

Intellectual Property and the Right to Science and Culture: The Reports of the Special Rapporteur in the Field of Cultural Rights

Lea Shaver

1. Introduction

In recent years, the right to science and culture has emerged as a leading conceptual framework for reconciling intellectual property law with human rights. The textual foundation of the right to science and culture dates back to the 1948 Universal Declaration of Human Rights. Article 27 of the UDHR states: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) 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."

Despite clear grounding in the international human rights documents, this particular provision has long suffered from obscurity and confusion about its meaning. Fortunately, a new wave of scholarship provides a more solid conceptual foundation for the right to science and culture. This new literature understands the right to science and culture as having two complementary aspects. The "protection" aspect of the right calls for attention to the moral and material interests of authors and scientists. The "participation" aspect emphasises inclusion in the processes of creative expression and scientific discovery, as well as access to the fruits of cultural and technological creativity.

This dual nature allows the right to science and culture to play a unique role in intellectual property debates. The encounter between the international human rights and IP regimes had previously been framed strongly in terms of conflict between IP protection and human rights demands. In contrast, the right to science and culture frames both protection and access in human rights terms. It thus points towards solutions in the nature of integrating and reconciling intellectual property and human rights principles, rather than asserting the primacy of one set of interests over the other.

These ideas have now found acceptance within the United Nations system. The UN Special Rapporteur in the field of cultural rights, Farida Shaheed, first offered a detailed and authoritative interpretation of the right to science in a May 2012 report adopted by the UN Human Rights Council (A/HRC/20/26). Among many themes, this report considered the role of intellectual property in shaping enjoyment of the right to science. Between 2013 and 2015, the Special Rapporteur decided to focus even further on understanding and explaining the relationship between intellectual property and the right to science and culture. This subsequent work ultimately resulted in two major reports by the Special Rapporteur, one focused on copyright (A/HRC/28/57) and the other on patents (A/70/279).

This short article examines the origins, development, and conclusions of these two reports. I had the privilege to serve as a consultant to the Special Rapporteur in this process, producing drafts, participating in all meetings organised to solicit expert feedback on the drafts, and collaborating on their finalisation. My aim here is to provide an accessible overview of the substance of these reports, as well as to take the reader "behind the scenes" to appreciate some of the challenges and difficulties encountered during the process to provide insight on the choices ultimately made.

2. *Origins of the Special Rapporteur's Reports*

The Special Rapporteur's 2012 report had focused on elaborating an understanding of the right to enjoy the benefits of scientific progress and its applications. Among many themes, this report included a discussion of the interaction between the right to science and intellectual property law and policy. The Special Rapporteur felt that this topic merited even further discussion, however, and she began planning to produce a report that would squarely focus on the interaction of intellectual property and the right to science and culture, to be completed towards the end of her second and final term.

My scholarship on the intersection of intellectual property and the right to science and culture¹ had informed the preparation of the 2012 report. Because of this, I was invited to participate in a 2013 OHCHR seminar on the right to science, and ultimately to serve as consultant to the Special Rapporteur.

When I began this work, the terms of reference called for enquiry into all forms of intellectual property as they related to the right to science and culture. As the process of drafting and discussion continued, however, it became clear that this was not ideal. There was simply too much to be said. Yet it was not initially obvious how best to subdivide it.

Within Article 27 of the UDHR, paragraph 1 highlights cultural, artistic, and scientific participation, while paragraph 2 highlights protection of authorship. Article 15 of the ICESCR similarly places protection and participation in separate paragraphs. Yet dealing separately with these two aspects of the right to science and culture was unsatisfactory. This was very clearly articulated to me by both Farida Shaheed and Mylène Bidault, the OHCHR staff member overseeing drafting. The entire purpose of bringing the lens of the right to science and culture to bear on intellectual property is to be able to focus simultaneously on these dual aspects, in order to consider how best to integrate, balance, and reconcile them. Splitting participation and protection into separate reports would undermine this goal.

The second possibility was to focus one report on science and a second on culture. Both the UDHR and the ICESCR place *cultural* participation and *scientific* participation in distinct clauses. Scholars in this field also sometimes speak separately of "the right to science" or "the right to culture." Yet this approach was ultimately unsatisfying as well, because there is no clear dividing line between "culture" and "science." Consider, for example, the issue of ensuring widespread access to scientific publications and scholarship. Would this belong in the "culture" report, because it deals with text and publication? Or is it an issue of science, because the subject matter of the publication pertains to engineering and medicine? If the latter, must we treat scholarship about physics differently from scholarship about poetry? Indeed, scientific inquiry, theory, and literature, as well as technological innovation and products, are themselves properly recognised as cultural manifestations.

In the context of a comprehensive report, it made little sense to rely on a strict dichotomy between science and culture. It was also plainly essential to consider both the participation and protection dimensions within a single report. Indeed, an integrated approach was considered as uniquely complementing and adding value to the CESCR's existing general comments (Nos 17 and 21), which

1 Lea Shaver, "The Right to Science and Culture," *Wisconsin Law Review* 1 (2010): 121–84.

had followed the treaty structure. It was ultimately decided to elaborate two separate reports for each of the main categories of IP rights: one on copyright, and one on patents.

This seed was first planted by a comment at an early special forum, where the Special Rapporteur publicly shared her intent to produce a report on intellectual property and the right to science and culture and invited feedback. The delegate from Germany emphasised her concern that despite the common usage of the umbrella term "intellectual property," different forms of intellectual property in fact hold very different implications for human rights, urging us not to lose sight of these important distinctions when preparing the report.

Although the earliest draft of the report had contained some material about trademark law and other forms of intellectual property, it quickly became clear that by far the strongest implications for the right to science and culture lay in the copyright and patent areas, and that although the dynamics across these two fields of law share significant commonalities, they also present unique challenges and opportunities.

The boundary between copyright and patent law also has the virtue of being quite clear, in contrast to the very slippery distinction between science and culture. This made it very natural to separate discussion of the two legal fields into two reports. The main drawback is that this approach may give greater primacy to intellectual property than is due. The right to science and culture is broad, with many implications beyond intellectual property. In the end, however, this seemed the only practical way to meaningfully subdivide our work.

Future scholarship and international norm development can take an important lesson from this experience. Although the human rights treaty structure seems to encourage conceptual divisions between science and culture and between protection and participation, these divisions may obscure more than they reveal. In my opinion, it is more informative to approach the right to science and culture in a holistic, integrated way. The field of study can best be narrowed by approaching the right to science and culture through the lens of some other well-defined topic; such as internet freedom, the role of libraries, access to learning materials, or affordability of communications technology.

3. Copyright and the Right to Science and Culture

Within each report, the text does separately discuss the two distinct aspects of protection and participation, while taking care to relate the two aspects. The human rights documents consistently place "participation" ahead of "protection" structurally. The copyright report however, presents the two topics in reverse order. This reversal was important in order to clarify, as early as possible, common misconceptions about the protection aspect. It was also important to avoid giving any impression that the Special Rapporteur considered participation to be more important than protection.

3.1 Protection of Authorship

A major objective of the copyright report was to firmly put to rest the misunderstanding that copyrights are human rights, or that copyright protection is of equal status with fundamental human rights. The report states unambiguously that "this equation is false and misleading" (para. 26). Yet this much was nothing new. Human rights authorities have repeatedly denied the equation of the

right to science and culture with copyright (e.g. CESCR General Comment No. 17, paras 1–3). Yet the myth has persisted and it was essential for this report to clarify this important point.

3.1.1 Distinguishing copyright from protection of authorship

To move things forward, we sought to offer improved terminology for speaking about the related but distinct concepts of copyright protection and the human rights of authors. The report coins the term "protection of authorship" (paras 26–9) as shorthand for "the right of everyone ... to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author" (ICESCR Art. 15(1)(C)). It goes on to emphasise that "protection of authorship" is not a synonym or euphemism for copyright, but rather a human rights standard against which copyright law must be judged (paras 29, 100).

3.1.2 What the right to protection of authorship requires

We felt it was also crucial to offer a more detailed and satisfying explanation of the precise relationship between protection of authorship and copyright protection. The report accordingly emphasises that some aspects of copyright protection are required, or at least strongly encouraged, in order to realise the duty of protection of authorship (para. 26). Yet in other ways, copyright law often goes too far, overly protecting works against adaptation and non-commercial sharing in ways that advance the interests of corporations, but undermine the interests of authors (para. 26).

Protection of authorship as a human rights concept requires a focus on the interests of human creators; where an individual creator has sold their copyright to a secondary rights-holder, protection of copyright may diverge from protection of authorship.

For example, national copyright laws may be designed in ways that promote or undermine the bargaining power of creators when they negotiate with publishers or other corporations that help to commercialise their works. This may be accomplished through reversion rights (para. 44), *droit de suite* (para. 45), and statutory licensing provisions that guarantee authors a certain share of the resulting income (para. 46). The report emphasises:

Given the inequality of legal expertise and bargaining power between artists and their publishers and distributors, States should protect artists from exploitation in the context of copyright licensing and royalty collection. In many contexts, it will be most appropriate to do so through legal protections that may not be waived by contract. (para. 101)

The report also notes that the moral and material interests of authors can and must be advanced through mechanisms in addition to copyright protection. "Copyright law is but one element of protection of authorship. States are encouraged to consider policies on labour practices, social benefits, funding for education and the arts, and cultural tourism from the perspective of that right" (para. 103).

The report thus pushes forward the discussion about authors' rights as human rights. "Protection of authorship requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries" (para. 29). The report draws attention to potential conflicts between the interests of human authors and corporate copyright holders. The human rights perspective requires that the interests of authors, as vulnerable parties negotiating with more

economically powerful and legally sophisticated entities, be legally protected. This can occur only when lawmakers are cognisant of these conflicts of interest and empower authors to speak for themselves, rather than allowing rights holders speak for authors (para. 99).

3.1.3 Copyright and the human right to property

Whether advanced by individual or corporate copyright owners, the claim to copyright protection itself as a human right better fits within the paradigm of the right to property.

The Special Rapporteur was careful to acknowledge that there is no international consensus recognising property as a human right. Yet we felt it was important to address the European approach to recognising a human right to protection of (intellectual) property (paras 52–4). This discussion reveals that human rights law requires much less than copyright owners frequently claim. Specifically, the European human right to property requires states to respect the copyright laws that they have adopted, but does not mandate any particular level of copyright protection (para. 53). Time limits on copyright's term, compulsory licensing, and copyright exceptions and limitations are entirely consistent with the well-recognised appropriateness of state regulation to fulfil the "social function" of property (para. 53).

The very brief discussion of this topic within the copyright report highlights the need for future research evaluating copyright law through the lens of the human right to property. At the time the copyright report was drafted, there was not an adequate basis in the literature to further develop this important discussion of copyright as a property right.

3.2 Cultural Participation

My prior scholarship has suggested that intellectual property protection is inherently in tension with human rights demands for participation, because it erects legal barriers to public access.² This does not, however, lead to the absurd conclusion that intellectual property law as a whole must be condemned or abandoned. Instead, recognition of this tension calls for special efforts to address it, reconciling the goals of human rights with the goals of IP protection through careful legal tailoring of intellectual property rules.

The Special Rapporteur's report proceeds in this vein. Rather than discussing the problem itself at length, the report more productively focuses on solutions. As the draft and discussion evolved, it became clear that two major solution spaces deserved emphasis in the final report: copyright exceptions and limitations, and open licensing.

3.2.1 Copyright exceptions and limitations

Copyright exceptions and limitations to promote cultural participation emerged as the most important solution space for reconciling copyright law with the right to science and culture. Particular credit for this emphasis goes to Professor Ruth Okediji, whose cogent feedback on an early draft of the report emphasised exceptions and limitations as the most important and promising tool within copyright law to strike an appropriate balance between protection and participation.

² Shaver, "The Right to Science and Culture."

As explained in the report, copyright law not only prohibits commercially exploitative exact copying (piracy), but a wide range of uses, including translation, performance, and modification, even when the user invests significant new creativity of their own.

Because of the broad application of copyright protection, countries have long found it necessary to affirmatively permit certain types of socially desirable uses. Thus, nearly every country has a provision allowing for small quotation within the context of new work. Many countries also allow extensive copying for the purposes of parody or pastiche, and full copying for classroom, research, or personal use. A few countries also have open-ended flexible exceptions, such as "fair use" in the United States (paras 20–5).

The report calls for even greater use of copyright exceptions and limitations to realise human rights goals (paras 61–73). "States have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations" (para. 104). Copyright exceptions and limitations may facilitate broader access to learning materials (para. 64), provide greater room for non-commercial culture (para. 65), and address the special needs of disadvantaged groups such as persons with disabilities (para. 67) and linguistic minorities (paras 68–70).

The report expressed significant concern that copyright exceptions and limitations are currently underutilised due to international legal impediments (paras 74–6). Copyright treaties set high standards in areas vital to the interests of rights holders, such as length of term. Yet these treaties have largely treated exceptions and limitations as an optional matter for national practice (para. 74). Indeed, copyright treaties currently impose significant restrictions on national use of exceptions and limitations, subjecting them to a "three-step test." Problematically, this standard remains very unclear, thereby discouraging national experimentation and innovation (para. 75). The report lends its weight to existing calls that "The 'three-step test' of international copyright law should be interpreted to encourage the establishment of [a robust and flexible] system of exceptions and limitations" (para. 73).

The report also considered arguments that more countries should adopt open-ended, flexible exceptions such as the US system of "fair use" (para. 73), but does not specifically endorse any particular solution, recognising this as an issue requiring further study. Instead, the report calls for further exploration of an international fair use provision and international lists of minimally required exceptions and limitations (para. 109).

In contrast, the report does adopt a clear stance on the often controversial issue of uncompensated exceptions and limitations, insisting that uncompensated exceptions are compatible with the human right to protection of authorship, and will be essential in many contexts (paras 71–2, 105–6). "States should enable allowance for uncompensated use of copyrighted works, in particular in contexts of income disparity, non-profit efforts, or undercapitalised artists, where a requirement of compensation might stifle efforts to create new works or reach new audiences" (para. 106).

The report also notes the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled as a promising example of international cooperation to promote exceptions and limitations (paras 74, 76, 109) and calls for further efforts in this vein, including current efforts to mandate exceptions and limitations to promote education and the functions of libraries (para. 116).

Recognising the disappointing failure of the Stockholm Protocol to reduce copyright barriers to translation (paras 69–70), the report also recommends that “Further studies should be undertaken to examine what reforms are needed to better enable access to copyrighted materials in all languages, at affordable prices” (para. 118).

3.2.2 Open licensing

In addition to the primary emphasis on realising the human rights potential of copyright exceptions and limitations, the copyright report also highlights the value of open licensing for promoting cultural participation—specifically mentioning Creative Commons, Free Art, and the GNU General Public License as leading examples. The report notes that open licensing not only promotes cultural and scientific participation, but also promotes the moral interests of scientific or academic authors in having their works travel as widely as possible, ensuring them the greatest credit for their ideas and contributions (para. 81).

The report therefore commends the growing practice of Open Access scholarship and Open Educational Resources as efforts to be encouraged in the name of human rights (paras 82–4). Within the report’s section on “Examples of Good Practices,” it highlights Mexico’s recent initiative to transition to open access scholarly publishing (para. 87), South Africa’s support for openly licensed textbooks (para. 88), and the work of Indian non-profit Pratham Books in producing openly licensed children’s books that address the need for affordable, multilingual materials for supporting literacy development (para. 89). The report recommends that “Public and private universities and research agencies should promote open access ... especially through Creative Commons licenses” (para. 113), and calls upon states to “redirect financial support from proprietary publishing models to open publishing models” (para. 112).

4. Patent Policy and the Right to Science and Culture

Dividing the Special Rapporteur’s work on intellectual property into separate reports on copyright and patents allowed for more detailed and careful analysis of the human rights implications of each regime. The Special Rapporteur also took the strategic decision to finalise the copyright report first, while saving the patent report for later. This prioritisation was motivated in significant part because of a particular conceptual challenge facing the patent report, namely whether to understand “inventors” as falling within the category of “authors.”

4.1 Inventors as Authors

In both the UDHR and the ICESCR, the protection aspect of the right to science and culture is specifically framed with regard to works of authorship. To intellectual property experts, the term “author” clearly invokes copyright law. It is less clear whether the human right to protection of moral and material interests similarly applies to inventors and patents.

Several experts consulted during the drafting strongly urged that the report should clarify that the human right to protection of authorship relates specifically to copyright law, and that there is no corresponding connection to patent protection. In their view, there was nothing to be gained and much to be lost from recognising a human rights foundation for claims to legal protection of inventions and discoveries. The patent report acknowledges this debate, explains some of the

reasons offered in defence of the narrow view, and notes the ambiguity of the drafting history and the primary documents (para 28–31).

Ultimately, however, the Special Rapporteur felt compelled to leave the door open to a broader interpretation of authorship, concluding that “the term ‘authors’ within the right to science and culture can be interpreted to include inventors and scientific discoverers” (para. 34). The CESCR had previously declared that the term “author” includes a “creator” of “‘scientific productions,’ such as scientific publications and innovations, including knowledge, innovations, and practices of indigenous communities.”³ Although far from conclusive, this precedent pointed towards a more expansive interpretation of authorship than the traditional notion imported from copyright law. The Special Rapporteur was also concerned not to undermine a human rights basis for protection of traditional knowledge (paras 35–45), as well as to honour the deep-rooted principle of human rights interpretation which prefers expansive interpretations over narrowing ones.

While therefore declining to conclusively distinguish “authorship” from “inventorship,” the report emphasises that protection of the moral and material interests of scientific creators should not be understood as a synonym or euphemism for patent protection. The introductory Summary of the report highlights in deliberately plain language: “There is no human right to patent protection” (see also para. 90). The report reiterates long-standing reasons given for distinguishing patent rights from human rights (para. 32). It further emphasises that even the right to property provides a slender human rights basis for intellectual property protection, and that compulsory licences and denials of patent applications are not to be considered as limitations on human rights, unless done on an arbitrary or capricious basis (para. 33).

In my opinion, this result represented the best possible compromise on a particularly difficult issue. Yet I remain uneasy about what this ambiguous guidance on the human rights of scientific innovators portends for future norm elaboration. The report emphasises that the human right to protection of authorship “does not provide patent holders grounds to challenge patent rules as providing inadequate protection of their financial or commercial interests. Nor can the right ... be used by States to defend patent laws that inadequately respect the right to science and culture.” Nevertheless, I suspect that the right to science and culture will continue to be invoked towards precisely these ends, and that even the unequivocal statement that “there is no human right to patent protection” may hold little power to discourage this. As long as states retain the ability to defend protectionist patent rules as “within the margin of appreciation” for national balancing of conflicting human rights demands, the right to science and culture may do too little to constrain patent expansionism.

3 General Comment No. 17, para. 9. The term “innovations” appears exactly twice in General Comment No. 17, and is never defined. It is thus a matter for speculation what the Committee intended by the term. Obviously neither scientific publications nor scientific knowledge can be patented. Therefore, nothing decisively indicates that “innovations” was intended as a synonym or euphemism for “inventions.” Despite the availability of “inventions” as a legally defined term, the General Comment refers to “inventions” only once, urging that states “should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights” (para. 35). While I did not take part in these debates, my suspicion is that the Committee was similarly conflicted about whether protection of authorship ought to extend analogously to protection of inventorship and intended to avoid answering it one way or the other in the General Comment.

4.2 Access to Science and Technology

In contrast to the challenges encountered in interpreting the "protection" aspect of the right to science and culture, the "participation" portion of the patent report came more easily.

This section of the report begins by clarifying that the human right "to enjoy the benefits of scientific progress and its applications" includes technologies that may be protected by patents (para. 46). The report emphasises that the tension between patent exclusivity and the need for broad access to new technologies extends beyond the most famous context of access to medicines, and that a broad set of technologies must be considered as essential for realisation of the human rights to an adequate standard of living and cultural and scientific participation (paras 47–55).

The report also expresses concern that over-reliance on patents may negatively impact scientific research and technological development. An overemphasis on patents may divert university researchers away from topics of public concern towards more profitable ventures (para. 58), impede third parties from further improving upon patented technologies (para. 59), and negatively impact agricultural innovation, especially among small farmers (para. 60). The report thus emphasises that "States must ensure that their patent laws are well-designed to promote the right of the public to participate in scientific progress, both through universal access to essential technologies and by eliminating or overcoming barriers to scientific research and technological development" (para. 62). In terms of specific solutions, the patent report focuses on several themes.

First, the report broadly emphasises the need to ensure that patent laws and policies adequately respect relevant human rights (paras. 95–101). "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" (para. 90). International patent instruments should contain safeguards for human rights (para. 95), WTO bodies should take human rights into account when interpreting TRIPS provisions (para. 96), states should conduct human rights assessments of their domestic patent rules (para. 97), and national courts should review these rules for compliance with human rights (paras 98–9). "Implementing unreasonably strong patent protection may constitute a violation of human rights" (para. 89).

Second, the report emphasises that although exclusions, exceptions and flexibilities are optional from the perspective of trade law, they are obligatory from the perspective of human rights (para. 72). "States have a positive obligation to provide for a robust and flexible system of patent exclusions, exceptions and flexibilities based on domestic circumstances, including through the establishment of compulsory and government use licences when needed" (para. 103).

States have a human rights obligation not to support, adopt, or accept intellectual property rules, such as TRIPS-Plus provisions, that would impede them from using exclusions, exceptions and flexibilities and thus from reconciling patent protection with human rights. International agreements that do not provide sufficient flexibility should be renounced or modified. (para. 104)

The report highlighted good practices, including India's exclusion of many medical technologies from patentability (para. 77), the rejection of patents on human genes (para. 78), Brazil's patent re-examination procedures (para. 79), and compulsory licensing in Brazil, Ecuador, India, Indonesia, Malaysia, and Thailand (para. 80).

Third, the report calls for increased efforts to promote scientific research and technological development through non-patent mechanisms (paras 108–13). Patents are unlikely to stimulate research and development on topics of specific concern to vulnerable groups (para. 56). Alternative incentive systems such as tax incentives, public grants, procurement commitments, and prize competitions have an important role to play, but are not a substitute for a well-functioning patent system (paras 57, 91). "Universities should ensure that their licensing approaches are compatible with their primary mission to explore and develop technological innovations for the benefit of society" (para. 111). "Plant variety rules should not impede the right of small farmers to use, save, exchange, and sell farm-saved seeds and to continue to engage in experimentation" (para. 110).

5. Conclusions

Several particularly important contributions of the Special Rapporteur's work in the area of intellectual property should be highlighted. Both reports advance the understanding of the relationship between intellectual property and human rights in significant ways.

The copyright report distinguishes between copyright protection and the protection of authorship. From a human rights perspective, protection of authorship is the goal, and the standard by which appropriate copyright laws must be judged. This requires ensuring that copyright law is well designed to serve the interests of human authors, particularly where these diverge from or conflict with the interests of corporate rights holders. This requires protections for human authors that cannot be waived by contract, in order to prevent exploitation. In order to ensure that the right to cultural participation is adequately protected, states have a human rights obligation to make extensive use of copyright exceptions and limitations, including uncompensated exceptions in appropriate contexts. The report is also the first UN human rights document to identify open licensing as a human rights necessity beyond the context of scientific literature, to include also educational and cultural materials.

The patent report soundly rejects the notion of a human right to patent protection, while leaving open the door to human rights claims by individual and community creators to share in the benefits of their own innovations. Importantly, it extends the recognition of the right to science beyond well-recognised contexts like medicines and food to more broadly insist upon equitable access to technologies. To achieve this goal, the patent report calls for human rights safeguards and the ability to challenge unreasonably protective patent policies. Similarly to the copyright report's emphasis on exceptions and limitations as a human rights obligation, the patent report also emphasises that although exceptions and compulsory licensing are treated as optional within the trade regime, they are obligatory under human rights law where necessary to promote public access to technology, particularly those technologies essential for a life with dignity. The Special Rapporteur expressed particular concern that international IP treaties must leave states room to implement their human rights obligations. States must also recognise the limits to what patent incentives can achieve, and design alternative institutions for encouraging research and innovation to benefit all of society.

Apart from substantive guidance for copyright and patent laws compatible with the right to science and culture, both reports also emphasised the importance of a participatory process in shaping those rules. Because copyright and patent protections offer immense financial benefits to certain companies, they will inevitably be the subject of intense corporate lobbying. Individual creators, vulnerable groups, and the general public typically have less influence, particularly in international negotiations that are characterised by secrecy and a democratic deficit.⁴ Both reports accordingly call for international IP instruments to be negotiated more transparently, with greater input from authors and the public at large.⁵ The patent report highlights the secrecy surrounding negotiation of the Trans-Pacific Partnership and the imposition of investor–state dispute settlement requirements as particularly problematic (paras 73–5). Exclusion of the general public from the policymaking process around intellectual property is itself identified as contrary to human rights obligations, independent from the substance of the resulting policies.

The Special Rapporteur's reports on intellectual property and the right to science and culture also point to areas in which additional scholarly research is still needed. The intersection of these two legal regimes begs for additional analysis through the paradigm of the human right to property. Difficult questions also remain of exactly what scientific creators' human right to protection of their moral and material interests means for intellectual property law.⁶ Further work must also be done to further clarify the human right to protection of authorship, build upon the copyright report's framework for distinguishing between this right and copyright protection as such.

The Special Rapporteur's copyright report happened to come out as the European Parliament was considering comprehensive harmonisation of copyright laws. A draft report prepared by Julia Reda gave significant prominence to the recommendations of the Special Rapporteur, advocating both for stronger protection of artists vis-à-vis their contractual partners and greater use of exceptions and limitations. Reda's recommendations were significantly watered down in the final report adopted by the European Parliament, which insisted upon "freedom of contract" and while encouraging updating of existing exceptions and limitations to reflect technological changes and meet the needs of libraries, reflected continuing controversy over whether these could ever be uncompensated.

Despite the achievements of the Special Rapporteur's reports, not everyone was satisfied with them. In particular, lobbyists from the copyright industries found the Special Rapporteur's activities and conclusions highly problematic. These groups took an intense interest in the Special Rapporteur's work even before the reports were concluded, submitting dozens of contributions for her consideration. The general themes of these letters were that the industry groups represent the interests of creators, who benefit from greater copyright protection. Many of the contributions also identified digital piracy as the single greatest threat to authors' human rights. The Special Rapporteur's reports could not adopt these views.

This prompted some countries highly influenced by these groups to condemn the Special Rapporteur's reports as "unbalanced." Of course, within intellectual property debates, "balance" has always been in the eye of the beholder. Everyone agrees in the abstract on the need for balance, yet they hope for

4 A/HRC/28/57, paras 19, 92–3; A/70/279, paras 73–5.

5 A/HRC/28/57 paras 92–3; A/70/279, paras 73–6, 92–4.

6 See Peter K. Yu, "The Anatomy of the Human Rights Framework for Intellectual Property," *Southern Methodist University Law Review* 69 (2016): 37–96.

the balance to be struck in their favour. The copyright industries have long been accustomed to having their opinions reflected in the trade and parliamentary spheres. To have a legal institution take a less agreeable view appears to have come as a bit of a shock. This suggests that public interest groups in the IP space should fully explore how they can continue to leverage human rights institutions as a favourable ground for advancing demands of access, inclusion, development, and equity.