

Toward a Human Rights Framework for Intellectual Property

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INTRODUCTION

The international intellectual property system is on the brink of a deepening crisis. Government officials, civil society groups, and private parties are staking out opposing positions on a variety of issues in an increasingly wide array of international venues. The issues range from patented medicine to biodiversity and traditional knowledge, and from digital content and webcasting to the harmonization of procedural rules. The results are increasingly dysfunctional: acrimonious and unresolved clashes over substantive rules and values, competition among international institutions for policy dominance, and a proliferation of fragmented and incoherent treaty obligations and nonbinding norms.

This ominous state of affairs has evolved fairly rapidly. The last decade has seen a dramatic expansion of intellectual property protection standards, both in their subject matter and in the scope of the economic interests they protect. Advances in technology have engendered demands for new forms of legal protection by businesses and content owners. And with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”),¹ nation states linked intellectual property rights to the world trading system, creating new and robust enforcement opportunities at the international and national levels. These interrelated developments have made intellectual property rights relevant to a broad range of value-laden economic, social, and political issues with important human rights implications, including public health, education, food and agriculture, privacy, and free expression.²

A recent wave of resistance to this rapid expansion of intellectual property rights has brought the work of the World Trade Organization

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

² For earlier analyses of these trends, see Peter Drahos, THE UNIVERSALITY OF INTELLECTUAL PROPERTY RIGHTS: ORIGINS AND DEVELOPMENT 19-23 (1998), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (documenting proceedings of panel discussion held by World Intellectual Property Organization in collaboration with Office of U.N. High Commissioner for Human Rights); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 22 NETH. Q. HUM. RTS. 167, 171-75 (2004) [hereinafter Helfer, *Conflict or Coexistence*]; Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 26-45 (2004) [hereinafter Helfer, *Regime Shifting*].

(“WTO”) and the World Intellectual Property Organization (“WIPO”) — the two most prominent international intellectual property lawmaking venues — to a virtual standstill. In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders’ rights; and the protection of geographical indications have remained unresolved for nearly four years.³ Negotiations in WIPO are faring little better. Industrialized nations are pressing for new treaties relating to substantive patent rules, audiovisual works, and broadcasters’ rights. Developing countries and consumer groups have countered with a “development agenda” that calls for a moratorium on new treaty-making and instead demands that WIPO give greater attention to public access to knowledge and to non-proprietary systems of creativity and innovation. These conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents’ proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism.⁴

With forward motion in the WTO and WIPO effectively stalled, both proponents and opponents of intellectual property rights have sought out greener pastures. Developing countries and their like-minded nongovernmental organization (“NGO”) allies have decamped to more sympathetic multilateral venues — most notably the World Health Organization (“WHO”), the Food and Agriculture Organization, and the conferences of the Convention on Biological Diversity — where they have found more fertile soil in which to grow proposals that seek to roll back intellectual property rights or at least

³ See, e.g., Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT’L L. 317, 324-26 (2005); *Scant Progress in GI Discussions*, BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Sept. 27, 2005, available at <http://www.ictsd.org/weekly/05-09-28/WTOinbrief.htm#2>; *TRIPS Council Meeting Suspended in Effort to Meet Public Health Deadline*, BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Mar. 16, 2005, available at <http://www.ictsd.org/weekly/05-03-16/story1.htm>.

⁴ See, e.g., Daniel Pruzin, *WIPO Members Reach Compromise on Advancing Patent Law Negotiations*, 22 Int’l Trade Rep. (BNA) 1622 (Oct. 13, 2005) (“The United States and a group of mainly developed countries have been at loggerheads since May 2003 . . . over the future direction and scope of negotiations on WIPO’s proposed Substantive Patent Law Treaty.”); Michael Warnecke, *WIPO Fails to Reach Consensus on Including Webcasts in Broadcasting Treaty*, 70 Pat. Trademark & Copyright J. (BNA) 599 (Sept. 30, 2005) (describing disputes over proposed broadcasting treaty).

For some commentators, this deadlock is a salutary result. See Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279, 312-13 (2004) (calling for moratorium on additional international intellectual property lawmaking).

eschew further expansions of the monopoly privileges they confer. Developed countries and intellectual property owners, too, are leaving the field, not for other multilateral organizations but for bilateral and regional trade and investment treaties. The price these countries demand for expanded market access and foreign investment is adherence to intellectual property rules that equal or exceed those found even in the most protective multilateral agreements.⁵

In this maelstrom of reaction, resistance, and regime shifting, international human rights law is poised to become an increasingly central subject of contestation. For more than a century, international agreements have protected certain moral and material interests of authors, inventors, and other intellectual property creators. Until very recently, however, the conceptualization of these intellectual property interests as internationally protected human rights was all but unexplored. Intellectual property has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows.⁶

What little can be discerned about the intellectual property provisions of human rights law reveals a concern for balance. Both the 1948 Universal Declaration of Human Rights (“UDHR”) and the 1966 International Covenant on Economic, Social, and Cultural Rights (“ICESCR” or “the Covenant”) recognize the moral and material interests of authors and inventors⁷ and the right “to enjoy the arts and

⁵ See Brian Knowlton, *U.S. Plays It Tough on Copyright Rules*, INT’L HERALD TRIB., Oct. 4, 2005, at 1, available at <http://www.iht.com/articles/2005/10/03/business/iptrade.php> (“So determined is the United States to strengthen copyright and patent protection that it is, in effect, exporting its own standards through free trade agreements reached with countries or regions as diverse as Australia, Singapore and Central America.”); see also *Concerns Raised Over Access to Medicines Under Trade Treaties*, BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Jul. 14, 2004, available at <http://www.ictsd.org/weekly/04-07-14/story3.htm>; GRAIN, *BILATERAL AGREEMENTS IMPOSING TRIPS-PLUS INTELLECTUAL PROPERTY RIGHTS ON BIODIVERSITY IN DEVELOPING COUNTRIES* (2005), http://www.grain.org/rights_files/TRIPS-plus%20table_September_2005.pdf.

⁶ Recently, a few commentators have started to explore in detail specific facets of the intersection between intellectual property law and human rights law, such as the relationship between copyright and freedom of expression. See generally, *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* (Jonathan Griffiths & Uma Suthersanen eds., 2005); *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION — INTELLECTUAL PROPERTY — PRIVACY* (Paul L.C. Torremans ed., 2004) [hereinafter *COPYRIGHT AND HUMAN RIGHTS*].

⁷ Universal Declaration of Human Rights art. 27, G.A. Res. 217A(III), U.N.

to share in scientific advancement and its benefits.”⁸ These clauses offer protection to creators and innovators and the fruits of their intellectual endeavors. But they also recognize the public’s right to benefit from the scientific and cultural progress that intellectual property products can engender.

Without elaboration, however, these textual provisions provide only a faint outline of how to develop human rights-compliant mechanisms to promote creativity and innovation. They also invite governments and activists on both sides of the intellectual property divide to use the rhetoric of human rights to bolster arguments for or against revising intellectual property protection standards in treaties and in national laws.⁹ Without greater normative clarity, however, such “rights talk”¹⁰ risks creating a legal environment in which every claim (and therefore no claim) enjoys the distinctive protections that attach to human rights.¹¹

The skeletal and under-theorized intellectual property provisions of human rights law also leave critical questions unanswered. What, for

GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social, and Cultural Rights arts. 15(1)(b), (c), Dec. 16, 1966, 993 U.N.T.S. 3, 5 [hereinafter ICESCR] (recognizing right “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” and to “to enjoy the benefits of scientific progress and its applications”).

⁸ UDHR, *supra* note 7, art. 27(1).

⁹ See, e.g., Tom Giovanetti & Merrill Matthews, Institute for Policy Innovation, *Intellectual Property Rights and Human Rights*, IDEAS, Sept. 2005, at 2, 2), available at <http://www.ipi.org> (asserting that “IP protection has long been recognized as a basic human right” and that those who “want to weaken IP protections” are advocating “expropriation of others’ property” and engaging in “ironically, one of the most ‘anti-human rights’ actions governments could take”); Third World Network, Statement at the Third Intersessional Intergovernmental Meeting (July 22, 2005), <http://lists.essential.org/pipermail/a2k/2005-July/000539.html> (challenging assertion that “IP rights have been recognized at human rights” as “a misreading of the existing international conventions,” and that [t]he [ICESCR recognizes] rewarding intellectual contribution but does not specifically mention ‘IP rights’”); see also Letter from Shari Steele, Staff Attorney, Electronic Freedom Foundation, to WIPO Internet Domain Name Process (Nov. 6, 1998), available at http://www.eff.org/Infrastructure/DNS_control/19981106_eff_wipo_dns.comments (“We believe that the provision of Internet domain names is fundamentally a human rights issue, not an intellectual property issue.”).

¹⁰ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

¹¹ See, e.g., Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984); John H. Knox, *Beyond Human Rights: Developing Private Duties Under Public International Law* 17 (Sept. 1, 2005) (unpublished manuscript, on file with author).

example, is the relationship between the intellectual property clauses of the UDHR and ICESCR and the remaining civil, political, social, and economic rights enshrined in human rights pantheon? And how do human rights law's intellectual property rules interface with the rules set out in multilateral agreements emanating from WIPO, the WTO, and regional and bilateral trade and investment treaties?

These uncertainties — together with the deepening crisis facing the international intellectual property system — highlight the need to develop a comprehensive and coherent “human rights framework” for intellectual property law and policy. The questions to be answered in constructing such a framework are foundational. They include issues as basic as defining the different attributes of the “rights” protected by each system; whether relevant standards of conduct are legally binding or only aspirational; whether such standards apply to governments alone or also to private parties; and adopting rules to resolve inconsistencies among overlapping international and national laws and policies. A human rights framework for intellectual property must also distinguish situations in which the two legal systems have the same or similar objectives (but may employ different rules or mechanisms to achieve those objectives), from “true conflicts” of goals or values that are far more difficult to reconcile.¹² Finally, the framework must include an institutional dimension, one that considers the diverse international and domestic lawmaking and adjudicatory bodies in which states and non-state actors generate new rules, norms, and enforcement strategies.

This Article offers a preliminary foray into these novel and complex issues. Part I begins with a brief overview of the textual and historical foundations of the intersections between human rights and intellectual property, focusing on the underlying legal and institutional factors that have fomented recent conflicts between the two legal regimes. Part II describes the genesis of those conflicts in greater detail, focusing on the rights of indigenous peoples and traditional knowledge and on the U.N. human rights system's response to TRIPS and bilateral and regional intellectual property treaties. Part III turns to an analysis of two documents, recently drafted by the U.N. Committee on Economic, Social, and Cultural Rights, which suggest a partial and tentative outline of a human rights framework for intellectual property. I use these documents to flesh out the

¹² Cf. BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77, 107 (1963) (distinguishing between false conflicts, which “present no real conflicts problem” and “true conflicts,” which “cannot be solved by any science or method of conflict of laws”).

framework in greater detail and offer a preliminary approach for mediating the two fields of law and policy. Part IV analyzes the rapidly changing institutional environment in which new actors are generating new legal rules relevant to the human rights-intellectual property interface. I focus in particular on recent treaty-making initiatives in the U.N. Educational, Scientific and Cultural Organization (“UNESCO”), WHO, and WIPO, each of which uses international human rights law in different ways to challenge existing approaches to intellectual property protection and to revise the mandates of intergovernmental organizations.

I. THE TEXTUAL AND HISTORICAL FOUNDATIONS OF A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

If asked to identify the freedoms and liberties protected as human rights, even the most knowledgeable observers would be unlikely to list the right of authors and inventors to protect the fruits of their intellectual efforts. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of principles than the UDHR provides that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”¹³ The UDHR’s drafting history makes clear that the protection of authors’ rights was no accident, even if the drafters’ precise intentions remain elusive.¹⁴ Support for these rights also finds

¹³ UDHR, *supra* note 7, art. 27(2).

¹⁴ JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 220-21 (1999). As one scholar recently observed, although the motivations of governments who favored inclusion of article 27 in the UDHR are somewhat obscure, the proponents appear to have been divided into two camps:

What we know is that the initial strong criticism that intellectual property was not properly speaking a Human Right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in favour because they felt that the moral rights deserved and needed protection and met the Human Rights standard and those who felt the ongoing internationalization of copyright needed a boost and that this could be a tool in this respect.

Paul Torremans, *Copyright as a Human Right*, in COPYRIGHT AND HUMAN RIGHTS, *supra* note 6, at 6. The intentions of the drafters of the analogous provisions of the ICESCR seem equally obscure. See Maria Green, Int’l Anti-Poverty L. Ctr., *Drafting History of the Article 15(1)(c) of the International Covenant*, ¶¶ 41-43, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000), available at <http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088?Opendocument> (demonstrating that debates

expression in nearly identical language in the ICESCR, an international convention adopted nearly twenty years later that makes the UDHR's economic and social guarantees binding as a matter of treaty law.¹⁵

Strikingly, human rights law's inclusion of the rights of creators and inventors has not been reciprocated in the international intellectual property system. No references to "human rights" appear in multilateral treaties such as the Paris,¹⁶ Berne,¹⁷ and Rome¹⁸ Conventions, nor do they appear in the more recently adopted TRIPS Agreement. These treaties repeatedly describe the legal protections for authors, inventors and other intellectual property owners as "rights," "private rights," and "exclusive rights,"¹⁹ phrases that may appear to suggest a commonality of objectives between the two legal regimes.

These linguistic and textual parallels are only superficial, however. References to rights in intellectual property treaties serve distinctive structural and institutional purposes. They help to demarcate the treaties as charters of private rather than public international law,²⁰ that is, as agreements that authorize individuals and businesses to

over intellectual property provisions of ICESCR focused on Cold War issues, and concluding that Covenant's drafters "did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property," and that "[w]hen the question was raised, they tended to dismiss it almost out of hand").

¹⁵ ICESCR, *supra* note 7, art. 15(1); *see also* Green, *supra* note 14, ¶¶ 7-46 (discussing drafting history of article 15(1)(c)).

¹⁶ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967) [hereinafter Paris Convention].

¹⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention].

¹⁸ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

¹⁹ *See, e.g.*, TRIPS, *supra* note 1, pmb. ("recognizing that intellectual property rights are private rights"); Berne Convention, *supra* note 17, art. 9(1) ("Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."); Paris Convention, *supra* note 16, art. 2 (referring to "the rights specially provided for by this Convention").

²⁰ *See* Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 192 (2005) (stating that "private international law has traditionally governed relationships and litigation between private parties"). *But see* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 520-21 (2005) (explaining ways in which distinctions between public and private international law are artificial and increasingly eroding).

claim legal entitlements against other private parties in national courts under national laws.²¹ In addition, use of “rights” language helps to bolster claims of intellectual property owners in foreign legal systems unfamiliar with or skeptical of the entitlements the treaties create for non-nationals. The principal justifications for references to rights in intellectual property agreements are thus grounded not in deontological claims about the inherent attributes or needs of human beings, but rather arise from efforts to realize the economic and instrumental benefits of protecting intellectual property products across national borders.

Although the references to rights in intellectual property law and human rights law have distinct theoretical and philosophical roots, the recent expansion of the two fields has blurred these distinctions in new and unexamined ways. International relations scholars have noted the tendency of international legal regimes to expand their scope over time, creating dense “policy spaces” in which formerly unrelated sets of principles, norms, and rules increasingly overlap in incoherent and inconsistent ways.²² Such regime expansions are especially pronounced in international intellectual property law and international human rights law.

Since its inception in the late nineteenth century, the development of intellectual property protection rules occurred in a uni-modal international regime confined to intellectual property-specific diplomatic conferences and conventions. The focus of treaty-making during this formative period was the gradual expansion of protected subject matters and exclusive rights through periodic revisions to the Berne, Paris, Rome, and other conventions.²³ With the advent of TRIPS in 1994, the regime entered into a bimodal phase in which rule-making competencies were shared between two

²¹ This structural framework also helps to explain the assertion made by international intellectual property scholars that there is “no international intellectual property law per se; instead intellectual property rights are subject to the principle of territoriality” and “vary according to what each state recognizes and enforces.” Andrea Morgan, Comment, *TRIPS to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court*, 23 *FORDHAM INT’L L.J.* 795, 796 (2000) (collecting authorities).

²² See Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 264, 266 (Roger B. Porter et al. eds., 2001).

²³ See 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 84-133 (2d ed. 2006).

intergovernmental organizations: WIPO and the WTO.²⁴ By 2005, however, the international intellectual property system had morphed again, this time into a “conglomerate regime” or a “regime complex” — a multi-issue, multi-venue, mega-regime in which governments and NGOs shift norm creating initiatives from one venue to another within the conglomerate, selecting the forum in which they are most likely to achieve their objectives.²⁵

The international human rights regime has exhibited similar expansionist tendencies. Although the roots of human rights law date back to the inter-war years, its full flowering first occurred in the years following World War II. During this gestational period, government officials, international bureaucrats, NGOs, and scholars were occupied with foundational issues. Their most pressing goal was to elaborate and codify legal norms and enhance international mechanisms for monitoring compliance by nation states. As treaties, institutions, and jurisprudence evolved, the regime developed a de facto separation of human rights into categories. These categories ranged from a core set of peremptory norms for the most egregious forms of misconduct, to civil and political rights, to economic, social, and cultural rights.²⁶

Economic, social, and cultural rights are the most expansive and, for many countries, the most controversial. Whereas civil and political rights are negative liberties that require government officials to refrain from particular actions, economic, social, and cultural rights obligate governments to provide minimum levels of subsistence and well-being to individuals and groups. Achieving these goals requires affirmative measures that often have significant financial consequences and require difficult tradeoffs among competing categories of rights holders and other claimants.²⁷ These affirmative obligations also

²⁴ See Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) (providing for joint legal and technical assistance to developing countries and information between both organizations).

²⁵ See Helfer, *Regime Shifting*, *supra* note 2, at 16-17.

²⁶ See Helfer, *Conflict or Coexistence*, *supra* note 2, at 50-51.

²⁷ For thoughtful recent discussions on achieving economic, social, and cultural rights, see generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); Mark Tushnet, *Enforcing Socio-Economic Rights: Lessons from South Africa*, *ESR REVIEW*, Sept. 2005, at 2, 2, available at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esrreviewsept2005.pdf>; Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review* (unpublished paper), available at <http://www.nyu.edu/gsas/dept/politics/seminars/tushnet.pdf>. For an earlier critical analysis of economic and social rights, see Cass R. Sunstein, *Against Positive Rights, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION* 225 (Andras Sajo ed., 1996).

create broad areas of overlap — and of potential conflict — with international intellectual property protection rules, as the next section explains.

II. INITIAL CONTESTATIONS OVER HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Two events catapulted intellectual property issues onto the agenda of international human rights norm-creating bodies. The first was an emphasis on the neglected cultural rights of indigenous peoples, and the second was the linking of intellectual property and trade through TRIPS and, more recently, bilateral and regional “TRIPS-plus” treaties.²⁸ These events exposed serious normative deficiencies of intellectual property from a human rights perspective, and they prompted new standard-setting initiatives which increased the contestations between the two regimes.

A. *The Rights of Indigenous Peoples and Traditional Knowledge*

Beginning in the early 1990s, the U.N. human rights system began to devote significant attention to the rights of indigenous communities.²⁹ Among the many claims that these communities sought from nation states was the right to recognition of and control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture. From an intellectual property perspective, traditional knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous communities

²⁸ These treaties are referred to as “TRIPS-plus” because they contain intellectual property protection rules more stringent than those found in TRIPS, obligate developing countries to implement TRIPS before the end of its specified transition periods, or require such countries to accede to or conform to the requirements of other multilateral intellectual property agreements. See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. L. 791, 794-807 (2002), available at www.oxfam.org.uk/what_we_do/issues/trade/papers.htm (describing TRIPS-plus bilateral agreements negotiated by United States and E.C. with individual developing country governments); GRAIN, “TRIPS-PLUS” THROUGH THE BACK DOOR: HOW BILATERAL TREATIES IMPOSE MUCH STRONGER RULES FOR IPRS ON LIFE THAN THE WTO (2001) [hereinafter GRAIN, TRIPS-PLUS], available at <http://www.grain.org/docs/trips-plus-en.pdf> (same); OECD, REGIONALISM AND THE MULTILATERAL TRADING SYSTEM 111, 111-22 (2003), available at <http://www1.oecd.org/publications/e-book/2203031E.PDF> (same).

²⁹ See Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 147 (2001).

who created it did not endorse private ownership rules.³⁰ By treating this knowledge as effectively un-owned, however, intellectual property law made that knowledge available for exploitation by third parties, to be used as an upstream input for later downstream innovations that were themselves privatized through patents, copyrights, and plant breeders' rights.³¹ Adding insult to injury, the financial and technological benefits of those innovations were rarely shared with indigenous communities.³²

U.N. human rights bodies sought to close this hole in the fabric of intellectual property law by commissioning a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples³³ and Principles and Guidelines for the Protection of the Heritage of Indigenous People.³⁴ These documents adopt a

³⁰ See Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 238 (2001) ("TK [traditional knowledge] is often (and conveniently) assumed to be in the public domain. This is likely to encourage the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely.").

³¹ See LAURENCE R. HELFER, FOOD AND AGRIC. ORG. OF THE U.N., *INTELLECTUAL PROPERTY RIGHTS IN PLANT VARIETIES: INTERNATIONAL LEGAL REGIMES AND POLICY OPTIONS FOR NATIONAL GOVERNMENTS 2-3* (2004).

³² See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, SUB-COMMISSION ON HUMAN RIGHTS, WRITTEN STATEMENTS SUBMITTED BY INTERNATIONAL INDIAN TREATY COUNCIL 3, U.N. Doc. E/CN.4/2003/NGO/127 (2003):

The theft and patenting of Indigenous Peoples' bio-genetic resources is facilitated by [TRIPS]. Some of the plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred ceremonies since time immemorial have already been patented in the United States, Japan and Europe. A few examples of these are ayahuasca, quinoa, and sangre de drago in South America; Kava in the Pacific; turmeric and bitter melon in Asia.

There are some exceptions, however, particularly in the form of so-called bioprospecting agreements between indigenous groups and entities in the developed world. For a discussion of these agreements, see Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally* (Univ. of Washington Occasional Papers No. 1, 2003).

³³ U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

³⁴ See U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1995/26, Annex 1 (June 21, 1995) (initial text draft of Principles and Guidelines); U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report of the Seminar on the Draft Principles and*

decidedly skeptical approach to intellectual property protection. On the one hand, the documents urge states to protect traditional knowledge using legal mechanisms that fit comfortably within existing intellectual property paradigms — such as allowing indigenous communities to seek injunctions and damages for unauthorized uses.³⁵ But the documents also define protectable subject matter more broadly than existing intellectual property laws, and they urge states to deny patents, copyrights, and other exclusive rights over “any element of indigenous peoples’ heritage” that does not provide for “sharing of ownership, control, use and benefits” with those peoples.³⁶ In short, a human rights-inspired analysis of traditional knowledge views intellectual property as one of the problems facing indigenous communities, and, only perhaps, as part of a solution to those problems.

B. The TRIPS Agreement, “TRIPS-Plus” Treaties, and Human Rights

The second area of intersection between human rights and intellectual property relates to the 1994 TRIPS Agreement and “TRIPS-plus” treaties.³⁷ TRIPS adopted relatively high minimum standards of protection for all WTO members, including many developing and least developed countries with little previous interest in protecting patents, copyrights, and trademarks.³⁸ In addition, unlike previous intellectual property agreements, TRIPS has teeth. It is linked to the WTO’s dispute settlement system in which states enforce treaty bargains

Guidelines for the Protection of the Heritage of Indigenous People, U.N. Doc. E/CN.4/Sub.2/2000/26 (2000) (revised text of draft Principles and Guidelines). The Sub-Commission later adopted the Revised Draft Principles and Guidelines and transmitted them to the Commission for its approval. U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm’n on the Promotion and Prot. of Human Rights, *Decision 2000/107*, U.N. Doc. E/CN.4/Sub.2/DEC/107/2000/107 (2000).

³⁵ U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm’n on Promotion & Prot. Human Rights, *Revised Draft Principles and Guidelines*, Guidelines § 23(b) [hereinafter ESOSOC, *Revised Draft*] (providing that national laws to protect indigenous peoples’ heritage should provide means for indigenous peoples to prevent and obtain damages for “the acquisition, documentation or use of their heritage without proper authorization of the traditional owners”).

³⁶ ESOSOC, *Revised Draft*, Guidelines § 23(c).

³⁷ See TRIPS, *supra* note 1; GRAIN, TRIPS-PLUS, *supra* note 28.

³⁸ For a review of the changes TRIPS wrought, see J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 445-56 (2000).

through mandatory adjudication backed up by the threat of retaliatory trade sanctions.³⁹

The U.N. human rights system first turned its attention to TRIPs in 2000. In August of that year, the U.N. Sub-Commission on the Protection and Promotion of Human Rights (“Sub-Commission”) adopted Resolution 2000/7 on “Intellectual Property Rights and Human Rights.”⁴⁰ The resolution, which was highly critical of intellectual property protection, stated that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights.”⁴¹ These conflicts cut across a wide swath of legal terrain, including: (1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders’ rights and patents for genetically modified organisms; (3) biopiracy;⁴² (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals.⁴³ To resolve these conflicts, the Sub-Commission urged national governments, intergovernmental organizations, and civil society groups to give human rights “primacy . . . over economic policies and agreements.”⁴⁴

This assertion of normative predominance had no legal force, however, because the Sub-Commission’s resolutions are, by their own terms, nonbinding. Nor did the Sub-Commission parse the texts of

³⁹ See Helfer, *Regime Shifting*, *supra* note 2, at 2.

⁴⁰ U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Intellectual Property Rights and Human Rights*, Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) [hereinafter Resolution 2000/7], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>. For a discussion of the Resolution’s history, see generally David Weissbrodt & Kell Schoff, *A Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (2003).

⁴¹ Resolution 2000/7, *supra* note 40, pmbl. ¶ 11.

⁴² “Biopiracy” has been loosely used to describe any act by which a commercial entity obtains intellectual property rights over biological resources that are seen as “belonging” to developing states or indigenous communities located within their borders. See CEAS CONSULTANTS (WYE) LTD., CTR. FOR EUROPEAN AGRIC. STUDIES, FINAL REPORT FOR DG TRADE EUR. COMM.: STUDY ON THE RELATIONSHIP BETWEEN THE AGREEMENT ON TRIPS AND BIODIVERSITY RELATED ISSUES 78 (2000).

⁴³ Resolution 2000/7, *supra* note 40, pmbl. ¶ 11; see also *id.* ¶ 2 (identifying conflicts between TRIPS and “the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination”).

⁴⁴ *Id.* ¶ 3.

the relevant (and binding) international agreements or the rules of customary international law to identify which specific human rights protections TRIPS violates. Rather, the Resolution's principal objective was to propose an ambitious new agenda for reviewing intellectual property issues within the U.N. human rights system, an agenda animated by the basic principle of human rights primacy.⁴⁵

In the more than five years since the Resolution's adoption, the response to the Sub-Commission's invitation has been overwhelming. The actions taken and documents produced by U.N. human rights bodies are numerous and diverse. They include: (1) annual resolutions by the U.N. Commission on Human Rights on "Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria," which urge states to ensure such access;⁴⁶ (2) an analysis of TRIPS by the U.N. High Commissioner for Human Rights, which argues that intellectual property laws must promote access to knowledge and innovations, opposes the adoption of TRIPS-plus treaties, and emphasizes states' obligations to provide access to affordable medicines to treat HIV/AIDS;⁴⁷ (3) a report by two Special Rapporteurs on Globalization, which asserts that intellectual property protection has undermined human rights objectives;⁴⁸ (4) a second resolution by the Sub-Commission that identifies a widening set of conflicts between TRIPS and human rights, including "the rights to self-determination, food, housing, work, health and education, and . . . transfers of technology to developing countries"⁴⁹; (5) an attempt by

⁴⁵ *Id.*

⁴⁶ See Comm'n on Human Rights Res. 2003/29, U.N. Doc. E/CN.4/RES/2003/29 (Apr. 22, 2003); Comm'n on Human Rights Res. 2001/33, U.N. Doc. E/CN.4/RES/2001/33 (Apr. 23, 2001); Comm'n on Human Rights Res. 2002/32, U.N. Doc. E/CN.4/RES/2002/32 (Apr. 22, 2002); see also *Human Rights Commission Calls on States to Use TRIPS Flexibilities*, BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Apr. 20, 2005, at 5. The first resolution, sponsored by Brazil in 2001, mandates that states, in implementing the right to the highest attainable standard of health, "adopt legislation or other measures, in accordance with applicable international law" to "safeguard access" to such medications "from any limitations by third parties." Comm'n on Human Rights Res. 2001/33, *supra*, ¶ 3(b).

⁴⁷ The High Commissioner, *Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶¶ 10-15, 27-58, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter *High Commissioner Report*].

⁴⁸ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, ¶¶ 19-34, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (prepared by J. Oloka-Onyango & Deepika Udagama) [hereinafter *Globalization Report*].

⁴⁹ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Prot. and

the High Commissioner for Human Rights to seek observer status with the WTO and participate in the reviews of TRIPS;⁵⁰ and (6) a report by the U.N. Secretary General on intellectual property and human rights based on information submitted by states, intergovernmental organizations, and NGOs.⁵¹

Several of these documents contain trenchant critiques of TRIPS, of TRIPS-plus treaties, and of expansive intellectual property rights more generally. They also discuss the empirical effects of intellectual property agreements on specific human rights, in particular the right to health in the context of global pandemics such as HIV/AIDS.⁵² With few exceptions, however, these studies fail to provide a detailed textual analysis of a human rights framework for intellectual property and how that framework interfaces with existing intellectual property protection standards in national and international law.

III. MEDIATING INTELLECTUAL PROPERTY AND ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: THE INTERPRETIVE APPROACH OF THE CESCR COMMITTEE

This absence of close textual scrutiny in the resolutions and reports discussed in the previous sections of this Article is not surprising, given that the principal areas of overlap between the two legal regimes relate to economic, social, and cultural rights. Among human rights law's diverse categories, these rights are the least well-developed and the least doctrinally prescriptive. The ICESCR — the principal international agreement that protects these rights — is a programmatic treaty.⁵³ Its provisions are drafted in gradualist and ambiguous language that requires each ratifying state to “take steps . . . to the maximum of its available resources, with a view to achieving

Promotion of Human Rights, Intellectual Property and Human Rights, Res. 2001/21, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001) (identifying “actual or potential conflicts” between human rights obligations and TRIPS, and asserting “need to clarify the scope and meaning of several provisions of the TRIPS Agreement”).

⁵⁰ See *High Commissioner Report*, *supra* note 47, ¶ 68.

⁵¹ The Secretary-General, *Report of the Secretary-General on Economic, Social and Cultural Rights, Intellectual Property Rights and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/12 (June 14, 2001).

⁵² See *High Commissioner Report*, *supra* note 47, ¶ 15 (stressing need for TRIPS to “be assessed empirically to determine the effects of the Agreement on human rights in practice”); *Globalization Report*, *supra* note 48, ¶¶ 19-34 (critiquing TRIPS and international trade regime more generally).

⁵³ See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW POLICY AND PROCESS* 88-93 (3d ed. 2001) (explaining that ICESCR establishes programmatic and flexible commitments that are to be achieved over time).

progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”⁵⁴

Only in the last decade have economic, social, and cultural rights received sustained jurisprudential attention. The U.N. Committee on Economic, Social, and Cultural Rights (“the CESCR Committee” or “the Committee”) has been the progenitor of a movement to imbue these rights with greater prescriptive force. The Committee is a supervisory body of eighteen human rights experts who interpret the ICESCR and monitor its implementation by its more than 150 member nations.⁵⁵

One of the Committee’s principal functions is to provide these nations with guidance as to the treaty’s meaning. This guidance takes the form of nonbinding “general comments” on specific treaty articles or specific human rights issues.⁵⁶ General comments serve as focal points for change in national legal systems and provide a standard against which the Committee can review states’ compliance with the Covenant. Formally, these recommended interpretations are directed only to governments.⁵⁷ But their scope is not limited to public laws or the actions of public officials. They extend as well to individuals, business associations, and other private parties whose conduct implicates social, economic, and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations.⁵⁸

The CESCR Committee’s first interpretive foray into intellectual property occurred in the fall of 2001, when it published a “Statement on Human Rights and Intellectual Property.”⁵⁹ The statement offered

⁵⁴ ICESCR, *supra* note 7, art. 2(1).

⁵⁵ Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, *available at* <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (last visited Feb. 20, 2007).

⁵⁶ See MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 89-92 (1995).

⁵⁷ See Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1)*, U.N. Doc. E/1991/23 (Dec. 14, 1990), *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument); see also WEISSBRODT ET AL., *supra* note 53, at 104-07 (discussing evolution of Committee’s general comments).

⁵⁸ For a thoughtful and influential analysis of these issues, see generally ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

⁵⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C12/2001/15 (Dec. 14, 2001)

a preliminary analysis of the ICESCR's intellectual property provisions and their relationship to other economic and social rights in the Covenant. It also set out a new agenda for the Committee to draft general comments on each of the ICESCR's intellectual property clauses.⁶⁰ In November 2005, the Committee published the first of these general comments, an exegesis on article 15(1)(c) of the Covenant ("General Comment"), "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."⁶¹

Taken together, the Committee's 2001 statement and the 2005 general comment on "authors' rights"⁶² provide a partial blueprint of a human rights framework for intellectual property. In the sections that follow, I review these two documents in detail, expanding upon that outline and analyzing its substantive implications.

A. Introducing a "Violations Approach" to Authors' Rights

The Committee's General Comment reveals the challenges of developing a coherent and detailed interpretation of article 15(1)(c) from the Covenant's sparse text. The draft is a lengthy, densely worded, and somewhat repetitive document of fifty-seven paragraphs divided into six parts: (1) an introductory section that explains the basic premises of the Committee's analysis; (2) a close textual reading of article 15(1)(c)'s "normative content"; (3) a section

[hereinafter Statement on Human Rights and Intellectual Property], available at [http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/\\$FILE/G0146641.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf) (follow-up to day of general discussion on article 15.1(c), Monday, 26 November 2001).

⁶⁰ *Id.* ¶ 2.

⁶¹ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c))*, U.N. Doc. E/C.12/2005 (Nov. 21, 2005) [hereinafter *General Comment No. 17*], available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf).

⁶² The Anglophone phrases "the rights of authors" and "authors' rights" are confusingly similar to, but legally distinct from, the Francophone "*droit d'auteur*," which refers to legal rights granted to authors and creators in countries that follow the civil law tradition of protection for literary and artistic works. See generally ALAN STROWEL, *DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES* (1993) (comparing *droit d'auteur* and copyright). By contrast, the references to "authors' rights" and similar phrases in this Article describe the legal entitlements for creators and inventors that are recognized in international human rights law. These legal protections are not coterminous with those of *droit d'auteur*.

outlining states' legal obligations, including general, specific, core, and related obligations; (4) an analysis of actions or omissions that would violate the article; (5) a section on how authors' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations.⁶³

This organizational structure, and in particular the distinction it creates between "legal obligations" and "violations," is likely to mystify domestic intellectual property lawyers. The Committee's methodology will, however, be familiar to foreign ministries, human rights scholars, and NGOs who have followed the Committee's past efforts to provide concrete interpretations of the ICESCR's many ambiguous clauses. In particular, the Committee has developed a "violations approach" to interpreting the Covenant that distinguishes "core obligations" — minimum essential levels of each right which all states must immediately implement — from other obligations that may be achieved progressively as additional resources become available.⁶⁴ These core obligations include three distinct undertakings — to respect, to protect, and to fulfill. As the Committee explains in the General Comment on authors' rights:

The obligation to *respect* requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).⁶⁵

These three core obligations, although framed in the distinctive language of human rights law, should, upon reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar states from violating authors' material and moral interests themselves, most notably in the form of infringements by government agencies or officials;⁶⁶ they mandate "effective

⁶³ *General Comment No. 17*, *supra* note 61.

⁶⁴ *Id.* ¶ 10; see also Audrey Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 TENN. L. REV. 389, 395 (1998).

⁶⁵ *General Comment No. 17*, *supra* note 61, ¶ 28; see also *id.* ¶¶ 44-46 (discussing actions and omissions that violate these three obligations).

⁶⁶ *Id.* ¶¶ 30, 44.

protection” of those interests in legislation, including protection of “works which are easily accessible or reproducible through modern communication and reproduction technologies”;⁶⁷ and they require states to provide judicial and administrative remedies for authors to prevent unauthorized uses of their works (i.e., injunctions) and to recover compensation for such uses (i.e., damages), and, more broadly, to facilitate authors’ participation in and control over decisions that affect their moral and material interests.⁶⁸

These obligations also overlap with several provisions in intellectual property treaties, most notably the Berne Convention’s reproduction rights and moral rights clauses, the “making available” right in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the enforcement provisions in TRIPS.⁶⁹ These commonalities suggest that states can satisfy their obligations under article 15(1)(c), at least in part, by ratifying international intellectual property agreements and by enacting national copyright and neighboring rights laws. The ICESCR’s state reporting procedures strongly support this claim.⁷⁰ Since the early 1990s, member nations have regularly cited to such treaties and laws to demonstrate compliance with the authors’ rights provisions in the Covenant.⁷¹

⁶⁷ *Id.* ¶¶ 31, 45.

⁶⁸ *See id.* ¶¶ 34, 46.

⁶⁹ Berne Convention, *supra* note 17, arts. 6bis, 9; WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (entered into force Mar. 6, 2002) [hereinafter WCT], available at http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; WIPO Performance and Phonograms Treaty art. 10, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (entered into force May 20, 2002), available at http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf; TRIPS, *supra* note 1, arts. 41-51, 61.

⁷⁰ ICESCR, *supra* note 7, art. 16 (requiring states to submit periodic “reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized” in Covenant).

⁷¹ *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report: Jordan*, ¶ 151, U.N. Doc. E/1990/6/Add.17, (July 23, 1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7eb0986e8af3f29c802567240056ca4c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7eb0986e8af3f29c802567240056ca4c?Opendocument) (citing amendments to Copyright Protection Act that conform to international copyright treaties and government’s intent to ratify such treaties to demonstrate compliance with article 15(1)(c)); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Report: Israel*, ¶¶ 782-88, U.N. Doc. E/1990/5/Add.39(3), (Jan. 20, 1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/41e674c4a2affbd480256617004768f5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/41e674c4a2affbd480256617004768f5?Opendocument) (discussing evolution and expansion of copyright legislation and ratification of numerous international

Notwithstanding the commonalities between the human rights and intellectual property regimes, the Committee's "core obligations" approach to authors' rights leaves many issues unresolved. Most notably, it does not define the content of the "moral and materials interests" which states are required to "respect, protect, and fulfill."⁷² Nor does it specify whether — and, if so, how — a human rights framework for authors' rights differs from the legal rules contained in intellectual property treaties and domestic legislation. The next section considers the Committee's treatment of these key definitional issues.

*B. Developing a Distinctive Human Rights Framework
for Authors' Rights*

The General Comment gives detailed attention to the differences between authors' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the "scope of protection" of authors' rights in article 15(1)(c) "does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements."⁷³ But what, precisely, are these differences in scope?

The Committee first compares foundational principles. It notes that "[h]uman rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity . . . for the benefit of society as a whole."⁷⁴ Because intellectual property rights are granted by the state, they may also be taken away by the state. They are temporary, not permanent; they may be "revoked, licensed or assigned";⁷⁵ and they may be

agreements to demonstrate compliance with article 15(1)(c)); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Report: Cyprus*, ¶ 420, U.N. Doc. E/1994/104/Add.12 (June 6, 1996), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1994.104.Add.12.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.Add.12.En?Opendocument) (citing ratification of Berne Convention and domestic copyright legislation to demonstrate compliance with article 15(1)(c)).

⁷² *General Comment No. 17*, *supra* note 61, ¶ 28.

⁷³ *Id.* ¶ 2; see also *id.* ¶ 3 ("It is . . . important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c).").

⁷⁴ *Id.* ¶ 1.

⁷⁵ *Id.* ¶ 2.

“traded, amended and even forfeited,”⁷⁶ commensurate with the regulation of a “social product [that] has a social function.”⁷⁷ By contrast, human rights are enduring, “fundamental, inalienable and universal entitlements.”⁷⁸ These statements reflect a vision of authors’ rights as human rights that exist independently of the vagaries of state approval, recognition, or regulation.

The Committee identifies several distinctive features of authors’ rights in the Covenant. For example, article 15(1)(c) applies only to “individuals, and under certain circumstances groups of individuals and communities.”⁷⁹ Corporations and other legal entities are expressly excluded.⁸⁰ This represents a profound departure from Anglo American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products, for example, of works made for hire.⁸¹

Moreover, the protections provided to these natural persons have a distinctive human rights flavor. Consider the issue of equality. A cornerstone of intellectual property treaties is the “national treatment” of foreign authors and rights owners.⁸² A human rights framework for authors’ rights encompasses a rule of equality between domestic and foreign owners of intellectual property products. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for “disadvantaged and marginalized groups.”⁸³ Equality also has a process dimension, which requires

⁷⁶ *Id.*

⁷⁷ Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 4.

⁷⁸ *Id.* ¶ 6.

⁷⁹ *General Comment No. 17*, *supra* note 61, ¶ 1.

⁸⁰ *See id.* ¶ 7 (stating that drafters of ICESCR article 15 “considered authors of scientific, literary or artistic productions to be natural persons”); Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 6 (contrasting human rights approach to authors’ rights with that of intellectual property regimes which “are increasingly focused on protecting business and corporate interests and investments”).

⁸¹ *See* 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright.”).

⁸² *See, e.g.,* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 17-38 (1987); David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions*, 17 INT’L REV. INDUS. PROP. & COPYRIGHT L. 577 (1986).

⁸³ *General Comment No. 17*, *supra* note 61, ¶ 39(d); *see also* Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 7 (stating that “human rights instruments place great emphasis on protection against discrimination,” and that rights guaranteed in Covenant “must be exercised without discrimination of any kind

states to provide authors with information “on the structure and functioning of . . . legal or policy regime[s],” and to facilitate their participation in “any significant decision-making processes with an impact on their rights and legitimate interests,” either directly or through “professional associations.”⁸⁴

These distinctive features of a human rights conception of authors’ rights have some surprising consequences. If the moral and material interests of authors and creators are fundamental rights, then the ability of governments to regulate them — either to protect other human rights or to achieve other social objectives — ought to be exceedingly narrow. And in fact, the Committee has developed a stringent test for assessing the legality of state restrictions on social and economic rights,⁸⁵ a standard that it reaffirms in the General Comment on article 15(1)(c).

According to this test, government restrictions on authors’ rights must be “[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, and [4] must be strictly necessary for the promotion of the general welfare in a democratic society.”⁸⁶ In addition, such limitations must “be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed.”⁸⁷ This multipart test is an intellectual property owner’s dream. And it is far more constraining than the now ubiquitous “three-step test”⁸⁸ used to

as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

⁸⁴ *General Comment No. 17*, *supra* note 61, ¶¶ 18(b), 34. For an analysis of the General Comment’s implications for government regulation of collective rights organizations, see Laurence R. Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 85 (Daniel J. Gervais ed., 2006).

⁸⁵ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 28, U.N. Doc. E/C.12/2000/4, (Nov. 8, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (discussing government’s burden to demonstrate legality of limitations on right to health).

⁸⁶ *General Comment No. 17*, *supra* note 61, ¶ 22 (bracketed numbers added).

⁸⁷ *Id.* ¶ 23 (bracketed numbers added).

⁸⁸ See, e.g., WCT, *supra* note 69, art. 10(1) (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”); TRIPS, *supra* note 1, art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice

assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws.⁸⁹

Yet if restrictions on authors' rights are to be so rigidly scrutinized (and, presumably, so rarely upheld) how, then, are governments to strike a balance between authors' rights on the one hand and the public's interest in access to knowledge on the other?⁹⁰ A close parsing of the text offers hints of how the Committee may ultimately construct a distinctive human rights framework for intellectual property when it drafts general comments interpreting the remaining rights protected by article 15, which include the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the freedom indispensable for scientific research and creative activity.⁹¹

The key to understanding this framework is to identify the purposes of recognizing authors' moral and material interests *as human rights*. According to the Committee, such rights serve two essential functions. First, they "safeguard[] the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage."⁹² And second, they protect "basic

the legitimate interests of the right holder."); *id.* art. 30 ("Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.").

⁸⁹ See generally Mihaly Ficsor, *How Much of What?: The "Three-Step Test" and Its Application in Two Recent WTO Dispute Settlement Cases*, 192 *REVUE INTERNATIONALE DU DROIT D'AUTEUR* 110 (2002); Jane Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 *REVUE INTERNATIONALE DU DROIT D'AUTEUR* 3 (2001).

⁹⁰ The CESCR Committee emphasizes the need for balancing throughout the General Comment and in its 2001 Statement. See, e.g., *General Comment No. 17, supra* note 61, ¶ 22 ("The right to the protection of the moral and materials interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be balanced with the other rights recognized in the Covenant . . ."); *id.* ¶ 35 ("States parties are . . . obliged to strike an adequate balance between their obligations under article 15, paragraph 1(c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant."); Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 4 ("Intellectual property rights must be balanced with the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications") (footnote omitted); *id.* ¶ 17 ("Article 15 of the Covenant sets out the need to balance the protection of public and private interests in knowledge.").

⁹¹ *General Comment No. 17, supra* note 61, ¶ 4.

⁹² *Id.* ¶ 2. This "personal link" is protected by legislation that enables authors to "be recognized as the creators of their scientific, literary and artistic productions and

material interests which are necessary to enable authors to enjoy an adequate standard of living.”⁹³

These two statements, which recur throughout the General Comment,⁹⁴ suggest the existence of an irreducible core of rights — a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential requisites for any free society.⁹⁵ Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But those additional protections are not required under article 15 of the Covenant and, as a result, they are not subject to the restrictive test quoted above.

Stated differently, once a country guarantees authors and creators these two core rights — one moral, the other material — any *additional* intellectual property protections the country provides “must be balanced with the other rights recognized in the Covenant,” and must give “due consideration” to “the public interest in enjoying broad access to” authors’ productions.⁹⁶ The ICESCR thus gives each of its member states the discretion to eschew these additional protections altogether or, alternatively, to shape them to the particular economic, social, and cultural conditions within their borders.⁹⁷

to object to any distortion, mutilation or other modification of, or other derogatory action in relation to their productions which would be prejudicial to their honour or reputation.” *Id.* ¶ 40(b). The Committee’s language closely tracks the moral rights provisions in article 6bis of the Berne Convention and in many national laws.

⁹³ *Id.* ¶ 2.

⁹⁴ The Committee repeats variants of the “personal link” language a total of six times, and it reasserts the “adequate standard of living” formulation no less than nine times — repetitions that suggest the importance of these concepts to its analysis. *See id.* ¶¶ 2, 12, 15, 23, 30, 39 (personal link or similar language); *id.* ¶¶ 2, 4, 15, 16, 23, 30, 39, 44, 45 (adequate standard of living).

⁹⁵ *Cf.* COPYRIGHT AND HUMAN RIGHTS, *supra* note 6, at 5 (stating that drafters of UDHR believed that best way to avoid recurrence of abuses of science, technology, and copyrighted propaganda that occurred during World War II would be “to recognize that everyone had a share in the benefits and that . . . those who made valuable [intellectual] contributions were entitled to protection”).

⁹⁶ *General Comment No. 17*, *supra* note 61, ¶¶ 22, 35; *see also id.* ¶ 11 (stating that nothing in article 15.1(c) prevents states parties from “adopting higher protection standards” in intellectual property treaties or national laws, “provided that these standards do not unjustifiably limit the enjoyment by others of their Covenant rights”).

⁹⁷ *See id.* ¶ 18 (stating that “the precise application” of authors’ and inventors’ moral and material interests “will depend on the economic, social and cultural conditions prevailing in a particular State party”).

A human rights framework for authors' rights is thus both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws. It is also less protective, however, in that a state need not recognize any authors' rights lying outside of this zone or, if it does recognize such additional rights, it must give appropriate weight to other social, economic, and cultural rights and to the public's interest in access to knowledge.

*C. First Steps Toward a Balanced Regime of
Intellectual Property Protection*

The Committee's General Comment on article 15(1)(c) — which focuses only the sub-paragraph of article 15 that protects the rights of creators and inventors — offers few details of how states are to achieve balanced, human rights-compliant rules of intellectual property protection. Its most informative statement appears in a single paragraph of the General Comment — paragraph 35 — which, as described below, sets forth an interpretive principle and three specific recommendations.⁹⁸

The interpretive principle requires states to ensure that “legal and other regimes” for the protection of intellectual property “constitute no impediment to their ability to comply with their core obligations in relation to the right to food, health, education culture, as well as the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications or any other right set out in the Covenant.”⁹⁹ On the one hand, this statement is simply an innocuous reminder that states must reconcile all of their treaty commitments and avoid derogating from one set of treaty rules when satisfying another. But the reference to compliance with the ICESCR's “core obligations” masks a deeper structural understanding of how the Committee believes governments should reconcile human rights and intellectual property.

First, such a reference acknowledges, albeit indirectly, that states may have difficulty reconciling treaty-based intellectual property protection rules with the Covenant's *non*-core obligations. These non-core obligations include the more expansive aspects of economic, social, and cultural rights that go beyond the Covenant's “minimum

⁹⁸ *Id.* ¶ 35.

⁹⁹ *Id.*

essential levels” of protection¹⁰⁰ and that states may permissibly recognize over time as constrained by their limited resources. This suggests that governments retain — at least in the near term — a fairly broad “margin of appreciation”¹⁰¹ within which to reconcile human rights guarantees, intellectual property protection rules, and other policy objectives, and that the calibrations needed to achieve such reconciliation may permissibly vary from one country to another.¹⁰²

Second, by referencing “core obligations” — a phrase that appears nowhere in the text of the ICESCR and is instead a product of the Committee’s own general comment jurisprudence — the Committee has arrogated to itself the power to determine which rights are “core” and thus could be violated by a government’s adoption of expansive intellectual property rules.¹⁰³ The Committee has thus linked violations of the ICESCR to an evolving legal standard that its members will develop in future general comments identifying the core aspects of specific Covenant rights, including the public’s right “to enjoy the benefits of scientific progress and its applications.”¹⁰⁴

In the interim, however, the Committee offers three specific prescriptions for member states. First, it opines that states “have a duty to prevent . . . unreasonably high costs for access to essential medicines, plant seeds or other means or food production, or to schoolbooks and learning materials, [from] undermin[ing] the rights

¹⁰⁰ Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 12.

¹⁰¹ The term “margin of appreciation” refers to a doctrine of judicial deference developed by the European Court of Human Rights. It describes “the degree of discretion that [a human rights tribunal] is willing to grant national decision makers who seek to fulfill their . . . obligations under [a human rights] treaty.” Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 404 (1998). The doctrine provides states with “a modicum of breathing room in balancing the protection of [specific human rights] against other pressing societal concerns.” *Id.* See generally HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996) (analyzing doctrine’s origins and operations).

¹⁰² See *General Comment No. 17*, *supra* note 61, ¶ 47 (noting “considerable margin of discretion” that each state possesses to determine “which measures are most suitable to meet its specific needs,” and stating that these measures “will vary significantly from one State to another”).

¹⁰³ Statement on Human Rights and Intellectual Property, *supra* note 59, ¶ 12 (explaining that “the Committee has *begun to identify* the core obligations arising from the ‘minimum essential levels in relation to the rights to health, food and education’”) (emphasis added).

¹⁰⁴ ICESCR, *supra* note 7, art. 15(1)(b).

of large segments of the population to health, food and education.”¹⁰⁵ Second, it recommends that states “prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health, and privacy,” for example “by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights,” and by “consider[ing] to what extent the patenting of the human body and its parts would affect their obligations under the Covenant.”¹⁰⁶ Finally, it urges states to “consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of” authors’ rights.¹⁰⁷

These detailed recommendations have uncertain consequences for states that have ratified TRIPS and other intellectual property treaties. Inasmuch as general comments are only nonbinding interpretations of the ICESCR, governments could reasonably interpret the Committee’s prescriptions as nothing more than aspirational goals. And, indeed, the recommendations in paragraph 35 are formulated merely as suggestions for governments to consider.

Even in this hortatory form, however, these recommendations may produce meaningful legal and political change.¹⁰⁸ For example, they create opportunities for the Committee, aided by information provided by sympathetic NGOs, to question officials about license fees and

¹⁰⁵ *General Comment No. 17*, *supra* note 61, ¶ 35.

¹⁰⁶ *Id.* ¶ 35. It bears noting that TRIPS already permits member states to exclude from patentability “animals other than micro-organisms.” TRIPS, *supra* note 1, art. 27(3)(b).

¹⁰⁷ *General Comment No. 17*, *supra* note 61, ¶ 35. An earlier draft of the general comment included a provision recommending states “to include human rights criteria among the requirements for the grant of patents or other intellectual property rights.” Comm. on Econ., Soc. & Cultural Rights, *Draft General Comment No. 18: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c))* (Nov. 15, 2004). The Committee removed this provision from the final draft, perhaps because of the uncertain legality of such eligibility requirements under TRIPS. See Nuño Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPS Agreement: The Problem and the Solution*, 2 WASH. U. J.L. & POL’Y 371, 386-89 (2000).

¹⁰⁸ Scholars have recently emphasized the importance of nonbinding norms, or soft law, as a method to promote international cooperation. See C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 856-59 (1989) (discussing different ways in which soft law evolves into customary international law). See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000).

patent eligibility rules when governments submit reports on the steps they have taken, and the difficulties they have encountered, to implement article 15.¹⁰⁹ The recommendations also provide a template for countries whose governments already oppose expansive intellectual property protection standards to implement more human rights-friendly standards in their national laws.¹¹⁰ And they may influence the jurisprudence of WTO dispute settlement panels, which are likely to confront arguments that TRIPS should be interpreted in a manner that avoids conflicts with nonbinding norms and harmonizes the objectives of the international intellectual property and international human rights regimes.¹¹¹ These changes are likely to evolve incrementally over the course of years.

A more immediate response to the Committee's analysis and recommendations, however, may occur in other intergovernmental negotiating fora. In the General Comment's concluding section, the Committee attempts to expand its influence and create a broader audience for its ideas. In discussing the obligations of actors other than states parties, the Committee declares that "as members of international organizations such as WIPO, UNESCO, FAO, WHO, and WTO, states parties have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant."¹¹² It also calls on these organizations, as independent actors, "to intensify their efforts to take into account human rights principles and obligations in their work concerning" authors' rights.¹¹³

These entreaties are overt attempts to expand the Committee's distinctive human rights framework for intellectual property to other international venues where intellectual property treaty-making and standard-setting is underway. The next part of this Article explores

¹⁰⁹ ICESCR, *supra* note 7, arts. 16-17 (setting forth reporting obligations of states parties to ICESCR).

¹¹⁰ These countries may include developing countries who have proposed a new "Development Agenda" at WIPO. See WIPO General Assembly, *Document Prepared by the Secretariat, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11 (Aug. 27, 2004) [hereinafter *Proposal by Argentina and Brazil*], available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf. For a more detailed discussion of the WIPO Development Agenda, see *infra* Part IV.C.

¹¹¹ For a prediction of how WTO dispute settlement jurists are likely to address these arguments, see Helfer, *Regime Shifting*, *supra* note 2, at 77-79.

¹¹² *General Comment No. 17*, *supra* note 61, ¶ 56.

¹¹³ *Id.* ¶ 57.

these developments, taking up specific lawmaking initiatives under way or recently completed in UNESCO, the WHO, and WIPO.

IV. RECENT TREATY-MAKING IN OTHER INTERGOVERNMENTAL ORGANIZATIONS RELEVANT TO A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

In the last two years, intellectual property issues have risen to the top of the agendas of several international organizations. Work in these venues involves not only the creation of new nonbinding norms but, more compellingly, new international agreements. The approaches to intellectual property contained in these treaties, both those that have recently been adopted and those still in draft form, are closely aligned with the human rights framework for intellectual property reflected in the CESCR Committee's recent interpretive statements. Several of these agreements expressly draw support from human rights law. In addition, they all include provisions that are skeptical of expansive intellectual property protection standards and appear to conflict with the obligations in TRIPS, TRIPS-plus treaties, and other intellectual property agreements.

A. UNESCO: *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions*

On October 20, 2005, UNESCO adopted a new international agreement, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("Cultural Diversity Convention").¹¹⁴ The Convention, which is a product of two years of intensive negotiations by government officials and meetings of independent experts, builds upon the Universal Declaration on Cultural Diversity which UNESCO's members unanimously adopted in 2001.¹¹⁵ The Convention's birth was significantly more contentious than that of its nonbinding parent, however. The United States in

¹¹⁴ See U.N. Educ., Scientific & Cultural Org. [UNESCO], Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005 [hereinafter Cultural Diversity Convention], available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>. For a brief overview of the Convention's drafting history and its associated documents, see UNESCO, Convention on the Prot. and Promotion of the Diversity of Cultural Expression, http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Feb. 20, 2007).

¹¹⁵ Universal Declaration on Cultural Diversity, UNESCO Res. 25, UNESCO, 31st Gen. Conference, UNESCO Doc. 31C/Res.25 (Nov. 2, 2001), available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

particular expressed vociferous opposition.¹¹⁶ Fighting a losing battle to amend the draft treaty during the final rounds of negotiations, the head of the U.S. delegation branded the final document as “deeply flawed and fundamentally incompatible with [UNESCO’s] obligation to promote the free flow of ideas,” and voted (with Israel) to oppose its adoption by 148 other nations.¹¹⁷

The Cultural Diversity Convention responds to the belief shared by many governments that the increasingly fluid movement of cultural goods and services across national borders is endangering cultural diversity and domestic cultural industries. A coalition of mainly Francophone industrialized and developing countries promoted the new treaty as a way to combat this threat and preserve their distinctive national cultures.¹¹⁸ Asserting that cultural diversity is a “common heritage of humanity,”¹¹⁹ the Convention reaffirms states’ “sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions” within its territory.¹²⁰ A series of “guiding principles” informs how states are to achieve this objective. These principles include refraining

¹¹⁶ See *UNESCO Overwhelmingly Approves Cultural Diversity Treaty*, BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Oct. 26, 2005, at 6, 7 (describing “all-out diplomatic offensive by Washington to modify the accord or delay its approval, including a letter from US Secretary of State Condoleezza Rice warning governments that the accord would ‘sow conflict rather than cooperation’”).

¹¹⁷ See Julio Godoy, *UNESCO Adopts Convention to Protect Diversity*, INTER PRESS SERVICE NEWS AGENCY, Oct. 20, 2005, <http://www.ipsnews.net/news.asp?idnews=30714>. The final vote on the treaty’s adoption was 148 votes in favor, 2 against, and 4 abstentions (Australia, Honduras, Liberia, and Nicaragua). See Press Release, Bureau of Public Information, General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), available at http://portal.unesco.org/culture/en/ev.php-URL_ID=29078&URL_DO=DO_TOPIC&URL_SECTION=201.html; Lawrence J. Speer, *UNESCO Culture Convention Approved, Despite Objections from United States*, 22 WTO Rep. (BNA) (Oct. 21, 2005).

¹¹⁸ The countries in the coalition were Canada, France, Germany, Greece, Mexico, Monaco, Morocco, and Senegal. They were supported by the Francophone member states of UNESCO. See Jan Wouters & Bart De Meester, *UNESCO’s Convention on Cultural Diversity and WTO Law: Complementary or Contradictory?* 3 n.6 (Institute for Int’l Law, Working Paper No. 73, 2005), available at <http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP73e.pdf>.

¹¹⁹ Cultural Diversity Convention, *supra* note 114, pmb1., ¶ 2.

¹²⁰ *Id.* art. 5(1). This sovereign right must be exercised “in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments.” *Id.*; see also Wouters & Meester, *supra* note 118, at 8 (“[T]he Convention puts forward only one main right: the State’s right to adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.”).

from actions that “hinder respect for human rights,” such as “freedom of expression, information and communication,” and a “principle of openness and balance,” which seeks an accommodation between protecting local culture and “promot[ing], in an appropriate manner, openness to other cultures of the world.”¹²¹

A major point of contention among the treaty’s drafters was how to define “cultural expressions,” “cultural industries,” and “cultural activities, goods and services,”¹²² given the overlap among these terms and free trade and intellectual property agreements. Ultimately, the drafters adopted capacious definitions of these phrases,¹²³ creating significant conflicts with several WTO agreements. In particular, the Cultural Diversity Convention authorizes its member states to give preferential treatment to the production, distribution, dissemination, and consumption of domestic cultural industries,¹²⁴ a preference that is inconsistent with the national treatment rules in GATT, GATS, and TRIPS.¹²⁵ According to some commentators these provisions are also

¹²¹ Cultural Diversity Convention, *supra* note 114, arts. 2(1), (8).

¹²² *Id.* art. 4 (defining each of these terms).

¹²³ *See id.* art. 4(3) (defining “cultural expressions” as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”); *id.* art. 4(4) (defining “cultural activities, goods and services” as including “those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have”); *id.* art. 4(5) (defining “cultural industries” as “industries producing and distributing cultural goods or services as defined in paragraph 4 above”).

¹²⁴ The “measures” that states “may” adopt to protect and promote the diversity of cultural expressions within their respective territories include, most notably, the following:

[M]easures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for their creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services; [and] measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services.

Id. arts. 6(2)(b), 6(2)(c).

¹²⁵ *See* Wouters & Meester, *supra* note 118, at 18 (identifying numerous inconsistencies between WTO agreements and earlier version of Cultural Diversity Convention, including provisions that appear in final text, and stating that “measures that reserve certain space for domestic cultural goods . . . are a clear violation of the principle of national treatment”); *see also* Lawrence J. Speer, *U.S. Totally Isolated at UNESCO Meeting as Cultural Diversity Treaty Gets Approved*, 22 WTO Rep. (BNA)

intended to slow the United States' effort to negotiate bilateral trade treaties that require developing countries to "give up their rights to preserve and support their own unique audiovisual and information services, including film, television and music."¹²⁶

Although early commentary on the new treaty has stressed its clash with international trade rules, the Cultural Diversity Convention's relationship to intellectual property protection standards has an even more troubled history. One might reasonably expect a treaty on cultural diversity to contain an extensive treatment of these standards. Remarkably, the Convention's final text contains only a single express reference on intellectual property — a statement of "the importance of intellectual property rights in sustaining those involved in cultural creativity" — which is buried near the end of a twenty-one paragraph preamble.¹²⁷ In addition, the treaty contains three citations to the Universal Declaration on Human Rights or to "universally recognized human rights instruments."¹²⁸ These references highlight the importance of certain rights protected by those documents, such as "freedom of expression, information and communication," and "freedom of thought."¹²⁹ Yet they make no mention of the documents' authors' rights provisions.

The Cultural Diversity Convention's sparse references to intellectual property are a profound departure from earlier versions of the treaty, most notably a March 2005 "composite text" produced by a group of intergovernmental experts charged with writing a preliminary draft of the Convention.¹³⁰ The preamble set the tone of the composite text,

(Oct. 20, 2005) (quoting statement by U.S. Ambassador to UNESCO that "[u]nder the provisions of the convention as drafted, any state, in the name of cultural diversity, might invoke the ambiguous provisions of this convention to try to assert a right to erect trade barriers to goods or services that are deemed to be cultural expressions").

¹²⁶ Godoy, *supra* note 117.

¹²⁷ Cultural Diversity Convention, *supra* note 114, pmb., ¶ 17. This single reference is especially surprising given that the Universal Declaration on Cultural Diversity advocates the "the full implementation of cultural rights as defined in Article 27 of the [UDHR] and in Articles 13 and 15 of the [ICESCR]." Universal Declaration on Cultural Diversity, *supra* note 115, art. 5.

¹²⁸ Cultural Diversity Convention, *supra* note 114, pmb., ¶ 5, arts. 2(1), 5(1).

¹²⁹ *Id.* at pmb., ¶ 12, art. 2(1).

¹³⁰ U.N. Educational, Scientific and Cultural Organization [UNESCO], *Preliminary Report of the Director-General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, U.N. Doc. CLT/CPD/2005/CONF.203/6, App. 1 (Mar. 3, 2005) [hereinafter March 2005 Composite Text]. Intellectual property rights are also emphasized in a July 2004 draft of the Convention:

States Parties shall also ensure:

emphasizing “the vital role of the creative act . . . and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights.”¹³¹ This was followed, in the draft treaty’s definitions section, with a list of the characteristics of “cultural goods and services,” which recognized that such goods and services “generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation.”¹³² The composite text also included, in unequivocal and forceful language, an affirmative obligation to protect intellectual property. This obligation extended to intellectual property rights recognized in “existing international instruments to which States are parties”¹³³ as well as “traditional . . . cultural contents and expressions,”¹³⁴ with a particular focus on preventing piracy, misappropriation, and “the granting of invalid intellectual property rights.”¹³⁵

Finally, in recognition of the need to harmonize the draft treaty with preexisting treaties, the composite text included two “savings clauses” that specified which treaty obligations were to take precedence in the event of a conflict between agreements.¹³⁶ The first clause specified that the provisions of the draft Cultural Diversity Convention were

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

U.N. Educational, Scientific and Cultural Organization [UNESCO], *Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, art. 7(2), U.N. Doc. CLT/CPD/2004/CONF-201/2 (July 2004).

¹³¹ March 2005 Composite Text, *supra* note 130, pmbi., ¶ 10.

¹³² *Id.* art. 4(3).

¹³³ *Id.* art. 7(3) (“[States Parties] shall ensure [intellectual property rights] are [fully respected and enforced] according to existing international instruments to which States are parties, particularly through the development [or strengthening] of measures against piracy.”) (internal citations omitted) (brackets in original).

¹³⁴ *Id.* art. 7(4) (“[States Parties] undertake to ensure in their territory [protection against unwarranted appropriation] of traditional and popular [cultural contents and expressions], [with particular regard to preventing the granting of invalid intellectual property rights].”) (internal citations omitted) (brackets in original).

¹³⁵ *Id.*

¹³⁶ For a discussion of savings clauses between trade and environmental protection agreements, see Sabrina Saffrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM. J. INT’L L. 606, 614-18 (2002).

subordinate to “any existing international instrument relating to intellectual property rights” to which the Convention’s member states were also parties.¹³⁷ The second paragraph carved out a narrow exception to this hierarchy, however, recognizing that “[t]he provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.”¹³⁸ Inspired by a similar provision in the Convention on Biological Diversity which has yet to be authoritatively interpreted, this savings clause would have subordinated trade and intellectual property obligations to those of the Cultural Diversity Convention in the event that a member state could demonstrate such damage.¹³⁹

In comparison to the March 2005 composite text, the final Convention manifests near antipathy to intellectual property protection standards. The drafters removed all of the clauses described above and replaced them with far weaker commitments.¹⁴⁰ When protecting and promoting the diversity of cultural expressions, member states now “may” adopt “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions.”¹⁴¹ And they need only “endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.”¹⁴² By contrast, states may also achieve the Cultural Diversity Convention’s goals by “promot[ing] the free exchange and circulation of . . . cultural expressions and cultural activities, goods

¹³⁷ March 2005 Composite Text, *supra* note 130, art. 19, Option A, ¶ 1.

¹³⁸ *Id.* art. 19, Option A, ¶ 2.

¹³⁹ U.N. Environment Programme [UNEP], Convention on Biological Diversity art. 22.1, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC5/4, 31 I.L.M. 818 (“The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”); *see also* Wouters & Meester, *supra* note 118, at 29 (analyzing savings clauses in March 2005 composite text).

¹⁴⁰ The removal of these clauses appears to have occurred in early April 2005 at a meeting of UNESCO officials and government negotiators held in Cape Town, South Africa. *See* The Director General, UNESCO, *Report of the Director-General on the Progress Achieved During the Third Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, ¶ 11, U.N. Doc. 172 EX/20 (Aug. 11, 2005).

¹⁴¹ Cultural Diversity Convention, *supra* note 114, art. 6(2)(g).

¹⁴² *Id.* art. 7(2).

and services”¹⁴³ — a provision that could be read as sanctioning promotional efforts that disregard intellectual property protection rules required by TRIPS and other international agreements.

Finally, the savings clause contained in the Convention differs substantially from the earlier draft described above. In place of hierarchical rules, the clause adopts a posture of studied ambiguity. On the one hand, it stresses the need to “foster mutual supportiveness between th[e] Convention and other treaties” and specifies that none of its provisions “shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”¹⁴⁴ But the savings clause also emphasizes that the Cultural Diversity Convention is not “subordinat[e] . . . to any other treaty.”¹⁴⁵ And it directs member states to take into account the Convention’s provisions when “interpreting and applying the other treaties to which they are parties or when entering into other international obligations.”¹⁴⁶ How states will reconcile these clauses, and whether they will enable states to protect cultural diversity in ways that violate trade and intellectual property agreements, cannot be determined until after the Convention enters into force following its thirtieth ratification.¹⁴⁷

B. WHO: *The Medical Research and Development Treaty*

In February 2005, a coalition of more than 150 NGOs, public health experts, economists, and legal scholars called on the WHO to consider a proposal for a Medical Research and Development Treaty (“MRDT”).¹⁴⁸ The treaty aims to establish a new legal framework to promote research and development for pharmaceuticals and other medical treatments that functions as an alternative to patents and the monopoly drug pricing they engender. The treaty’s proponents argue that expansive intellectual property protection rules have created numerous problems, including restricting access to essential medicines, costly and wasteful marketing of drugs and medical products, and skewing investment away from innovations needed to

¹⁴³ *Id.* art. 6(2)(e). This clause also appeared in earlier drafts of the Convention. See March 2005 Composite Text, *supra* note 130, art. 6(2)(d).

¹⁴⁴ Cultural Diversity Convention, *supra* note 114, arts. 20(1)(a), 20(2).

¹⁴⁵ *Id.* art. 20(1).

¹⁴⁶ *Id.* arts. 20(1), 20(1)(b).

¹⁴⁷ *Id.* art. 29 (specifying procedures for Convention’s entry into force).

¹⁴⁸ Medical Research and Development Treaty (draft Feb. 7, 2005) [hereinafter MRDT], available at <http://www.cptech.org/workingdrafts/rndtreaty4.pdf>.

treat diseases that afflict individuals throughout the developing world.¹⁴⁹

The core objectives of the MRDT include encouraging investments in medical innovation responsive to the greatest global need, fairly allocating the costs of such innovation among governments, and sharing the benefits of medical innovation, including new drugs and medical technologies, with developing countries.¹⁵⁰ The treaty achieves these goals by setting minimum financial obligations for qualifying research and development based upon each nation's gross domestic product. Member states can meet those obligations by funding qualifying research projects within their own borders. But they can also fund eligible research in other countries through a system of tradable credits that resembles the emissions trading mechanism created for environmental agreements such as the Kyoto Protocol.¹⁵¹ According to the treaty's proponents, the result of these provisions will be a new legal paradigm that "provide[s] the flexibility to reconcile different policy objectives, including the promotion of both innovation and access, consistent with human rights and the promotion of science in the public interest."¹⁵²

The MRDT's intellectual property provisions are both novel and controversial. The treaty requires all member states to adopt "minimum exceptions to patents rights for research purposes" within five years of ratification.¹⁵³ (The current draft does not specify the content of these exceptions, however.) It also includes a commitment to forego patent applications for a yet-to-be-specified period of time for inventions based upon data from certain open or "public goods databases."¹⁵⁴ In the area of copyright, related rights, and databases, the treaty envisions the adoption of "a best practices model for

¹⁴⁹ See Letter to Ask World Health Organization to Evaluate New Treaty Framework for Medical Research and Development (Feb. 24, 2005) [hereinafter NGO Letter to WHO], available at <http://www.cptech.org/workingdrafts/rndsignonletter.html>; see also Nicoletta Denticio & Nathan Ford, *The Courage to Change the Rules: A Proposal for an Essential Health R & D Treaty*, 2 PUB. LIB. SCI. MED. 96, 97-98 (2005).

¹⁵⁰ See Andrew Jack, *WHO Members Urged to Sign Kyoto-Style Treaty*, FIN. TIMES (London), Feb. 24, 2005, available at 2005 WLNR 2823253; Posting by William New, *Medical R & D Treaty Debated at World Health Assembly*, to Intellectual Property Watch, <http://www.ip-watch.org/weblog/index.php?p=60> (May 30, 2005, 2:01 P.M.).

¹⁵¹ Jack, *supra* note 150; New, *supra* note 150.

¹⁵² NGO Letter to WHO, *supra* note 149, at 1.

¹⁵³ MRDT, *supra* note 148, art. 14.2.

¹⁵⁴ *Id.* art. 14.1

exceptions” in national laws.¹⁵⁵ It does not explain, however, how these exceptions further the treaty’s medical research goals.

To protect the MRDT’s distinctive alternative framework for medical research and innovation, including its intellectual property provisions, the MRDT’s proponents needed to specify the treaty’s relationship to other international agreements. The drafters adopted a distinctive approach to this important legal issue. Unlike other recently adopted treaties whose provisions plausibly conflict with preexisting trade or intellectual property agreements, the MRDT does not contain a clause specifying its relationship to those agreements. Rather, with respect to a defined class of medical research and development products,¹⁵⁶ the MRDT’s signatories agree “to forgo dispute resolution cases” that concern (1) the TRIPS provisions protecting patents and undisclosed test data, or (2) the “pricing of medicines.”¹⁵⁷ They also agree to forgo such dispute settlement, as well as sanctions, “in regional or bilateral trade agreements or unilateral trade policies.”¹⁵⁸ This forbearance is not absolute, however. Rather, it applies only “in areas where compliance with the terms of the Treaty provides an alternative and superior framework for supporting innovation.”¹⁵⁹

The MRDT’s future remains uncertain. A meeting of experts attending the World Health Assembly in May 2005 debated the treaty’s provisions and underlying philosophy, and advocates at that meeting have proposed that the Assembly establish a committee of member states to consider the draft treaty sometime in 2006.¹⁶⁰

C. WIPO: *The Development Agenda and Access to Knowledge Treaty*

Since its creation in the late 1960s, the WIPO has engaged in a broad array of activities consistent with its mandate of “promot[ing]

¹⁵⁵ *Id.* art. 15.

¹⁵⁶ The products defined as “qualified medical research and development” include: “i. Basic biomedical research; ii. Development of biomedical databases and research tools; iii. Development of pharmaceutical drugs, vaccines, medical diagnostic tools; iv. Medical evaluations of these products; and v. the preservation and dissemination of traditional medical knowledge.” *Id.* art. 4.1.

¹⁵⁷ *Id.* art. 16(d).

¹⁵⁸ *Id.* arts. 16(d), 2.3.

¹⁵⁹ *Id.* art. 2.3.

¹⁶⁰ See New, *supra* note 150; Tim Hubbard, Reply to the Comments Requested by CIPIH and WHO to the CPTech Proposal for a Medical Research and Development Treaty (MRDT) (Aug. 15, 2005), available at <http://www.who.int/intellectualproperty/submissions/SubmissionsHubbard.pdf>.

the protection of intellectual property throughout the world.”¹⁶¹ To assist member states in negotiating international agreements, the WIPO Secretariat hosts periodic diplomatic conferences, shares information, and provides expert advice. WIPO also provides technical assistance and training to national governments and to their intellectual property offices, especially in developing countries. More recently, the organization has created standing, expert, and intergovernmental committees which examine specific intellectual property topics and create nonbinding guidelines and recommendations (so-called “soft law”).¹⁶²

Over the last decade, WIPO and its member states have been exceptionally active in negotiating new intellectual property treaties relating to copyrights, patents, and trademarks and in undertaking an ambitious program of soft lawmaking. Although these activities have generated new intellectual property protection standards, those standards have not exclusively favored the interests of industrialized countries. Although some initiatives have benefited states with well-resourced and influential intellectual property industries, developing countries have retained considerable influence in the organization to shape treaty obligations and soft law norms.¹⁶³

Two years ago, however, the political winds shifted in favor of governments and civil society groups seeking to refocus WIPO’s mandate away from generating new intellectual property protection standards and toward economic development and non-proprietary approaches to promoting human innovation and creativity. In October 2004, the WIPO General Assembly adopted a proposal from Argentina and Brazil to establish a new Development Agenda for the organization.¹⁶⁴ This proposal reflected collaboration among like-minded developing countries (known as the “Friends of Development”)¹⁶⁵ and civil society groups, the latter of which issued

¹⁶¹ Convention Establishing the World Intellectual Property Organization [WIPO] art. 3(i), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended Sept. 28, 1979).

¹⁶² See Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT’L L. 179, 192 (2002) (discussing resolutions and recommendations that comprise “the new ‘soft law initiative’ at WIPO”).

¹⁶³ For a more detailed discussion of these trends, see Helfer, *Regime Shifting*, *supra* note 2, at 25-26.

¹⁶⁴ See World Intellectual Prop. Org. [WIPO], General Assembly, *Report of the Twenty-First (15th Extraordinary) Session*, ¶ 218, WO/GA/31/15 (Oct. 5, 2004), available at <http://www.cptech.org/ip/wipo/wipo10042004.html>; WIPO, *Proposal by Argentina and Brazil*, *supra* note 110.

¹⁶⁵ The Friends of Development are comprised of the following countries:

the “Geneva Declaration on the Future of WIPO” prior to the General Assembly meeting.¹⁶⁶

The Geneva Declaration was a brilliant example of using core institutional principles to foment institutional reform. Although the convention establishing WIPO speaks of promoting intellectual property protection on a global basis, there is authority for interpreting the organization’s mandate much more capaciously. In 1974 WIPO entered into an agreement designating it as a specialized agency of the United Nations.¹⁶⁷ Adopted during a period when pressure by newly independent developing countries for a New International Economic Order was at its zenith,¹⁶⁸ the agreement states that WIPO is responsible for “promoting creative intellectual activity and facilitating the transfer of technology . . . to developing countries in order to accelerate economic, social and cultural development.”¹⁶⁹

The Geneva Declaration’s drafters seized upon this long-forgotten treaty language to articulate a revised mission for WIPO. Proceeding from the premise that “[h]umanity faces a global crisis in the governance of knowledge, technology and culture,”¹⁷⁰ the Geneva Declaration demands that WIPO eschew additional expansions of monopoly privileges.¹⁷¹ Instead, it urges the organization to devote greater attention to issues such as (1) the social and economic costs of

Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela. See WIPO, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, 1st Sess., *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11*, Annex at 2, IIM/1/4 (Apr. 6, 2005).

¹⁶⁶ Geneva Declaration on the Future of the World Intellectual Property Organization (Oct. 12, 2004) [hereinafter Geneva Declaration], available at <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

¹⁶⁷ Agreement Between the United Nations and the World Intellectual Property Organization art. 1, Dec. 17, 1974, [hereinafter UN-WIPO Agreement], available at http://www.wipo.int/treaties/en/agreement/pdf/un_wipo_agreement.pdf.

¹⁶⁸ As Peter Yu has stated, “The New International Economic Order sought to bring about fundamental changes in the international economic system by redistributing power, wealth, and resources from the developed North to the less developed South.” Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 409 n.392 (2004) (citing Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, at 527, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (1974)).

¹⁶⁹ UN-WIPO Agreement, *supra* note 167, art. 1.

¹⁷⁰ Geneva Declaration, *supra* note 166, at 1.

¹⁷¹ *Id.* at 2 (“A one size fits all’ approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.”).

intellectual property protection, (2) reforms of existing intellectual property rules, and (3) non-proprietary systems of creativity and innovation, such as “Wikipedia, the Creative Commons, GNU Linux and other free and open software projects, as well as distance education tools and medical research tools.”¹⁷²

Among the many items on the Development Agenda is a proposal for a Treaty on Access to Knowledge (colloquially referred to as the “A2K Treaty”).¹⁷³ Although the A2K Treaty has recently received the backing of influential developing countries such as Brazil and India, its origins are firmly rooted in civil society. In fact, the treaty’s genesis resembles the decentralized, open source collaboration models that its text endorses. A diverse group of NGOs, whose members include medical researchers, educators, archivists, disabled people, and librarians from industrialized and developing nations, drafted and circulated numerous suggestions for provisions to be included in the treaty.¹⁷⁴ In February 2005, representatives of these groups met in Geneva to discuss the proposals and to hammer out a comprehensive text.¹⁷⁵

The current draft of the A2K Treaty bears the telltale fingerprints of multiple authors with diverse (if not divergent) interests. It includes a dozen articles on limitations and exceptions to copyright and related rights, provisions on patent protection aimed at “expanding and enhancing the knowledge commons,” measures to promote open standards and control anticompetitive practices, and a hodge podge of

¹⁷² *Id.* at 1. For more detailed discussions of the objectives of the Development Agenda’s proponents, see generally *Humanizing Intellectual Property: Developing Countries Launch New Initiative*, THIRD WORLD RESURGENCE, Nov.-Dec. 2004), available at <http://www.twinside.org.sg/focus.htm> (describing different components of Development Agenda); James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9, available at www.law.duke.edu/journals/dltr/articles/2004dltr0009.html (arguing that WIPO must reverse “maximalist rights culture” that international intellectual property regime currently embodies and that is detrimental to global development).

¹⁷³ Treaty on Access to Knowledge (May 9, 2005) (draft) [hereinafter A2K Treaty], available at <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>.

¹⁷⁴ For a list of supporting civil society organizations, see IP Justice, NGO Group Statement Supporting the Friends of Development Proposal, http://www.ipjustice.org/WIPO/NGO_Statement.shtml (last visited Feb. 20, 2007). Proposals for inclusion in the A2K Treaty circulated through an “A2K” listerv. CPTech.org, A2K Listserv, <http://lists.essential.org/mailman/listinfo/a2k>.

¹⁷⁵ See Posting of William New, *Experts Debate Access to Knowledge*, to Intellectual Property Watch, <http://www.ip-watch.org/weblog/index.php?p=19&res=1024&print=0> (Feb. 15, 2005, 10:24 P.M.).

miscellaneous and unfinished clauses on technology transfer, copyright collecting societies, and financial obligations.¹⁷⁶

Several common threads connect these varied provisions. First, according to observers at the Geneva meeting, the treaty's proponents strongly support the view that "access to knowledge is a basic human right, and that restrictions on access ought to be the exception, not the other way around."¹⁷⁷ Although the draft text does not expressly mention human rights nor cite to the ICESCR or the UDHR, many of its provisions echo the human rights framework for intellectual property described in this Article. For example, the treaty's preamble highlights the need for a balanced regime of protection, emphasizing both the importance of "protecting and supporting the interests of creative individuals and communities" and "enhanc[ing] participation in cultural, civic and educational affairs, and sharing of the benefits of scientific advancement."¹⁷⁸

A second thematic link among the A2K Treaty's diverse clauses is that both subject matter exclusions from, and exceptions and limitations to, intellectual property protection standards are mandatory rather than permissive. In the area of inventions, for example, the treaty contains a lengthy list of exclusions from patentable subject matter, including, most controversially, computer programs and business methods.¹⁷⁹ With respect to copyright, the treaty states that "[f]acts and works lacking in creativity, should not be subject to copyright or copyrightlike protections,"¹⁸⁰ a rule that appears to preclude sui generis protection for unoriginal databases. It also contains a lengthy list of exceptions and limitations, which (in the case of copyrighted works) are presumed to satisfy the "three-step test" for such restrictions set out in TRIPS.¹⁸¹

The A2K Treaty's subject matter exclusions and its exceptions and limitations parallel similar provisions found in some — but by no means all — national laws. For states that ratify the A2K Treaty, however, these exceptions will become compulsory. The treaty thus

¹⁷⁶ A2K Treaty, *supra* note 173, at 1-2 (listing various treaty provisions).

¹⁷⁷ New, *supra* note 175.

¹⁷⁸ A2K Treaty, *supra* note 173, pmb., paras. 1, 4.

¹⁷⁹ *Id.* art. 4.1(c) (stating that "patent rights shall not be granted for, inter alia, "programs for computers," "presentations of information," and "methods of teaching and education").

¹⁸⁰ *Id.* art. 3.7.

¹⁸¹ *Id.* art. 3.1(a); see Ginsburg, *supra* note 89, at 17-19 (discussing three-step test for TRIPS-compatibility of exceptions and limitations to copyright and patent protection).

endorses maximum standards of intellectual property protection to counterbalance the “minimum standards” approach that intellectual property agreements have followed for more than a century.¹⁸²

Under this “minimum standards” approach, multilateral intellectual property treaties establish a floor of protection. But nothing in the treaties prevents governments from enacting more expansive intellectual property rules in their domestic laws or from entering into subsequent agreements that achieve the same result. Indeed, the treaties expressly contemplate that governments may gravitate toward such higher standards.¹⁸³ By placing a mandatory ceiling on how high these standards can rise, the proponents of the A2K Treaty are attempting to counteract the upward drift of intellectual property rules that has accelerated over the past few decades and to establish a balance regime of protection that is fully consistent with a human rights framework for intellectual property.

CONCLUSION

The creation of a human rights framework for intellectual property is still in an early stage of development. During this gestational period, government officials, international jurists, NGOs, and commentators — many of whom have divergent views concerning the appropriate relationship between human rights and intellectual property — have a window of opportunity to influence the framework’s substantive content and the procedural rules that mediate relationships among its component parts. In this conclusion, I briefly sketch three hypothetical futures for the framework and explain why each of these predictions is both plausible and likely to be contested by states and non-state actors.

¹⁸² See, e.g., TRIPS, *supra* note 1, art. 1 (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement.”); see also J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT’L LAW. 345, 351 (1995).

¹⁸³ See, e.g., Berne Convention *supra* note 17, art. 19 (“The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”); Paris Convention, *supra* note 16, art. 19 (“It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.”).

A. *Using Human Rights to Expand Intellectual Property*

One possible future relationship between human rights and intellectual property is an expansion of intellectual property protection standards at the expense of other human rights and the interests of licensees, users, and consumers. In this vision of the future (a dystopian one, to be sure), industries and interest groups that rely upon intellectual property for their economic well-being would invoke the authors' rights and property rights provisions in human rights treaties to further augment existing standards of protection. The fear of such expansions helps to explain why some commentators are skeptical of attempts to analyze intellectual property issues in human rights terms.¹⁸⁴

Early intimations of this version of the framework's future are already apparent. The authors' rights clauses of the UDHR and ICESCR share a close affinity with the natural rights tradition of *droit d'auteur* prominent in civil law jurisdictions.¹⁸⁵ Constitutional courts in several European countries have recently relied on fundamental rights guarantees in their respective domestic constitutions to justify intellectual property protection.¹⁸⁶ It would be but a short step for these courts to turn to international human rights law to enhance this protection still further.¹⁸⁷

Whether these expansionist tendencies take root or not may depend upon the outcome of a dispute pending before the European Court of Human Rights ("ECHR"), the international tribunal charged with adjudicating complaints under the European Convention on Human

¹⁸⁴ See, e.g., Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2853 (2006); Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021, 1031-32 (2007).

¹⁸⁵ See STROWEL, *supra* note 62, at 290-321.

¹⁸⁶ See, e.g., Joseph Straus, *Design Protection for Spare Parts Gone in Europe? Proposed Changes to the EC Directive: The Commission's Mandate and Its Doubtful Extension*, 27 EUR. INTELL. PROP. REV. 391, 298 (2005) (discussing 2000 decision of German Constitutional Court which held that patents constitute property under article 14 of German Basic Law); Thomas Crampton, *Apple Gets French Support in Music Compatibility Case*, N.Y. TIMES, July 29, 2006, at C7 (discussing ruling of French Constitutional Council, country's highest judicial body, which "declared major aspects of the so-called iPod law unconstitutional"; court's decision "made frequent reference to the 1789 Declaration on Human Rights and concluded that the law violated the constitutional protections of property").

¹⁸⁷ For an insightful discussion of these issues, see Christophe Geiger, "Constitutionalising" Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMP. L. 371, 382-85 (2006).

Rights (“European Convention”) and its Protocols.¹⁸⁸ In *Anheuser-Busch, Inc. v. Portugal*, a decision issued in late 2005,¹⁸⁹ the ECHR concluded that registered trademarks are protected by the property rights clause of the European Convention’s first Protocol.¹⁹⁰ Using forceful and unequivocal language, the ECHR stated that “intellectual property as such incontestably enjoys the protection of Article 1 of Protocol No. 1.”¹⁹¹ On the facts presented, however, a majority of the ECHR found no violation of the right to property because the American brewer’s trademark application was contested by a rival Czech beer distributor whose products were protected by a registered geographical indication.¹⁹² Given the importance of these issues, the ECHR referred the case to a Grand Chamber for re-argument in 2006.¹⁹³ The Grand Chamber held that the right to property includes intellectual property as well as applications to register trademarks. On the unique facts presented, however, it concluded that the government had not violated article 1.¹⁹⁴ The Grand Chamber thus left unresolved

¹⁸⁸ See generally European Court of Human Rights, <http://www.echr.coe.int/echr> (last visited Feb. 20, 2007).

¹⁸⁹ *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01 (Eur. Ct. H.R. Oct. 10, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787908&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACCBCD1763D4D8149>.

¹⁹⁰ See *id.* paras. 43-49; see also Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, opened for signature Mar. 20, 1952, 213 U.N.T.S. 262, 262 [hereinafter Article 1] (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”).

¹⁹¹ *Anheuser-Busch*, App. No. 73049/01, para. 43.

¹⁹² *Id.* paras. 50-52.

¹⁹³ Press Release, European Court of Human Rights, Grand Chamber Hearing *Anheuser-Busch Inc. v. Portugal* (June 28, 2006), available at http://www.coe.int/T/D/Kommunikation_und_politische_Forschung/Presse_und_Online_Info/Presseinfos/2006/20060628-381-GH-Portugal.asp. Review by this panel of 17 judges is reserved for disputes which involve “a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.” *Id.*

¹⁹⁴ *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, ¶¶ 72, 79-87 (Eur. Ct. H.R. Grand Chamber Jan. 11, 2007), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=60433&sessionId=11419720&skin=hudoc-en&attachment=true>. Article 1 expressly authorizes governments to regulate private property in the public interest. Article 1, *supra* note 190, at 262 (“The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .”). It does not, however, specify how the ECHR is to assess the legality of such regulations.

the more difficult issue of when governments may regulate or restrict intellectual property in the public interest.

B. *Using Human Rights to Impose External Limits on Intellectual Property*

Patent, trademark, and copyright owners who invoke the property rights and authors' rights provisions of human rights law to demand additional legal protections will likely face stiff resistance from user groups. These groups can draw upon other fundamental rights and freedoms to press for a competing version of the framework, one that relies on human rights law to restrict intellectual property.

National courts in Europe are using the right to freedom of expression protected by the European Convention for precisely this purpose.¹⁹⁵ "In particular, there have been a number of decisions in the field of copyright in which the freedom of expression has been invoked to justify a use that is not covered by an exception provided for in the law."¹⁹⁶ These decisions rely on human rights law to overcome the "malfunctions" of the intellectual property system, using them as a "corrective when [intellectual property] rights are used excessively and contrary to their functions."¹⁹⁷ In effect, these cases reach beyond intellectual property's own safety valves — such as fair use, fair dealing, and other exceptions and limitations — to impose external limits, or maximum standards of protection, upon rights holders.¹⁹⁸

How might user groups increase the likelihood that national courts will invoke human rights law to constrain intellectual property in this way? One plausible method would be to extend the strategy described in Part IV of this Article to other international lawmaking venues.¹⁹⁹

¹⁹⁵ See Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, in TORREMANS, *supra* note 6, at 37, 52-61; Alain Strowel & François Tulkens, *Equilibrer la liberté d'expression et le droit d'auteur: A propos des libertés de créer et d'user des oeuvres*, in DROIT D'AUTEUR ET LIBERTÉ D'EXPRESSION 1 (Alain Strowel & François Tulkens eds., 2006).

¹⁹⁶ Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 268, 277 (2004).

¹⁹⁷ *Id.* at 278.

¹⁹⁸ See Birnhack, *supra* note 195, at 61-62; Geiger, *supra* note 196, at 270-80.

¹⁹⁹ See Helfer, *Regime Shifting*, *supra* note 2, at 58 (describing strategy whereby states and non-state actors shifted lawmaking initiatives into biodiversity, plant genetic resources, public health, and human rights regimes as way to create "counterregime intellectual property norms" in tension with TRIPS).

Increasing the number of new treaties and soft law standards that contain precise, subject-specific limits on intellectual property improves the odds that domestic judges will refer to those limits when resolving the disputes that come before them. Such an approach also creates “strategic inconsistency” that increases pressure on government representatives in other international organizations to acknowledge these new rules and standards.²⁰⁰

This tactic has considerable risks, however. The international legal system is disaggregated and decentralized and lacks the comprehensive normative hierarchies and enforcements mechanisms found in national laws.²⁰¹ A surfeit of conflicting rules will further diminish the system’s coherence. This could make international rules less amenable to incorporation into national law, especially for judges unsure of their authority to construe domestic statutes in harmony with those rules.

C. *Achieving Human Rights Ends Through Intellectual Property Means*

The two future frameworks described above share a common strategy. They each take the existing baseline of intellectual property protection as a given and then invoke human rights law to bolster arguments for moving that baseline in one direction or the other.

A third human rights framework for intellectual property proceeds from a very different premise. It 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 laws help to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified (but not necessarily restricted, as I indicate below). But the focus remains on the minimum levels of human well-being that states must provide, using either appropriate intellectual property rules or other means.

A 2001 report by the U.N. High Commissioner for Human Rights analyzing the impact of TRIPS on the right to health exemplifies this

²⁰⁰ Kal Raustalia & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 301-02 (2004); see also Helfer, *Regime Shifting*, *supra* note 2, at 60 (describing efforts by developing countries to integrate “principles, norms, and rules generated in other regimes into the WTO and WIPO”).

²⁰¹ See Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 205-06 (2003).

outcome-focused, inductive approach.²⁰² The report reviews the components of the right to health protected by article 12 of the ICESCR.²⁰³ According to a general comment issued by the CESCR Committee, the right to health includes an obligation for states to promote medical research and to provide access to affordable treatments, including essential drugs.²⁰⁴

The High Commissioner's report analyzes how intellectual property affects these two obligations. It acknowledges that patents help governments promote medical research by providing an incentive to invent new medical technologies, including new drugs. But the report also asserts that pharmaceutical companies' "commercial motivation . . . means that research is directed, first and foremost, towards 'profitable' disease. Diseases that predominantly affect people in poorer countries . . . remain relatively under-researched."²⁰⁵ One way to remedy this market imperfection is to create incentives for innovation outside of the patent system.²⁰⁶

A similar perspective informs the High Commissioner's discussion of access to essential medicines. The report states that patent protection decreases the affordability of drugs. But affordability also depends on factors unrelated to intellectual property, "such as the level of import duties, taxes, and local market approval costs."²⁰⁷ In light of these dual impediments, governments can improve access to patented pharmaceuticals in two ways. First, they can exploit the flexibilities already embedded in TRIPS, such as issuing compulsory licenses to manufacturer generic drugs and importing cheaper drugs from other countries.²⁰⁸ Second, they can adopt affordability-enhancing mechanisms outside of the intellectual property system, for example through differential pricing, "the exchange of price information, price competition and price negotiation with public procurement and insurance schemes."²⁰⁹ Strikingly, the efficacy of

²⁰² *High Commissioner Report*, *supra* note 47.

²⁰³ ICESCR, *supra* note 7, art. 12.

²⁰⁴ *High Commissioner Report*, *supra* note 47, ¶ 30.

²⁰⁵ *Id.* ¶ 37.

²⁰⁶ *See id.* ¶¶ 37-38. One such alternative would be to establish "fixed monetary prizes for the first inventor to come up with an effective treatment for a medical indication" that was under-researched in the patent system. Keith E. Maskus, *Ensuring Access to Essential Medicines: Some Economic Considerations*, 20 WIS. INT'L L.J. 563, 578 (2002) (reviewing and critiquing such proposals).

²⁰⁷ *High Commissioner Report*, *supra* note 47, ¶ 43.

²⁰⁸ *Id.* ¶¶ 47-49.

²⁰⁹ *Id.* ¶ 46.

these mechanisms may require augmenting existing intellectual property protection rules, such as negotiating “drug licensing agreements with geographical restrictions[,] . . . so that cheaper drugs do not leak back to wealthier markets.”²¹⁰

It is too early to predict which of these three versions of the human rights framework for intellectual property, or others yet to be identified, will emerge as dominant. What is certain is that the rules, institutions, and discourse of international human rights are now increasingly relevant to intellectual property law and policy and that the two fields, once isolated from each other, are becoming ever more intertwined.

²¹⁰ *Id.* ¶ 47; *see also id.* ¶ 50 (emphasizing need for rules to ensure that “trademarks are not counterfeited” so that consumers and medical professionals can “identify the source and quality of pharmaceuticals”).