. Not protecting cultural IP could also have a detrimental effect on human rights. In the case of cultural IP, the concern is not about human rights abuses, but on protecting and promoting respect for human rights. A CSR approach would mean that, in the event of a conflict between an IP right and a human right, the corporation would recognize that the human right should prevail.

Protecting corporate IP helps to maximize profits, but unless it is managed appropriately, it does not necessarily promote human rights. Whether IP law and policy further human well-being depends on what is valued in the global trading regime. For example, one might query whether IP rights are primarily about fostering creativity and promoting human dignity or about maximizing profits. There are several reasons to conclude that IP rights are not primarily about maximizing profit. For example, copyright attaches even if an artwork is never sold.[199] A manuscript can have no commercial value, but still be protected by copyright.[200] This leaves room for policymakers and judicial bodies to interpret copyright, for instance, as having non-commercial objectives, including promoting human flourishing.

A CSR approach can complement efforts to reform the law. Socially responsible business norms can help resolve the challenges presented by cross-border cultural IP transactions. As a model that is based on dignity and respect for human rights, CSR aligns with a moral rights view of IP, as well as with a human rights approach to IP. CSR is based on respect for human dignity and human rights and is not limited to legal obligations. Indeed, corporations cannot be charged with violating human rights by elevating their IP interests above human rights concerns.

It is interesting to observe that the recently concluded free trade agreement between eleven countries,[201] the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), contains language in its preamble that supports a socially responsible approach to trade.[202] The preamble to the agreement reaffirms "the importance of promoting corporate social responsibility, cultural

199. *See* Berne Convention, *supra* note 92, art. 2(1).

200. *See* Berne Convention, *supra* note 92, art. 5. Copyright arises automatically. *See id.* art. 5(2).

201. The parties to the agreement are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. *See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, GOV'T CAN., https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng [https://perma.cc/HM6Y-9Z2A] (last visited Nov. 7, 2018).

202. *Id.*

identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest."[203]

This means that these eleven states, and whichever other nations decide to accede to the CPTPP, are willing recognize CSR within the context of their trade obligations. Since the CPTPP includes an IP chapter, CSR framing of IP would be consistent with the approach taken to trade in the context of this agreement. In addition, the language in the preamble recognizes traditional knowledge, as does the IP chapter.[204] This represents progress for those seeking international recognition for traditional knowledge and cultural IP, and a progressive approach to international IP.

V. CONCLUSION

Multinational corporations are important actors in the global intellectual property (IP) system. Corporations own significant amounts of IP and, as such, they are beneficiaries of harmonized IP standards. An approach to IP that respects human rights may require corporations to sometimes refrain from fully exerting their rights. Alternatively, it may expect them to take positive action even in the absence of any legal obligation.

International IP rules allow some flexibility to limit IP rights so that states have policy room to address essential human needs, such as health or nutrition.[205] Yet, this flexibility is limited insofar as states must ensure that their legislative and policy measures do not conflict with their legal obligations to protect and enforce IP rights.[206] If corporations insist on maximizing their IP rights within the bounds of the law, human beings may lose out. This is because, in a contest between legal rights and interests, human flourishing can be readily subordinated to corporate IP rights. Additionally, the law does not protect certain IP-related interests, such as traditional knowledge. Still, corporations can help change international IP norms by managing their IP rights in ways that promote human rights.

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203. *Id.*

204. *Consolidated TPP Text – Chapter 18 – Intellectual Property*, GOV'T CAN., http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/18.aspx?lang=eng [https://perma.cc/3PEM-TBDY] (last visited Nov. 7, 2018).

205. *See, e.g.*, TRIPS Agreement, *supra* note 6, arts. 7–8; Land, *supra* note 106, at 440–42.

206. *See, e.g.*, TRIPS Agreement, *supra* note 6, art. 8 (authorizing nations to protect public health and nutrition, "provided that such measures are consistent with the provisions of this agreement").

This Article has suggested that a corporate social responsibility (CSR) model for international IP can be an effective short-term strategy for making IP law and policy more responsive to human rights considerations. A CSR approach would complement efforts to reform legally binding international obligations and help foster an international IP regime that respects human rights alongside IP rights. This model for IP encourages a norm of protection and enforcement that values innovation as human progress, which embraces human flourishing, and human development.