

2017

## Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus

J. Janewa Osei-Tutu

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Human Rights Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

J. Janewa Osei-Tutu, Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus, 20 *Vanderbilt Journal of Entertainment and Technology Law* 207 (2020)  
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol20/iss1/5>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus

*J. Janewa Osei-Tutu\**

## ABSTRACT

*This Article compares the natural rights property framework with the international human rights framework for intellectual property. These two frameworks share a common theoretical basis in the natural rights tradition but appear to lead to conflicting outcomes. Proponents of natural rights to intellectual property tend to support more expansive intellectual property protections. Yet, advocates of a human rights approach to intellectual property contend that human rights will have a moderating influence on intellectual property law. This Article is among the first scholarly works to explore the apparent conflict between these two important frameworks for intellectual property. It concludes that a human rights approach to intellectual property enriches the natural rights intellectual property dialogue by broadening the analysis to acknowledge and value human interests that go beyond the individual property interest.*

---

\* Associate Professor of Law, Florida International University College of Law. I would like to thank the participants of the Chicago-Kent/Loyola Intellectual Property Colloquium, the Drake Intellectual Property Scholars Roundtable, and the Florida State University Intellectual Property workshop for their helpful comments and questions on early stages of this project. I am grateful to Dean Tawiah Ansah, Matthew Mirow, and Ediberto Roman for their thoughtful comments on this draft, as well as to Charles Jalloh, Deidre Keller, Joelle Moreno, Eva Subotonik, and Howard Wasserman for their helpful conversations. Chanelle Artiles, Adrian Karborani, and Sandra Ramirez provided superb research assistance. Finally, I am grateful to Nicole Keefe, Thomas Johnson, and the editorial team of the *Vanderbilt Journal of Entertainment & Technology Law* for their dedication and professionalism. All errors and omissions are mine.

## TABLE OF CONTENTS

I.	INTRODUCTION.....	208
II.	THE GLOBAL EXPANSION OF INTELLECTUAL PROPERTY RIGHTS .....	213
	<i>A. Balancing Competing Interests</i> .....	213
	<i>B. Global Theoretical Foundations for IP</i> .....	218
III.	HUMAN RIGHTS APPROACHES TO INTELLECTUAL PROPERTY ...	222
	<i>A. Human Rights to Intellectual Property</i> .....	223
	<i>B. Human Rights Are Natural Rights</i> .....	226
	<i>C. Implications of a Human Right to IP</i> .....	230
IV.	CLASSIC INTELLECTUAL PROPERTY THEORIES .....	235
	<i>A. The Utilitarian Norm</i> .....	235
	<i>B. Natural Rights Property Theories to Expand IP Rights</i> .....	238
	<i>C. Natural Rights Property Theories to Limit IP Rights</i> .....	240
V.	THE COMMUNITY AND THE INDIVIDUAL LABORER .....	242
	<i>A. Utilitarianism and the Public Interest</i> .....	242
	<i>B. Natural Rights and the Public Interest</i> .....	245
VI.	HUMAN RIGHTS APPROACHES VALUE THE COMMUNITY OF INDIVIDUALS .....	246
	<i>A. Beyond the Property Interest</i> .....	248
	<i>B. A Broader Community</i> .....	251
VII.	CONCLUSION .....	256

## I. INTRODUCTION

In this global economy, policy makers and courts regularly confront critical questions at the intersection of intellectual property (IP) and human rights. For instance, should society prioritize intangible rights in genetically modified food, cancer genes, or human organs that have been created using 3D printing technology? How important is it to ensure access to the genetically modified food or to the manufactured organs? What should nations consider in determining whether to expand concepts of IP law to include relatively new areas, such as indigenous knowledge and culture or rights in public or well-known personalities?<sup>1</sup> These questions require policy

---

1. For a discussion of efforts by disadvantaged groups to protect their cultural interests through the use of IP, see Madhavi Sunder, *IP*, 59 STAN. L. REV. 257, 271 (2006). See also Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 169–70 (2006).

makers and analysts to regularly revisit questions about what IP laws should protect, what should be excluded, and, importantly, how to balance competing interests.<sup>2</sup> The answers to these questions will be determined, in part, by the characterization of the IP rights at issue.

Utilitarian theories, which posit that innovation will take place because patent and copyright laws incentivize people to create, are typically used to justify IP rights.<sup>3</sup> According to the utilitarian approach to IP, the public should obtain some benefit in exchange for protecting the interests of the creator.<sup>4</sup> Critics of high IP standards and expansive IP rights contend that excessive IP protection interferes with key human rights, such as the right to health or the right to education.<sup>5</sup>

As these criticisms of the global IP regime have gained traction, one of the increasingly common responses to its perceived failings is to propose the adoption of a human rights framework for IP.<sup>6</sup> This human rights framing is not based on the classic economic approach to the utilitarian analysis of IP.<sup>7</sup> It is instead rooted in the natural rights tradition.<sup>8</sup>

---

2. See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 22, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]; Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 153 (2006); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1201–03 (2009) (discussing fashion as an area of IP “negative space” where creativity flourishes); Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 448–49 (2011); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 370 (2006); discussion *infra* Part V.

3. U.S. CONST. art. I, § 8, cl. 8; see *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 432 (1984) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

4. *Sony*, 464 U.S. at 432 (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1316 (2004) (“Patents are commonly understood as a hypothetical contract between the inventor and the government resulting in a quid pro quo of innovation for exclusivity.”).

5. See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 324–25 (2004).

6. See Andrew T.F. Lang, *Re-Thinking Trade and Human Rights*, 15 TUL. J. INT’L & COMP. L. 335, 396–97 (2007) (describing the use of a human rights framework in the context of trade and patent law).

7. See, e.g., Dan L. Burk, *Patenting Transgenic Human Embryos: A Nonuse Cost Perspective*, 30 HOUS. L. REV. 1597, 1658 (1993) (arguing that patents are a “utilitarian legal construct with an economic purpose”).

8. See John T. Cross, *Justifying Property Rights in Native American Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 257, 266 (2009). But see Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 716 (2007)

Interestingly, advocates of a human rights approach seek results that are often incongruous with the outcomes suggested by many proponents of a natural rights property analysis of IP.<sup>9</sup> Scholars who advance a human rights framework for IP suggest that it will result in a more balanced IP system, which may restrict IP rights when these rights conflict with other human interests.<sup>10</sup> Proponents of this framework view it as a tool for achieving a regime that gives greater weight to human concerns, such as access to health, education, and food. In contrast, advocates of property-based natural rights frameworks for IP adopt these theories to promote and prioritize the interests of the individual creator. Scholars who consider IP rights natural entitlements often espouse the view that natural rights justify more expansive IP protection for innovators and creators.<sup>11</sup>

This Article connects these two distinct frameworks for IP rights. It compares the US property-based natural rights framework for IP with the international human rights framework for IP to ascertain why these two approaches lead to opposing conclusions about IP law. Despite their seemingly conflicting trajectories, both the human rights approach and the natural rights property model for IP have the same theoretical foundations.<sup>12</sup> Human rights are generally understood as natural rights as described by philosophers such as John Locke and Immanuel Kant.<sup>13</sup> IP theorists also draw heavily on

---

(stating that some scholars support an international human rights framework through a theory based on positive law, rather than natural law).

9. See *infra* Parts II and IV. It is not the aim of this Article to engage the question of whether IP rights should be treated as natural rights or whether they should be justified based on utilitarian theories. Nor does this Article purport to engage in a broader and long-standing debate between positivism and natural law. Rather, the focus here is on the apparent tension between natural rights property analyses of IP (predominantly in the United States) and international human rights approaches to IP.

10. Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1018 (2007); see also Yu, *supra* note 8, at 711 (analyzing intellectual property in the context of human rights).

11. See Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 66 (1997); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 1012 (2007). But see Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 461 (2009) ("An author who creates a work and attaches no value to it loses property rights in the work by virtue of Locke's waste prohibition."). See generally ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (analyzing the moral justifications for intellectual property rights).

12. Oguamanam, *supra* note 2, at 109 ("On the surface, the appeal to natural rights highlights the human rights nexus of intellectual property.").

13. See MERGES, *supra* note 11, at 304–09 (discussing his movement away from a utilitarian approach of IP, relying instead on theorists such as Locke and Kant); JAMES NICKEL & DAVID A. REIDY, *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 9–10 (2011) (discussing

Locke's labor theory for their natural rights analysis of IP.<sup>14</sup> In both modern human rights law and natural rights IP theory, natural rights are described as those God-given rights that each human being enjoys by virtue of being human.<sup>15</sup> For example, in her natural rights property analysis of IP, Wendy Gordon acknowledges God-given duties<sup>16</sup> and refers to rights people enjoy by virtue of their humanity.<sup>17</sup>

Although they have common origins, these natural rights theories for IP diverge because, as this Article explains, the predominant natural rights framework for IP in the United States is a property-centric model, whereas the international human rights model is not. Human rights framing can be distinguished from mainstream natural rights property theories for IP because it recognizes *all* human rights without elevating the property interest above other interests. In this way, it bolsters the views espoused by scholars who suggest that natural rights framing limits excessive IP rights.<sup>18</sup>

International human rights can, therefore, enrich the natural rights IP discourse—and help to promote the public interest—in at least two ways. First, the rights of the individual must be considered

---

Kant's view that recognition and respect of another's moral personality "sometimes manifests or is expressed in the form of human rights").

14. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–53 (1993) (discussing a Lockean approach to IP); Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 36 (2005) (describing the historical references to Lockean theory in copyright law); Seana Valentine Shiffrin, *Intellectual Property*, in 1 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 656–57 (Robert E. Goodin et al. eds., 2d ed. 2007). See generally MERGES, *supra* note 11.

15. The Author acknowledges that some commentators take a positivist approach to human rights based on the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and other international instruments. Nonetheless, human rights are widely accepted as natural rights. For the purposes of this Article, human rights will be discussed as natural rights, rather than rights that emanate solely from international treaties and national laws. See Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 391 (1982).

16. Gordon, *supra* note 14, at 1541 ("Locke tells us that in the state of nature there is no positive law parceling out ownership or giving any particular person the right to command anyone else. There are, however, moral duties that constrain persons' behavior toward each other. Locke argues that these duties are imposed by God and are discernable by reason. . . . Since all humanity is equal in the state of nature, the duties we owe others are also the duties they owe us, and the rights I have against others they have against me." (footnotes omitted)).

17. *Id.* at 1543 ("[S]ome we possess by virtue of what we do, and some we possess by virtue of our humanity. Of the humanity-based entitlements, three are most important: our claim right to be free from harm, our claim right to have a share of others' plenty in times of our great need, and our liberty right to use the common." (footnotes omitted)).

18. See Gordon, *supra* note 14, at 1549; Shiffrin, *supra* note 14, at 658; Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 550–51 (1990).

in relation to the rights of other members of society.<sup>19</sup> In other words, rights do not exist in a vacuum but are exercised within a community. Human rights theories require an analysis of IP rights in relation to other equally valid rights. Second, human rights framing de-emphasizes the property interest. Natural rights IP advocates place the property interest at the center of the analysis.<sup>20</sup> In addition, scholarly analyses of IP rights, whether based on utilitarian or natural rights theories, tend to be conversations about property. Human rights theory expands the scope of the discussion, and thereby alters the nature of the analysis.

Commentators disagree about which theories should guide the crafting of IP laws.<sup>21</sup> Yet these important theoretical inquiries help shape the answers to challenging issues. As one scholar notes, the policy debate about the appropriate level of IP protection is “neither political nor legal, but ‘conceptual.’”<sup>22</sup> The question is whether, like utilitarian theories, natural rights theories can adequately account for the public interest. Human rights framing that aims to bring greater balance to the IP regime must, therefore, be distinguished from expansionist natural rights theories for IP.

Part II of this Article discusses the expansion of global IP rights and the tension between public and private interests. Part III explains why a human rights approach is a natural rights framework and identifies relevant international agreements. Part IV of this Article provides an overview of classic intellectual property theories. Part V then identifies and analyzes why the human rights model for IP and the natural rights property model for IP, both of which are derived from the natural rights tradition, support contradictory conclusions about IP rights. Finally, Part VI explains how a human rights model enriches the natural rights discussion of IP by

---

19. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 29 (Dec. 10, 1948) [hereinafter UDHR].

20. MERGES, *supra* note 11, at 31–33; Gordon, *supra* note 14, at 1540–44; Mossoff, *supra* note 14, at 40–42.

21. Oguamanam, *supra* note 2, at 106 (“The search for a unified theory of intellectual property is an ongoing, albeit elusive adventure. The inconclusive nature of the theoretical inquiry, coupled with the ever expanding and ubiquitous character of intellectual property, contributes to the inherently controversial nature of the concept of intellectual property.” (footnotes omitted)). See generally JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008) (discussing multiple theories of property law); MERGES, *supra* note 11 (same); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing multiple ways to conceptualize intellectual property); Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015) (contending that traditional intellectual property justifications are contradicted by empirical evidence).

22. Mossoff, *supra* note 14, at 32 (“The fundamental issue in the policy debate is neither political nor legal, but ‘conceptual.’” (footnotes omitted)).

underscoring the fact that all rights intersect and must be recognized as inherently valuable. As such, the human rights framework is an IP model that does not necessarily bolster claims for natural entitlements to property, but instead has the potential to promote human flourishing.

## II. THE GLOBAL EXPANSION OF INTELLECTUAL PROPERTY RIGHTS

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) establishes what must be protected and what can be excluded from IP protection in all WTO member states.<sup>23</sup> International IP agreements, such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)<sup>24</sup> and the Paris Convention for the Protection of Industrial Property (Paris Convention),<sup>25</sup> long predated the TRIPS Agreement. However, nations had significant latitude under those earlier agreements to implement their IP obligations to suit their domestic situations.<sup>26</sup> This changed under the WTO as a result of harmonized minimum standards for IP rights, the WTO dispute settlement mechanism, and the possibility of trade sanctions for noncompliance.<sup>27</sup>

### A. *Balancing Competing Interests*

Harmonized IP standards can be useful to the extent that IP rights serve their intended purpose. For instance, patents are thought to stimulate innovation.<sup>28</sup> Copyright promotes cultural works and the dissemination of knowledge by protecting literary and artistic works such as songs, films, video games, and books for leisure as well as

23. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

24. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. No. 99-27 [hereinafter Berne Convention].

25. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583 [hereinafter Paris Convention].

26. TRIPS Agreement, *supra* note 23, art. 1(1) (“Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”).

27. TRIPS Agreement, *supra* note 23, arts. 63–64; Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

28. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (“When a patent is granted . . . the Federal Government is willing to pay the high price of 17 years of exclusive use for its disclosure, which . . . will stimulate ideas and the eventual development of further significant advances in the art.”).



education.<sup>29</sup> Trademarks are indicators of source that allow consumers to make decisions efficiently in the marketplace.<sup>30</sup>

But IP rights can also have deleterious social effects. For instance, genetically modified crops may be protected by patent rights that prevent farmers who purchase seeds from harvesting and replanting the seeds.<sup>31</sup> Songs, novels, and films are protected by copyright, which can limit one's ability to reproduce or share music from one's iTunes library.<sup>32</sup> Trademarks help identify favorite brands of soap, shoes, or cars, but they can also enable Christian Louboutin to corner the market on red-soled shoes and price them such that they are prohibitively expensive for the majority of consumers.<sup>33</sup>

Despite its utilitarian premise, the global IP system—which must balance the interests of IP creators and the consuming public<sup>34</sup>—has increasingly favored IP owners.<sup>35</sup> This trend is apparent from longer terms of protection, global harmonization of minimum

29. 17 U.S.C. § 102(a) (2012) (listing as protectable “works of authorship”: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works); *id.* § 103(a) (“The subject matter of copyright as specified by section 102 includes compilations and derivative works.”).

30. Trademarks are symbols used to aide consumers in selecting what they want. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. . . . If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.”); *see also* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (“A trademark is . . . ‘any word, name, symbol, or device or any combination thereof’ used by any person ‘to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.’”).

31. *See* *Bowman v. Monsanto Co.*, 569 U.S. 278, 284–85 (2013).

32. *See* *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013) (finding that reselling iTunes media files infringes on the producer’s copyright).

33. *See* *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 225–26 (2d Cir. 2012).

34. TRIPS Agreement, *supra* note 23, 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, 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.”); *see also* *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (noting that the Copyright Act aims to enrich the general public “by striking a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work”).

35. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 900 (1997) (book review) (“[E]ven within the realm of existing intellectual property rights, the power the intellectual property owner has over those rights is increasing. Copying is less likely to be excused as a fair use of the copyright than ever before, particularly if the licensor can show that some money could have been squeezed out of the user.”).

standards of protection, increased protections through bilateral and multilateral international agreements, and the corresponding response by the access-to-medicine and access-to-education movements.<sup>36</sup> Increasingly, the utilitarian rationales for IP laws have been called into question.<sup>37</sup> Nonetheless, the trend towards increased IP protection has continued. This is because trademarks, copyrights, and patents—collectively referred to as IP rights—have tremendous financial value, especially for large multinational corporations.<sup>38</sup>

The breadth and scope of IP protection has increased over the past several years, as has the protected subject matter under international agreements and domestic laws.<sup>39</sup> Copyright, for example, evolved from a fourteen-year term of protection to the life of the author plus seventy years.<sup>40</sup> Courts have concluded that higher

36. See discussion *infra* Part II. See generally TRIPS Agreement, *supra* note 23, arts. 9–40 (harmonizing minimum global standards for IP); Cynthia M. Ho, *Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions*, 30 BERKELEY TECH. L.J. 213 (2015) (lamenting that the TRIPS Agreement exposes sovereign nations to litigation by foreign investors in response to domestic regulation of public health); Sell, *supra* note 2 (remarking that, despite the TRIPS Agreement's establishment of minimum IP standards, nations have aggressively sought increased international standards through bilateral and multilateral agreements).

37. Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, 2 INNOVATION POL'Y & ECON. 51, 51 (2002).

38. Irene Kosturakis, *Intellectual Property 101*, 46 TEX. J. BUS. L. 37, 40–41 (2014) (describing the financial value of intellectual property rights); see, e.g., PATENT TECH. MONITORING TEAM, U.S. PATENT & TRADEMARK OFFICE, PATENTING BY ORGANIZATIONS (UTILITY PATENTS) 2015, tbl.A1-1b (2016), [https://www.uspto.gov/web/offices/ac/ido/oeip/taff/topo\\_15.htm](https://www.uspto.gov/web/offices/ac/ido/oeip/taff/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 (ed. 2002); SUSAN K. SELL ET AL., PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 44–50 (Steve Smith et al. eds., 2003) (discussing corporate power over IP law); *Top 300 Patents Owners*, INTELL. PROP. OWNERS ASS'N, <https://www.ipo.org/index.php/publications/top-300-patent-owners/> [<https://perma.cc/2957-JCNM>] (last visited Sept. 23, 2017) (showing an increase over time in patents per corporation for top patent owning corporations, from 3,621 patents in 2006 to 8,023 in 2016). For a variety of international IP treaties, see generally *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/> [<https://perma.cc/G2CD-QLA8>] (last visited Sept. 23, 2017).

39. For example, in the international context, the TRIPS Agreement is the first major multilateral agreement to mandate protection for geographical indications (GIs). Irina Kireeva & Bernard O'Connor, *Geographic Indications and the TRIPS Agreement: What Protection Is Provided to Geographic Indications in WTO Members?*, 13 J. WORLD INTELL. PROP. 275, 275 (2009). Articles 22–23 of the TRIPS Agreement require protection for all GIs and special protection for wines and spirits. TRIPS Agreement, *supra* note 23, arts. 22–23. Domestically, in the landmark *Diamond v. Chakrabarty* case, the Supreme Court expanded patent protection to life forms. *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980).

40. The current term of copyright protection in the United States is life of the author plus seventy years. 17 U.S.C. § 302(a) (2012). In the Copyright Act of 1790, by contrast, copyright

life forms are patentable<sup>41</sup> and that patent rights extend to the offspring of self-replicating plants.<sup>42</sup> The TRIPS Agreement requires compilations of data to be protected, removing national discretion to assess and determine whether the databases would meet the domestic requirements for copyright protection.<sup>43</sup> Some US scholars have decried this continuous expansion of IP rights as inconsistent with the objectives of IP law.<sup>44</sup>

From an international perspective, IP obligations implemented pursuant to the various agreements have been criticized as interfering with access to medicine and access to food, among others.<sup>45</sup> The access-to-medicine advocates, for example, argue that human life will

duration was only fourteen years. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790). It was extended to twenty-eight years with a fourteen-year renewal in 1831 and was extended again in 1909 to twenty-eight years with a twenty-eight-year renewal. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 17 (3d ed. 2014). Congress authorized an overhaul of copyright law in 1976, when it extended copyright duration to the author's life plus seventy years. *Id.* at 13–14.

41. *See* President & Fellows of Harvard Coll. v. Lee, 589 F. App'x 982, 983 (Fed. Cir. 2014). *But see* Harvard Coll. v. Canada (Comm'r of Patents), [2002] 4 S.C.R. 45, 46 (Can.) (“A higher life form is not patentable because it is not a ‘manufacture’ or ‘composition of matter’ within the meaning of [the Canada Patent Act].”).

42. *Bowman v. Monsanto Co.*, 569 U.S. 278, 284–85 (2013).

43. The TRIPS Agreement requires copyright protection for databases. TRIPS Agreement, *supra* note 23, art. 10(2). This obligation applies even if it would have been unclear that the criteria for copyright protection would have been met under domestic law. *Id.* (“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection . . . shall be without prejudice to any copyright subsisting in the data or material itself.”).

44. *See* Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 *IND. J. GLOB. LEGAL STUD.* 117, 180 (1999) (“The protection of databases is again unprecedented in U.S. history and is, at least, in tension with prevalent theoretical justifications of the U.S. intellectual property system.”); Yen, *supra* note 18, at 518–19 (“Instead of maintaining a balance between the interests of authors and society, modern courts and legislatures have used copyright to steadily expand authors’ rights.”); *see also* Yu, *supra* note 5, at 400 (arguing that the WTO, coupled with widespread globalization, has led to international law replacing domestic policy as the predominant means of developing intellectual property laws; thus, “the control of national governments over the adoption and implementation of domestic intellectual property laws has been greatly reduced”).

45. Yu, *supra* note 5, at 324–25 (explaining that many developing countries have found that their initial concerns about the TRIPS Agreement have been substantiated by the regime’s failure to consider their particular needs, interests, and local conditions; thus, the increased expansion of global intellectual property protection afforded by TRIPS Agreement has jeopardized their access to information, knowledge, and essential medicines). *But see* TRIPS Agreement, *supra* note 23, pmb1. (recognizing “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base”); Yu, *supra* note 5, at 440–41 (arguing that developing countries can shift the intellectual property regime’s imbalance by interpreting Articles 7 and 8 of the TRIPS Agreement to their advantage and exercising national discretion).

be lost if patent rights, and the corresponding ability to raise prices, prevent medicine from being made available to those who need it most.<sup>46</sup> As a result of these concerns, the WTO members issued the Doha Declaration on Trade-Related IP Rights and Public Health, which expressly acknowledges the role of IP in promoting innovation while clarifying that IP rights should not interfere with the right to health.<sup>47</sup>

Some amount of tension between the rights of the creator and the rights of users is inherent in IP law.<sup>48</sup> Pharmaceutical companies, for example, explain that without adequate patent protection to recoup their costs, they simply will not be able to produce certain medications.<sup>49</sup> Access-to-medicine advocates, by comparison, assert that there is a human right to health and that patent rights should not interfere with access to life-saving medications.

Clearly, it is essential to strike a balance between the interests of the rights holder and the interests of the user of IP-protected goods, as well as between the interests of the individual and the interests of the collective.<sup>50</sup> But *how* that balance should be determined remains a complex question. This task is more challenging at the international level than it is domestically because of the difficulty of incorporating domestic policy considerations into international negotiations and disputes. When over 150 nations have come together to reach an agreement, there is relatively limited room to interpret the obligations in light of each nation's policy objectives.<sup>51</sup> International tribunals, such as the WTO dispute resolution panels, interpret international IP obligations based on the text of the TRIPS Agreement, along with any relevant context.<sup>52</sup> They therefore tend to give minimal consideration

46. See Ellen F.M. 't Hoen, *TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond*, in *ECONOMICS OF AIDS AND ACCESS TO HIV/AIDS CARE IN DEVELOPING COUNTRIES: ISSUES AND CHALLENGES* 39, 41–42 (Jean-Paul Moatti et al. eds., 2003).

47. Doha Declaration, *supra* note 2, ¶ 17.

48. See, e.g., TRIPS Agreement, *supra* note 23, art. 7 (identifying the need to balance the interests of users and producers of intellectual property).

49. MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 212–13 (2008).

50. Charlotte Waelde & Abbe E.L. Brown, *A Practical Analysis of the Human Rights Paradox in Intellectual Property Law: Russian Roulette*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX* 183, 229 (Willem Grosheide ed., 2010).

51. There were 164 WTO member states as of July 29, 2016. *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/T2CV-AJNL>] (last visited Sept. 24, 2017). But see TRIPS Agreement, *supra* note 23, art. 1(1) (stating that WTO members can “determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”).

52. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

to national policy objectives.<sup>53</sup> This is not surprising, given the diversity of values, interests, and approaches to IP.

### *B. Global Theoretical Foundations for IP*

There is no global consensus about the theoretical foundations for IP rights. Nor is it clear whether international institutions, such as the WTO and the World Intellectual Property Organization, have embraced a natural rights or utilitarian approach in their multilateral IP agreements. However, since most nations are WTO members, and are therefore required to comply with the WTO obligations, interpretations of the TRIPS Agreement have the potential to shape IP policy both domestically and internationally.<sup>54</sup>

The language of the TRIPS Agreement appears to adopt a more consequentialist stance.<sup>55</sup> For example, one of the stated goals of the TRIPS Agreement is to reduce barriers to trade.<sup>56</sup> The provision that requires a balancing of interests is found in the “objectives” in Article 7 of the Agreement.<sup>57</sup> This provision states that IP protection “should 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.”<sup>58</sup> This language indicates that the TRIPS Agreement treats IP rights as having certain utilitarian goals.

At the same time, as Samuel Oddi observed, the rhetoric of natural rights was deployed to advance high global standards for IP protection.<sup>59</sup> For example, the unauthorized sale, use, or reproduction

53. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.94, WTO Doc. WT/DS114/R (adopted Oct. 23, 2000) [hereinafter *Canada—Patent Protection Panel Report*];

54. See TRIPS Agreement, *supra* note 23, art. 1(1); *Members and Observers*, *supra* note 51.

55. See TRIPS Agreement, *supra* note 23, pmb. *But see* A. Samuel Oddi, *TRIPS—Natural Rights and a “Polite Form of Economic Imperialism”*, 29 VAND. J. TRANSNAT’L L. 415, 434–35 (1996) (characterizing Articles 27 (patentable subject matter) and 33 (term of protection) as reflecting a natural rights approach to intellectual property).

56. TRIPS Agreement, *supra* note 23, art. 41(1).

57. *Id.* art. 7.

58. *Id.*

59. Oddi, *supra* note 55, at 432 (“Whatever may be the merits or failings of the philosophical underpinnings of a natural rights theory of intellectual property and of patents in particular, this theory has had great rhetorical power in convincing the world community to sacrifice country-by-country traditional instrumentalist control over intellectual property to a more universal world standard as dictated by TRIPS. While never quite articulated as such, natural rights theory is submitted to have played a major rhetorical role in the strategy of industry groups dominated by multinational corporations (MNCs) to convince their governments in developed countries to demand ‘adequate’ protection of intellectual property in the GATT

of goods protected by IP is often described as “theft.”<sup>60</sup> This characterization enabled proponents of globalized IP standards to effectively argue that copying, wherever it happens, is wrong.<sup>61</sup> In particular, IP-dependent industries benefitted from the rhetoric of natural rights and the implementation of globalized IP standards under the WTO.<sup>62</sup>

Even if one were to view the TRIPS Agreement as supporting a natural rights IP model, the WTO model is distinct from the human rights approach because the TRIPS Agreement purports to address rights that are “trade related.”<sup>63</sup> The trade-based nature of the WTO IP obligations is not a philosophical approach as such, but it has the effect of emphasizing the economic value of IP rights.<sup>64</sup> This is why the trade lens promotes the commodification of IP.<sup>65</sup> Since all WTO

negotiating process.”). See generally STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 6–7 (2012).

60. See Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 473–74 (2011).

61. Oddi, *supra* note 55, at 433 (“Copying an invention, wherever created and patented, becomes immoral because it is an incident of a natural property rights entitlement of the inventor (patent owner). All countries of the world must recognize this entitlement by means of its positive law. . . . By accepting the natural rights premise, the basic philosophical tension between patents as a privilege or as an entitlement appears to be resolved in favor of the latter[.]”).

62. See SELL ET AL., *supra* note 38, at 97–99; Oddi, *supra* note 55, at 455 (“The big winners under patent TRIPS would clearly be those enterprises (read multinational corporations) in developed countries that create inventions and are heavily engaged in international trade. Particular winners would be those entities in the pharmaceutical and agricultural chemical industries that receive ‘supernatural’ property rights under patent TRIPS. The benefits are clear: patent protection is now mandated for fields of technology that were previously unprotected in many countries, and the duration of protection is set at twenty years from the filing date compared to significantly shorter periods, even when that subject matter was protected.”).

63. Scholars have also engaged in analysis about the relationship between trade and human rights. See Lang, *supra* note 6, at 335–45 (discussing human rights approaches to international trade).

64. Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property*, 36 MICH. J. INT’L L. 557, 566 (2015) (“While TRIPS laid the platform for commodification, much of the current regime shifting is reconceptualizing IP as an asset and progressively detaching it from its grounding in incentive-based principles.”).

65. Once IP became a global trade issue through its integration into the TRIPS Agreement, the nature of protection shifted from incentivizing innovation to commodification. See Pamela Samuelson, *Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULTURAL ECON. 95, 96 (1999) (“[TRIPS] puts a trade ‘spin’ on intellectual property rules that have in the past been guided by a host of other principles, including those related to cultural policies embodied in national laws. This last difference from earlier agreements may, in the long run, have a profound impact on national intellectual property laws in part because it may push national laws toward

members must comply with their TRIPS Agreement obligations, this emphasis on the economic value of IP rights can be expected to influence what happens domestically as well.<sup>66</sup> The same is true for treaties that protect IP rights as investments.<sup>67</sup> Certainly, the economic value of IP is significant. However, the societal value of IP rights goes far beyond the economic interest.

Unlike the trade model, international human rights encompass both moral and material interests arising from one's intellectual creations.<sup>68</sup> Trade-based IP emphasizes economic interests, which may correspond to material interests. The TRIPS Agreement, however, expressly takes no stance on the moral rights contained in the Berne Convention.<sup>69</sup> It seems that, from a TRIPS perspective, any natural rights arguments for IP would be limited to material interests, with moral interests falling by the wayside.

Currently, IP rights, as implemented through international agreements, tend to take priority over other interests.<sup>70</sup> A natural rights framework for IP could exacerbate this trend. Like the trade model, a property-centric theoretical framework, such as a natural rights property model, prioritizes the IP interest. This is because it places the property interest above all other interests. Clearly, this framing leads to a distinct result from a model that places equal value on numerous competing interests.

As this Author has argued elsewhere, IP rights are more easily elevated when competing interests are relegated to the periphery.<sup>71</sup> For instance, when there is a conflict between IP rights and a human interest, such as access to food or the right to health, there is a tendency to analyze the conflict from a perspective that positions IP

---

greater commodification of intellectual products." (footnotes omitted); see also Dreyfuss & Frankel, *supra* note 64, at 562–63.

66. See J. Janewa OseiTutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1655–56 (2012).

67. See Ho, *supra* note 36, at 231–36.

68. UDHR, *supra* note 19, art. 27(2).

69. See TRIPS Agreement, *supra* note 23, art. 9(1) ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.").

70. See *Canada—Patent Protection Panel Report*, *supra* note 53, ¶¶ 7.81–7.82. But see *Philip Morris Brand Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of the Tribunal, ¶ 307 (July 8, 2016), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf) [<https://perma.cc/DBP3-Y8A4>] ("[T]he Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of [Philip Morris'] investment.").

71. J. Janewa OseiTutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1, 7 (2016).

rights at the center of the analysis. Human rights, such as the right to food or the right to health, must then be justified as exceptions to the IP interest.<sup>72</sup> The ability to give competing human interests at least the same importance as property interests is one of the main contributions of the human rights approach to IP.

The TRIPS Agreement does not refer to international human rights.<sup>73</sup> Indeed, the human rights framework presents an attractive alternative to the commodification of IP rights that the trade model represents. Importantly, human rights framing includes the possibility of recognizing IP protection as a human right, as well as using human rights to limit IP rights.<sup>74</sup> The question is whether characterizing a right to IP protection as a human right would support natural rights expansionist arguments for patents and copyrights.<sup>75</sup> Further, it is not clear whether IP rights, framed as human rights, would be limited to human persons.<sup>76</sup>

The human rights framework is, arguably, a natural rights approach to patent and copyright protection.<sup>77</sup> Yet many access advocates prefer a utilitarian approach over a natural rights approach to IP.<sup>78</sup> This may be because natural rights doctrine lends itself to arguments that encourage greater rights for producers and reduced access for users.<sup>79</sup> The advantage of the utilitarian approach to IP is

72. See OseiTutu, *supra* note 71, at 3–6 (arguing that other interests like human rights do not have to be in a secondary position to IP rights).

73. See TRIPS Agreement, *supra* note 23, arts. 7–8.

74. See Helfer, *supra* note 10, at 1018.

75. See Kal Raustiala, Commentary, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1030–31 (2007).

76. See *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 41, 63 (2007); J. Janewa OseiTutu, *Corporate “Human Rights” to Intellectual Property Protection?*, 55 SANTA CLARA L. REV. 1, 2–4 (2015).

77. See Donnelly, *supra* note 15, at 391; Mossoff, *supra* note 14, at 42.

78. See BOYLE, *supra* note 21, at 27–35; LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 249–50 (2001) (“Our aim should be a system of sufficient control to give artists enough incentive to produce, while leaving free as much as we can for others to build upon and create. . . . [W]hile control is needed, and perfectly justifiable, our bias should be clear up front: Monopolies are not justified by theory; they should be permitted only when justified by facts. . . . Before the monopoly should be permitted, there should be reason to believe it will do some good—for society, and not just for monopoly holders.”); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597–99 (2003) (discussing the dominant position that utilitarianism occupies in the realm of IP rights).

79. See Hughes, *supra* note 21, at 363–64 (“The preservation of cultural works has become increasingly important to all modern societies, but what counts as effective preservation varies with the cultural object. It is not enough to preserve music scores in a library basement if no one plays them or no one knows the tempo at which they should be played.”); Mossoff, *supra* note 14, at 37.



that it requires a consideration of the law in light of its purpose.<sup>80</sup> By comparison, natural rights IP advocates would have the law focus primarily on the interests of individual creators rather than on the societal consequences of the law.<sup>81</sup> This has implications for the protection and enforcement of IP.

The human rights framework which, as noted, engenders a balanced analysis of all rights could—perversely—be deployed to support a natural rights expansionist approach to patent and copyright protection.

### III. HUMAN RIGHTS APPROACHES TO INTELLECTUAL PROPERTY

Some scholars have argued that IP protection is a human right, or that aspects of IP protection are human rights.<sup>82</sup> Advocates of human rights approaches to IP promote human rights philosophies as a way to achieve a more balanced IP system.<sup>83</sup> For example, Megan Carpenter suggests “a human rights perspective on IP should . . . expose the flaws of a system designed primarily to protect corporate interests, and present possibilities for a more inclusive approach.”<sup>84</sup> Audrey Chapman characterizes the human rights approach as taking “what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting.”<sup>85</sup> This could mean higher standards for patentability, for example.<sup>86</sup>

Laurence Helfer, meanwhile, proposes that a human rights framework for IP could be used to ensure that IP serves as a tool to achieve human rights ends.<sup>87</sup> Under this framework,

[w]here intellectual property laws help to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified[,] . . . [b]ut the focus remains on the minimum level of human

---

80. See Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 *HAMLIN L. REV.* 601, 608–10, 608 n.35 (2003).

81. See Hughes, *supra* note 21, at 297–300.

82. Helfer, *supra* note 10, at 975–76; see Audrey Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, WIPO 1 (1999), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf) [<https://perma.cc/J2BZ-RESC>].

83. See Megan M. Carpenter, *Intellectual Property: A Human (Not Corporate) Right*, in *THE CHALLENGE OF HUMAN RIGHTS, PAST, PRESENT AND FUTURE* 312, 312–13 (David Keane & Yvonne McDermott eds., 2012); Helfer, *supra* note 10, at 974; Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 *SMU L. REV.* 37, 38–40 (2016).

84. Carpenter, *supra* note 83, at 313.

85. Chapman, *supra* note 82, at 1.

86. *Id.* at 2.

87. Helfer, *supra* note 10, at 1018.

well-being that states must provide, using either appropriate intellectual property rules or other means.<sup>88</sup>

Engaging the nuances between human rights and the existing IP legal framework, Peter Yu outlines a layered approach for a human rights framework that provides the minimum essential levels of protection for moral and material interests resulting from intellectual creations.<sup>89</sup> This approach acknowledges that the human rights aspects of IP may diverge from the legal aspects of IP protection<sup>90</sup> and that states have flexibility in deciding how to provide such protection.<sup>91</sup>

As discussed below, there is a basis for claiming human rights to IP, even though there is some disagreement about whether there is a human right to copyright or patent protection, as such. A human right to IP, to the extent this right exists, is one that human beings enjoy simply because they are human.

#### A. Human Rights to Intellectual Property

There is an international human rights basis for claiming IP protection as a human right.<sup>92</sup> Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain language that is suggestive of copyright and patent protection.<sup>93</sup> Furthermore, European jurisprudence has recognized trademark and copyright property interests as human rights under the European Convention on Human Rights.<sup>94</sup>

---

88. *Id.* (“A third human rights framework for intellectual property . . . first specifies the minimum outcomes—in terms of health, poverty, education, and so forth—that human rights law requires of states. The framework next works backwards to identify different mechanisms available to states to achieve those outcomes. Intellectual property plays only a secondary role in this version of the framework. Where intellectual property law helps to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified. . . . But the focus remains on the minimum level of human well-being that states must provide, using either appropriate intellectual property rules or other means.”).

89. Yu, *supra* note 83, at 57.

90. *Id.* at 54–55.

91. *Id.* at 61.

92. See Carpenter, *supra* note 83, at 314; Helfer, *supra* note 10, at 975–76; Yu, *supra* note 83, at 38–39. *But see* Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL’Y 315, 323 (1996) (“[T]he central features of intellectual property in most industrialized countries . . . cannot be sustained on any human rights premise.”).

93. See G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15 (Dec. 16, 1966) [hereinafter ICESCR]; UDHR, *supra* note 19, art. 27(2).

94. Anheuser-Busch Inc. v. Portugal, 2007-I Eur. Ct. H.R. 41, 67 (2007); *see also id.* at 72 (Steiner & Hajiyev, JJ., concurring) (“We agreed with the majority that there has been no

The UDHR is an important instrument because, although it is not a binding treaty, it is largely considered customary international law.<sup>95</sup> Its status as customary international law means that it is part of the accepted law of nations.<sup>96</sup> Article 27(2) of the UDHR states: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>97</sup> Similar language is found in Article 15(1)(c) of the ICESCR, which also provides for the protection of material and moral interests.<sup>98</sup>

Arguably, Article 27 of the UDHR and Article 15 of the ICESCR acknowledge a human right to IP.<sup>99</sup> In particular, copyright and patents seem to intersect with the human rights enunciated both in the UDHR and in the ICESCR.<sup>100</sup> Copyright protects literary and artistic works, while patents protect new, useful, and inventive products or processes.<sup>101</sup> The right to the protection of moral and material interests resulting from any scientific production of which one is the author is less clearly related to patents, trademarks, or copyrights than the rights related to literary and artistic works.<sup>102</sup>

violation of Article 1 of Protocol No. 1, but on other grounds. In our view, Article 1 of Protocol No. 1 does apply, in general, to intellectual property. This was accepted by both the parties but there has never been any clear statement of this principle by the Court in the past. We therefore agree that Article 1 of Protocol No. 1 is applicable to intellectual property in general and to a duly registered trade mark.”).

95. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).

96. Customary international law is the uncodified but binding law that emerges from the general practices of states. See U.N. Charter and Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031, 1060 (“The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law[.]”). For more than a century—where no treaty exists—the United States has recognized customary international law as the law of nations. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations[.]”).

97. UDHR, *supra* note 19, art. 27.

98. That provision of the ICESCR states that each Party recognizes the right of everyone: “(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” ICESCR, *supra* note 93, art. 15(1)

99. For further discussion, see OseiTutu, *supra* note 76, at 18–20.

100. Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to ICESCR Article 15(1)(C)*, 35 UNESCO 4, 5–6 (2001).

101. 17 U.S.C. § 102(a) (2012); 35 U.S.C. § 101 (2012).

102. Copyright protects literary and artistic works, but the relationship with patents is less obvious. See *Berne Convention*, *supra* note 24, art. 2(7); *Dreyfuss & Frankel*, *supra* note 64, at 562–63. See generally *Copyright in General*, U.S. COPYRIGHT OFF.,

This is because a scientific production may not be the same thing as a new, useful, and non-obvious invention. However, the language of these human rights provisions has been interpreted as overlapping with patent protection as well.<sup>103</sup>

The UDHR also recognizes property rights.<sup>104</sup> To the extent that patents, trademarks, copyrights, and other intangible rights are considered property, this provides an additional basis for claiming a human right to IP.<sup>105</sup> The natural rights property-based IP model more closely aligns with the notion of an absolute right to property.<sup>106</sup> It is important to note, however, that property as a human right is not universally accepted.<sup>107</sup>

Leaving property aside for the moment, one might reasonably conclude that a human right to the material and moral interests that arise from the author's literary, scientific, or artistic creation coincides with copyright and patent protection.<sup>108</sup> However, there are differences between the existing IP regime and human rights to the moral and material interests arising from one's creative endeavors.<sup>109</sup>

<https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/ZH3B-683E>] (last visited Sept. 24, 2017) (referencing fundamental information on copyright).

103. See U.N. ESCOR, 35th Sess. ¶ 10, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter General Comment 17]; Chapman, *supra* note 100, at 24. However, a "scientific production" may include any science-based product, display, or report that was made by an "author." See General Comment 17, *supra*, ¶ 9.

104. UDHR, *supra* note 19, art. 17.

105. See *id.* "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.")

106. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*134 ("T[he] third absolute right, inherent in every Englishman, is that of property[.]"); Mossoff, *supra* note 11, at 971–73.

107. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 5 (1988) ("[T]here is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none. The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries."); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1041 (2007).

108. Carpenter, *supra* note 83, at 324 ("[C]opyrights and patent rights are the means by which the Article 15 creators' rights are made manifest.")

109. General Comment 17, *supra* note 103, ¶ 10. "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific or literary production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons." *Id.* ¶ 1; see Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, U.N. Doc. A/70/279, ¶ 90 (Aug. 4, 2015) [hereinafter Special Rapporteur's Cultural Rights Report] ("There is no human right to patent protection under article 15 of the International Covenant on Economic, Social and Cultural Rights. This provision does not obligate States parties to enact any particular form of patent protection. Patents are one policy tool among many for encouraging innovation and technological research and development. More caution is required in assessing their positive versus negative effects depending on the

For instance, human rights claims may not be as expansive as patent or copyright protections.<sup>110</sup> Patent law awards a patent to the first inventor to file an application for protection of an invention that meets that nation's particular standards for patentability.<sup>111</sup> Human rights, on the other hand, could mean that multiple inventors should be entitled to obtain patent protection in the same invention if they each arrived at the invention independently.<sup>112</sup> It may also be unnecessary to demonstrate that an invention is novel, particularly since international human rights may not require the "production" to be new or to meet any particular standards.<sup>113</sup> Furthermore, unlike current copyright protection, a human rights basis for copyright may not necessarily extend to derivative works or continue beyond the life of the author.<sup>114</sup>

Despite these differences between IP law and what is reflected in international human rights instruments, there is some basis for claiming human rights to IP. Importantly, both modern human rights law and IP law have been explained through natural rights theories.

### *B. Human Rights Are Natural Rights*

Human rights are generally understood to be natural rights.<sup>115</sup> They are natural rights as described by John Locke.<sup>116</sup> These rights are fundamental and inalienable rights enjoyed by all human beings by virtue of being human.<sup>117</sup> As such, human beings are entitled to

context and the technologies at stake. Human rights law operates as a limit to prevent the overreaching of economic claims by patent-holders in contexts where the rights to health, food, access to technology or other human rights would be compromised.”)

110. Yu, *supra* note 83, at 42–43.

111. See, e.g., Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284, 285–87 (2011) (codified as amended at 35 U.S.C. §§ 100–03 (2012)).

112. The language of the UDHR Article 27 and the ICESCR Article 15 do not suggest that only one person should be able to obtain patent protection for an invention or that the first person to invent should be entitled to have her moral and material interests protected, to the exclusion of all others. See ICESCR, *supra* note 93, art. 15; UDHR, *supra* note 19, art. 27. For instance, Article 15 of the ICESCR states that *everyone* is entitled to benefit from the “moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” ICESCR, *supra* note 93, art. 15.

113. See ICESCR, *supra* note 93, art. 15; UDHR, *supra* note 19, art. 27.

114. See, e.g., 17 U.S.C. §§ 103, 302 (2012).

115. Donnelly, *supra* note 15, at 391 (“The term *human rights* is generally taken to mean what Locke and his successors meant by *natural rights*: namely, rights (entitlements) held simply by virtue of being a person (human being).”).

116. *Id.*

117. UDHR, *supra* note 19, pmb. (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom,

enjoy these rights, even if the state refuses to recognize them.<sup>118</sup> Although such rights are sometimes described as sacred or derived from God, they are also rights that human beings enjoy as members of society.<sup>119</sup>

Natural law concepts can be traced back to biblical times, as well as to philosophers such as Aristotle, Cicero, and Grotius.<sup>120</sup> However, John Locke's work was a major philosophical source for human rights, as well as for IP natural rights property theorists.<sup>121</sup> Courts and scholars have offered natural rights analyses when seeking theoretical justifications to support IP laws.<sup>122</sup>

These natural rights are distinct from rights that are granted by the state for a specific, limited purpose.<sup>123</sup> With state-granted rights, the state does not have an obligation to recognize the right but chooses to enable the citizenry to enjoy certain rights with the expectation that the rights will serve their intended purpose. Such rights are more limited than natural rights, which are inherent and inalienable.<sup>124</sup> Thus, patents and copyrights, when analyzed through a consequentialist lens, are state-granted rights circumscribed by the

justice and peace in the world[.]"); *id.* art. 1 ("All human beings are born free and equal in dignity and rights.").

118. ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY* 32 (2012) ("[T]his concept of human rights requires a commitment to three principles: that rights are natural and, therefore, inherent in all human beings and not only in those who derive them from their relationship to a particular entity or political regime; that all are equal in their entitlement to rights; and that rights are universal and, therefore, applicable everywhere.").

119. *Id.*

120. *Id.*

121. *Id.* at 36 (citing John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* 1, 5–8 (Oxford Univ. Press 1960) ("Locke's description embodies the essential elements of human rights: namely, that rights have their foundation in natural law and, therefore, are not dependent on particular circumstances that prevail at particular times and places; that all are equal in their entitlement to enjoy and exercise rights; and that they are universal in their application to all human beings and not only to those who are nationals or citizens of a particular political regime.")).

122. See MERGES, *supra* note 11, at 32–33; Gordon, *supra* note 14, at 1540.

123. Oguamanam, *supra* note 2, at 108 ("Historically rooted in continental European approaches to intellectual property, the crux of natural rights thinking is that creators' or inventors' entitlement to their work is akin to an inherent natural right which the state is under an obligation to protect and enforce.").

124. *Id.* at 110–11 ("[I]ntellectual property rights, for the most part, are statutorily created rights rather than inherent and inalienable natural rights. Statutes, case law, and contracts, including general common law traditions and other regulatory and quasi-regulatory regimes, control the ambit of rights over intellectual products, taking such rights well outside natural rights' unfettered terrain. Traditionally, special exceptions or rights are created under common law and statute reflecting the non-absolute character of rights to intellectual property. Notable in these regards are such accommodations relating to education, 'fair use,' 'fair dealing' . . . and other uses in relation to copyright works." (footnotes omitted)).

goals they are intended to serve. When analyzed as human rights, they become a natural entitlement.<sup>125</sup>

Some scholars may dispute the characterization of the material and moral interests arising from one's creations as natural rights. Aryeh Neier, for instance, posits that the civil and political rights, but not the social and cultural rights, are derived from natural rights philosophies.<sup>126</sup> The civil and political rights include the rights outlined in the first twenty-one articles of the UDHR and in the International Covenant on Civil and Political Rights (ICCPR).<sup>127</sup> The economic, social, and cultural rights include those enumerated in the ICESCR. The basis for a human right to IP is among the social and cultural rights, rather than the civil and political rights.<sup>128</sup>

While the civil and political rights are, generally speaking, individual rights that limit the ability of the state to interfere with the individual, their social and economic counterparts include collective rights and rights that aim to promote prosperity and security.<sup>129</sup> These social and cultural rights, Neier suggests, may not have the same theoretical foundation as the civil and political rights.<sup>130</sup>

As noted, human rights claims to IP can be based on the right to the moral and material interests arising from one's creative work or from the right to property.<sup>131</sup> The human right that intersects with copyright and patent protection is the right to moral and material interests arising from one's creations.<sup>132</sup> Another basis for claiming a human right to IP is the right to property.<sup>133</sup> It is the right to property that most closely aligns with natural rights theories of IP. The right to property falls within the civil and political rights.<sup>134</sup> Meanwhile, the right to material and moral interests is among the economic, social, and cultural rights.<sup>135</sup> Human rights scholars sometimes refer to these categories as the "first generation" and "second generation"

125. See discussion *infra* Part IV.

126. NEIER, *supra* note 118, at 36.

127. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 2 (Dec. 16, 1966) [hereinafter ICCPR]; UDHR, *supra* note 19, arts. 1–21.

128. ICESCR, *supra* note 93, art. 15; UDHR, *supra* note 19, art. 27.

129. See NEIER, *supra* note 118, at 64 (comparing civil and political rights with social and economic rights).

130. *Id.* at 63 (explaining that economic and social rights derive from the nineteenth century and are not based on seventeenth-century thought about natural law).

131. See ICESCR, *supra* note 93, art. 15; UDHR, *supra* note 19, art. 27.

132. UDHR, *supra* note 19, art. 27(2).

133. *Id.* art. 17.

134. *Id.*; see MARY ANN GLENDON, A WORLD MADE NEW 182 (2001).

135. ICESCR, *supra* note 93, art. 15.

rights, respectively.<sup>136</sup> If one accepts this distinction between the civil and political rights and the social and cultural rights, then the extent to which patents, copyright, and trademarks are recognized as “property” could also influence the natural rights basis for human rights claims to IP.

A theoretical and practical hierarchy between the civil and political rights and the economic, social, and cultural rights is a source of debate and criticism in the human rights literature.<sup>137</sup> Modern human rights law, however, has rejected these categorizations as creating false distinctions.<sup>138</sup> Furthermore, the idea of economic, social, and cultural rights is not antithetical to a natural rights regime.<sup>139</sup> The UDHR recognizes “the inherent dignity and . . . the equal and inalienable rights of all members of the human family,” without distinguishing civil and political rights from economic, social, and cultural rights.<sup>140</sup> Thus, for the purposes of this Article, both the so-called first-generation and second-generation human rights are treated as inherent in human beings by virtue of their humanity<sup>141</sup> and are analyzed as natural rights.

136. Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 256–58 (2006).

137. ICCPR, *supra* note 127, art 1; *see id.*, pmb. (recognizing that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”); *see also* ICESCR, *supra* note 93, pmb. (recognizing similarly that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”); Peggy Ducoulombier, *Interaction Between Human Rights: Are All Human Rights Equal?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 39, 39 (Christophe Geiger ed., 2015) (“What is more precisely rejected is the assertion that first-generation rights, i.e. civil and political rights, are superior to second-generation rights, i.e. social, economic, and cultural rights.”).

138. *See* UDHR, *supra* note 19, pmb.; MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS* 273, 294–95 (2004).

139. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 174 (2d ed. 2011) (“For the objective of justice is not equality but the common good, the flourishing of all members of the community[.]”).

140. UDHR, *supra* note 19, pmb.; PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 277–78 (2013) (explaining the official position that the rights contained in the UDHR, the ICESCR, and the ICCPR are “universal, indivisible, and interdependent”).

141. *What Are Human Rights?*, U.N. HUM. RTS. OFF. HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> [https://perma.cc/USY7-SYUV] (last visited Sept. 24, 2017). The United Nations Office of the High Commissioner for Human Rights explains:

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary



### C. Implications of a Human Right to IP

IP laws play a distinct role from human rights laws. Unlike human rights, it is not among the expressed goals of patent, trademark, or copyright law to promote individual dignity, freedom, justice, or peace.<sup>142</sup> In light of the admirable goals of the UDHR, one may be inclined to conclude that importing human rights principles into IP law would lead to IP laws that are somehow preferable, and even morally superior, to rights created by the state for a specific purpose.<sup>143</sup> As discussed, advocates of a human rights approach to IP suggest that human rights philosophies will result in a more balanced IP system.<sup>144</sup> Indeed, human rights framing may have some advantages. However, to the extent that it could be deployed to bolster natural rights property claims, it may not be a remedy for excessive IP protections that interfere with human flourishing.

Assuming there is a human right to IP protection,<sup>145</sup> it does not automatically follow that injecting human rights law into IP law will lead to positive outcomes. From a developing country perspective, for instance, elevating IP rights to the status of human rights could enforce a model of IP protection that is not universally accepted.<sup>146</sup> As Ruth Okediji points out, the international IP norms that have been established through the TRIPS Agreement are based predominantly on Western values, which tend to be more individualistic than the values held in non-Western societies.<sup>147</sup> In addition, according IP rights the status of fundamental human rights may further hinder the right to development, for example.<sup>148</sup>

---

international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

*Id.*

142. See Sub-Commission on Human Rights Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/, ¶ 11 (Aug. 17, 2000).

143. See UDHR, *supra* note 19, pmbl. (proclaiming that human dignity and equality “is the foundation of freedom, justice and peace in the world” and noting that the members of the United Nations “have determined to promote social progress and better standards of life in larger freedom”).

144. Carpenter, *supra* note 83, at 313; see Helfer, *supra* note 10, at 974–76; Chidi Oguamanam, *Indigenous Peoples’ Rights at the Intersection of Human Rights and Intellectual Property Rights*, 18 MARQ. INTELL. PROP. L. REV. 261, 282–84 (2014); *infra* Part IV.

145. Cf. Special Rapporteur’s Cultural Rights Report, *supra* note 109, ¶ 5 (“Although the human right to science and culture does not establish a human right to patent protection, it does provide a human rights framework within which to consider patent policy.”).

146. Gana, *supra* note 92, at 340.

147. *Id.* at 340–41.

148. *Id.* at 338 (discussing challenges in implementing the right to development).

The characterization of IP can affect how it is perceived and treated by policymakers, judges, and the public.<sup>149</sup> Treating copyrights, patents, and trademarks as property, for example, leads to a different analysis than if these interests are not viewed as “property.” Likewise, if society recognizes patent protection as a human right, it may be subjected to different legal treatment. Patent rights, viewed purely as state-granted entitlements, should have a limited scope and duration, whereas a natural right to patent protection is more readily justified as having an extended term and limited scrutiny before the patent is granted.<sup>150</sup> Significantly, if patent protection is treated as a human right, it would strengthen the patent holder’s claim vis-à-vis human rights—such as the right to food or education—that directly affect quality of life and human flourishing.<sup>151</sup>

On the other hand, human rights law may require that precedence be given to relieving hunger instead of protecting financial interests, particularly if the right holder has met, or exceeded, her basic needs.<sup>152</sup> It matters, therefore, whether IP rights are considered natural rights based on labor theory, human rights, or limited state-granted rights. This is a theoretical inquiry that can have practical implications. The nature of the rights should influence the design of IP laws, including the question of who is treated as the primary beneficiary of these laws.<sup>153</sup>

For example, if patents are justified purely under a consequentialist theory,<sup>154</sup> but one has a natural entitlement to food,<sup>155</sup> then access to food should take priority over patent rights.

149. See Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 279–91 (2014).

150. See, e.g., Mossoff, *supra* note 11, at 956–58 (explaining that the utilitarian narrative has been used to characterize the shift from treating patents as privileges to the property paradigm rights and the corresponding expansion of intellectual property rights, and suggesting that the “proportization” critique is wrong because the patent right was never a privilege).

151. Rochelle Dreyfuss, *Patents and Human Rights: Where is the Paradox?* 2 (N.Y. Univ. Law Sch., Pub. Law Research, Paper No. 06-29, 2006), <http://ssrn.com/abstract=929498> [<https://perma.cc/WXB4-3SWS>] (“Elevating intellectual property rights to human rights has unfortunate pragmatic consequences. Presumably, human rights can be outweighed only by other human rights. Accordingly, under a human rights approach, the benefit stream flowing from inventive production can be distributed, without a patentee’s authorization, only to meet social needs that are likewise classified as fundamental.”).

152. U.N. ESCOR, 27th Sess. ¶¶ 4, 8, 15, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001).

153. For instance, should the laws be designed primarily with the interests of the creator in mind, or primarily with the interests of the public in mind, or should these interests be equally weighted?

154. Cf. Sigrid Sterckx, *The Moral Justifiability of Patents*, 13 J. EUR. ETHICS NETWORK 249, 249 (2006) (arguing that patents are not a consequentialist theory).

155. ICESCR, *supra* note 93, art. 11; UDHR, *supra* note 19, art. 25.

However, if one enjoys a natural right to patent protection, then the claim that a right to food should prevail would be weakened.

Existing laws often give preference to real property over human needs. Those who have abundant food are not obligated to share—even the excess—with those in need. But stealing food is a crime, even if one is starving.<sup>156</sup> IP rights, however, may not warrant the same deference as tangible property. There are various justifications for the treatment of physical property that are unrelated to the question of whether there is a natural right to property. IP, unlike tangible property, is generally considered to be nonrivalrous and nonexcludable.<sup>157</sup> This means there can be multiple users at one time.<sup>158</sup> Furthermore, there are reasons, such as maintaining social order and avoiding violence, for protecting property in a democratic, capitalist system.<sup>159</sup> Such justifications are inapplicable to intangible goods.

A human rights approach to IP should, according to some human rights experts, focus on the needs of disadvantaged and marginalized individuals and communities.<sup>160</sup> From this perspective, any human right to copyright or patent should be limited to natural persons.<sup>161</sup> This vision of a human right to IP would focus on the human individual—particularly the members of society most in need of protection—while excluding corporations from the scope of such protection.<sup>162</sup> Unfortunately, human rights-based IP claims have neither been limited to human persons nor aimed at protecting the most vulnerable members of society.<sup>163</sup>

156. See, e.g., FLA. STAT. § 812.014 (2017) (ruling petty theft a misdemeanor in the State of Florida). *But see* Dominique Mosbergen, *Stealing Small Amounts of Food When in Desperate Need Is Not a Crime, Rules Italy's Highest Court*, HUFFINGTON POST (May 4, 2016, 12:20 AM), [http://www.huffingtonpost.com/entry/stealing-food-not-a-crime-italy\\_us\\_57296b6fe4b016f378941ef9](http://www.huffingtonpost.com/entry/stealing-food-not-a-crime-italy_us_57296b6fe4b016f378941ef9) [<https://perma.cc/BRQ2-4X66>].

157. See David W. Barnes, *Congestible Intellectual Property and Impure Public Goods*, 9 NW. J. TECH. & INTELL. PROP. 533, 533 (2011) (explaining the nonrivalrous nature of IP and the possibility that some IP rights are partially rivalrous).

158. *Id.* at 533–34 (“If a good is non-rivalrous, ‘it is costless to allow additional consumers simultaneously to enjoy the benefits of a public good once it has been produced.’ If a good is ‘non-excludable,’ it is difficult for producers to get consumers to pay for the privilege of using it.” (footnotes omitted)).

159. See GREEN, *supra* note 59, at 139–40 (discussing theft laws and remedies for loss of property and seven factors that justify criminalizing theft).

160. U.N. ESCOR, 27th Sess. ¶¶ 4, 8, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001).

161. See *id.* ¶¶ 4–6 (detailing the importance of authors’ rights in intellectual property and humans as a central subject).

162. *Id.* ¶¶ 5–7 (“Human rights are fundamental as they derive from the human person as such[.]”).

163. See *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 41, 57, 63 (2007).

For example, in the European case of *Anheuser-Busch v. Portugal*, the owner of the Budweiser mark for beer successfully claimed a human right to its trademark interest based on the acceptance of IP as “property” and as a “human right” under European human rights law.<sup>164</sup> If the court had not considered a trademark interest to be “property” that falls within the scope of protected human rights under the relevant law, there would have been no clear legal basis upon which Anheuser-Busch could ground its human rights claim.<sup>165</sup> Even though Anheuser-Busch, a major corporation,<sup>166</sup> did not prevail in the dispute, it is significant that the court expressly recognized IP rights as protected property under European human rights law.<sup>167</sup>

One could dismiss this jurisprudence as irrelevant in the US context due to the differences between US and European legal systems. Indeed, the *Anheuser-Busch* decision was based on European implementation of human rights law.<sup>168</sup> However, there has been increased harmonization in IP law, partly due to the global and trans-border nature of many IP-protected goods. US jurisprudence has influenced the law in other countries, but the laws from other nations are also affecting US law. For example, to bring its patent law in line with the rest of the world, the United States recently moved to a system that awards the patent right to the first applicant to file for patent protection, instead of to the first inventor.<sup>169</sup>

---

164. *Id.* at 57, 69.

165. *See id.* at 57–58. In other words, Anheuser was able to claim a human right related to its trademark because the trademark interest was recognized as property by the court. *Id.* at 51–54.

166. *Id.* at 47 (“The applicant is an American public company whose registered office is in Saint Louis, Missouri (United States of America). It produces and sells beer under the brand name ‘Budweiser’ in a number of countries around the world.”). Anheuser-Busch was subsequently purchased by a Belgian company and is now AB InBev. *See Anheuser Will be Bought by Belgian InBev for \$50 Billion*, REUTERS (Aug. 5, 2010, 1:05 PM), <https://www.cnbc.com/id/25665930> [<https://perma.cc/2TS2-E3WQ>].

167. *Id.* at 65, 69 (“In the light of the above-mentioned decisions, the Grand Chamber agrees with the Chamber’s conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such.”); *see also id.* at 71 (Steiner & Hajiyev, JJ., concurring) (“We agreed with the majority that there has been no violation of Article 1 of Protocol No. 1, but on other grounds. In our view, Article 1 of Protocol No. 1 does apply, in general, to intellectual property. This was accepted by both the parties but there has never been any clear statement of this principle by the Court in the past. We therefore agree that Article 1 of Protocol No. 1 is applicable to intellectual property in general and to a duly registered trade mark.”).

168. *Id.* at 50–55 (majority opinion).

169. *See Leahy-Smith America Invents Act*, Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.). When the Leahy-Smith America Invents Act (AIA) was signed into law on September 16, 2011, “it adopted the first-to-file system of determining a patent’s priority date.” Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 435 (2011). The AIA also “redefined what

Furthermore, large multinational corporations—including US companies—operate across borders. Such businesses may articulate their claims under international human rights law in some jurisdictions but as constitutional rights in others.<sup>170</sup> The terminology used may be distinct, but human rights obligations are often enshrined as constitutional rights.<sup>171</sup>

Arguably, corporations should not enjoy human rights to IP protection. Even if corporations have legal rights, such rights should not be accorded the same status as the rights human beings enjoy by virtue of their humanity.<sup>172</sup> Ideally, human rights frameworks will distinguish human rights entitlements from copyrights, patents, and trademarks. This is critical, particularly since there is a great deal of IP that is owned by corporations.<sup>173</sup> If this distinction is maintained, a human rights approach to IP could counter corporate expansion of IP protections.

However, to the extent corporate property interests are protected as fundamental rights under regional human rights instruments or national constitutions, the human rights framework may not be a particularly effective restraint on IP rights. If corporations can protect their IP by making human rights claims, as was done in *Anheuser-Busch*, human rights framing could further the upward trend in IP protection that has already resulted from the trade-related and investment-related treatment of IP.<sup>174</sup>

Still, the human rights discourse, which tends to be internationalist, can enrich the domestic natural rights IP discourse.

---

constitutes prior art against a patent, created several new post-issuance proceedings for patents and revised existing proceedings, and made many other important changes to the patent code.” *Id.* (“The AIA is the first comprehensive patent bill to be enacted since the Patent Act of 1952 . . . and it arguably makes the most substantial changes to the law since those imposed by the Patent Act of 1836[,] . . . which created the system of patent examination.”).

170. See *Anheuser-Busch* 2007-I Eur. Ct. H.R. at 45, 49–50; Matal, *supra* note 169, at 451.

171. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1866 (2003) (“[C]onsensual sources of constitutional rights may also provide guidance in the interpretation of the rights, under different interpretive methodologies.”).

172. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 176–77 (1955) (“[T]here may be codes of conduct quite properly termed moral codes . . . which do not employ the notion of a right. . . . There is . . . no simple identification to be made between moral and legal rights, but there is an intimate connection between the two[.]”).

173. See Special Rapporteur’s Cultural Rights Report, *supra* note 109, ¶¶ 17, 21, 32. The Special Rapporteur has argued for this framework; however, this question is more complicated than it may appear. For instance, could copyright or patent protection be the method by which the state implements its human rights obligation? This question goes beyond the scope of the present project, but is worth further consideration. For data on corporate ownership of IP, see PATENT TECH. MONITORING TEAM, *supra* note 38.

174. See Part II.B.

The human rights framework diverges from classic IP theories in some important respects, which are analyzed in Part VI of this Article. Before returning to the human rights framework, the next Part discusses some of the classic justifications for intellectual property protection.

#### IV. CLASSIC INTELLECTUAL PROPERTY THEORIES

Courts and theorists draw on a combination of philosophies to justify IP rights.<sup>175</sup> Copyright and patent laws, for example, are often rationalized using both consequentialist and deontological theories.<sup>176</sup> However, utilitarianism remains the predominant theoretical justification for IP rights in the United States. In particular, many US scholars analyze the consequences of IP policy through the lens of economic efficiency.<sup>177</sup> In general, commentators who support less restrictive IP protections rely on utilitarian theories,<sup>178</sup> whereas some scholars who resist access arguments turn to natural rights property theories to justify strong IP rights.<sup>179</sup>

##### *A. The Utilitarian Norm*

Utilitarian theories are based on the writings of philosophers such as Jeremy Bentham and John Stuart Mill.<sup>180</sup> Bentham notably

---

175. See Mossoff, *supra* note 14, at 36 (explaining that copyright is justified, “particularly the labor theory of property and the social contract doctrine at the core of John Locke’s political philosophy”). See generally *Bowman v. Monsanto Co.*, 569 U.S. 278 (2013) (denying farmers from reusing patented seeds); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the Copyright Term Extension Act); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (finding copyright violation despite claim of fair use for public interest).

176. See William W. Fisher III, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 174, 189 (Stephen R. Munzer ed., 2001) (discussing Lockean labor theories, personality theories and utilitarian theories such as reward theory). See generally Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *PHIL. & PUB. AFF.* 31 (1989) (discussing utilitarian and natural rights justifications for intellectual property).

177. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 35 (4th ed. 1992); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 325 (1989); Richard Posner, *Intellectual Property: The Law and Economics Approach*, 19 *J. ECON. PERSP.* 57–58 (2005).

178. See LESSIG, *supra* note 78, at 7, 57; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33, 37–40 (2003); Lemley, *supra* note 21, at 1328.

179. MERGES, *supra* note 11, at 95.

180. David O. Brink, *Mill’s Ambivalence About Rights*, 90 *B.U. L. REV.* 1669, 1669–70, 1675 (2010).

rejected natural rights as “nonsense upon stilts.”<sup>181</sup> Thomas Jefferson, who was a key figure in US patent law,<sup>182</sup> was also critical of the idea of justifying IP through natural rights.<sup>183</sup> Utilitarians instead see rules as having a specific purpose, which is usually to maximize welfare.<sup>184</sup>

Utilitarianism is typically classified as direct or indirect utilitarianism, or “act utilitarianism” and “rule utilitarianism,” respectively.<sup>185</sup> Act utilitarianism assesses an act against its ability to maximize general welfare, whereas rule utilitarianism evaluates a rule against its general conformity to some norm that is widely accepted as a good one.<sup>186</sup> Modern utilitarianism in IP law typically refers to economic theories that support the protection of copyrights and patents in order to promote innovation and discourage free riding.<sup>187</sup> Thus, utilitarian approaches to IP are predominantly concerned with the economic benefits of copyright and patent protection.<sup>188</sup>

IP rights are justified on the basis that they stimulate innovation, thereby promoting societal progress.<sup>189</sup> In the United States, scholars find support for the utilitarian approach to patents

---

181. NEIER, *supra* note 118, at 37 (explaining how natural law has significant critics, “such as the utilitarian philosopher Jeremy Bentham who famously described natural rights as ‘nonsense upon stilts’”).

182. Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 176, at 138, 138 (“Thomas Jefferson was the first administrator of the U.S. patent system[.]”); see also Mossoff, *supra* note 11, at 954–57 (discussing and criticizing court decisions and scholarly articles that treat Jefferson as the founder of US patent law).

183. Shiffrin, *supra* note 182, at 138.

184. *See id.*

185. *See* Brink, *supra* note 180, at 1671.

186. *Id.* at 1671–72.

187. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032–33 (2005).

188. Although utilitarianism is often equated with wealth maximization, the two are not the same. *See* Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 103, 111 (1979) (“The important question is whether utilitarianism and economics are really the same thing. I believe they are not and, further, that the economic norm I shall call ‘wealth maximization’ provides a firmer basis for a normative theory of law than does utilitarianism.”).

189. *See* U.S. CONST. art. I, § 8, cl. 8; see also Gregory N. Mandel, *Promoting Environmental Innovation with Intellectual Property Innovation: A New Basis For Patent Rewards*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 51, 54 (2005) (discussing how patent law serves as a basis for environmental innovation). *But see* Stijepko Tokic, *The Interplay Between User Innovation, The Patent System and Product Liability Laws: Policy Implications*, 99 J. PAT. & TRADEMARK OFF. SOC’Y 20, 21 (2016) (illuminating how the patent system may suppress innovation).

and copyrights in the US Constitution.<sup>190</sup> Article I, Clause 8 of the Constitution gives Congress the authority to create laws to provide authors and inventors time-limited patent and copyright protection to promote “the progress of Science and the useful Arts.”<sup>191</sup>

According to incentive theory, creators need an economic incentive to innovate and to create new products.<sup>192</sup> IP protection creates this incentive and provides economic rewards for innovators and creators.<sup>193</sup> The incentive to innovate is that the inventor who is the first to seek patent protection will, assuming all the criteria for patentability are met, obtain the exclusive right to make, use, and sell the invention for twenty years from the date the patent application was submitted.<sup>194</sup> In exchange for the time-limited patent protection, the inventor discloses the invention to the public. The public receives the benefit of the invention and the knowledge about how to make the invention. This incentive theory, therefore, is not only about rewarding the inventor but also about promoting the public interest.<sup>195</sup> Thus, with a view to the public interest, patent law should promote innovation, while copyright law should promote the dissemination of knowledge.<sup>196</sup>

Natural rights approaches to IP, by comparison, demonstrate greater concern for the interests of the creator than for the consuming public.<sup>197</sup> The works of some natural rights IP scholars are discussed below.

---

190. Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 WIS. L. REV. 123, 123 (2011).

191. U.S. CONST. art. I, § 8, cl. 8. This clause in the Constitution is often referred to as either the Patent Clause, the Copyright Clause, or the Intellectual Property Clause.

192. See Moore, *supra* note 80, at 610–13.

193. 1 ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2017*, at 19–20 (2017).

194. TRIPS Agreement, *supra* note 23, arts. 28, 33.

195. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1262 (2014).

196. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 8 (2010) (“A copyright system is designed to produce an ecology that nurtures the creation, dissemination, and enjoyment of works of authorship. When it works well, it encourages creators to generate new works, assists intermediaries in disseminating them widely, and supports readers, listeners, and viewers in enjoying them.” (footnotes omitted)).

197. While many scholars see the utilitarian and natural rights approaches as being at odds, some scholars see both approaches as landing at the same place. See Brian Frye, *Machiavellian Intellectual Property*, 78 PITT. L. REV. 1, 7 (2016) (“[P]roponents of intellectual property have adopted moral theories in order to ignore evidence that intellectual property may decrease social welfare, and detractors of intellectual property have adopted moral theories in order to ignore evidence that intellectual property may increase social welfare.”).



*B. Natural Rights Property Theories to Expand IP Rights*

Although the utilitarian model is predominant, courts tend to explain copyright law, for example, through a combination of utilitarian and natural rights theories.<sup>198</sup> In addition, various scholars have used natural rights theories to justify patent and copyright protection.<sup>199</sup>

Justin Hughes argues from a property-based natural rights perspective that rights must be derived from a source other than the laws that create those rights.<sup>200</sup> He therefore contends that the US constitutional vision of property is informed by Lockean justifications.<sup>201</sup> According to Locke's theory, once an individual mixes her labor with what previously belonged to the commons, she has a right to claim it as her private property.<sup>202</sup> This Lockean labor is "central to the legal definition and protection of property entitlements."<sup>203</sup> According to this line of reasoning, intangible rights are a form of property that can be justified based on the right to enjoy the fruit of one's labors,<sup>204</sup> whether physical or mental.<sup>205</sup>

198. Gordon, *supra* note 14, at 1607–08; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 425 (2003); Yen, *supra* note 18, at 524. *But see* Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1, 34 (2002) (criticizing the Lockean approach to copyright).

199. Mossoff, *supra* note 14, at 39 ("The right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law. . . . Thus, the exclusive rights granted to copyright and patent holders appear arbitrary—they are only legal figments of our collective social imagination. And these rights certainly do not fit the definition of *property*, which as we are constantly reminded, is naturally exclusive." (emphasis added)). *But see* Shiffrin, *supra* note 182, at 141 ("[T]he nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation.").

200. Hughes, *supra* note 21, at 288 ("Rights in our society cannot depend for their justification solely upon statutory or constitutional provisions.").

201. *Id.*

202. *Id.* at 297–98; see JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 267, 287–88 (Peter Laslett ed., student ed. 1988) ("The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men.").

203. Mossoff, *supra* note 14, at 41.

204. *Id.* at 39–40 ("The right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law. . . . Thus, the exclusive rights granted to copyright and patent holders appear arbitrary—they are only legal figments of our collective social imagination. And these rights certainly do not fit the definition of *property*, which, as we are constantly reminded, is naturally exclusive. . . . This does not mean that these rights are not property rights. It means that they are only a different *type* of property right—but a property right nonetheless." (emphasis added)). *But see generally* Shiffrin, *supra* note 182.

With some exceptions,<sup>206</sup> natural rights rationales are utilized to explain and support extensive IP rights.<sup>207</sup> Adam Mossoff describes the recent expansion of patent rights as consistent with the “similarly expansive development of patent rights under the guiding influence of natural rights philosophy in the early nineteenth century.”<sup>208</sup> Since, according to this theory, the laborer is entitled to protect her property from others, the rights can be relatively strong, even if there is no contribution to some broader societal purpose.<sup>209</sup> According to Adam Moore, a Lockean justification for IP means term limits should not be imposed on creators and inventors.<sup>210</sup> Both IP scholars and members of the consuming public who believe in a natural entitlement to copyright or patent protection hold the view that creators are entitled to robust IP rights.<sup>211</sup>

---

205. Mossoff, *supra* note 14, at 42; Mossoff, *supra* note 11, at 997 (“In summary, nineteenth-century case law provides substantial support for Madison’s declaration in *The Federalist No. 43* that patent rights were justified ‘with equal reason’ as the labor-based property justification for common-law copyright. Patents were indeed privileges—civil rights securing property rights.” (footnotes omitted)). *But see* Hettinger, *supra* note 176, at 40–41 (“[The] argument that people are naturally entitled to the fruits of their labor is distinct from the argument that a person has a claim to labor’s fruits based on desert. . . . The desert argument suggests that the laborer deserves to benefit from her labor, at least if it is an attempt to do something worthwhile. This proposal is convincing, but does not show that what the laborer deserves is property rights in the object labored on. The mistake is to conflate the created object which makes a person deserving of a reward with what that reward should be.”).

206. Gordon, *supra* note 14, at 1538. *See generally* Yen, *supra* note 18.

207. *See* Mossoff, *supra* note 14, at 41; *Intellectual Property Theft/Piracy*, FBI, <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft> [<https://perma.cc/6G5K-6W5C>] (“Intellectual property theft involves robbing people or companies of their ideas, inventions, and creative expressions—known as ‘intellectual property’—which can include everything from trade secrets and proprietary products and parts to movies, music, and software.”); *see also* Haxorcat, *Piracy It’s a Crime*, YOUTUBE (Dec. 4, 2007), <https://www.youtube.com/watch?v=HmZm8vNHBSU> [<https://perma.cc/4AMM-PR84>] [hereinafter *Anti-Piracy Campaign*]. *See generally* Mossoff, *supra* note 11.

208. Mossoff, *supra* note 11, at 1011 (“The expansion in patent rights today is in accord with the similarly expansive development in patent rights under the guiding influence of natural rights philosophy in the early nineteenth century.”).

209. *Id.*

210. Moore, *supra* note 11, at 103–04 (“While I find [Robert] Nozick’s suggestion for limiting intellectual property rights with respect to discoveries convincing, I do not think a similar case can be made for intellectual works that are created. Moreover, I do not find the prospect for perpetual rights for created intellectual works alarming. Suppose that so long as authors and inventors and their heirs defend property claims, these rights are perpetual, similar to property rights in tangible objects.”).

211. Mandel, *supra* note 149, at 279–91 (finding that individuals who took a natural rights approach to intellectual property tended to support stronger intellectual property protections).

In addition, some commentators see natural rights as providing a basis to resist demands for access to intangible goods.<sup>212</sup> Robert Merges, for example, objects to assertions that it is harmful to expose society to goods protected by IP and then limit access to those goods.<sup>213</sup> While he acknowledges the principle that the property owner should “prevent harm,”<sup>214</sup> he contends that IP rights should be limited only when people are in dire need.<sup>215</sup> According to this reasoning, even though cultural development may be important for human flourishing, for example, such claims would not be particularly strong.<sup>216</sup> The clear tension between the individual interest, whether corporate or human, and the community interest would therefore be resolved in favor of the individual property owner.

As discussed, natural rights theories tend to be employed to support arguments for more expansive IP protection for both individuals and corporations.<sup>217</sup> Nonetheless, as the next Section outlines, some commentators use natural rights property models to argue for limits on IP.

### *C. Natural Rights Property Theories to Limit IP Rights*

Although the trend is to the contrary, some scholars contend that natural rights property theories place effective limits on IP. These scholars view natural rights theories of IP as preferable for both creators and society.<sup>218</sup>

Alfred Yen posits that once a work is published, copyright protection cannot be based on a natural entitlement but must instead be limited to what is granted by statute.<sup>219</sup> Yen draws on Locke’s labor theory and Roman natural law to argue, in contrast to some natural rights scholars, that the natural law of property only extends to things that can be possessed.<sup>220</sup> According to this argument, property is defined by occupation and possession.<sup>221</sup> Once the work has been published and distributed to the public, it is no longer in the

---

212. MERGES, *supra* note 11, at 54. Merges, for instance, objects to arguments supporting what he sees as a restrictive vision of intellectual property rights. *See id.* at 54–55.

213. *Id.* at 54–55.

214. *Id.* at 69.

215. *Id.* at 64 (“[I]n my view IP rights are only limited in actual cases where IP is enforced in a way that interferes with sustenance or survival.”).

216. *Id.* at 64–65.

217. *See* Mossoff, *supra* note 11, at 1011.

218. *See, e.g.,* Shiffrin, *supra* note 14, at 657–58; Yen, *supra* note 18, at 521.

219. Yen, *supra* note 18, at 550–51.

220. *Id.* at 552–53.

221. *Id.* at 550.

possession of the creator and protection is no longer justified on the basis of natural law.<sup>222</sup>

Wendy Gordon suggests that natural rights theories will lead to the appropriate balance between the interests of the creators and users.<sup>223</sup> She argues that a natural rights approach to IP law takes into consideration not only the rights of the creator, but also the property interests of the public. This is because Lockean theory does not permit one to harm others.<sup>224</sup> Accordingly, the public cannot be harmed in order to protect the interests of the creator. Further, once the work is created, withdrawal could cause harm; in that case, the public may have a reliance argument.<sup>225</sup>

Likewise, Seana Shiffrin argues that Lockean analysis will lead to the appropriate balance between creators and users. Her analysis is based on the principle that appropriation must not be wasteful.<sup>226</sup> Removing something from the state of nature to take as individual property is consistent with God's grant only when the taking is useful or beneficial.<sup>227</sup> In addition, Shiffrin contends that Locke's appropriation theory makes sense with respect to physical property but not intangible goods. This is because exclusive use may be necessary for the full and effective use of land and tangible goods but not for intangible goods.<sup>228</sup> Unlike physical goods, she argues, the

---

222. *Id.* at 551.

223. Gordon, *supra* note 14, at 1561–62. *But see* Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 754 (2009) (“As Joseph Singer has pointed out, ‘It is well understood that owners cannot use their property to harm others, but it is not well understood how difficult it is to define what that means.’ The problem with using the harm principle as the basis for defining social obligations of ownership is that it misleads owners into believing that William Blackstone’s description of ownership as conferring on owners ‘sole and despotic dominion’ over their property is accurate.” (footnotes omitted)).

224. Gordon, *supra* note 14, at 1544 (“We cannot ‘earn’ a right to harm others, or a right to impair their access to the common.” (footnotes omitted)).

225. *Id.* at 1567–68.

226. Shiffrin, *supra* note 182, at 147 (“These criteria ensure that appropriation does not disadvantage the equal rights of others to appropriate some goods and to use others, and to ensure that the common stock is not depleted past the point of fruitful use. Wasteful appropriation would frustrate the charge to make the common grant work to humankind’s benefit.”).

227. *Id.* at 146–47.

228. *Id.* at 152 (“Why then must the use of ‘extra’ land be exclusive to facilitate full exploitation of God’s gift? . . . The land would not be as effectively used if a user’s plans could be disrupted by the imposition of another’s inconsistent plan or spontaneous use. It would then make some sense that he endorsed private, nonconsensual appropriation of some things beyond what is necessary to subsist. Their appropriation would be justified where exclusive use of such thing is necessary for their *fully* effective use.” (footnotes omitted)). Shiffrin discusses Locke’s objections to “‘patent’ (copyright-like) clauses *on the grounds that they granted a monopoly to publishers*” and his seeming disapproval of copyright expansion. *Id.* at 154–56 (emphasis added)

full exploitation of intangible goods requires nonexclusive use rather than exclusive use.<sup>229</sup> Shiffrin therefore concludes that Lockean labor theory cannot serve as the theoretical justification for strong IP rights.<sup>230</sup>

When comparing natural rights IP scholarship with human rights approaches to IP, the distinction between the individual and the community becomes an important aspect. Human rights IP theories advance the community of individuals. At the same time, human rights framing offers a model for preserving the interests of the individual. However, the individual interest must be assessed in light of the competing interests of the multiple individuals who form part of the human community.

## V. THE COMMUNITY AND THE INDIVIDUAL LABORER

A central issue in modern IP debates is how to balance competing rights and interests. Compared to natural rights property theories, which tend to bolster arguments that prioritize the creator's individual interests,<sup>231</sup> utilitarian IP theories are concerned with incentivizing innovation and maximizing welfare by concentrating on the greater good.<sup>232</sup> This distinction influences the perception of IP rights, including who is the primary beneficiary of the relevant laws.

### A. Utilitarianism and the Public Interest

Unlike human rights, IP utilitarianism is not based on the inherent dignity of the human being.<sup>233</sup> Rather, the laws are designed

---

("Generally one's use or consumption of an idea, proposition, concept, expression, method, and so forth, is fully compatible with others' use, even their simultaneous use.")

229. *Id.* at 141 ("I mean to criticize the claim that Lockean theory, as I suggest it is most plausibly interpreted, generally supports the assertion of strong, natural rights over most intellectual products."). Shiffrin defines strong intellectual property rights to mean "those core intellectual property rights that empower their bearers to exert exclusive control over access to and use of intellectual works." *Id.* at 142. Shiffrin concludes that Lockean natural rights theory is not well suited to intellectual property. *Id.* at 158–66.

230. *Id.* at 166 ("If effective exploitation of the grant of the world is a value that propels Locke's arguments for ownership, then, since free, shared use of intellectual products contributes to their effective exploitation, this sort of property seems unamenable to private appropriation that manifests in strong rights."). *But see* Mossoff, *supra* note 14, at 36 (arguing that nineteenth century protections of intellectual property—trademarks and trade secrets in particular—are rooted in "the courts' belief that such rights were similar to other property rights born of valuable labor and protected by the law").

231. *See* Mossoff, *supra* note 11, at 956.

232. MERGES, MENELL & LEMLEY, *supra* note 193, at 11–14.

233. Mirela V. Hristova, *Are Intellectual Property Rights Human Rights?*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 339, 351–52 (2001).

with a view to promoting some public good.<sup>234</sup> A utilitarian theory of IP values the rights of the creator, even though its primary aim is not to protect the interests of the individual creator.<sup>235</sup> Innovators and creators enjoy protection for the purpose of producing some societal benefit.<sup>236</sup> Arguably, this can result in the individual being sacrificed for the good of the many.<sup>237</sup> Thus, one critique of utilitarianism is that it can be oppressive when taken to extremes because the goal of utilitarianism is to maximize welfare.<sup>238</sup>

Despite this criticism, under the current model IP producers are not oppressed for the benefit of the masses.<sup>239</sup> Rather, the producer-centered system is the reason for much of the concern about the current global rules.<sup>240</sup> Arguably, the current system overprotects the interests of producers and owners of IP goods, sometimes to the detriment of users.<sup>241</sup> Despite the language of utilitarianism, IP rights are increasingly treated as natural entitlements.<sup>242</sup>

The existing model of IP utilitarianism has been questioned by some commentators because of its focus on wealth maximization.<sup>243</sup> Indeed, numerous scholars have offered utilitarian interpretations of IP progress that are not about maximizing wealth.<sup>244</sup> Some scholars contend that a natural rights vision of copyright, for example, can lead

---

234. See U.S. CONST. art. I, § 8, cl. 8.

235. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1754–55 (2013).

236. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) (“The purpose of copyright law is to encourage authorship. When we embody that encouragement in property rights for authors, we can lose sight of a crucial distinction: Nurturing authorship is not necessarily the same thing as nurturing authors. When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.”).

237. Sunder, *supra* note 1, at 284 (focusing “simply as the maximization of creative output[,] . . . [t]he utilitarian approach to intellectual property does not ask: Who makes the goods? Who profits, and at whose expense?”).

238. *Id.* (“Martha Nussbaum describes this as ‘the problem of respect for the separate person.’”).

239. See, e.g., *Canada—Patent Protection Panel Report*, *supra* note 53, ¶ 4.14(iv).

240. Sunder, *supra* note 1, at 263.

241. Oguamanam, *supra* note 2, at 152–53 (discussing North-South tensions relating to intellectual property).

242. Craig, *supra* note 198, at 12–13.

243. *But see* Posner, *supra* note 188, at 103, 111–12 (“The important question is whether utilitarianism and economics are really the same thing. I believe they are not and, further, that the economic norm I shall call ‘wealth maximization’ provides a firmer basis for a normative theory of law than does utilitarianism.”).

244. See Cynthia M. Ho, *Do Patents Promote the Progress of Justice? Reflections on Varied Visions of Justice*, 36 LOY. U. CHI. L.J. 469, 469 (2005); Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755–56 (2001).

to more balance because inherent in natural rights analysis is a recognition that IP is about more than wealth creation.<sup>245</sup> In line with the utilitarian concern for the public good, some commentators have advocated a return to referring to IP protections as *privileges* rather than rights.<sup>246</sup> Concerned with the expanding scope of IP rights, others have lamented the “proPERTIZATION” of copyright, patents, and trademarks.<sup>247</sup> Clearly, there is some doubt about whether the utilitarian model of IP is effective in balancing the interests of creators with those of the public.<sup>248</sup>

In theory, the focus on the greater good—on advancing the interests of the greatest number of individuals—distinguishes utilitarianism from natural rights approaches to IP. Certainly, it has been suggested that utilitarian theories can accommodate moral rights<sup>249</sup> and that both theories may ultimately lead to the same outcome.<sup>250</sup> This Article does not engage that debate, but instead compares two natural rights models—one of which appears to be more likely to advance the common good.

Even without engaging the question of distributive justice, human rights frameworks can shift the natural rights property-centric IP discussion towards analyses that accord greater value to competing nonproprietary rights and interests.<sup>251</sup> A human rights approach,

245. OseiTutu, *supra* note 71, at 27, 44 (suggesting that utilitarian IP law does not have to be about wealth maximization but can promote human progress in economic *and* noneconomic ways). *But see* Yen, *supra* note 18, at 520 (“Under the economic copyright model, the propriety of copyright’s expansion rests solely on an economic cost-benefit calculation.”).

246. PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 212 (1996).

247. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 1 (2004); Craig, *supra* note 198, at 15; Mossoff, *supra* note 11, at 956 n.15.

248. Lemley, *supra* note 21, at 1334–35 (“The decidedly ambiguous nature of this evidence should trouble us as IP lawyers, scholars, and policymakers. It is one thing to say in Fritz Machlup’s day that we should trust in theory because the evidence isn’t in yet. In the absence of evidence, he might well have been right that the best thing to do is maintain the status quo. But it is quite another thing to continue trusting in theory when we have gone out, collected the evidence, and found that it is far from clear that IP is doing the world more good than harm.”).

249. *See, e.g.*, Adrian Brown, *Can Utilitarianism Accommodate Moral Rights?*, 2 UCL JURIS. REV. 16, 26 (1995); Gustavo Hessmann Dalaqua, *John Stuart Mill vs. John Rawls: A Comparison*, 8 SEARA FILOSÓFICA, 61, 67–68 (2014).

250. Fromer, *supra* note 235, at 1761–64; David A. Reidy, *Philosophy and Human Rights: Some Contemporary Perspectives*, in *PHILOSOPHICAL DIMENSIONS OF HUMAN RIGHTS* 23, 31–32 (Claudio Corredetti ed., 2012) (“John Rawls is best known for his theory of social or distributive justice. . . . On Rawls’s view, then, human rights as universal moral rights, basic human rights or human rights proper, are those rights that all peoples . . . secure as constitutional or civic rights within their own borders[.]”).

251. Human rights approaches may import distributive justice considerations into the utilitarian economic IP framework. *See* Lang, *supra* note 6, at 410 (“Human rights discourse also focuses our attention on questions of distributive justice. Bureaucratic international

which promotes individual human flourishing, recognizes the need for all individuals within the community to flourish and to enjoy rights that promote their human dignity.<sup>252</sup> The human rights approach, therefore, can be distinguished from the natural rights IP discourse, which is preoccupied with the interests of the creator but does not adequately acknowledge other rights. Human rights framing moves natural rights theories towards greater accountability for the public interest.

### *B. Natural Rights and the Public Interest*

The property-centric model that is put forth by proponents of natural rights to IP emphasizes the property interests of the creator.<sup>253</sup> This is due to the tendency of natural rights IP theorists to analyze IP from the perspective of the individual property interest.<sup>254</sup> What is created by the individual remains the property of the individual and does not become part of the “common stock.”<sup>255</sup> The reward for individual effort, and any corresponding distributional inequities, may also be justified under this analysis.<sup>256</sup> This concept of individualism and autonomy is paramount for some natural rights

---

organizations, particularly those like the WTO, which rely heavily on technical expertise as an important source of their legitimacy, tend to structure their activity so that questions of distributive justice appear irrelevant to their tasks.”).

252. See Gregory S. Alexander, *Intergenerational Communities*, 8 LAW & ETHICS HUM. RTS. 21, 25 (2014) (“My account of human flourishing stresses two necessary conditions. First, following Amartya Sen, I argue that human beings must develop certain capabilities necessary for a well lived and distinctly human life. Among these necessary capabilities are health, the ability to engage in practical reasoning, freedom to make deliberate choices, and the ability to get along with other people (sociability). . . . Flourishing occurs only in society with, indeed, dependent upon, other human beings.” (emphasis omitted) (footnotes omitted)). Martha Nussbaum proclaims that individuals should not be content with mere “formal” equality. See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 292 (1997). Everyone should seek to eliminate unfavorable economic and social situations for the benefit of society. *Id.*

253. See MERGES, *supra* note 11, at 31; Mossoff, *supra* note 11, at 953; Yen, *supra* note 18, at 520–21.

254. See Craig, *supra* note 198, at 43.

255. See Hughes, *supra* note 21, at 299 (“[Richard Epstein] suggests that granting people property rights in goods procured through their labor ‘increase[s] the common stock of mankind,’ a utilitarian argument grounded in increasing mankind’s collective wealth. This justification is called into question by an obvious problem. If the new wealth remains the private property of the laborer, it does not increase the common stock. If it can be wantonly appropriated by the social mob, the laborer will realize quickly that he has no motivation to produce property and increase the common stock.” (footnotes omitted)).

256. See MERGES, *supra* note 11, at 106 (“[T]he capacity to work hard and be creative is something that a person just naturally possesses, and that the actual hard work, and its fruits, thus belong rightfully to that person.”).



scholars.<sup>257</sup> Merges, for instance, relies on Locke and Kant for theoretical rationales that focus on the individual first, with the community having a secondary interest.<sup>258</sup>

Kantian philosophy has also been utilized to advance a theory of a “community of owners,”<sup>259</sup> in which each person has a duty to respect the property of the other.<sup>260</sup> Yet even Kant’s philosophies, as applied to IP, acknowledge the importance of the community and the inherent dignity and value of each human being.<sup>261</sup> This reference to human dignity reflects the language used in human rights discourse and international instruments.<sup>262</sup> Still, an analysis from the perspective of a “community of owners” gives greater priority to the individual property interest. Significantly, the individual in question could be a legal entity rather than a human being. For example, large corporations seeking higher global IP standards could benefit from expansive IP protection based on this type of framing.<sup>263</sup>

As Carys Craig observes,

[o]ne might, of course, distinguish between a concern for the copyright holder’s property rights and a more powerful understanding of those rights as the author’s moral and natural entitlement. . . . [But] [t]he easy slippage from “property” to “proprietary” quickly turns an economically rationalized interest into a morally deserved right.<sup>264</sup>

A human rights framework moves the analysis from one dominated by the property interest to one which considers the rights of various individuals in the community. This is an important distinction between a human rights approach and the natural rights property model.<sup>265</sup>

## VI. HUMAN RIGHTS APPROACHES VALUE THE COMMUNITY OF INDIVIDUALS

As this Article has discussed, the predicted moderating effect of a human rights approach to IP is at odds with the predominant

257. *Id.* at 17–18.

258. *Id.* at 19 (arguing that society has an interest but not a co-equal right).

259. *Id.* at 88.

260. *Id.*

261. *Id.* at 87.

262. *See, e.g.*, UDHR, *supra* note 19, pmb., art. 1.

263. Merges contends that Lockean and Kantian natural right philosophies continue to be pertinent when large corporations are the IP owner. MERGES, *supra* note 11, at 22.

264. Craig, *supra* note 198, at 15.

265. This Article refers to the natural rights property model and not to natural rights generally. It does so because the IP scholarship on natural rights that is being discussed here is about the right to the fruits of one’s labor, and not about broader natural rights.

natural rights property-centric analysis, which has the potential to bolster claims for more entrenched and expansive IP rights. This is one reason why the notion of a human right to IP, although appealing to some social justice advocates, raises concerns for other commentators.<sup>266</sup>

Yet a human rights approach can be distinguished from a Lockean property-based analysis of IP. The UDHR recognizes the inherent dignity of the human being, acknowledges all human rights as equal and inalienable, and aims to promote justice and social progress.<sup>267</sup> Starting from this point, human rights frameworks for IP diverge from property-focused natural rights theories of IP. According to human rights theory, all rights are indivisible, interdependent, and interrelated.<sup>268</sup> They must, therefore, be balanced against one another.<sup>269</sup>

This is one way the international human rights IP discourse can lend support to natural rights arguments for tempering IP rights.<sup>270</sup> Much like the proponents of a human rights framework for IP law, some advocates of natural rights rationales for IP suggest that the natural rights lens will benefit creators and the public alike.<sup>271</sup> For example, Shiffrin criticizes standard interpretations of Lockean

266. See, e.g., Gana, *supra* note 92, at 318 (“[The human rights regime] should not provide a source of legitimacy for the newly established minimum standards of international intellectual property protection under the TRIPS Agreement. If anything, the individualistic orientation of human rights ideology . . . should raise questions about the universal validity of contemporary forms of intellectual property protection reflected in the TRIPS and its predecessor agreements.”).

267. See UDHR, *supra* note 19, pmb1. (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.] . . . Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people[.] . . . Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom[.]”).

268. Hannu Wager & Jayashree Watal, *Human Rights and International Intellectual Property Law*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 149, 158 (Christophe Geiger ed., 2015).

269. *Id.*

270. These are some of the arguments presented by scholars like Wendy Gordon and Alfred Yen. Gordon, for instance, suggests that natural rights will lead to a balanced IP, and Yen advocates natural rights as preferable to utilitarian theories as a way to limit IP rights. See discussion *supra* Part IV.C.

271. Gordon, *supra* note 14, at 1538 (“Natural-rights theory can yield significant protection for free speech interests. . . . The Article shows why when the public’s claims conflict with a laborer’s, the public’s claims should prevail.”).

labor theory for failing to sufficiently account for the importance of initial common ownership.<sup>272</sup>

Various scholars point out that a creator does not labor alone but rather relies on the society of which she is part to build on the works of others.<sup>273</sup> This makes the laborer's claim incomplete.<sup>274</sup> This type of analysis aligns with the human rights approach to IP insofar as equality of all persons is central to the analysis.<sup>275</sup> It also acknowledges the tension between the natural rights of the creator and the rights of the community.<sup>276</sup> A human rights analysis injects a stronger consideration of community interests than currently exists in much of the natural rights IP literature.

A human rights approach to IP creates a framework that emphasizes more than the individual property interest. The advantage of human rights framing over property-centric natural rights analyses of IP is that the former supports a vision of IP rights that protects the individual creator but equally values the interests of the community of users. More specifically, the community has rights and interests that may diverge from those of the creator or owner of the IP.

### *A. Beyond the Property Interest*

The natural right to property provides a basis for natural rights claims to IP. Though controversial, property is recognized in the UDHR as a human right.<sup>277</sup> However, neither the ICCPR nor the

272. Shiffrin, *supra* note 182, at 149 (“I think that the standard account is called into question because it is unable to acknowledge the primacy of the thesis of common ownership and to explain how Locke understands the compatibility of private appropriation with this notion.”). The author further states: “Locke notes that ‘labour put a distinction between [acorns collected by a person] and the common.’” *Id.* at 147 (emphasis omitted).

273. See, e.g., Craig, *supra* note 198, at 36 (“The interdependent nature of human culture means that intellectual works are necessarily the products of collective labour and so ought to be owned collectively.”); Hettinger, *supra* note 176, at 38 (“If laboring gives the laborer the right to receive the market value of the resulting product, this market value should be shared by all those whose ideas contributed to the origin of the product. The fact that most of these contributors are no longer present to receive their fair share is not a reason to give the entire market value to the last contributor.”); Yen, *supra* note 18, at 554–55.

274. See Yen, *supra* note 18, at 554–55.

275. Shiffrin, *supra* note 182, at 167 (“Common ownership, for Locke, is not, I think, best seen as a mere starting place or an easily overturned default rule. It is also a concrete expression of the equal standing of, and the community relationship between, all people.”).

276. *Id.*

277. Article 17(1) of the UDHR states: “Everyone has the right to own property alone as well as in association with others.” UDHR, *supra* note 19, art. 17. Article 17(2), meanwhile, provides that no one “shall be arbitrarily deprived of his property.” *Id.*; see Helfer, *supra* note 10, at 978; Yu, *supra* note 83, at 92–94.

ICESCR recognizes a human right to property.<sup>278</sup> Property is not universally accepted as a human right. Indeed, it has been suggested that characterizing property as a human right is disingenuous because it facilitates claims that “legitimize . . . massive inequality.”<sup>279</sup>

IP scholars, focusing on Locke’s labor theory, have analyzed copyright and patent rights within a property model.<sup>280</sup> A human rights analysis along the same lines as the IP natural rights discourse could further entrench IP interests. Additionally, one could equate the right to the moral and material interests to one’s creative work with copyright protection so as to claim a natural right to more extensive protection. In that case, human rights would not have a moderating effect. Such an analysis presents at least two areas of concern.

First, from a natural rights perspective, when the issue is framed as an entitlement to the fruits of one’s labor, the property right becomes the salient aspect of the analysis. This inevitably leads to a conversation about expanding the property right to the maximum extent that one can do so without harming others.<sup>281</sup> It then requires that access be justified as an exception to a natural entitlement that the creator enjoys.<sup>282</sup> Second, human rights framing does not necessarily exclude corporations, who have been the main *demandeurs* and beneficiaries of increased global IP standards and harmonization.<sup>283</sup> To the contrary, corporations have utilized human rights law to protect their IP interests.<sup>284</sup>

Nonetheless, a human rights approach, depending on how it is framed and applied, could be used to restrict IP owners, particularly large corporations, from enforcing IP claims that impinge on important human interests, such as the right to food or the right to health. More specifically, if the human rights relating to IP protection

---

278. See generally ICESCR, *supra* note 93; ICCPR, *supra* note 127.

279. WALDRON, *supra* note 107, at 5 (“[T]here is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none. The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries.”).

280. See, e.g., Gordon, *supra* note 14, at 1581; Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1191 (2008); Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 156 (2002).

281. Gordon, *supra* note 14, at 1539.

282. See MERGES, *supra* note 11, at 273 (“[T]hat property does not confer the right to deny relief to those in ‘pressing want’; and . . . [those] in desperate need have an actual, binding *right* to the assets held by legitimate owners, and this right arises from the same source, and carries the same weight, as an initial appropriator’s right.”).

283. OseiTutu, *supra* note 76, at 38.

284. See *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 41, 57, 63 (2007).

are defined as rights belonging exclusively to human persons, corporations could be excluded from any natural entitlement to IP. Corporations may own IP, but they are not human creators or innovators.<sup>285</sup> As discussed, however, corporations can protect their property interests through human rights law—at least in Europe. Nonetheless, from a human rights perspective, IP, even if it is owned by corporations, should promote human flourishing.<sup>286</sup>

Moreover, while natural rights theories of property can have the effect of prioritizing the interests of the property holder, natural rights are not incompatible with distributive justice.<sup>287</sup> John Finnis suggests that, under a natural rights framework, justice requires redistribution when there are large wealth disparities.<sup>288</sup> This is because, in such instances, “the rich have failed to redistribute that portion of their wealth which could be better used by others for the realization of basic values in their own lives.”<sup>289</sup>

Even under a property-focused model, property owners may have some social obligation that limits what they can do with their property. This is based on the idea that property rights should entail some social responsibility.<sup>290</sup> Gregory Alexander advances a social function theory of property in US property law that promotes human flourishing.<sup>291</sup> Alexander contends that even if the social obligation is

285. Other theories of property may also support limits on corporate claims. Margaret Radin, for instance, advances a personhood theory of property, which is based on Hegel’s philosophy. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 977 (1982). She suggests that some types of property are more closely linked to the person than others. *Id.* at 993.

286. This should not be limited to economic arguments about employment generated by companies that own IP.

287. FINNIS, *supra* note 139, at 169 (“The good of personal autonomy in community, as we have just traced it in outline, suggests that the opportunity of exercising some form of private ownership, including of means of production, is in most times and places a requirement of justice. It is a requirement that strongly conditions, but also is conditioned by, the concrete application of the general principles and criteria of distributive justice.” (footnote omitted)).

288. *Id.* at 174.

289. *Id.* (“For the objective of justice is not equality but the common good, the flourishing of all members of the community[.]”).

290. M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem and Others*, 22 FLA. J. INT’L L. 191, 192 (2010) (“In essence, the idea of the social-obligation norm of property is that ‘[p]roperty rights should have their share of social responsibility.’ These ideas contrasted with the dominant conception of property as an absolute right in which the owner is free to do or not to do whatever the owner likes with the property. Duguit’s characterization of private property limits it by requiring a minimum level of social utility beyond which property no longer exists.”).

291. Alexander, *supra* note 223, at 748 (“The normative claim is that the version of the social-obligation norm that I develop here is morally superior to other candidates for the social-obligation norm. It is superior because it best promotes human flourishing, i.e., my version of the social-obligation norm enables individuals to live lives worthy of human dignity. In some

not explicitly recognized in US property law, courts occasionally incorporate something that approximates this norm into their decision making.<sup>292</sup>

As Matthew Mirow explains, the social function theory of property contrasts with the “despotic ownership” that represents the Blackstonian view of property.<sup>293</sup> Although the social function theory is not the dominant property model in the United States, a number of US legal scholars have become advocates for the social obligation norm to counter absolutist views of property.<sup>294</sup> A natural rights property-centric analysis of IP seems to align with the Blackstonian vision of property, whereas a human rights framework for IP, like Alexander’s social function norm for property, promotes human flourishing.

IP rights have implications for many other areas because these rights, by definition, create spheres of inclusion and exclusion. In particular, the legally constructed ability to restrict access to information and technology can impact various aspects of human flourishing. International human rights law contemplates multiple rights, thereby moving the IP natural rights discussion beyond the property interest. As such, this framing enlarges the range of interests that must be considered when analyzing competing claims, as well as the way these interests must be balanced against one another. In other words, human rights framing requires one to consider the broader community to which one belongs.

### *B. A Broader Community*

One might dispute whether human rights framing is superior to a natural rights property approach because, arguably, natural rights property theories also contain natural limits.<sup>295</sup> However, human rights framing can be distinguished from a natural rights property analysis because it more effectively acknowledges co-equal claims. If the creator or innovator has a more significant interest than

---

cases it may also promote social utility, economic efficiency, or similar values; but those values do not provide its primary normative foundation. Although the social-obligation theory developed here is not indifferent to efficiency, utilitarian, or similar considerations, its overriding normative commitment is to human flourishing.”).

292. *Id.*

293. Mirow, *supra* note 290, at 195 (“This new way of looking at property, the social-function model of property, was introduced in 1910 by the French doctoral student Henri Hayem, and a few years later, it was widely disseminated by Duguit. As Blackstone represents ‘despotic ownership,’ so Duguit has come to represent property’s ‘social function.’”).

294. *Id.* at 194.

295. *See supra* Part IV.

the user, then the user has a higher burden to meet. The property-centric natural rights analysis focuses on the property interest of the creator. As a result, the user—the person seeking to share a digital novel with a friend or seeking to access a patented medical test, for example—would need to prove that she would suffer harm if her actions were to be restricted by IP rights. If IP protection becomes the default position, then access must be justified as an exception. This has the effect of prioritizing the interests of the creator or owner of IP.

Mary Ann Glendon cautions that the “current tendency to frame every social controversy in terms of a clash of rights . . . impedes compromise, mutual understanding, and the discovery of common ground.”<sup>296</sup> However, as she reminds us, there is no “lone rights bearer,” because each person has rights *within the context of a community* to which that person belongs.<sup>297</sup> The natural rights discourse in US legal literature places significant value on the rights of an individual creator but gives relatively little weight to the community of which she is part. Yet every person necessarily functions within a wider community, starting at home with the family and extending through to the neighborhood, locality, region, or nation.

It is not necessarily the goal of human rights to ensure absolute equality, but rather to promote human flourishing for all the members of the community.<sup>298</sup> A human rights perspective is beneficial because it contemplates many rights, of which property is only one. For example, one may conceive of a community as being comprised of individual property owners.<sup>299</sup> Yet the most vulnerable individuals—those whose human rights may be most easily trampled upon—may not own property. They may not have a home, food, or other necessities. As a result, they may not be part of the defined community whose interests matter. In this regard, the community that a human rights perspective envisions is a broader community, and one that is more inclusive.

Human rights approaches to IP contemplate the wide array of rights that human beings enjoy, whereas natural rights IP rationales are largely based on an analysis that treats property rights as paramount.<sup>300</sup> Even if the property interest is considered a human

---

296. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, ix–xii (1991) (explaining that the penchant to do “whatever I want with my property”[] promotes unrealistic expectations and ignores both social costs and rights of the rights of others”).

297. *Id.* at 47–48, 74.

298. FINNIS, *supra* note 139, at 174.

299. MERGES, *supra* note 11, at 88.

300. GLENDON, *supra* note 296, at 43 (“In the case of property, it was not the Fifth Amendment, but the Lockean paradigm, cut loose from its context, that became part of our

right, this does not mean that it must lead to an expansion of property rights. Human rights are interdependent and indivisible.<sup>301</sup> The *other human rights* of other members of society are therefore as important as the property right or the material and moral interests of the creator. These may include, for example, the rights to health, food, education, and various other rights that promote human flourishing.<sup>302</sup>

The evaluation of competing interests changes when the user has an equal claim in the form of a human right. From a human rights perspective, property is no more important than other human rights. Importantly, there is no hierarchy of human rights—at least in theory.<sup>303</sup> Hence, the interests of the copyright or patent holder do not have a greater weight than the interests of other members of society, even if the competing interests are not property rights.

In practice, commentators have observed that there is a hierarchy of human rights.<sup>304</sup> For example, under the European Convention of Human Rights, some rights are prioritized.<sup>305</sup> Some rights are nonderogable, such as the right to life and the right to be free from torture and slavery.<sup>306</sup> It has been suggested, therefore, that rights can be balanced by taking various factors into consideration, including the seriousness of the interference and the social aim the rights purport to protect.<sup>307</sup>

Even if one were to accept a hierarchy of rights, there is no clear reason why IP rights should take precedence over the right to health or the right to culture, for example. Assuming a human right

property story as well as of our rights discourse. Blackstone's flights of fancy about property as absolute dominion stuck in American legal imaginations[.]”.

301. See, e.g., World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”).

302. See UDHR, *supra* note 19, arts. 25–26; see also *Human Development Index (HDI)*, U.N. DEV. PROGRAMME, <http://hdr.undp.org/en/content/human-development-index-hdi> [<https://perma.cc/BV59-3HGV>] (measuring human development by taking into account aspects of human flourishing such as health, and education and literacy in addition to economic well-being).

303. Ducoulombier, *supra* note 137, at 39.

304. *Id.* at 40–42.

305. *Id.* at 42.

306. *Id.* at 44 (citing *Al-Saadoon v. United Kingdom*, 2010-II Eur. Ct. H.R. 61, 125–26 (2010)).

307. *Id.* at 50–51.



to patent protection exists, it would seem that, in the event of a conflict, the right to food should take precedence over a multinational corporation's patent rights in genetically modified seeds.<sup>308</sup> In fact, if one were to create a hierarchy of rights, it would be by no means clear that property, which is not universally accepted as a human right and does not appear in either the ICESCR or the ICCPR, should be at the top of the list.

Furthermore, human rights may entail positive duties in addition to the obligation to refrain from causing harm.<sup>309</sup> Article 29(1) of the UDHR articulates this concept of duty to the community: "Everyone has duties to the community in which alone the free and full development of his personality is possible."<sup>310</sup> Article 29(2) addresses the need for limitations on the rights of each individual in order to respect the rights and freedoms of others and to meet the "just requirements of morality, public order and the general welfare in a democratic society."<sup>311</sup> The ICESCR preamble states: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant[.]"<sup>312</sup> The preamble to the ICCPR contains identical language.<sup>313</sup>

This duty to the community is distinct from the arguments presented by some natural rights scholars that one has a duty to refrain from causing harm.<sup>314</sup> Wendy Gordon argues, for example, that the public has an entitlement to the commons and that the

308. Thanks to participants of the Chicago-Kent/Loyola IP Colloquium for a thoughtful discussion on this question.

309. GLENDON, *supra* note 296, at 13; *see also* UDHR, *supra* note 19, art. 29. Article 29 states:

(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.

*Id.* art. 29(1)-(2).

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

311. *See id.* art 29(2).

312. ICESCR, *supra* note 93, pmbl (emphasis omitted).

313. *See* ICCPR, *supra* note 127, pmbl. ("Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant[.]").

314. Gordon, *supra* note 14, at 1538.

creator cannot rely on labor theory to harm the public.<sup>315</sup> However, the limitation on harming others is a lesser obligation than the community-oriented language adopted in these human rights instruments.

Admittedly, human rights are highly individualistic in many respects. For example, the civil and political rights primarily protect individual freedoms. These include, among others, the right to life and the right not to be arbitrarily deprived of one's life;<sup>316</sup> the right to be free from torture, slavery and servitude;<sup>317</sup> and the right to freedom of expression.<sup>318</sup> The economic, social, and cultural rights, however, reflect a greater recognition of some duty to the community. These rights are not limited to negative liberties, but include, for example, the right to food and the right to participate in cultural life.<sup>319</sup> Such rights are to be realized progressively. Ultimately, both the civil and political rights and the economic, social, and cultural rights entail respect for a wide array of rights which are properly enjoyed and circumscribed in relation to the rights of other individuals.

From an international law perspective, the obligation to respect human rights is an obligation on the state.<sup>320</sup> Nonetheless, human rights effectively regulate human conduct within the context of the community because, in carrying out its obligation to ensure that these rights are respected, the state will regulate the behavior of its citizens. For example, the state will intervene to isolate and punish

315. *Id.* at 1544, 1550–51 (“But by our own actions we cannot give ourselves a right to impair others’ fundamental human entitlements.”). The harm that Gordon identifies is excluding the public from using an intellectual product that has impacted the culture. *Id.* at 1553–54, 1567 (“That an intellectual product is new, would not have otherwise existed, and may initially bring benefit to the public, does not guarantee that later exclusions from it will be harmless. Tort law has long recognized that once action has begun, inaction can result in harm, not merely in the failure to confer a benefit. Analogously, once a creator exposes her intellectual product to the public, and that product influences the stream of culture and events, excluding the public from access to it can harm.” (footnotes omitted)). Thus, the public could make a reliance argument regarding IP-protected goods. *See id.* at 1567–68 (“[E]ven if A’s appropriation leaves ‘as much’ for others, it does not leave ‘enough, and as good.’ Mere quantitative identity is not enough. This is essentially a reliance argument: having changed people’s position, the inventor cannot then refuse them the tools they need for surviving under their new condition.”).

316. ICCPR, *supra* note 127, art. 6(1); *see also* Gordon, *supra* note 14, at 1561 (“But the same no-harm principle dictates that the laborer should not do harm to other peoples’ claim to the common. When the two conflict, the common must prevail. Were the result otherwise, the natural law would grant laborers a claim right to do harm, reversing Locke’s first law of nature that no harm be done.”).

317. ICCPR, *supra* note 127, arts. 7–8.

318. *Id.* art. 19.

319. *See* ICESCR, *supra* note 93, arts. 11, 15(1).

320. ALSTON & GOODMAN, *supra* note 140, at 1047. Accordingly, these are not rights created by the state, but rights that must be respected by the state.

those who deliberately cause physical harm or death to others.<sup>321</sup> Ultimately, therefore, human rights require one to consider the rights of other human beings in the exercise of one's own rights.<sup>322</sup>

## VII. CONCLUSION

Theoretical justifications for IP can affect the way the public, creators, and courts interpret and understand IP rights.<sup>323</sup> If society recognizes copyright as private property akin to physical property, such as a car, a home, or a book, then it becomes easier to view reproduction without consent of the copyright holder as theft. Similarly, if IP rights are treated as human rights or natural entitlements, there is potential to view these rights as more expansive and to view the state's ability to restrict these rights as relatively limited.

It is no surprise, therefore, that many proponents of natural rights to IP tend to support broader, and possibly more entrenched, IP protections. Yet human rights advocates suggest that human rights framing can have a moderating influence on IP law. The natural rights property analyses of IP and human rights have a common basis in the philosophies of John Locke and other natural rights philosophers. Thus, both human rights and natural rights property approaches to IP are derived from natural rights philosophies but seemingly lead to contradictory conclusions.

In exploring this apparent conflict, this Article identifies two ways that the human rights framework differs from and enriches the natural rights property-centric analysis of IP. First, the human rights narrative offers a broader framing than the natural rights IP model. Proponents of natural rights to IP focus on the individual property interest, thereby putting property rights at the center while relegating other rights to the periphery. This has the effect of elevating property above all other rights. The human rights approach, by comparison, provides a more complete perspective because it requires one to contemplate various interdependent rights.

The second, and related, way that human rights framing contributes to the natural rights discourse is by acknowledging the existence of equally valid competing claims. This does not mean that

---

321. See, e.g., FLA. STAT. § 782.04 (2017) (punishing conduct that results in the unlawful killing of another person).

322. GLENDON, *supra* note 134, at 177–79.

323. See *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2003) (upholding the Copyright Term Extension Act as a congressional decision that would “provide greater incentive for . . . authors to create and disseminate their work in the United States”); Mandel, *supra* note 149, at 275–76 (discussing how the way in which IP rights are framed can impact public perception).

the natural rights approach is more individualistic and the human rights perspective more communitarian. Indeed, human rights have historically been individualistic in many respects. However, international human rights framing enhances the conversation because it underscores the value of multiple human interests rather than giving preference to the property interest. Importantly, because the various human rights are interdependent and indivisible, they do not need to be assessed and defended in reference to their interference with individual property rights. Instead, all rights are weighed against one another without prioritizing the property right.

Human rights framing reinforces the idea that balance should be inherent in natural rights approaches to IP. This is because a human rights lens for IP injects a dignitary aspect that can assist in defining the scope of the rights that each person enjoys.<sup>324</sup> A human rights approach is beneficial insofar as it simultaneously promotes the individual interest and the interests of the community.

The natural rights property focus defines competing interests in relation to the individual property right and then carves out limits and exceptions in respect of that property interest. A human rights lens, by contrast, promotes human flourishing for the individual creator, as well as human flourishing for the community of individuals who use and enjoy the creator's contribution.

---

324. See ICESCR, *supra* note 93, pmb. (“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [and] [r]ecognizing that these rights derive from the inherent dignity of the human person[.]”); UDHR, *supra* note 19, pmb. (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]”).

