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Intellectual Property and Human Rights in the Nonmultilateral Era

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INTELLECTUAL PROPERTY AND HUMAN RIGHTS IN THE NONMULTILATERAL ERA

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Abstract

In the past decade, countries have actively established bilateral, plurilateral, and regional trade and investment agreements, such as the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership Agreement. Although commentators have examined the conflict and tension between intellectual property and human rights in the past, the arrival of these agreements has ushered in a new era of nonmultilateralism that warrants a reexamination of the complex interrelationship between intellectual property and human rights. This Article closely examines the human rights impact of the intellectual property provisions in TRIPS-plus nonmultilateral agreements. It begins by outlining the challenges inherent in any analysis of the interface between intellectual property and human rights. It then examines the relationship between these agreements and the human rights system. The Article concludes with a discussion of the normative and systemic adjustments needed to alleviate the tension or conflict between these agreements and the international human rights system.

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INTRODUCTION

In the past decade, the European Union and the United States have actively established bilateral, plurilateral, and regional trade and investment agreements.[1] While the United States developed free trade

1. *See generally* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing free trade agreements in the intellectual property context); Pedro Roffe et al., *Intellectual Property Rights in Free Trade Agreements: Moving Beyond TRIPS Minimum Standards*, *in* RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 266 (Carlos M. Correa ed., 2010) (discussing free trade agreements in relation to the TRIPS framework); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the U.S.–Australia Free Trade Agreement); Jean-Frédéric Morin, *Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?*, 12 J. WORLD INTELL. PROP. 175 (2009) (examining the United States' free trade agreement strategy); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392–400 (2004) [hereinafter Yu, *Currents and Crosscurrents*] (discussing the growing use of bilateral, plurilateral, and regional trade agreements to push for higher intellectual property standards); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 961–86 (2011) (critically examining the strengths and weaknesses of bilateral and plurilateral trade agreements).

Although no clear distinctions exist between plurilateral agreements, regional agreements, and multilateral agreements, "plurilateral agreements" tend to refer to those agreements that are negotiated outside the traditional international or regional organizations or fora. The recently adopted Anti-Counterfeiting Trade Agreement is a good example. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA]. Plurilateral agreements can also have a "loose" regional focus. Simon Lester and Bryan Mercurio, for example, define "'loose' regional trade agreements" as "plurilateral agreements among countries which may or may not be in somewhat close proximity to each other, but do not necessarily include

agreements (FTAs), with a strong focus on trade, investment, and related areas, the European Union negotiated both FTAs and economic partnership agreements (EPAs) with its trading partners. Compared with FTAs, EPAs seek not only to promote free trade, but also to facilitate economic integration and stimulate local development. In addition to the United States and the European Union, emerging countries such as China[2] and India[3] have negotiated their own nonmultilateral trade agreements. Although these agreements bear some similarities to FTAs and EPAs, they also differ significantly in terms of their language, underlying goals, and negotiating approaches.[4]

It remains to be seen whether these myriad agreements will eventually spark a race among the major trading powers, or even result in a "battle of the FTAs."[5] It is also unclear whether the recent agreements will subsequently be consolidated into a new multilateral arrangement.[6] Nevertheless, there is no denying that the establishment of these agreements has ushered in a new era of nonmultilateralism, which has raised difficult questions concerning appropriate policy responses.[7] The arrival of this era has also rendered inadequate the existing literature on the interrelationship among various international regimes.

The relationship between intellectual property and human rights is an area that deserves our renewed attention. Although commentators have

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all countries from that area." Simon Lester & Bryan Mercurio, *Introduction* to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 1, 2 (Simon Lester & Bryan Mercurio eds., 2008) [hereinafter BILATERAL AND REGIONAL TRADE AGREEMENTS].

2. For discussions of China's free trade agreements, or what I have termed "Sinic trade agreements," see generally Henry Gao, *The RTA Strategy of China: A Critical Visit*, *in* CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 53 (Ross Buckley et al. eds., 2008); Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362 (2010); Yu, *Sinic Trade Agreements*, *supra* note 1.

3. *See* Julia Ya Qin, *China, India and WTO Law*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 167, 196 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010) ("It was not until recent years that India began to enter into regional free trade arrangements with others, mostly its neighbouring countries."); Wang Jiangyu, *The Role of China and India in Asian Regionalism*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra*, at 333, 356–58 (discussing India's regional trade initiatives).

4. *See* Yu, *Sinic Trade Agreements*, *supra* note 1, at 986–1018 (discussing the different underlying goals and negotiating approaches of China's nonmultilateral agreements).

5. *See id.* at 1018–27 (identifying three potential "battles of the FTAs" caused by the differences between FTAs and EPAs on the one hand and China's nonmultilateral agreements on the other).

6. *See id.* at 976 (noting that "bilateral and plurilateral agreements can help drive new norms that will be eventually consolidated in a multilateral setting").

7. *See* Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 9–12 (2011) (discussing the rise of the nonmultilateral era). Policy adjustments will become even more important if this era continues for an extended period of time, as opposed to serving as a mere temporary transition before countries return their focus to the multilateral system.

examined at length the conflict and tension between these two regimes, as well as the human rights impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[8] the intellectual property provisions in nonmultilateral agreements have generated new issues and problems while bringing to the debate many new voices. With the recent adoption of the Anti-Counterfeiting Trade Agreement (ACTA)[9] and the ongoing negotiation of the Trans-Pacific Partnership Agreement (TPP),[10] it is high time we revisit the debate on intellectual property and human rights.

This Article closely examines the human rights impact of the intellectual property provisions in TRIPS-plus nonmultilateral agreements. Part I demonstrates that the debate on intellectual property and human rights deserves our renewed attention. This Part further identifies five sets of new developments that justify a reexamination of the complex interplay between intellectual property and human rights.

Part II outlines the challenges inherent in any analysis of the interface between intellectual property and human rights. Building on the human rights framework for intellectual property I have previously developed,[11] this Part notes the overlap between the intellectual property rights protected under TRIPS-plus nonmultilateral agreements and the rights recognized in existing international or regional human rights instruments. It underscores the importance of distinguishing the human rights attributes of intellectual property rights from the non-human rights aspects of intellectual property protection.

Part III examines the relationship between TRIPS-plus nonmultilateral

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

9. ACTA, *supra* note 1; *see also* Yu, *supra* note 7 (discussing the complex politics behind the negotiation of ACTA); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA (forthcoming 2012), *available at* http://ssrn.com/abstract=1948326 [hereinafter Yu, *What Enforcement?*] (suggesting ways to improve the design of an anticounterfeiting trade agreement); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 [hereinafter Yu, *Six Secret Fears*] (discussing the serious concerns about ACTA).

10. *See Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/tpp (last visited Sept. 19, 2011) (providing up-to-date information about the Trans-Pacific Partnership Agreement). *See generally* Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27 (2011) (discussing the Trans-Pacific Partnership Agreement); Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, DRAKE L. REV. DISCOURSE, forthcoming June 2012, *available at* http://ssrn.com/abstract=2054950 (discussing why TPP is likely to be more dangerous than ACTA from a public interest standpoint).

11. *See generally* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007) (exploring ways to develop a human rights framework for intellectual property and to resolve the tension and conflict between human rights and the non-human rights aspects of intellectual property protection).

agreements and the human rights system. This Part discusses the compatibilities between intellectual property provisions in these agreements and the human rights system as well as the resulting synergies created within the system. This Part also examines the various impediments nonmultilateral agreements pose to greater protection of human rights. It discusses, in particular, the conflicts and inconsistencies within these agreements, the lost opportunities for promoting human rights, and the indirect systemic tension that the agreements have generated within the human rights system.

Part IV concludes with a discussion of normative and systemic adjustments that seek to alleviate the tension or conflict between TRIPS-plus nonmultilateral agreements and the international human rights system. It is my hope that these adjustments will help to strike a more appropriate balance between the protection and enforcement of intellectual property rights and the commitments made in international or regional human rights instruments.

I. REVISITING THE DEBATE

Until recently, policy makers, scholars, and activists have paid little attention to the implications of the intellectual property system for the protection of human rights.[12] Their lack of interest was due in part to the arcane, obscure, complex, and highly technical nature of intellectual property law and policy[13] and in part to the ability of countries to retain substantial policy space for developing their own intellectual property systems.[14] When human rights issues arose, they were usually the result of

12. As Professors Laurence Helfer and Graeme Austin acknowledge:

> Long ignored by both the human rights and intellectual property communities, the relationship between these two fields has now captured the attention of government officials, judges, activist communities, and scholars in domestic legal systems and in international venues such as the World Intellectual Property Organization, the United Nations Human Rights Council, the Committee on Economic, Social and Cultural Rights, the World Trade Organization, the World Health Organization, and the Food and Agriculture Organization.

LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 1 (2011).

13. *See* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 99 (2003) ("To a certain extent IP law is reminiscent of the Catholic Church when the Bible was in Latin. IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy."); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975 (2007) ("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."); Yu, *Currents and Crosscurrents*, *supra* note 1, at 419 (2004) ("In the past, intellectual property issues were considered arcane, obscure, complex, and highly technical.").

14. *See* Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property*

decisions made at the domestic level, including those made under heavy foreign pressure. Indeed, the two systems rarely interact with each other. As Professors Laurence Helfer and Graeme Austin remind us:

> Human rights law . . . offered neither a necessary nor a sufficient justification for state-granted monopolies in intangible knowledge goods; nor, conversely, did it serve to check the expansion of intellectual property protection standards . . . . [To a great extent,] each legal regime was preoccupied with its own distinct concerns and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion.[15]

That position changed, however, when the TRIPS Agreement entered into force in January 1995. For the first time, the Agreement imposed a supersize-fits-all template on less developed countries for the protection and enforcement of intellectual property rights.[16] The Agreement's impact was more transformative and far-reaching than that of preexisting intellectual property conventions, such as the Paris Convention for the Protection of Industrial Property[17] and the Berne Convention for the Protection of Literary and Artistic Works.[18] Because the TRIPS Agreement introduced high, mandatory standards for the protection and enforcement of intellectual property rights, many countries, in particular those in the less developed world, lost considerable autonomy and policy space for developing their own intellectual property systems.[19]

In view of the Agreement's many deleterious effects on the protection of human rights in less developed countries, human rights bodies and commentators have lamented the conflict between the TRIPS Agreement and the international human rights system. For example, in Resolution 2000/7 on "Intellectual Property Rights and Human Rights," the United Nations Sub-Commission on the Promotion and Protection of Human Rights (U.N. Sub-Commission) declared:

> [A]ctual or potential conflicts exist between the

Schizophrenia, 2007 MICH. ST. L. REV. 1, 2–5 (discussing how the policy space of less developed countries has been increasingly enclosed in the name of international harmonization).

15. HELFER & AUSTIN, *supra* note 12, at 33–34.

16. *See* Yu, *Currents and Crosscurrents*, *supra* note 1, at 364–67 (discussing the establishment of the TRIPS Agreement as a supranational code); Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 928–33 (2008) (discussing the transformational impact of the TRIPS Agreement on the field of intellectual property law).

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

18. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986) (revised at Paris July 24, 1971).

19. *See* Yu, *supra* note 14, at 7–9.

> implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, *inter alia*, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, "bio-piracy" and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health.[20]

A year later, in Resolution 2001/21, the Sub-Commission reiterated its concerns about the conflicts between intellectual property and human rights.[21] While the problems brought about by the TRIPS Agreement were serious, the international community's growing attention to the protection of traditional peoples, indigenous communities, and their knowledge and cultural expressions made the conflicts more salient.[22]

Coming to the defense of the intellectual property system, the World Trade Organization (WTO) noted the potential for the intellectual property and human rights systems to coexist.[23] Instead of focusing on conflicts, the WTO emphasized the flexibilities built into the TRIPS Agreement and

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20. Sub-Comm'n on Human Rights Res. 2000/7, Intellectual Property Rights and Human Rights, 52d Sess., July 31–Aug. 18, 2000, pmbl., recital 11, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument [hereinafter Resolution 2000/7].

21. *See* Sub-Comm'n on Human Rights Res. 2001/21, Intellectual Property and Human Rights, 53d Sess., July 30–Aug. 17, 2001, pmbl., recital 11, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.RES.2001.21.En?Opendocument ("Reiterating that actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, in particular the rights to self-determination, food, housing, work, health and education, and in relation to transfers of technology to developing countries . . . .").

22. *See* HELFER & AUSTIN, *supra* note 12, at 432 ("[T]he increased attention given to the rights of indigenous peoples by U.N. agencies in the 1990s was among the catalysts that encouraged international human rights bodies to address intellectual property issues." (footnote omitted)).

23. As the WTO declared:

> Rights under article 27.2 of the UDHR and article 15.1(c) of the ICESCR together with other human rights will be best served, taking into account their interdependent nature, by reaching an optimal balance within the IP system and by other related policy responses. Human rights can be used—and have been and are currently being used—to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing rights or by creating new rights.

U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Protection of Intellectual Property Under the TRIPS Agreement*, 24th Sess., Nov. 13–Dec. 1, 2000, ¶ 9, U.N. Doc. E/C.12/2000/18 (Nov. 27, 2000) (by WTO Secretariat), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/292864197888d603c12569ba00543291?Opendocument.

other international trade agreements.[24] The U.N. High Commissioner for Human Rights also declared that "[t]he balance between public and private interests found under [the international human rights instruments] is one familiar to intellectual property law."[25]

The debate on intellectual property and human rights therefore has generated two opposing camps: one embracing the conflict approach and the other the coexistence approach.[26] While the conflict approach views the two sets of rights as being in fundamental conflict, the coexistence approach considers them essentially compatible.

This debate was refined in 2006 by the Committee on Economic, Social and Cultural Rights (CESCR) in *General Comment No. 17*.[27] This

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24. *See id.* (pointing out that the "TRIPS Agreement provides a fair amount of leeway").

25. U.N. High Commissioner for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Rep. of the High Commissioner*, ¶ 11, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.pdf [hereinafter *High Commissioner's Report*]; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression."); Estelle Derclaye, *Intellectual Property Rights and Human Rights: Coinciding and Cooperating*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 133, 134 (Paul L.C. Torremans ed., 2008) ("[H]uman rights and [intellectual property rights] do not 'simply' coexist but in fact most of them coincide from the outset, that is, they have the same goal . . . and as a result, in most cases, because of this similarity or identity of goals, they even 'cooperate' . . . ."); Daniel J. Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra*, at 3, 12 ("Human rights and intellectual property were natural law cousins owing to their shared filiation with equity.").

26. Professor Helfer summarizes the two approaches:

> The first approach views human rights and intellectual property as being in fundamental conflict. This framing sees strong intellectual property protection as undermining—and therefore as incompatible with—a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights. The prescription that proponents of this approach advocate for resolving this conflict is to recognize the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict.
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> The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school views human rights law and intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.

Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 48–49 (2003) (footnotes omitted); *see also* Paul L.C. Torremans, *Copyright (and Other Intellectual Property Rights) as a Human Right*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25, at 195, 196–97 (discussing the two different approaches).

27. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment*

authoritative interpretation of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[28] made clear that *not all* attributes of intellectual property rights have human rights status.[29] As it explained in great depth:

> Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.
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> In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1(c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.
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> *It is therefore important not to equate intellectual property rights with the human right recognized in article 15,*

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 or She Is the Author (Article 15, Paragraph 1(c), of the Covenant), U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), *available at* http://www.unhcr.org/refworld/category,LEGAL,CESCR,,,441543594,0.html [hereinafter *General Comment No. 17*].

28. International Covenant on Economic, Social and Cultural Rights art. 15(1)(c), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976) [hereinafter ICESCR].

29. *See General Comment No. 17*, *supra* note 27, ¶ 1.

paragraph 1(c).[30]

Notwithstanding the differences between these two sets of rights, the CESCR recognized that *some* attributes of intellectual property rights "derive[] from the inherent dignity and worth of all persons."[31] These attributes are therefore protected under the ICESCR—and most likely under the Universal Declaration of Human Rights (UDHR) as well.[32]

In the wake of *General Comment No. 17*, a number of scholars explored the need to develop a human rights framework for intellectual property.[33] In a symposium on intellectual property and social justice, Professor Laurence Helfer utilized the CESCR's documents to flesh out this framework, offering suggestions on how to mediate law and policy in the fields of intellectual property and human rights.[34] Professor Kal Raustiala "question[ed] whether the infusion of human rights concepts and rhetoric will serve, on balance, to make international [intellectual property] rights more socially just, or just more powerful."[35] Taking a cue from Professor Helfer, I also explored ways to develop this framework and to resolve the tension and conflict between human rights and the non-human rights aspects of intellectual property protection.[36]

At a much broader level, human rights concerns have been raised frequently and vocally in the debates concerning access to medicines,[37] access to knowledge,[38] and the protection of traditional knowledge and

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30. *Id.* ¶¶ 1–3 (emphasis added).

31. *Id.* ¶ 1.

32. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

33. *See, e.g.*, Helfer, *supra* note 13; Yu, *supra* note 11.

34. *See* Helfer, *supra* note 13, at 977.

35. Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1023 (2007).

36. *See generally* Yu, *supra* note 11.

37. *See* Comm'n on Human Rights Res. 2004/26, Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria, 60th Sess., Mar. 15–Apr. 23, 2004, U.N. Doc. E/CN.4/RES/2004/26 (Apr. 16, 2004), *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-26.doc.

38. *See* Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 819 (2007) ("To the extent that development is driven not only by economic growth but also by cultural and social change, education is foundational."); Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* 2 (Int'l Ctr. for Trade & Sustainable Dev., Issue Paper No. 15, 2006), *available at* http://www.unctad.org/en/docs/iteipc200610_en.pdf ("[W]ith regard to education and basic scientific knowledge, limitations and exceptions are an important component in creating an environment in which domestic economic initiatives and development policies can take root. A well-informed, educated and skilled citizenry is indispensable to the development process.").

cultural expressions.[39] Two edited volumes exploring the complex interrelationship between intellectual property and human rights have also been published—one by Professor Paul Torremans of the University of Nottingham[40] and the other by Professor Willem Grosheide of Utrecht University.[41] In 2011, Cambridge University Press published a highly welcome text: *Human Rights and Intellectual Property: Mapping the Global Interface*, by Professors Helfer and Austin.[42] This new text will likely inspire the development of new seminars while shaping the next generation of human rights scholars interested in intellectual property issues.

In light of this growing volume of literature, one may hesitate to revisit the debate on intellectual property and human rights. This Article, however, argues that we should not hesitate. The gravity of the issues involved and the wide implications of the debate on intellectual property and human rights provide a strong justification for scholars to undertake research in the area. The changing laws, policies, technologies, and practices have also brought about five sets of new developments that justify a reexamination of the complex interrelationship between intellectual property and human rights.

First, countries have actively utilized nonmultilateral agreements to provide new and higher standards for the protection and enforcement of intellectual property rights. While this trend predated the publication of a wide array of human rights documents[43] and legal literature examining the interrelationship between intellectual property and human rights, the recent adoption of ACTA and the ongoing negotiation of TPP have increased our urgency to revisit the debate on intellectual property and human rights.

Consider, for example, ACTA, a highly controversial plurilateral agreement that sought to raise the standards of intellectual property protection and enforcement beyond the TRIPS requirements.[44] This anticounterfeiting agreement facilitates the provision of ex officio authority to suspend allegedly infringing goods.[45] It also calls for the introduction of

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39. *See High Commissioner's Report*, *supra* note 25, ¶ 65 (encouraging "the adaptation of IP systems so that they fully take into account cultural and other rights of indigenous and local communities"); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 740–44 (2007) (discussing the protection of human rights in relation to the interests of indigenous peoples and traditional communities).

40. INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25.

41. INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX (Willem Grosheide ed., 2010) [hereinafter A PARADOX].

42. HELFER & AUSTIN, *supra* note 12.

43. *See id.* at 53–56 (listing the various documents).

44. *See* ACTA, *supra* note 1, pmbl., recital 4 ("*Intending* to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices . . . .").

45. *See id.* arts. 16.1(a)–.2(a); *see also* Frederick M. Abbott, *Trading's End: Is ACTA the Leading Edge of a Protectionist Wave?*, INTELL. PROP. WATCH (May 6, 2011, 2:48 PM),

preestablished or statutory damages[46] and criminal penalties for activities that infringe on copyrights, even though such infringements have only "indirect economic or commercial advantage."[47] Depending on its implementation, ACTA could affect how injunctions are granted and damages calculated.[48] The Agreement might even result in the creation of new penalties for "aiding and abetting" intellectual property infringements.[49]

Even worse, many countries have questioned the legitimacy of this plurilateral agreement, due largely to the developed countries' use of a "country club" approach to set a higher benchmark among like-minded countries.[50] Exemplifying this concern was the participation of only two less developed countries—Mexico and Morocco—in the negotiations beyond the first round.[51] Even if one counts Jordan and the United Arab Emirates, which participated only in the first round, no more than four percent of the world's developing-country governments were involved in the ACTA negotiations.[52]

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http://www.ip-watch.org/weblog/2011/05/06/trading%e2%80%99s-end-is-acta-the-leading-edge-of-a-protectionist-wave/ ("Probably the most problematic provisions mandate that customs authorities be enabled to act *ex officio* to seize 'suspect goods' at the border, without definition of the basis for suspicion, and without mandating that a determination be made regarding the offense the suspect goods allegedly commit.").

46. *See* ACTA, *supra* note 1, art. 9.3. Article 9.3 specifically provides:

> At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:
> (a) pre-established damages; or
> (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or
> (c) at least for copyright, additional damages.

Id. (footnote omitted). For criticisms of preestablished or statutory damages, see generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 716–19 (2010); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

47. ACTA, *supra* note 1, art. 23.1.

48. *See generally* James Love, *Comments on ACTA Provisions on Injunctions and Damages*, JAMES LOVE'S BLOG (Apr. 6, 2010, 9:29 PM), http://keionline.org/sites/default/files/kei_rn_2010_1.pdf (discussing the ACTA provisions on injunctions and damages).

49. *See* ACTA, *supra* note 1, art. 23.4 ("With respect to the offences specified in [Article 23] for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law.").

50. *See generally* Yu, *Six Secret Fears*, *supra* note 9, at 1074–83 (criticizing the "country club" approach).

51. *See* ACTA, *supra* note 1, art. 39 n.17.

52. An article in *Inside U.S. Trade* suggested that Uruguay might have also been involved in

Moreover, the adoption of ACTA and the ongoing negotiation of TPP have rendered inadequate many of the existing analyses of the tension or conflict between the TRIPS Agreement and the human rights system. For example, although the High Commissioner for Human Rights recommended that "developing countries be cautious about enacting 'TRIPS plus' legislation . . . without first understanding the impact of such legislation on the protection of human rights,"[53] her report did not anticipate that plurilateral agreements would be used primarily to circumvent the multilateral process. To a great extent, the development of ACTA, TPP, and other nonmultilateral agreements has brought intellectual property issues to the forefront of the human rights debate.

Second, the increased sophistication of piracy and counterfeiting networks[54] and the rapid development of potentially disruptive digital technology[55] have necessitated the introduction of new enforcement measures at both the domestic and international levels.[56] While some of these measures were designed to address traditional cross-border issues—issues that were present, but not successfully resolved during the TRIPS negotiations[57]—others were created as responses to problems brought about by the advent of the World Wide Web and the proliferation of new communications technologies.[58]

A case in point is the recent introduction of the graduated response system—or what some commentators and policy makers have termed the "three strikes" rule or the "notice and termination" procedure.[59] Targeting unauthorized copying on the Internet, this system enables Internet service providers to take a wide variety of actions after giving users warnings about their potentially illegal online file-sharing activities.[60] Permissible

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the prenegotiation discussions. *EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA*, INSIDE U.S. TRADE, May 8, 2009, at 11.

53. *High Commissioner's Report*, *supra* note 25, ¶ 69.

54. *See* TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 618 (2008) (stating that "greater enforcement efforts are needed given the increasing sophistication of counterfeiters and pirates").

55. For discussions of the massive unauthorized copying problem created by peer-to-peer technology, see generally Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004).

56. *See* Yu, *What Enforcement?*, *supra* note 9.

57. *See* Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 483–504 (2011) (discussing the weaknesses of the TRIPS enforcement provisions).

58. *See id.* at 502–03.

59. For discussions of the gradated response system, see generally Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010); Eldar Haber, *The French Revolution 2.0: Copyright and the Three Strikes Policy*, 2 HARV. J. SPORTS & ENT. L. 297 (2011); Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the "Graduated Response" a Good Reply?*, 1 WIPO J. 75 (2009); Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010).

60. *See* Yu, *supra* note 59, at 1374.

actions include suspensions or terminations of service; capping of bandwidth; and blocking of sites, portals, and protocols. To date, Chile, France, South Korea, and Taiwan have adopted this system, while Germany, Hong Kong, Spain, Sweden, and the European Parliament have rejected it.[61]

Third, with the growing use of the Internet and new communications technologies, the tension between intellectual property and human rights is no longer limited to economic, social, and cultural rights.[62] Instead, the debate also implicates civil and political rights, rights that many in Europe and the United States have considered of a higher priority.[63] The resulting elevated status of the conflict between intellectual property and human rights has also awakened many individuals and communities who otherwise would not engage in the debate. These new voices express a wide array of concerns that have not been fully articulated until now.

Fourth, as individuals continue to participate in creative communities, producing what commentators have euphemistically described as "user-generated content,"[64] the protection of human rights interests in intellectual creations is no longer limited to a subclass of individual authors.[65] Such limitation reminds us of the concerns raised by delegates during the drafting of the UDHR. As British delegate F. Corbet noted, "[T]he declaration of human rights should be universal in nature and only recognize general principles that were valid for all men [and women]."[66] Alan Watt, the Australian delegate, concurred, adding that "the indisputable rights of the intellectual worker could not appear beside

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61. *See* INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2011, at 3, 19 (2011), *available at* http://ifpi.org/content/library/DMR2012.pdf; Yu, *supra* note 59, at 1377.

62. Thanks to Xavier Seuba for pointing this out.

63. *See* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 9 (1995) ("Western States . . . asserted the priority of civil and political rights as being the foundation of liberty and democracy in the 'free world.'"); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 27 (2d ed. 2003) ("We should . . . note that in some Western circles a lingering suspicion of economic and social rights persists.").

64. Commentators and industry representatives have questioned the term "user-generated content." *Compare* Alan N. Braverman & Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471, 471 (2009) ("UGC . . . is not always user-generated; it would more accurately be called user-posted content."), *and* Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842 (2009) ("Let me be perfectly clear: there is no such thing as 'user-generated content.'"), *with* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 870–74 (2008) (providing a definition of user-generated content).

65. *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 221 (1999) (recounting that Mexican delegate Pablo Campos Ortiz identified the right to the protection of interests in intellectual creations as a right of the individual as "an intellectual worker, artist, scientist or writer").

66. *Id.*

fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work."[67] The sentiments of both delegates echoed those voiced earlier by delegates from India and the United Kingdom who "felt that no special group should be singled out for attention."[68]

Thanks to new technology and increased digital literacy, the ability to create today is no longer limited to a small subclass of "intellectual workers" or "creative laborers." Instead, a growing number of individuals from both developed and less developed countries now have the ability to exploit their rights to the protection of the moral and material interests in intellectual creations.[69] As this community of creative individuals grows, these rights will become more universal in nature, with most considering them valid for all humans. The present technological and cultural environments have therefore rendered irrelevant those earlier concerns raised during the drafting of the UDHR.

To some extent, the increasing focus on the authors' human rights has made the intellectual property system more author-centric.[70] There also remain very challenging questions concerning whether the right to create should include the right to use others' creations to create—a perennial debate among copyright scholars.[71] Notwithstanding these complex questions, there is no question that we continue to need a vibrant debate on intellectual property and human rights.

Finally, the U.N. human rights bodies have undertaken many important activities since the release of *General Comment No. 17*, the last major impetus driving the recent scholarship on intellectual property and human rights. In December 2009, the CESCR released *General Comment No. 21*,

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67. HELFER & AUSTIN, *supra* note 12, at 185; MORSINK, *supra* note 65, at 221.

68. MORSINK, *supra* note 65, at 220; *see also* Audrey R. Chapman, *Core Obligations Related to ICESCR Article 15(1)(c)*, *in* CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 305, 313 (Audrey Chapman & Sage Russell eds., 2002) [hereinafter CORE OBLIGATIONS] (stating that "other members of the [UDHR] drafting committee claimed that special protection for intellectual property entailed an elitist perspective").

69. The universal nature of the right to the protection of interests in intellectual creations was first asserted by Chang Peng-chun, the Chinese delegate and one of the Declaration's key drafters. Taking a populist approach, he noted that "the purpose of the joint amendment [from Cuba, France and Mexico to include such a right] was not merely to protect creative artists but to safeguard the interests of everyone." MORSINK, *supra* note 65, at 221–22. Nevertheless, his primary focus was on the need to protect the integrity of the creative work for the benefit of all individuals. As he explained, "Literary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected." *Id.* at 222.

70. *See* Yu, *supra* note 11, at 1131 ("[T]he recognition of the human rights attributes of intellectual property rights may challenge the structure of the traditional intellectual property system. In the copyright context, for example, such recognition will encourage the development of an author-centered regime, rather than one that is publisher-centered.").

71. *See* Yu, *supra* note 59, at 1399–1400.

a new interpretative comment on "the right of everyone . . . [t]o take part in cultural life" as recognized in Article 15(1)(a) of the ICESCR.[72] The Committee is also in the process of drafting an additional general comment on "the right of everyone . . . [t]o enjoy the benefits of scientific progress and its applications" as recognized in Article 15(1)(b) of the ICESCR.[73]

Moreover, the year 2011 celebrates the silver anniversary of the Declaration on the Right to Development,[74] which the U.N. General Assembly adopted in December 1986. Such celebration is particularly timely in light of the many development agendas that have recently sprung up at the WTO, the World Intellectual Property Organization (WIPO), the World Health Organization (WHO), and in other international fora governing biological diversity, food and agriculture, and information and communications.[75] An increased focus on the right to development is also important in light of the growing concern among less developed countries that their more developed counterparts are circumventing the multilateral process in an effort to establish new and higher standards of intellectual property enforcement.[76]

In sum, the human rights impact of the intellectual property system remains an important issue deserving our renewed attention. The arrival of new nonmultilateral agreements and the rapid changes in the cultural, economic, and technological environments have generated new issues previously unexplored in great depth. The stakes implicated by nonmultilateral agreements and new enforcement measures are also much higher than those implicated by the TRIPS Agreement. It is therefore high time we revisit the debate on intellectual property and human rights.

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72. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 4, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009), *available at* http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc.

73. *See* Press Release, Public Consultation, The Right to Enjoy the Benefits of Scientific Progress and Its Applications: Consultation Organized by the Independent Expert in the Field of Cultural Rights, Ms. Farida Shaheed, Palais des Nations, Room XXIII (Dec. 7, 2011), *available at* http://www.ohchr.org/EN/Issues/CulturalRights/Pages/Consultation7December2011.aspx (providing information about the public consultation).

74. Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (1986), *available at* http://www.un.org/en/events/righttodevelopment/declaration.shtml.

75. *See* Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 522–40 (2009).

76. *See* Minutes of Meeting, Council for TRIPS, World Trade Org. ¶¶ 248–73, IP/C/M/63 (Oct. 4, 2010), *available at* http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FIP%2FC%2FM63%2EDOC%2EHTM (reporting about China and India's interventions at the June 2010 TRIPS Council meeting, in which they heavily criticized the ACTA negotiations and the highly disturbing trend of establishing TRIPS-plus enforcement standards); *see also* Yu, *Six Secret Fears*, *supra* note 9, at 1074–83 (criticizing the developed countries' use of the "country club" approach to circumvent the multilateral process).

II. INHERENT ANALYTICAL CHALLENGES

Notwithstanding the importance and urgency of examining the human rights impact of TRIPS-plus nonmultilateral agreements, the analysis of the relationship between intellectual property and human rights is fraught with challenges. Consider the following questions: Which forms or attributes of intellectual property rights should be protected at the level of human rights? Which rights should be considered under the rubric of "human rights" for the purpose of the analysis? Can corporate rights holders possess human rights at all? This Part explores each of these questions in turn.

The answers to these questions inevitably depend on one's worldview, basic assumptions, ideological values, and philosophical predispositions. For instance, the approach taken in this Article is unlikely to convince those who insist that no intellectual property right can attain human rights status. Likewise, the approach will not appeal to those who see very little value in a human rights discourse in the intellectual property debate. Thus, rather than convincing readers to subscribe to the approach laid out in this Article and my previous scholarship, this Part seeks to inform readers about my assumptions and choices. Readers can then adjust their analyses based on their own basic theoretical assumptions, ideological values, and philosophical predispositions.

A. *IP Rights as Human Rights?*

The first challenge concerns the human rights attributes of intellectual property rights. As discussed earlier, policy makers, international bureaucrats, academic commentators, and civil society organizations traditionally examine the interface between intellectual property and human rights by using either the conflict approach or the coexistence approach.[77] Although each of these approaches has benefits and drawbacks, both ignore the fact that *some* attributes of intellectual property rights are protected in international human rights instruments while other attributes do not have any human rights basis. For example, it is rather easy to identify the human rights basis of copyrights and, to some extent, patents,[78] but it is much harder to justify human rights protection for

77. *See supra* Part I.

78. *See* Yu, *supra* note 39, at 721–26 (discussing the question concerning whether patents should be separated from copyrights in the human rights debate). *But see* Rochelle Cooper Dreyfuss, *Patents and Human Rights: Where Is the Paradox?*, *in* A PARADOX, *supra* note 41, at 73 ("As a theoretical matter, there are clearly dimensions to intellectual property that sound in human rights concerns (rights to protect one's dignity, to be compensated for one's labor, and to enjoy one's property without arbitrary governmental interference). But at least on the patent side, there is little reason to think that the human rights concerns associated with creative labor must be furthered

corporate trademarks and trade secrets, works made for hire, employee inventions, neighboring rights for broadcasters and phonogram producers, database protection, protection for clinical trial data, and other rights that primarily protect the economic investments of institutional authors and inventors.[79]

Thus, instead of inquiring whether intellectual property and human rights conflict or coexist with each other, it is important to distinguish the human rights attributes of intellectual property rights from the non-human rights aspects of intellectual property protection. Article 27(2) of the UDHR states, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author."[80] Article 15(1)(c) of the ICESCR also requires state parties to "recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author."[81]

In view of these provisions, the tension between TRIPS-plus nonmultilateral agreements and the international human rights system is not simple categorical tension between intellectual property rights and human rights. Rather, tension exists between the non-human rights aspects of intellectual property protection and human rights, including the human rights attributes of intellectual property rights. Although commentators tend to emphasize the conflict between intellectual property rights and human rights, the intellectual property provisions in nonmultilateral agreements, in certain circumstances, can create synergy between the two.[82]

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by recognizing a right to full control over the information that creative labor produces."); Wendy J. Gordon, *Current Patent Laws Cannot Claim the Backing of Human Rights*, *in* A PARADOX, *supra* note 41, at 155–56 (dispelling "the notion that current patent laws are the manifestation of the human right commitment to authors under the ICESCR").

79. *See, e.g.*, U.N. Econ. & Social Council, Comm. on Econ., Soc. & Cultural Rights, *Implementation of the International Covenant on Economic, Social, and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social, and Cultural Rights*, ¶ 45, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000) (by Maria Green) [hereinafter *Drafting History of the Article 15(1)(c)*], *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/872a8f7775c9823cc1256999005c3088/$FILE/G0044899.pdf ("[T]he drafters [of the ICESCR] do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that holds the patent or the copyright."); Chapman, *supra* note 68, at 316–17 (noting that there is no "basis in human rights to justify using intellectual property instruments as a means to protect economic investments").

80. UDHR, *supra* note 32, art. 27(2).

81. ICESCR, *supra* note 28, art. 15(1)(c).

82. *See infra* Part III.A.

B. *No Consensus on Human Rights?*

The second challenge concerns the type of human rights that the analysis should cover. Despite decades of efforts establishing the international human rights system, countries have yet to agree on the nature, scope, and meaning of human rights obligations. While the Vienna Declaration and Programme of Action states that "[a]ll human rights are universal, indivisible and interdependent and interrelated,"[83] the document is mostly aspirational. As mentioned earlier, many governments, policy makers, and commentators still have yet to view all forms of human rights as having the same weight and priority.[84] Many of them continue to prioritize civil and political rights over rights of later generations, such as economic, social, and cultural rights (second-generation rights) or collective rights for minorities, indigenous peoples, and traditional communities (third-generation rights).[85]

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83. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En ("All human rights are universal, indivisible and interdependent and interrelated.").

84. *See* CRAVEN, *supra* note 63, at 9 ("Western States . . . asserted the priority of civil and political rights as being the foundation of liberty and democracy in the 'free world.'"); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59, 60 (1998) ("[E]conomic, social, and cultural rights have been juridically marginalized in comparison to civil and political rights, both in terms of the institutional frameworks developed for their implementation and in terms of their judicial interpretation . . . ."); Helfer, *supra* note 13, at 987 (stating that economic, social, and cultural rights remain "the least well-developed and the least doctrinally prescriptive").

85. As Professor Matthew Craven explains:

> That economic, social, and cultural rights have been identified as a discrete category of human rights is most usually explained in terms of their distinct historical origin. Economic, social, and cultural rights are frequently termed "second generation" rights, deriving from the growth of socialist ideals in the late nineteenth and early twentieth centuries and the rise of the labour movement in Europe. They contrast with the "first generation" civil and political rights associated with the eighteenth-century Declarations on the Rights of Man, and the "third generation" rights that encompass the rights of "peoples" or "groups", such as the right to self-determination and the right to development. In fact the reason for making a distinction between first and second generation rights could be more accurately put down to the ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenants. The Soviet States, on the one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of the socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the "free world". The conflict was such that during the drafting of the International Bill of Rights the intended treaty was divided into two separate instruments which were later to become the ICCPR [International Covenant on Civil and Political Rights] and the ICESCR.

To complicate matters, policy makers and commentators subscribe to different conceptions of human rights. While some take a highly *philosophical* approach that relies heavily on first principles and natural law, others take a more *positive* approach that focuses on compromises in existing international or regional human rights instruments. As Professor Richard Falk observes:

> The positivists consider the content of human rights to be determined by the texts agreed upon by states and embodied in valid treaties, or determined by obligatory state practice attaining the status of binding international custom. The naturalists, on the other hand, regard the content of human rights as principally based upon immutable values that endow standards and norms with a universal validity.[86]

Some commentators also question how relatively trivial matters such as intellectual property rights can be equated with such fundamental rights as the "prohibition on genocide, slavery, and torture; the rights to freedom of thought, expression, association, and religion; and the rights to life, food, health, basic education, and work."[87] That question was indeed raised during the drafting of the UDHR. Alan Watt declared that "'the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work.'"[88]

Although both the philosophical and positive approaches have merits, this Article focuses on the latter, for at least three reasons.[89] First, the

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CRAVEN, *supra* note 63, at 8–9; *see also* Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 3–4 (Asbjørn Eide et al. eds., 1995) (discussing use of the terms "first generation," "second generation," and "third generation" to distinguish between different types of human rights).

86. Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44 (Abdullahi Ahmed An-Na□im ed., 1992); *see also* THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 59 (2d ed. 2008) (discussing the distinction between legal and moral human rights).

87. Yu, *supra* note 39, at 713; *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE xi (1991) ("A rapidly expanding catalog of rights . . . not only multiplies the occasions for collisions, but it risks trivializing core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights . . . impedes compromise, mutual understanding, and the discovery of common ground."); Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984) (expressing concern that the continuous proclamation of new human rights will undermine both the fundamental nature of human rights and the integrity of the process of recognizing those rights).

88. MORSINK, *supra* note 65, at 221 (quoting Alan Watt, the Australian delegate).

89. This approach is not without its weaknesses. For example, Professors William Fisher and Talha Syed identify two main weaknesses of the positivist approach:

> First, by tying a right to health strictly to what is recognized in legal documents

drafting histories of the UDHR and the ICESCR show that it is difficult for countries to achieve a *political* consensus on the rights recognized in the instruments.[90] Given their divergent interests, backgrounds, beliefs, and cultures, countries are very unlikely to succeed in achieving an international *philosophical* consensus on these rights. As Professor Jack Donnelly reminds us, "few issues in moral or political philosophy are more contentious or intractable than theories of human nature."[91] Thus, it makes great pragmatic sense to focus on rights that have already attained international consensus, if not universal agreement.[92]

Second, international human rights instruments thus far have received significant attention in the international debate concerning the human rights implications of intellectual property protection. The plain language of these instruments is therefore likely to have a significant impact on the future development of the international intellectual property system. While commentators may question whether the UDHR has achieved the status of customary international law,[93] this Declaration, along with other

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> the analysis limits its scope of protection to claims against governments acting within their own sovereign territories (and, perhaps, only to certain types of "negative" claims). Second, implementing the right requires knowing what its substantive requirements should be and how tradeoffs with other rights or priorities are to be made, and to answer those questions adequately we need to draw on extra-legal normative considerations.

William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 642 (2007) (footnote omitted). "One could also add a third weakness concerning how this approach would encourage one to ignore important goals and interests that have strong moral bases but have yet to be recognized politically by the international community." Yu, *supra* note 39, at 716.

90. *See generally Drafting History of the Article 15(1)(c)*, *supra* note 79 (providing a drafting history of Article 15(1) of the ICESCR); MORSINK, *supra* note 65, at 217–22 (providing a detailed drafting history of Article 27(2) of the UDHR); Yu, *supra* note 11, at 1047–75 (providing the drafting history of the right to the protection of interests in intellectual creations in international human rights instruments).

91. DONNELLY, *supra* note 63, at 16.

92. *Cf.* JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION 18–19 (2007) ("A legal positivist approach . . . helps to overcome many of the philosophical differences that would otherwise undermine the usefulness of a human rights methodology in the trade law context.").

93. *See* JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE 75–76 (1984) (providing evidence that the UDHR "is now part of the customary law of nations"); Richard Pierre Claude, *Scientists' Rights and the Human Right to the Benefits of Science*, *in* CORE OBLIGATIONS, *supra* note 68, at 247, 252 ("[A]fter fifty years, the Universal Declaration . . . has begun to take on the qualities of 'customary international law.'"); Torremans, *supra* note 26, at 201 ("[W]here initially Member States were not obliged to implement [the Declaration] on the basis [that it is merely aspirational or advisory in nature], it has now gradually acquired the status of customary international law and of the single most authoritative source of human rights norms."). *See generally* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989) (examining human rights and humanitarian law in relation to the general principles of

international and regional human rights instruments, has undeniably achieved an international normative consensus.[94]

Third, based on the usual approach to drafting international agreements, the provisions in international human rights instruments "do not necessarily have a commonly agreed-upon purpose (other than a broad one to promote human dignity and respect)."[95] As Professor James Nickel points out, "[P]eople can agree on human rights without agreeing on the grounds of human rights."[96] During treaty drafting processes, delegates often harbor disparate concerns and vote based on different motivations. In the context of Article 27 of the UDHR, these motivations "ranged from the protection of moral rights to international harmonization to collateral realization of other human rights."[97] In retrospect, no one can pinpoint exactly what motivated the delegates to adopt a particular provision.

Indeed, international instruments cannot escape the *realpolitik* of international negotiations no matter how much foresight the drafters had. As one commentator observes:

> [H]uman rights codifications inevitably convey a somewhat incomplete, or even biased, image of what human rights really are. All of them have been drafted and enacted under specific political and economic circumstances, and therefore reflect the mindsets and specific concerns of their drafters and the time they lived in. They are often the fruit of political compromise—a constraint to which moral truth is not exposed.[98]

According to Professor Donnelly, human rights are far from "timeless, unchanging, or absolute; any list or conception of human rights—and the idea of human rights itself—is historically specific and contingent."[99]

C. *Human Rights for Corporate Owners?*

The final challenge concerns the increasing willingness of the European Court of Human Rights (ECtHR) to extend human rights protection to non-individuals, such as corporate owners of intellectual

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international law).

94. *See* DONNELLY, *supra* note 63, at 17 ("[T]here is a remarkable international normative consensus on the list of rights contained in the Universal Declaration and the International Human Rights Covenants . . . ."); *id.* at 40–41 (discussing the concept of "overlapping consensus on international human rights").

95. Yu, *supra* note 11, at 1072.

96. JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 177 (2d ed. 2007).

97. *See* Yu, *supra* note 11, at 1072–73.

98. Jakob Cornides, *Human Rights and Intellectual Property: Conflict or Convergence?*, 7 J. WORLD INTELL. PROP. 135, 137 (2004).

99. DONNELLY, *supra* note 63, at 1.

property rights. As Professors Helfer and Austin observe:

> Some in the human rights community . . . fear that intellectual property owners—in particular, multinational corporations—will invoke the creators' rights and property rights provisions of international instruments to lock in maximalist intellectual property rules that will further concentrate wealth in the hands of a few at the expense of the many.[100]

In *Anheuser-Busch, Inc v. Portugal*,[101] for example, the Grand Chamber of the ECtHR extended the coverage of Article 1 of Protocol No. 1 to the European Convention of Human Rights[102] to both registered trademarks and trademark applications of a multinational corporation. The case concerned a dispute over Portugal's cancellation of a multinational brewery's application for the "Budweiser" trademark in an effort to protect the appellation of origin "Budějovický Budvar," which is owned by Budweiser's longstanding Czech rival.[103] Focusing on the right to property, the ECtHR considered the term "possessions" to include trademarks and trademark applications.[104] Following this decision, even a faceless corporation may receive human rights-like protection for its intellectual property.

The willingness of the ECtHR to extend human rights protection to the intellectual property of corporate entities is particularly important to our analysis of the human rights implications of TRIPS-plus nonmultilateral agreements. To be certain, one could make a strong argument that corporations aggregate the disparate human rights interests of individuals, such as their individual shareholders. One could also cite to the many social benefits created through lawsuits brought by resourceful corporate entities on behalf of individuals whose rights have been violated.[105] Nevertheless, given the considerable disparity in power between transnational corporations and individuals (or even governments representing some of these individuals[106]), the tension created by a system that allows *corporate* owners to demand greater *human* rights protection at

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100. HELFER & AUSTIN, *supra* note 12, at 504–05.

101. Anheuser-Busch, Inc. v. Portugal, 45 Eur. Ct. H.R. 36 (2007) (Grand Chamber).

102. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

103. *See* Torremans, *supra* note 26, at 205; Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1, 3 (2008).

104. *See* Helfer, *supra* note 103, at 7–8.

105. *See* Yu, *supra* note 39, at 728–29.

106. *See* HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 94–95 (2007) ("Corporate power has grown to rival that of states: in 2002 the corporation with the largest sales figure, Wal-Mart at $217,799m, outdid Austria's 2002 GDP, the twentieth biggest national GDP of the world, and was not that much smaller than the GDP of all of Sub-Saharan Africa ($319,288m)." (footnote omitted)).

the expense of individuals is inherently troubling.

As a conceptual matter, such an expansive view of human rights is also highly problematic. As the CESCR reminds us:

> [O]nly the "author", namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1(c). . . . Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, . . . their entitlements, because of their different nature, are not protected at the level of human rights.[107]

Likewise, Professor Donnelly declares emphatically, "Collectivities of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept."[108] It is one thing to give corporations standing to bring human rights claims on behalf of individuals, but quite another to allow corporate owners to claim that "their 'human' rights have [actually] been violated."[109] This Article therefore focuses only on individuals; it does not explore the impact of nonmultilateral agreements on the human rights-like protection afforded to corporate owners that the ECtHR has recently recognized.

Moreover, if corporate owners have rights, they should also have human rights responsibilities.[110] The lack of such responsibilities is,

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107. *General Comment No. 17*, *supra* note 27, ¶ 7 (footnote omitted).

108. DONNELLY, *supra* note 63, at 25.

109. Yu, *supra* note 39, at 730. As I noted in an earlier article:

> I consider it acceptable and socially beneficial for a newspaper to bring a human rights lawsuit on behalf of its individual readers, whose rights have been violated and who may not be able to afford the lawsuit—in terms of either time, energy or resources. However, it would be disturbing for that newspaper to claim that its human rights have been violated.

Id. at 730 n.72 (emphasis omitted).

110. *See General Comment No. 17*, *supra* note 27, ¶ 55 ("While only States parties to the Covenant are held accountable for compliance with its provisions, they are nevertheless urged to consider regulating the responsibility resting on the private business sector, private research institutions and other non-State actors to respect the rights recognized in article 15, paragraph 1(c), of the Covenant."); U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument [hereinafter *Norms on the Responsibilities of Transnational Corporations*] ("Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect,

indeed, the reason why we need to better balance the protection and enforcement of intellectual property rights against international human rights commitments. In recent years, international human rights bodies have increasingly outlined the vast responsibilities of corporate owners in areas implicated by intellectual property protection and enforcement.[111]

For example, in its authoritative interpretative comment on the right to health, the CESCR declares: "While only States are parties to the [ICESCR] and thus ultimately accountable for compliance with it, all members of society— . . . including . . . the private business sector—have responsibilities regarding the realization of the right to health."[112] The preamble to the Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines similarly states: "Pharmaceutical companies, including innovator, generic and biotechnology companies, have human rights responsibilities in relation to access to medicines."[113] Guideline 26, in particular, stipulates that these companies "should make

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ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."); *see also* Special Rapporteur on the Promotion & Prot. of the Right to Freedom of Opinion & Expression, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 45, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf [hereinafter *Report of the Special Rapporteur on Freedom of Expression*] ("While States are the duty-bearers for human rights, private actors and business enterprises also have a responsibility to respect human rights."); Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical & Mental Health, *Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, at 6–12, *transmitted by Note of the Secretary General*, U.N. Doc. A/63/263 (Aug. 11, 2008) (by Paul Hunt), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/456/47/PDF/N0845647.pdf?OpenElement [hereinafter *Report of the Special Rapporteur on Health*] (discussing the "human rights responsibilities of pharmaceutical companies in relation to access to medicines").

111. *See, e.g.*, *Report of the Special Rapporteur on Health*, *supra* note 110, at 15–25; *Norms on the Responsibilities of Transnational Corporations*, *supra* note 110; ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 7–25 (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf; *Overview of the UN Global Compact*, U.N. GLOBAL COMPACT (Dec. 1, 2011), http://www.globalcompact.org/AboutTheGC/ (providing information about the U.N. Global Compact, which aims at aligning business initiatives "with [the] ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption"). For discussions of the relationship between human rights obligations and private actors, see generally ALISON BRYSK, HUMAN RIGHTS AND PRIVATE WRONGS: CONSTRUCTING GLOBAL CIVIL SOCIETY 117 (2005) ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 475–88 (2001).

112. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 42, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

113. *Report of the Special Rapporteur on Health*, *supra* note 111, at 15.

and respect a public commitment not to lobby for more demanding protection of intellectual property interests than those required by TRIPS, such as additional limitations on compulsory licensing."[114]

III. INTELLECTUAL PROPERTY AND HUMAN RIGHTS

A. *Compatibilities and Synergies*

Although commentators remain concerned about the adverse impact of intellectual property rights on the human rights system, the protection and enforcement of those rights can be consistent with a country's human rights commitments. In fact, because some attributes of intellectual property rights are protected by international or regional human rights instruments, greater protection of those attributes can promote the protection of human rights.

The intellectual property provisions in nonmultilateral agreements cover a wide variety of intellectual property rights, ranging from copyrights to patents and from geographical indications to sui generis database protection.[115] Although an ongoing debate exists concerning whether international human rights instruments recognize the right to property[116] and whether intellectual property should be identified as personal property,[117] many commentators have equated the protection of intellectual property rights with the protection of human rights.

In Europe, this view is strongly supported by the ECtHR's interpretation of Article 1 of Protocol No. 1 to the European Convention of Human Rights.[118] Intellectual property is also explicitly covered in the right to property provision in Article 17(2) of the Charter of Fundamental Rights of the European Union,[119] which recently entered into force

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114. *Id.* at 21.

115. *See, e.g.*, ACTA, *supra* note 1, art. 5(h); Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part art. 139(3), Oct. 30, 2008, 2008 O.J. (L 289/I) 3 [hereinafter EC-CARIFORUM EPA], *available at* http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf.

116. *See General Comment No. 17*, *supra* note 27, ¶ 15 ("The protection of 'material interests' of authors in article 15, paragraph 1(c), reflects the close linkage of this provision with the right to own property, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration (art. 7(a))."); *see also* Yu, *supra* note 39, at 731–36 (exploring whether "the right to private property already provides adequate protection to the interests in intellectual creations").

117. *See* Raustiala, *supra* note 35, at 1032 (warning that "the embrace of [intellectual property] by human rights advocates and entities . . . is likely to further entrench some dangerous ideas about property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community").

118. *See* Anheuser-Busch, Inc. v. Portugal, 45 Eur. Ct. H.R. 36, ¶ 78 (2007) (holding that Article 1 of Protocol No. 1 is applicable to intellectual property as well as the application for intellectual property rights if such an application gives rise to proprietary interests).

119. *See* Charter of Fundamental Rights of the European Union art. 17(2), Dec. 7, 2000, 2000 O.J. (C 364) 1 ("Intellectual property shall be protected.").

following the adoption of the Lisbon Treaty on the Functioning of the European Union.[120]

Even for those refusing to equate intellectual property rights with human rights, the intellectual property provisions do protect important human rights attributes of intellectual property rights. To begin with, some of these provisions protect the *material* interests in the creations of individual authors and inventors as recognized in international human rights instruments.[121] While not all forms of intellectual property rights should be protected at the level of human rights, copyrights and patents clearly implicate the material interests of individual authors and inventors.[122]

The intellectual property provisions in nonmultilateral agreements also offer important protection to the *moral* interests in the creations of individual authors and inventors.[123] For instance, the provisions on copyright and related rights help strengthen the protection of moral rights; they ensure proper identification and attribution of the creative work and prevent the work from being recoded or otherwise modified in a manner that would prejudice the author's honor or reputation.[124] The provisions on copyright management information and the requirement that the parties ratify the 1996 WIPO Internet Treaties[125] also serve similar purposes.[126] In addition, the provisions on patents help ensure the recognition of individual inventors, whose contributions patent grants will acknowledge.[127]

Likewise, the provisions on geographical indications can help

120. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Charter of Fundamental Rights became effective on December 1, 2009. *EU Charter of Fundamental Rights*, EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE (Nov. 11, 2011), http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

121. *See* UDHR, *supra* note 32, art. 27(2); ICESCR, *supra* note 28, art. 15(1)(c).

122. *See* Yu, *supra* note 11, at 1083–92 (discussing the protection of material interests in intellectual creations).

123. *See General Comment No. 17*, *supra* note 27, ¶ 2 ("[T]he human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living.").

124. *See, e.g.*, EC-CARIFORUM EPA, *supra* note 115, art. 143.

125. WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, at 18 (1997).

126. *See, e.g.*, ACTA, *supra* note 1, arts. 27(5)–(8); Dominican Republic–Central America–United States Free Trade Agreement art. 15.1(2), Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter CAFTA-DR]; EC-CARIFORUM EPA, *supra* note 115, art. 143(A)(1).

127. *See, e.g.*, CAFTA-DR, *supra* note 126, art. 15.9; EC-CARIFORUM EPA, *supra* note 115, art. 147; *see also* Paris Convention, *supra* note 17, art. 4*ter* (stipulating that "the inventor shall have the right to be mentioned as such in the patent").

indigenous peoples and traditional communities obtain the much-needed protection of the moral and material interests in their creations.[128] The provisions on the protection of traditional knowledge and cultural expressions can also preserve the ways of life and economic and cultural heritage of these individuals and communities.[129] By fostering the equitable sharing of benefits, these provisions thereby promote the right to self-determination, the right to development, the right to cultural participation and development, and the right to the benefits of scientific progress of these individuals and communities. As far as biodiversity, seeds, plant genetic resources, and traditional agrarian practices are concerned, such protection could implicate the rights to adequate food and health.

From the human rights standpoint, the protection of traditional knowledge and cultural expressions is rather important. As stated in the Declaration on the Rights of Indigenous Peoples, which the United Nations General Assembly adopted in September 2007:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. *They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*[130]

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128. *See, e.g.*, CAFTA-DR, *supra* note 126, art. 15.3; EC-CARIFORUM EPA, *supra* note 115, art. 145; *see also* Dev Gangjee, *Geographical Indications and Human Rights*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25, at 383 (discussing geographical indications in relation to the protection of human rights). Nevertheless, the protection of geographical indications could also undermine the protection of human rights if the former creates a trade barrier by imposing unfair restrictions on the ability of local producers to rename, label, remarket, or brand their products. *See* SISULE F. MUSUNGU, INNOVATION AND INTELLECTUAL PROPERTY IN THE EC-CARIFORUM EPA: LESSONS FOR OTHER ACP REGIONS 31 (2009), http://www.iqsensato.org/pdf/iqsensato-studies-no-1-full.pdf.

129. *See, e.g.*, EC-CARIFORUM EPA, *supra* note 115, art. 150; *see also* HELFER & AUSTIN, *supra* note 12, at 3 ("Some indigenous communities invoke intellectual property rights as vehicles for preserving their ways of life and protecting their cultural and economic heritage . . . ."); Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 471–73 (2008) (discussing preservation and conservation as the main objectives of the protection for cultural heritage).

130. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 31(1), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (emphasis added).

Although the Declaration does not cover intellectual property rights per se, the protection of indigenous heritage is likely to have serious ramifications for the protection of intellectual property rights. The Declaration's focus on the protection of "cultural heritage, traditional knowledge and traditional cultural expressions"[131] also echoes provisions in the UDHR, the International Covenant on Civil and Political Rights, the ICESCR, and other international and regional human rights instruments.[132]

Moreover, nonmultilateral agreements may include abuse of rights provisions to promote competition,[133] which complement other provisions related to antitrust or competition law.[134] They may also include technology transfer provisions,[135] which could promote the protection of human rights, in particular the right to the benefits of scientific progress. The scope and extent of such protection, however, will depend on how serious signatory countries take those obligations. For example, Articles 66.2 and 67 of the TRIPS Agreement outline the obligations of developed countries to promote technology transfer, technical cooperation, and legal assistance in developing and least developed countries.[136] Even though the Doha Ministerial Decision of November 14, 2001, reaffirmed the

131. *Id.*

132. *See* UDHR, *supra* note 32, art. 27(2) (declaring that "everyone has the right freely to participate in the cultural life of the community"); International Covenant on Civil and Political Rights art. 27, 999 U.N.T.S. 171 (Dec. 19, 1966) (recognizing right of minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language"); ICESCR, *supra* note 28, art. 15(1)(a) (recognizing right "[t]o take part in cultural life"); Int'l Labour Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries [No. 169] art. 15(2), June 27, 1989, 28 I.L.M 1382 ("In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.").

133. *See, e.g.*, ACTA, *supra* note 1, art. 27(3); CAFTA-DR, *supra* note 126, art. 15.1(15); EC-CARIFORUM EPA, *supra* note 115, arts. 97, 111, 128(3), 142(2), 151(2).

134. *See High Commissioner's Report*, *supra* note 25, ¶ 64 (encouraging "States to consider the elaboration of competition laws that prevent abuses of IPRs that lead to violations of the right to health—in particular restrictive licensing practices or the setting of high prices for essential drugs").

135. *See, e.g.*, EC-CARIFORUM EPA, *supra* note 115, art. 142.

136. *See* TRIPS Agreement art. 66.2 ("Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."); *id.* art. 67 ("In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.").

mandatory nature of these obligations,[137] developed countries thus far have failed to take them seriously.

Finally, if trademark protection in nonmultilateral agreements could be extended to cover personality interests, such as those protections found under the right of publicity in the United States or personality rights in other jurisdictions,[138] nonmultilateral agreements could provide important protection to individuals—especially celebrities—against the unauthorized use of their names, likenesses, images, voices, or other personal attributes. Such protection may also enhance the protection against privacy intrusions, which goes hand in hand with publicity rights.[139] Although the right to privacy is generally not within the scope of intellectual property rights,[140] some nonmultilateral agreements, especially those involving the European Union, do contain provisions to ensure proper protection of personal data and informational privacy.[141]

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137. *See* World Trade Organization, Implementation-Related Issues and Concerns: Decision of 14 November 2001, ¶ 11.2, WT/MIN(01)/17, 41 I.L.M. 757 (2002) ("[T]he provisions of Article 66.2 of the TRIPS Agreement are mandatory.").

138. *See generally* Catherine W. Ng, *Some Cultural Narrative Themes and Variations in the Common Law*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25, at 359, 366–70 (discussing protection against appropriation of personality in common law jurisdictions); Peter K. Yu, *No Personality Rights for Pop Stars in Hong Kong?*, *in* THE LAW OF REPUTATION AND BRANDS IN THE ASIA PACIFIC RIM (Andrew Kenyon et al. eds., forthcoming 2012), *available at* http://ssrn.com/abstract=1672311 [hereinafter Yu, *No Personality Rights*] (discussing the limited protection of personality rights in Hong Kong); Hayley Stallard, *The Right of Publicity in the United Kingdom*, 18 LOY. L.A. ENT. L.J. 565 (1998) (discussing the restricted protection of personality rights in the United Kingdom); Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 359–67 (1998) (providing an overview of the right of publicity in the United States).

139. *See* Rosina Zapparoni, *Propertising Identity: Understanding the United States Right of Publicity and Its Implications—Some Lessons for Australia*, 28 MELB. U. L. REV. 690, 706 (2004) (noting "the unique historic relationship of the right of publicity to privacy law in the US" and stating that "the right of publicity is, and continues to be, closely aligned with a branch of privacy law based on misappropriation"); Yu, *No Personality Rights*, *supra* note 138 (stating that "the protections of privacy and personality rights can reinforce each other beneficially"). *But see* Peter Jaffey, *Privacy, Confidentiality and Property*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25, at 447, 464–65 ("The right to prevent the commercial use of one's public image does not relate to private information; indeed the commercial use of a public image does not involve the transmission of information at all (unless it is understood as an endorsement). That is not to say that such a right is not justified. But it has to be justified on quite different grounds from a right against the invasion of informational privacy.").

140. *See, e.g.*, ACTA, *supra* note 1, art. 5(h); EC-CARIFORUM EPA, *supra* note 115, art. 139(3); *see also* Yu, *No Personality Rights*, *supra* note 138 (explaining why no need exists for international harmonization in the area of personality or publicity rights).

141. *See, e.g.*, ACTA, *supra* note 1, art. 4; CAFTA-DR, *supra* note 126, art. 15.4(2); EC-CARIFORUM EPA, *supra* note 115, arts. 10, 107, 155(3)(e), 197–201.

B. *Conflicts, Inconsistencies, and Lost Opportunities*

Although intellectual property provisions in nonmultilateral agreements can promote the protection of human rights, they can also frustrate such protection. Indeed, many commentators believe that these provisions would frustrate such protection more than they promote it. The human rights impediments created by TRIPS-plus nonmultilateral agreements can arise in two different ways: first, directly through the tension created by the language of the intellectual property provisions in nonmultilateral agreements; and second, indirectly through an emphasis on trade, economic partnerships, and nonmultilateral approaches that eventually divert time, resources, energy, and attention from the further development of the international human rights system. This Section discusses direct impediments, and the next Section examines indirect impediments.

At the normative level, direct human rights impediments can take the form of conflicts or inconsistencies between TRIPS-plus nonmultilateral agreements and international human rights instruments. They can also take the form of lost opportunities resulting from the failure of nonmultilateral agreements to promote the protection of human rights, even though such protection would not create any direct conflict with the intellectual property provisions in the agreements.[142] These lost opportunities were due in large part to the misguided and unproven assumption that more intellectual property rights are always better.[143] At times, developed countries and their policy makers seek to strengthen the levels of protection and enforcement of intellectual property rights *at all costs*, without taking full account of the many spillover effects in the human rights arena.

To help us better understand the potential conflicts, inconsistencies, and lost opportunities, this Section focuses on three debates in areas where intellectual property rights have posed significant challenges to the protection of human rights. However, it does not identify each individual intellectual property provision in light of the large number of interrelated provisions involved and the wide variety of human rights implicated in the debates.

1. Access to Essential Medicines

The most widely cited debate concerns the much-needed access to essential medicines in less developed countries,[144] which was impeded by

142. *See* MUSUNGU, *supra* note 128, at 35.

143. *See* James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 0009, at 2–3 (2004), http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0009.pdf (discussing the "maximalist 'rights culture'" and the resulting loss of balance in the intellectual property system).

144. For discussions of TRIPS developments in relation to access to medicines, see generally NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES (Pedro Roffe et al. eds., 2006); Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the*

the strong protection of patents and clinical trial data, as well as heightened measures restricting parallel imports while mandating the seizure of in-transit generic drugs.[145] This debate has caught the attention of the WTO, WIPO, WHO, and other international intergovernmental bodies.[146]

The debate concerning access to essential medicines implicates both the right to life and the right to health. Article 3 of the UDHR explicitly provides: "Everyone has the right to life, liberty and security of person."[147] Article 25(1) further recognizes that every person has "the right to a standard of living adequate for the health and well-being of himself [or herself] and of his [or her] family, including food, clothing, housing and medical care and necessary social services."[148] Echoing this provision, the preamble to the WHO Constitution declares: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[149] While the right to life has arguably entered into customary international law, a raging debate continues over the legal status of the right to health.[150]

Regardless of the legal status of the right to health, the AIDS crises in less developed countries have led many policy makers, commentators, and activists to question the expediency and appropriateness of the existing

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Protection of Public Health, 99 AM. J. INT'L L. 317 (2005); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007).

145. *See generally* Frederick M. Abbott, *Seizure of Generic Pharmaceuticals in Transit Based on Allegations of Patent Infringement: A Threat to International Trade, Development and Public Welfare*, 1 WIPO J. 43 (2009) (discussing issues concerning the seizure of in-transit generic drugs in Europe); Kaitlin Mara, *Drug Seizures in Frankfurt Spark Fears of EU-Wide Pattern*, INTELL. PROP. WATCH (June 5, 2009), http://www.ip-watch.org/2009/06/05/drug-seizures-in-frankfurt-spark-fears-of-eu-wide-pattern/ (reporting about the seizure of generic drugs in Europe). In May 2010, Brazil and India filed complaints against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs. *See* Request for Consultations by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS408/1 (May 19, 2010); Request for Consultations by Brazil, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WT/DS409/1 (May 19, 2010). A year later, India and the European Union reached an interim settlement. *India, EU Ink Deal to End Drug Seizure for Now*, TIMES OF INDIA (July 29, 2011), http://articles.timesofindia.indiatimes.com/2011-07-29/india-business/29828750_1_generic-drugs-consignments-of-generic-medicines-eu-parliament. It remains to be seen whether India will withdraw its complaint from the WTO and whether Brazil will follow suit.

146. *See* Yu, *supra* note 75, at 527–29.

147. UDHR, *supra* note 32, art. 3.

148. *Id.* art. 25(1).

149. Constitution of the World Health Organization pmbl., recital 2, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.

150. *See, e.g.*, HESTERMEYER, *supra* note 106, at 76–136 (discussing access to medicines as a human right); Denis Borges Barbosa et al., *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71, 131–33 (discussing the legal status of the right to health in relation to the Doha Declaration and the access to medicines debate).

intellectual property system.[151] Indeed, concerns over these crises led WTO members to adopt the Doha Declaration on the TRIPS Agreement and Public Health,[152] which "recognize[d] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics."[153] The document also declared that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and that "the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[154]

A few years later, the member states adopted a pioneering protocol to formally amend the TRIPS Agreement by adding Article 31*bis*.[155] If ratified by two-thirds of the WTO membership, the proposed amendment will allow countries with insufficient or no manufacturing capacity to import generic versions of patented pharmaceuticals. As of this writing, more than a third of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Union, have ratified the proposed amendment.[156]

Interestingly, some commentators have suggested that the right to health can go in the opposite direction. For example, victims of harmful diseases can use this right to argue for the need to provide incentives for pharmaceutical manufacturers to develop drugs that treat, prevent, or cure the diseases.[157] Although the intellectual property system provides the much-needed incentives for the development of new pharmaceuticals,[158] commentators continue to disagree over whether some of these incentives can be generated outside the intellectual property system or through other

151. *See generally* THE GLOBAL GOVERNANCE OF HIV/AIDS: INTELLECTUAL PROPERTY AND ACCESS TO ESSENTIAL MEDICINES (Obijiofor Aginam, John Harrington & Peter K. Yu eds., forthcoming 2012) (examining the global HIV/AIDS governance regime and the implications of high international intellectual property standards for access to essential medicines in developing countries).

152. *See* World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2001).

153. *Id.* ¶ 1.

154. *Id.* ¶ 4.

155. *See* General Council, *Amendment of the TRIPS Agreement*, at 2, WT/L/641 (Dec. 8, 2005); *see also* Yu, *supra* note 144, at 872–86 (discussing the proposed Article 31*bis* of the TRIPS Agreement and its origins).

156. *See Members Accepting Amendment of the TRIPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last updated Oct. 5, 2012).

157. *See, e.g.*, Martin J. Adelman, Theodore and James Pedas Family Professor of Intellectual Prop. & Tech. Law, The George Washington Univ. Law Sch., Remarks at the 15th Fordham Annual International Intellectual Property and Policy Conference (Apr. 13, 2007).

158. *See, e.g.*, JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 106–09 (2008); DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 49 (2009).

funding models, such as grants, subsidies, prizes, advance market commitments, reputation gains, open source drug discovery, patent pools, public–private partnerships, or equity-based systems built upon liability rules.[159] Such disagreement is understandable, considering that the international human rights instruments have not specified a modality of protection for interests in intellectual creations.[160]

There is also an ongoing debate concerning the optimal levels of patent protection for less developed countries and whether existing protections have already exceeded those levels. As Professor Josh Lerner observes: "Almost all economists would agree that some intellectual property protection is better than no intellectual property protection at all. But this does not mean that very strong protection is better than a more moderate level of protection."[161] Noting the problems in the patent systems in many developed countries, Professors Keith Maskus and Jerome Reichman have also called for "[a] moratorium on stronger international intellectual property standards."[162]

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159. *See, e.g.*, INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES 133–283 (Thomas Pogge et al. eds., 2010) (collecting articles discussing prizes, patent pools, and open source drug discovery); GENE PATENTS AND COLLABORATIVE LICENSING MODELS: PATENT POOLS, CLEARINGHOUSES, OPEN SOURCE MODELS AND LIABILITY REGIMES (Geertrui Van Overwalle ed., 2009) (collecting articles discussing patent pools, clearinghouses, open source models, and liability regimes); Yu, *supra* note 11, at 1088–92 (discussing the different acceptable modalities of protection that can be used to realize the right to the protection of interests in intellectual creations).

160. *See General Comment No. 17*, *supra* note 27, ¶ 10 ("[T]he protection under article 15, paragraph 1(c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions . . . ."); Yu, *supra* note 11, at 1089 ("[T]he key criterion for satisfying the material interests obligation is not whether the offered protection meets the level of protection required by existing international intellectual property agreements or whether such protection is based on the property rights model. Rather, one has to inquire whether the existing system provides meaningful protection of material interests in the creations by authors and inventors.").

161. Josh Lerner, *The Patent System in a Time of Turmoil*, 2 WIPO J. 28, 32 (2010).

162. *See* Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 36 (Keith E. Maskus & Jerome H. Reichman eds., 2005). As they explain:

> [T]he drive to further harmonize the international minimum standards of patent protection at WIPO has occurred at the very time when the domestic standards of the United States and the operations of its patent system are under critical assault. . . . How, under such circumstances, could it be timely to harmonize and elevate international standards of patent protection—even if that were demonstrably beneficial—when there is so little agreement in the U.S. itself on how to rectify a dysfunctional apparatus that often seems out of control? . . . Further harmonization efforts in this climate thus amount to a gamble from which bad decisions and bad laws are far more likely to emerge than good

2. Access to Knowledge

A second debate concerns access to information technology, communications infrastructure, computer software, electronic databases, and digital content. Such access is impeded by the protection of copyrights, databases, and technological measures. This debate implicates the rights to education and freedom of expression. Because education directly affects one's ability to fully realize oneself,[163] the impeded access has troubled those adopting the human capabilities or human flourishing approaches to human rights.[164] The issue regarding access to knowledge further ties the discussion on intellectual property and human rights to both the older debate about the global digital divide[165] and a much newer one concerning access to knowledge.[166]

Thanks to the Internet and new communications technologies, the debate on access to information technology has now caught the attention of not only civil liberties groups, but also the United Nations and other international intergovernmental organizations. Held in two phases in Geneva and Tunis,[167] the World Summit on the Information Society sought to address the concerns raised by the growing digital divide in less developed countries and the possibility that these countries might lose out

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laws that appropriately balance public and private interests.

Id. at 24–26 (footnote omitted).

163. *See* HELFER & AUSTIN, *supra* note 12, at 322 (discussing the connection between education and the idea of self-realization); Fons Coomans, *In Search of the Core Content of the Right to Education*, *in* CORE OBLIGATIONS, *supra* note 68, at 217, 219 (characterizing the right to education as an "'empowerment' right").

164. *See* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2885 (2006) (proposing to integrate a principle of substantive equality "throughout intellectual property globalization decision-making via a legal rule akin to the strict scrutiny doctrine in U.S. constitutional law"); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 287–88 (1997) (providing an open-ended working list of the most central human capabilities). *See generally* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011) (providing a detailed overview of the human capabilities approach to development); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000) (discussing the human capabilities approach to human rights in relation to women in less developed countries); AMARTYA SEN, DEVELOPMENT AS FREEDOM 87–110 (1999) (outlining the human flourishing approach to development).

165. *See generally* Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1 (2002) (discussing the global digital divide).

166. For discussions of the access to knowledge debate, see generally ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (Gaëlle Krikorian & Amy Kapczynski eds., 2010); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

167. *See* Yu, *supra* note 75, at 537–38 (discussing the World Summit on the Information Society and developments in the emerging information and communications regime); *see also World Summit on the Information Society*, INT'L TELECOMM. UNION, http://www.itu.int/wsis/index.html (last updated Nov. 17, 2011) (providing information about the World Summit).

on many unprecedented opportunities generated by the information revolution.[168] This summit led to the launch of the Internet Governance Forum (IGF), which was created to promote a "multilateral, multi-stakeholder, democratic and transparent" policy dialogue on Internet governance.[169] IGF meetings have since convened in Athens, Rio de Janeiro, Hyderabad, Sharm El Sheikh, Vilnius, and Nairobi.[170]

In recent years, the adoption of the graduated response system[171] has elicited strong criticisms in the human rights arena.[172] Of primary concern are the human rights implications of Internet disconnection, the system's final option. From the human rights standpoint, using suspension or termination of Internet service as a remedy for alleged copyright infringement is highly problematic. As Frank La Rue, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, declared in his recent report:

> The Special Rapporteur considers cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of Article 19, paragraph 3, of the International Covenant on Civil and Political Rights.
>
> The Special Rapporteur [further] calls upon all States to ensure that Internet access is maintained at all times, including during times of political unrest. In particular, the Special Rapporteur urges States to repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access, and to refrain from adopting such laws.[173]

The Special Rapporteur's concern and request are understandable. After all, repressive governments have recruited Internet service providers to serve as gatekeepers to help censor digital content and restrict

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168. *See generally* Peter K. Yu, *The Trust and Distrust of Intellectual Property Rights*, 18 REVUE QUÉBÉCOISE DE DROIT INT'L 107 (2005) (discussing intellectual property issues raised at the World Summit on the Information Society in Geneva).

169. Int'l Telecomm. Union [ITU], World Summit on the Info. Soc'y, *Tunis Agenda for the Information Society*, ¶¶ 72–73, WSIS-05/TUNIS/DOC/6(Rev. 1)-E (Nov. 18, 2005), *available at* http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

170. *See* INTERNET GOVERNANCE F., http://www.intgovforum.org/cms/ (last visited Feb. 2, 2012) (providing information about the Internet Governance Forum); *see also* Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1, 32–38 (2009) (discussing the Internet Governance Forum in the context of human rights and access to knowledge).

171. *See supra* Part I.

172. *See, e.g.*, *Report of the Special Rapporteur on Freedom of Expression*, *supra* note 110, ¶¶ 78–79.

173. *Id.* ¶¶ 78–79.

information flows.[174] While the graduated response system protects intellectual property rights holders, as opposed to governments, its impact on individual freedom of expression is not that different from the impact of government censorship.[175]

Indeed, as I have pointed out elsewhere, developed countries' increasing push for draconian measures to respond to enforcement problems in the digital environment has slowly backfired on their longstanding interests in promoting free speech, free press, human rights, and civil liberties abroad.[176] From the human rights standpoint, provisions

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174. *See* Yu, *supra* note 46, at 715 (noting the free speech concerns raised by the proposal in Hong Kong's digital copyright reform to introduce a streamlined procedure to obtain users' information for the facilitation of copyright infringement actions); Yu, *supra* note 59, at 1402 (discussing how the graduated response system would undermine the protection of free speech, free press, and privacy). *See generally* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006) (discussing how private actors have been enlisted as "proxy censors" to control the flow of information).

It is worth noting that the use of Internet service providers as gatekeepers to help censor digital content and restrict information flows is not limited to repressive governments. Many democracies in the developed world engage in such use. *See* Rebecca MacKinnon, *The Green Dam Phenomenon*, WALL ST. J. ASIA, June 18, 2009, http://online.wsj.com/article/SB12452599205102 3961.html ("The Internet censorship club is expanding and now includes a growing number of democracies. Legislators are under growing pressure from family groups to 'do something' in the face of all the threats sloshing around the Internet, and the risk of overstepping is high."); *see also* REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 101 (2012) ("[P]oliticians throughout the democratic world are pushing for stronger censorship and surveillance by Internet companies to stop the theft of intellectual property. They are doing so in response to aggressive lobbying by powerful corporate constituents without adequate consideration of the consequences for civil liberties, and for democracy more broadly."); Christopher Rhoads & Loretta Chao, *Iran's Web Spying Aided by Western Technology*, WALL ST. J., June 22, 2009, at A1 (discussing Internet control in Britain, Germany, United States, and Australia); *Transparency Report*, GOOGLE, http://www.google.com/transparencyreport/government requests/ (last visited Feb. 2, 2012) (providing the Google transparency report).

175. *See* Yu, *supra* note 59, at 1374 (noting that the graduated response system involves mostly private censorship, as opposed to state censorship).

176. As I have noted before:

> Today, the entertainment industry's aggressive push for stronger copyright protection and enforcement has caused serious collateral damages to society at large, eroding the protections of free speech, free press, privacy, due process, and other civil liberties. The proposed ACTA, for example, calls for draconian measures that threaten to undermine the United States' longstanding interests in promoting human rights, civil liberties, and the rule of law abroad. Likewise, the push for the worldwide adoption of the graduated response system has undermined the protections of free speech, free press, privacy, and both procedural and substantive due process. In addition, the introduction of anti-circumvention laws and the ongoing push for greater protection of digital rights management tools have brought about many unintended consequences, chilling innovation and competition while raising concerns over free speech, privacy, consumer protection, academic freedom, learning, scientific advancement, cultural

that call for Internet disconnection, greater intermediary liability for Internet service providers, and tougher criminal penalties for unauthorized dissemination of online content have raised very serious concerns.[177]

3. Global Climate Change

The final debate concerns the role of the intellectual property system in response to challenges posed by global climate change.[178] As the debate has emerged only recently, it is unclear what rights will be implicated, what limitations and exceptions will be introduced, and how and whether the overall intellectual property system will be changed. Indeed, the rights involved are more likely to be covered in the category of lost opportunities than in the category of conflicts or inconsistencies.

Nevertheless, it is worth noting that the debate will implicate such important human rights as the rights to health, adequate housing, adequate food, water, and development.[179] Because of the asymmetry in resource endowment, less developed countries with significant populations and resources in areas vulnerable to floods, hurricanes, typhoons, tsunamis, severe drought, desertification, or forest decay will likely suffer more than others if the intellectual property system is not better managed to respond to climate change.

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development, and democratic discourse.

Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 928–29 (2011) (footnotes omitted); *see also* Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 254–59 (2009) (discussing the damage to free speech wrought by overreaching copyright protection); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 174 (2000) ("By demonstrating that a country should rely heavily on pressure and ultimata to protect its economic interests, the existing foreign intellectual property policy backfires and jeopardizes the United States's longstanding interests in promoting human rights and civil liberties in China. It also discredits the very important message that one should respect rights and the legal process.").

177. For critiques of these provisions, see generally Yu, *supra* note 46, at 701–16 (examining provisions creating criminal liability for the unauthorized distribution of copyrighted works and concerning Internet service providers); Yu, *supra* note 59, at 1390–1403 (discussing the drawbacks of the graduated response system).

178. For discussions of the relationship between intellectual property rights and global climate change, see generally ERIC L. LANE, CLEAN TECH INTELLECTUAL PROPERTY (2011); MATTHEW RIMMER, INTELLECTUAL PROPERTY AND CLIMATE CHANGE (2011); RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE (Joshua Sarnoff ed., forthcoming 2012).

179. *See* MARCOS A. ORELLANA ET AL., TECHNOLOGY TRANSFER IN THE UNFCCC AND OTHER INTERNATIONAL LEGAL REGIMES: THE CHALLENGE OF SYSTEMIC INTEGRATION 4 (2010), *available at* http://www.ichrp.org/files/papers/181/138_technology_transfer_UNFCCC.pdf.

C. *Systemic Tension and Indirect Impediments*

In addition to the above conflicts and inconsistencies, the intellectual property provisions in nonmultilateral agreements have created considerable tension between the intellectual property and human rights systems. Even in areas where no direct conflicts or inconsistencies arise, the agreements could distort the work of the international human rights system by creating an undue emphasis on trade, economic partnerships, and nonmultilateral approaches. They could also divert time, resources, energy, and attention from the further development of the international human rights system.

1. Intellectual Property v. Human Rights

Compared with the intellectual property system, the human rights system has a distinctive culture, language, and forum structure, as well as drastically different approaches to negotiation and conflict resolution.[180] The position human rights advocates take often do not coincide with those taken by intellectual property rights holders and their supportive governments.[181] The latter's views are often colored by the trade-based—

180. As Professors Laurence Helfer and Graeme Austin explain:

> Intellectual property commentators, especially those working in the Anglo-American tradition, employ the analytical tools of utilitarianism and welfare economics to evaluate the trade-offs between incentives and access and the consequences for the individuals and firms that create, own, and consume intellectual property products. The international human rights movement, by contrast, engages in a discourse of absolutes that seeks to delineate the negative and positive duties of states to respect and promote inalienable individual freedoms. As a result, to label something as a "human right" often invokes—in rhetoric if not always in reality—a language of trumps and unconditional demands. This emphasis on categorical rights and responsibilities appears ill suited to the rapidly changing technological and economic environment in which intellectual property rules operate, an environment that often engenders calls for incremental recalibrations of the balance between incentives and access.

HELFER & AUSTIN, *supra* note 12, at 504; *see also* Land, *supra* note 170, at 1–2 ("Those in the human rights movement are largely international lawyers, while the A2K movement is predominantly composed of cyberlaw and intellectual property lawyers and technologists."); Audrey Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, *in* WORLD INTELLECTUAL PROP. ORG., PUB. NO. 762(E), INTELLECTUAL PROPERTY AND HUMAN RIGHTS 127, 128 (1998) ("Intellectual property lawyers tend to have little involvement with human rights law, and few human rights specialists deal with science and technology or intellectual property issues."); Yu, *supra* note 11, at 1136 (noting that transnational corporations "often find alien the human rights language and the forum structure").

181. *See* Gervais, *supra* note 25, at 22 ("The response of the industry and the United States Government thus far . . . point[] to additional trade-enforced restrictions on existing flexibilities that would be successful in maintaining maximum protection and limiting access to products . . . sold by the patent holder, but at a potentially high human and ethical cost. This seems like suboptimal cohabitation [of intellectual property and human rights].").

and at times, trade-only—approach developed through the founding of the WTO and the adoption of the TRIPS Agreement. It is therefore no surprise that commentators have heavily criticized the WTO panels and the Appellate Body for failing to protect important human rights.[182]

Indeed, the tension between the WTO and the international human rights system has led U.N. human rights bodies to heavily criticize the TRIPS Agreement. For example, in Resolution 2000/7, the U.N. Sub-Commission stated that "the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights."[183] Noting the "apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other,"[184] the Sub-Commission underscored the "social function of intellectual property"[185] and reminded governments of "the primacy of human rights obligations over economic policies and agreements."[186] The resolution also requested "[g]overnments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation."[187]

Likewise, Mary Robinson, the U.N. High Commissioner for Human Rights, released a report highly critical of the TRIPS Agreement.[188] The report provided five observations concerning the potential challenge for developing a human rights approach to the Agreement. First, the High Commissioner noted:

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182. *See* Tomer Broude, *It's Easily Done: The China—Intellectual Property Rights Enforcement Dispute and the Freedom of Expression*, 13 J. WORLD INTELL. PROP. 660, 661 (2010) (arguing that "contrary to any prior expectations of spontaneous confluence between trade, intellectual property and human rights, the reasoning of [the WTO panel report on *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*] is entirely oblivious to the human rights implications of the dispute, and that it could even have negative effects on the legal framework of the freedom of expression in China"); *see also* Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INTELL. PROP. 493, 496 (2000) (criticizing the WTO Panel for being "only interested in how much the rights holder might lose, not in how much society might gain, from a given exception"); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 914–15 (2003) (expressing disappointment that WTO panels, despite focusing on the purpose and objective of the TRIPS Agreement and the context of the negotiations, "have interpreted the provisions almost solely in light of the economic expectations of the private right holders").

183. Resolution 2000/7, *supra* note 20, ¶ 2.

184. *Id.*

185. *Id.* ¶ 5.

186. *Id.* ¶ 3.

187. *Id.* ¶ 4.

188. *High Commissioner's Report*, *supra* note 25, ¶ 2.

> [T]he overall thrust of the TRIPS Agreement is the promotion of innovation through the provision of commercial incentives. The various links with the subject matter of human rights—the promotion of public health, nutrition, environment and development—are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement.[189]

Second, "while the Agreement identifies the need to balance rights with obligations, it gives no guidance on how to achieve this balance."[190] Although the TRIPS Agreement "sets out in considerable detail the content of intellectual property *rights*"—such as the requirements for the grant of rights, the duration of protection, and the modes of enforcement—it "only alludes to the *responsibilities* of [intellectual property] holders that should balance those rights in accordance with its own objectives. . . . [U]nlike the rights it sets out, the Agreement does not establish the content of these responsibilities, or how they should be implemented."[191]

Third, because of the required minimum standards, the TRIPS Agreement has taken away a high degree of autonomy and a considerable amount of policy space from the WTO member states. The lack of such autonomy, in turn, may affect their "abilities to promote and protect human rights, including the right to development."[192] As the High Commissioner reminded us, Article 2(3) of the Declaration on the Right to Development provides:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.[193]

A fourth concern, related to the third, is that "the protection contained in the TRIPS Agreement focuses on forms of protection that have

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189. *Id.* ¶ 22; *see also* Sisule F. Musungu, *Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond* 4–5 (Quaker Int'l Affairs Programme, Ottawa, TRIPS Issues Paper No. 5, 2005), *available at* http://www.quno.org/geneva/pdf/economic/Issues/TRIPS53.pdf ("So far the only widely accepted notion has been that intellectual property is trade-related, justifying the TRIPS Agreement in the WTO but not the notion that intellectual property rules are also education-related, health-related, defence-related and environment-related and so forth.").

190. *High Commissioner's Report*, *supra* note 25, ¶ 23.

191. *Id.*

192. *Id.* ¶ 24.

193. Declaration on the Right to Development, *supra* note 74, art. 2(3).

developed in industrialized countries."[194] As a result, less developed countries are required to offer protection that does not always take account of local needs, interests, and conditions. Even worse, such protection may significantly reduce a country's ability to promote public health or participation in development.

Finally, under the current international intellectual property system, limited attention has been devoted to the protection of "the cultural heritage and technology of local communities and indigenous peoples."[195] There are also growing concerns about the use of trade pressure to impose TRIPS-plus legislation that could result in the development of "IP systems that are inconsistent with States' responsibilities under human rights law."[196]

Notwithstanding these concerns, the High Commissioner recognized the flexibilities built into the TRIPS Agreement and noted that "much still depends on how the . . . Agreement is actually implemented."[197] While these flexibilities are important and may help retain the balance in the international intellectual property system, it is important to remember that countries need expertise and resources to take advantage of these flexibilities. As UNCTAD reminded us in *The Least Developed Countries Report 2007*:

> Even with its inbuilt flexibilities, the TRIPS Agreement is highly problematic for [least developed countries] owing to the high transaction costs involved in complex and burdensome procedural requirements for implementing and enforcing appropriate national legal provisions. [These countries] generally lack the relevant expertise and the administrative capacity to implement them.[198]

In sum, as shown in the U.N. Sub-Commission's and High Commissioner's analyses of the human rights impact of the TRIPS Agreement, obligations in international intellectual property agreements—including nonmultilateral agreements—could create tension between the intellectual property system and the human rights system. Even if tension does not exist on the surface, the obligations could mismatch the adopted

194. *High Commissioner's Report*, *supra* note 25, ¶ 25.

195. *Id.* ¶ 26.

196. *Id.* ¶ 27.

197. *Id.* ¶ 28.

198. U.N. Conference on Trade & Dev. [UNCTAD], *The Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development*, at 99, U.N. Doc. UNCTAD/LDC/2007 (2007); *accord* Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 25 (2004) (noting that many less developed countries lack "experience with intellectual property protection [and] sufficient human capital (in the form of legal talent) to codify wiggles into law").

standards and local conditions.[199] They could also divert the scarce economic resources from other important public needs. Such diversion is particularly likely in the enforcement area.[200]

2. Bi/Plurilateral v. Multilateral

Although nonmultilateral agreements have created significant tension between the intellectual property system and the human rights system, the bilateral and plurilateral approaches used to establish these agreements have raised additional concerns. By going outside the multilateral system, nonmultilateral agreements have undermined the existing multilateral approach to international norm-setting in both the intellectual property and human rights arenas.[201]

As commentators have widely recognized, the development of the highly controversial ACTA, the equally problematic TPP, and other TRIPS-plus nonmultilateral agreements is not only an effort to strengthen the protection and enforcement of intellectual property rights, but also an

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199. *See* Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13, 42–50 (2006) (discussing the mismatch between the anticircumvention regime and the local conditions of less developed countries); Yu, *supra* note 144, at 889–91 (discussing the mismatch between the TRIPS Agreement and the local conditions of less developed countries).

200. *See* Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, *in* INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, ISSUE PAPER NO. 22, THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES xiii, 2 (2009) ("Governments need to make choices about how many resources to spend on combating piracy, as opposed to enforcing other areas of law, building roads and bridges, protecting national security, and providing other public goods. Such choices are usually not stated in explicit terms, but they underlie every budgetary decision by federal and local governments."); *see also* Li Xuan & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, *in* INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 207, 210 (Li Xuan & Carlos M. Correa eds., 2009) [hereinafter INTELLECTUAL PROPERTY ENFORCEMENT] (noting that the demands for strengthened intellectual property enforcement "seem to overlook the cost of the required actions, the different priorities that exist in developing countries regarding the use of public funds (health and education would normally be regarded as more urgent than IP enforcement) and the crucial fact that IPRs are *private rights* and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large"); MUSUNGU, *supra* note 128, at 61 ("African and Pacific countries, learning from the example of the CARIFORUM EPA, should approach proposals for additional obligations on IP issues in their regions with utmost caution. Even in cases where the issues addressed have the potential of development benefits, the overall obligations assumed may be too onerous for these countries. This is the case, for example, with respect to the provisions on enforcement and on the protection of geographical indications."); Xue Hong, *Enforcement for Development: Why Not an Agenda for the Developing World?*, *in* INTELLECTUAL PROPERTY ENFORCEMENT, *supra*, at 133, 143 ("Increment and strength of public enforcement measures will inevitably impose an economic burden on the developing countries and divert the priorities of these countries, such as prosecution of violent crimes or relief of poverty."); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 2–6 (2010) (discussing the costs of strong intellectual property enforcement norms and the resulting trade-offs).

201. *See* Yu, *Sinic Trade Agreements*, *supra* note 1, at 976–77.

indictment of the deficiencies in the TRIPS Agreement and the multilateral approach used in completing the WTO rounds of trade negotiations.[202] By changing countries' preferences for multilateral approaches, the establishment of nonmultilateral agreements has therefore posed significant challenges to the stability of both the international trading system and the international human rights system.[203] These bilateral and plurilateral negotiations may further alienate a country's trading partners, making it more difficult for the country to undertake multilateral discussions in the future.[204]

Even worse, by fragmenting the international regulatory system and creating what Professor Jagdish Bhagwati and other commentators have described as the "spaghetti bowl"[205] or the "noodle bowl,"[206] the continued

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202. *See* Jeffery Atik, *ACTA and the Destabilization of TRIPS*, *in* SUSTAINABLE TECHNOLOGY TRANSFER: A GUIDE TO GLOBAL AID & TRADE DEVELOPMENT (121, 145 Hans Henrik Lidgard et al. eds., 2012) ("ACTA is a critique of TRIPS—its very core signals a diagnosis that TRIPS inadequately addressed the problem of IP enforcement."); Yu, *supra* note 57, at 511–14 (noting that ACTA was created in part to address the inadequacies and ineffectiveness of the TRIPS enforcement provisions); Catherine Saez, *ACTA a Sign of Weakness in Multilateral System, WIPO Head Says*, INTELL. PROP. WATCH (June 30, 2010, 6:18 PM), http://www.ip-watch.org/weblog/2010/06/30/acta-a-sign-of-weakness-in-multilateral-system-wipo-head-says/ (reporting the concern of WIPO Director General Francis Gurry that countries are "taking matters into their own hands to seek solutions outside of the multilateral system to the detriment of inclusiveness of the present system"). *See generally* Yu, *supra* note 57 (providing a comprehensive discussion of why the TRIPS enforcement provisions are inadequate and ineffective from the standpoint of developed countries and intellectual property rights holders).

203. *Cf.* Chad Damro, *The Political Economy of Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 23, 39–41 (Lorand Bartels & Federico Ortino eds., 2006) (discussing how regional trade agreements can serve as "political stumbling blocks" to WTO multilateralism); Yu, *Sinic Trade Agreements*, *supra* note 1, at 976 (noting that nonmultilateral agreements "threaten to undermine the existing multilateral system").

204. *See* Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219, 239 (2004) ("The inherent discriminatory nature of bilateralism/regionalism is often blended with an internal power disparity and ultimately begets unilateralism. Unilateralism, which is often clad with extraterritoriality, tends to eclipse international trade law, thereby placing the global trading system at the mercy of bare politics by a handful of powerful states."); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 297 (1991) (arguing that bilateral agreements "may run counter to U.S. long-term interests for a healthy, stable trade environment . . . [and] fragment the world trading system . . . [by creating] resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism"); Yu, *Sinic Trade Agreements*, *supra* note 1, at 976 (noting that nonmultilateral agreements can "alienate a country's multilateral partners, resulting in distractions, or even disengagement, that impede the progress of multilateral discussions").

205. Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995); *see also* Yu, *Sinic Trade Agreements*, *supra* note 1, at 978 & n.107 (noting the creation of a "noodle bowl" in Asia).

206. *See* Wang Jiangyu, *Association of Southeast Asian Nations–China Free Trade Agreement*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS, *supra* note 1, at 192, 224 (noting

push for TRIPS-plus nonmultilateral agreements has forced countries to divert scarce time, resources, energy, and attention from other international intergovernmental initiatives, including the development of the international human rights system.[207] In less developed countries where resources are scarce and personnel dedicated to the negotiation of international human rights instruments may overlap with those involved in the development of international intellectual property agreements, the negotiation of nonmultilateral agreements will inevitably deplete resources that can otherwise be used to strengthen human rights protection.

It is important to remember that not every country has the ability to undertake discussions in a multitude of fora—in this case, in both intellectual property and human rights fora and in both multilateral and nonmultilateral fora. Even the United States or the European Union could not devote the same amount of time, energy, and attention to the multilateral process had it been asked to negotiate a large number of bilateral and plurilateral agreements alongside the ongoing multilateral negotiations.[208] With significantly more limited resources, less developed

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"'Asian noodle bowl effect' as highlighted by officials of the Asian Development Bank"); Yu, *Sinic Trade Agreements*, *supra* note 1, at 978 (noting the creation of the "noodle bowl" or "curry bowl" in Asia); Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* (Asian Dev. Bank, Working Paper on Regional Economic Integration No. 7, 2007), *available at* http://www.adb.org/documents/papers/regional-economic-integration/WP07-Baldwin.pdf; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank, Working Paper No. 144, 2009), *available at* http://www.adb.org/documents/Working-Papers/2010/Economics-WP226.pdf (noting "a 'noodle bowl' problem of criss-crossing agreements that potentially distort trade toward bilateral channels, excessive exclusions and special treatment in FTAs, and the possibility that the multilateral trading system may be progressively eroded").

207. As I noted in an earlier article:

> In an ideal world, both the multilateral and bilateral processes should work in tandem to maximize their strengths and effectiveness. Countries, therefore, should continue to negotiate in a multilateral forum while at the same time seeking enhancement through FTAs and EPAs. In reality, however, countries—especially those in the less-developed world—have very limited resources. As a result, they may not have the ability to dedicate efforts to normmaking in a multitude of competing fora. Not even developed countries can devote the same amount of energy and resources to the multilateral process if they also have to negotiate a large number of bilateral and plurilateral agreements.

Yu, *Sinic Trade Agreements*, *supra* note 1, at 977 (footnote omitted); *see also* Renato Ruggiero, *Comment*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 25, 26–27 (Jeffrey J. Schott ed., 2004) [hereinafter FREE TRADE AGREEMENTS] ("Negotiating bilateral and regional agreements can divert attention and effort from the Doha Round. This in turn can create a vicious cycle, whereby a lack of progress at the WTO spurs a greater emphasis on bilateralism and regionalism, which in turn further hampers efforts in Geneva.").

208. *See* European Comm'n, Directorate-General for Trade, Strategy for the Enforcement of Intellectual Property Rights in Third Countries, 2005 O.J. (C 129) 3, 5 ("It is important to identify a limited number of countries on which the efforts of the Commission in the framework of the present

countries most certainly would do much worse.

Moreover, as Professors Eyal Benvenisti and George Downs insightfully observe, the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries could help powerful countries preserve their dominance in the international arena.[209] The growing complexities could also result in what Professor Kal Raustiala describes as "strategic inconsistenc[ies]," which help alter, undermine, or put pressure on unfavorable norms in the international human rights system.[210] Such complexities could further upset the existing coalition dynamics between international actors and institutions, thereby threatening to reduce the bargaining power and influence less developed

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strategy should be concentrated. The human and financial resources allocated to the enforcement of IPR being limited, it is unrealistic to pretend that our action can extend equally to all, or even most, of the countries where piracy and counterfeiting occur." (citation and footnote omitted)); Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System?*, *in* FREE TRADE AGREEMENTS, *supra* note 207, at 3, 16 (pointing out that resource scarcity equally "affects US negotiators, whose budget is inadequate to meet the extensive demands set out in US Trade Promotion Authority by their congressional masters"); *see also id.* ("If WTO talks face tough sledding, [FTA critics'] counsel is to redouble efforts at most favored nation reforms rather than to create new distortions via competing preferential regimes."); Richard N. Cooper, *Comment*, in FREE TRADE AGREEMENTS, *supra* note 207, at 20, 23 ("The United States ought to devote its negotiating and political energies to getting a successful conclusion to the multilateral negotiations, currently the Doha Round and some unfinished business from the Uruguay Round."); Damro, *supra* note 203, at 42 (noting that multilateral liberalization could slow down "as governments shift attention and resources toward the negotiation of regional agreements").

209. Professors Benvenisti and Downs describe three ways in which the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries has helped powerful states preserve their dominance:

> First, [fragmentation] limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states. . . . Second, by creating a multitude of competing institutions with overlapping responsibilities, fragmentation provides powerful states with the opportunity to abandon—or threaten to abandon—any given venue for a more sympathetic venue if their demands are not met. . . . Third, a fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality. . . . This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the capacity to alter.

Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597–98 (2007).

210. *See* Raustiala, *supra* note 35, at 1027–28 (stating that strategic inconsistencies "'occur[] when actors deliberately seek to create inconsistency via a new rule crafted in another forum in an effort to alter or put pressure on an earlier rule'"); Yu, *Sinic Trade Agreements*, *supra* note 1, at 979 ("The more bilateral and plurilateral agreements there are, the more opportunities there will be for powerful and geopolitically savvy countries to develop such inconsistencies."); *see also* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 14 (2004) (discussing legal inconsistencies generated by development of counter-regime norms).

countries have obtained through past coalition-building initiatives.[211]

IV. RECONCILIATION AND ADJUSTMENTS

To reconcile the conflicts and inconsistencies, and to alleviate the tensions, between the intellectual property system and the human rights system, this Part proposes two different sets of adjustments. The first set focuses on the normative challenges identified in Part III.B. The second set responds to the systemic challenges discussed in Part III.C.

A. *Normative Adjustments*

As discussed earlier, some attributes of intellectual property rights are protected by international human rights instruments. A satisfactory resolution of the tension between the intellectual property and human rights systems therefore requires a careful delineation of the different attributes of intellectual property rights.[212] After all, the CESCR stated clearly that, "[i]n contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else."[213]

From the human rights standpoint, there are two different types of conflicts: external and internal.[214] External conflicts arise at the intersection between human rights and the non-human rights aspects of intellectual property protection. Internal conflicts, by contrast, arise at the intersection between rights protecting the human rights attributes of intellectual property and other forms of human rights. These conflicts take place within the human rights system even though they also implicate intellectual property protection.

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211. *See* Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 373 (2003) ("[T]o the extent regime shifting upsets coalitional dynamics between developing countries, the loss on the development side is actually doubled. Not only is there a dilution of a normative proposition, however subtle, but there is also the political loss resulting from splinters between developing countries whose membership in various regimes may be different, or whose position on issues within the regimes may differ."); *see also* Yu, *supra* note 14, at 17–18 (discussing how "the increased complexity of the international intellectual property regime has upset existing coalition dynamics between actors and institutions within the regime complex"); Yu, *Sinic Trade Agreements*, *supra* note 1, at 981 ("[B]y taking away these countries' ability to form coalitions, FTAs and EPAs have generally made less-developed countries more vulnerable than in a multilateral setting." (footnote omitted)).

212. *See* Yu, *supra* note 11, at 1128.

213. *General Comment No. 17*, *supra* note 27, ¶ 2.

214. In addition to these two sets of conflicts, which are true conflicts, it is also worth noting the possibilities for false conflicts (similar to those identified by conflict of law scholars). One commentator, for example, contends that market failures can precipitate false conflicts. *See* Sharon E. Foster, *The Conflict Between the Human Right to Education and Copyright*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, *supra* note 25, at 287, 305–06.

1. External Conflicts

With respect to external conflicts, countries can consider the introduction of limitations and exceptions either within the intellectual property system or without. Such limitations and exceptions are consistent with the existing international human rights instruments. Article 4 of the ICESCR provides:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[215]

Article 25 further states: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[216]

Externally, countries can embrace the principle of human rights primacy that the U.N. Sub-Commission outlined in Resolution 2000/7.[217] In the event of a conflict between intellectual property rights and human rights, countries can ensure proper protection of human rights by using certain human rights to preempt intellectual property rights. For example, the rights to life and health can be used to safeguard against the over-protection of pharmaceutical patents or clinical trial data.[218] To some extent, greater utilization of the human rights system may help less developed countries uphold the flexibilities in the TRIPS Agreement. Such utilization may also allow these countries to "claw back" some of the concessions they made during the TRIPS negotiations.[219]

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215. ICESCR, *supra* note 28, art. 4; *see also* UDHR, *supra* note 32, art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

216. ICESCR, *supra* note 28, art. 25.

217. *See* Resolution 2000/7, *supra* note 20, ¶¶ 2, 3 (reminding governments "of the primacy of human rights obligations over economic policies and agreements" and the importance of other human rights, such as the right to food and the right to health); Yu, *supra* note 11, at 1092–93 (discussing the principle of human rights primacy).

218. Given their lack of basis in human rights instruments, rights in clinical trial data will be more easily preempted by human rights than patent rights, which contain at least some human rights attributes. *See supra* Part III.A.

219. *See* Raustiala, *supra* note 35, at 1036 ("[T]here are significant efforts to use human rights instruments and concepts to roll back some of the more egregious elements of TRIPS."); *cf.* JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 7 (2001) (suggesting that a constructive resolution of ambiguities in the TRIPS Agreement may

Nevertheless, authors, inventors, and their corporate owners may abuse the human rights system. "Because those attributes or forms of intellectual property rights that do not have a human rights basis are likely to be deemed less important through a human rights lens,"[220] without proper safeguards, preemption based on the principle of human rights primacy could significantly reduce the incentives generated by the existing intellectual property system. As Professor Rochelle Cooper Dreyfuss cautions:

> Elevating intellectual property rights to human rights has unfortunate pragmatic consequences. Presumably, human rights can be outweighed only by other human rights. Accordingly, under a human rights approach, the benefit stream flowing from inventive production can be distributed, without a patentee's authorization, only to meet social needs that are likewise classified as fundamental. (Or to put it another way, every incursion on a patent right would need to be justified by showing that it involved an interest that is not only socially desirable, but that can also be categorized as a human right.) Instead of relying on legislatures and courts to wield well-understood tools embedded in existing patent law, ad hoc rights-balancing leads to unpredictable decision-making. The result, ironically, is an environment less conducive to decisions to invest time and money in intellectual efforts. The new—human rights—justification can, in short, thwart the traditional—utilitarian—goal of limiting protection from free riders as a means of encouraging the advancement of knowledge.[221]

Internally, countries can also proactively introduce limitations and exceptions into the intellectual property system. In the area of access to essential medicines, for example, countries can introduce provisions that facilitate compulsory licensing, parallel importation, or government use.[222] They can also introduce exemptions from patent protection for early working, research, and development of diagnostics,[223] or provisions

provide less developed countries with a "means of 'clawing' back much of what was lost in the negotiating battles in TRIPS").

220. *See* Yu, *supra* note 39, at 712.

221. Dreyfuss, *supra* note 78, at 74.

222. *See generally* HESTERMEYER, *supra* note 106, at 229–55 (discussing TRIPS flexibilities in relation to the protection of human rights); ELLEN F.M. 'T HOEN, THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER: DRUG PATENTS, ACCESS, INNOVATION AND THE APPLICATION OF THE WTO DOHA DECLARATION ON TRIPS AND PUBLIC HEALTH 39–59 (2009) (discussing compulsory licenses and parallel importation in relation to flexibilities under the TRIPS Agreement).

223. *See* COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY

facilitating the production, importation, or use of generic substitutes.[224] In addition, as the CESCR suggested, countries can introduce complementary measures to improve access to essential medicines "through the exchange of price information, price competition and price negotiation with public procurement and insurance schemes, price controls, reduced duties and taxes and improved distribution efficiency, reduced distribution and dispensing costs and reduced marketing expenses."[225]

Countries can further introduce safeguard provisions to ensure better protection of human rights. A recent example is Article 27 of ACTA, which, as a compromise, includes safeguard clauses in three sub-provisions to preserve "fundamental principles such as freedom of expression, fair process, and privacy."[226] Although these clauses may be a redeeming feature of this controversial treaty, it remains to be seen whether they can alleviate the tension between intellectual property and human rights. After all, ACTA member states, especially the powerful ones, could deem the safeguard provisions "merely hortatory," as they did in regard to Articles 7 and 8 of the TRIPS Agreement and to the Doha Declaration.[227] The effectiveness of these safeguard clauses could also be undermined by a

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RIGHTS AND DEVELOPMENT POLICY 50 (2002) (discussing the importance of the Bolar exception, which "makes it legal for a generic producer to import, manufacture and test a patented product prior to the expiry of the patent in order that it may fulfil the regulatory requirements imposed by particular countries as necessary for marketing as a generic").

224. *See High Commissioner's Report*, *supra* note 25, ¶ 49 (stating that "access to affordable drugs can be improved by encouraging the production of generic substitutes").

225. *Id.* ¶ 46. In a previous article, I also wrote:

> [I]f human rights are to be effectively and meaningfully protected, states not only need to broker human rights-based compulsory licenses, but also have to introduce legislation and institutions to prevent exorbitant pricing, anticompetitive behavior, and other market abuses. Examples of such remedial measures include compulsory licensing, price control, competition laws, government procurement and subsidies, voluntary cooperation, and international assistance and cooperation.

Yu, *supra* note 11, at 1101 (footnote omitted).

226. ACTA, *supra* note 1, arts. 27.2–.4.

227. *See* CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 93 (2007) ("Some observers have read 'should' to mean that Article 7 is a mere hortary [sic] provision, the interpretative value of which is equivalent to that of any preambular provision."); JACQUES J. GORLIN, AN ANALYSIS OF THE PHARMACEUTICAL-RELATED PROVISIONS OF THE WTO TRIPS (INTELLECTUAL PROPERTY) AGREEMENT 16 (1999) (stating that "according to United States and EC negotiators, the language of Article 7 is hortatory and does not have any operational significance" and that Article 8 "was viewed by developed country negotiators throughout most of the negotiations as being non-operational and hortatory" (citing interviews with Mike Kirk and Peter Carl)); Chon, *supra* note 164, at 2843 ("[T]he language referencing development in TRIPS is not mandatory, but rather hortatory . . . ."); Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1003 (2009) (discussing how the choice of the word "should" in Article 7 of the TRIPS Agreement "has led some industry groups and commentators to argue that the provision is 'mere hortatory'").

member state's insistence that the human rights conflicts have been internally resolved through the flexibilities built into the intellectual property system.

A better alternative, therefore, is for countries to clearly delineate the limitations or exceptions available to individuals. Article 6(4) of the EU Information Society Directive, for instance, states:

> Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of [the specified] exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.[228]

Such a clearly delineated exception not only strikes a better balance in the intellectual property system, but also ensures the proper recognition of the human rights interests in individual users.

2. Internal Conflicts

With respect to internal conflicts, resolution will require more complicated approaches. In an earlier work, I outlined three different approaches that can be used to resolve these conflicts: (1) just remuneration; (2) core minimum; and (3) progressive realization.[229] For the purposes of this Article, the most important approach is just

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228. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 6(4), 2001 O.J. (L 167) 10, 17–18.

229. *See* Yu, *supra* note 11, at 1094–1123. As I noted earlier:

> The just remuneration approach is ideal for situations involving an inevitable conflict between two human rights—for example, between the right to the protection of interests in intellectual creations and the right to freedom of expression. Under this approach, authors and inventors hold a right to remuneration (rather than exclusive control) while individuals obtain a human rights-based compulsory license (as compared to a free license). The core minimum approach, in contrast, provides guidance on the minimum essential levels of protection a state has to offer to comply with its human rights obligations. That approach seeks to balance the state's obligations against the inevitable constraints created by a scarcity of natural and economic resources. Finally, the progressive realization approach offers insight into the non-competing relationship amongst the different rights protected in international or regional human rights treaties. This final approach is important, because human rights are not only universal entitlements, but also empowerment rights—rights that enable individuals to benefit from other equally important rights.

Yu, *supra* note 39, at 712–13 (footnotes omitted).

remuneration,[230] which is specially designed for situations involving an unavoidable conflict between two sets of human rights. Under this approach, authors and inventors hold only a right to remuneration, as opposed to maintaining exclusive control; meanwhile, individuals obtain a human rights-based compulsory license, as compared with a free license).[231]

Consider, for example, a conflict involving a newspaper's freedom of expression and the author's moral and material interests in his or her creation, as illustrated by the famous English case of *Ashdown v. Telegraph Group Ltd.*[232] If the publication of a news account is of significant public interest and high political value (for example, when the author is a public figure), the human rights interest in freedom of expression will ensure the publication of the news account. Meanwhile, the author will receive proper compensation for the injury to the creative interest through the introduction of a human right-based compulsory license. Although this outcome may not please either party, it strikes a reasonable compromise from the human rights standpoint.

Moreover, although international and regional human rights agreements offer protection to the material interests in intellectual creations, such protection may not reach the level stipulated in intellectual property, trade, or investment agreements. As the CESCR reminds us, the ICESCR merely covers the "basic material interests which are necessary to enable authors [and inventors] to enjoy an adequate standard of living."[233] Thus, once an author or inventor has obtained an adequate standard of living, the human rights system may not offer additional protection.

B. *Systemic Adjustments*

1. Human Rights Impact Assessments

At the systemic level, countries can consider building the necessary

230. *See* Yu, *supra* note 11, at 1095–1105 (elaborating on the just remuneration approach).

231. *See* Yu, *supra* note 39, at 712; Yu, *supra* note 11, at 1096–99; *see also* Alan B. Bennett, *Reservation of Rights for Humanitarian Uses*, *in* 1 INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURE INNOVATION 41, 41 (Anatole Krattiger et al. eds., 2007) (discussing ways to reserve rights to meet the needs of developing countries for other humanitarian purposes); Joshua D. Sarnoff, *The Patent System and Climate Change*, 16 VA. J.L. & TECH. 301, 350–51 (2011) (discussing "'humanitarian licensing'").

232. [2001] EWCA (Civ) 1142 (Eng.). The case "concerned the publication by the *Sunday Telegraph* of a yet-to-be-published minute written by Paddy Ashdown, the former leader of the Liberal Democrats in the United Kingdom, of his secret meeting with Prime Minister Tony Blair shortly after the 1997 general elections." Yu, *supra* note 11, at 1096. The meeting concerned the political cooperation between the Labor Party and the Liberal Democrats after the elections. Ashdown sued the newspaper for breach of confidence and copyright infringement. The newspaper defended by "invok[ing] both the usual defenses of fair dealing and public interest and a novel defense based on the newly enacted Human Rights Act of 1998." *Id.* at 1096–97.

233. *General Comment No. 17*, *supra* note 27, ¶ 2.

infrastructure to promote the protection of human rights. For example, a country can demand the inclusion of human rights impact assessments before the adoption of new nonmultilateral agreements or the introduction of new legislation that seeks to implement those agreements.[234] The country can also demand such assessments for a specified period following the introduction of the legislation,[235] although an *ex post* review is likely to be less effective than an *ex ante* review.[236]

To be certain, human rights impact assessments are not easy to conduct, especially when some attributes of the intellectual property rights at issue have human rights status. Nevertheless, countries often undertake such assessments when they file reports with the monitoring arms of the U.N. human rights bodies. As far as quantitative assessments are concerned, countries can rely on indicators provided internally by national or local governments and nongovernmental organizations or externally by the U.N., the World Bank, OECD, or other intergovernmental and nongovernmental organizations.[237]

Thus far, impact assessments of law and policy have remained rare and piecemeal. Nevertheless, they have become increasingly common not only in the human rights field, but also in the areas of public health and

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234. *See* HARRISON, *supra* note 92, at 233 ("If States were to conduct human rights-compliant impact assessments as a key component of the negotiating process of any new trade agreement, this would be an important step in ensuring that trade law rules protect and promote human rights."); WILLIAM PATRY, HOW TO FIX COPYRIGHT 52 (2012) (noting the need for "mandatory, independently-produced, impartial, empirically rigorous impact statements *before* any new copyright legislation is passed").

235. *See id.* at 229 ("The EU methodology . . . contains provisions requiring 'ex post monitoring, evaluation and follow up of trade agreements' so that ongoing impacts of trade agreements can be evaluated once the agreement in question is actually in force." (quoting EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR EXTERNAL TRADE, HANDBOOK FOR TRADE SUSTAINABILITY IMPACT ASSESSMENT 9 (2006), *available at* http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf)); PATRY, *supra* note 234, at 52 (noting the need for "impact statements for existing laws so that we know whether existing laws need to be amended or repealed").

236. *See* Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 799–801 (2010) (criticizing the EU *ex post* evaluation of its Database Directive and distributing recommendations based on such an evaluation); James Boyle, *Two Database Cheers for the EU*, FIN. TIMES (Jan. 2, 2006), http://www.ft.com/cms/s/99610a50-7bb2-11da-ab8e-0000779e2340.html (discussing the European Commission's first report on the Directive).

237. The U.N. indicators, compiled by the United Nations Statistical Division, are available at U.N. STAT. DIVISION, http://unstats.un.org/unsd/default.htm (last visited Feb. 3, 2012). The International Human Development Indications, compiled by the United Nations Development Programme, are available at *Human Development Reports*, U.N. DEV. PROGRAMME, http://hdr.undp.org/en/ (last visited Feb. 3, 2012). The World Bank's World Development Indicators are available at *Data*, WORLD BANK, http://data.worldbank.org/indicator (last visited Feb. 3, 2012). Some commentators have also called for the development of "human rights indicators . . . with specific relevance to trade agreements and their impacts." HARRISON, *supra* note 92, at 235.

biological diversity.[238] Assessment, evaluation, and impact studies also constitute one of the six clusters of recommendations adopted by WIPO as part of its Development Agenda in October 2007.[239]

Notwithstanding the growing popularity and wider adoption of human rights impact assessments, one should keep these developments in perspective. As Professor James Harrison reminds us: "The fact that impact assessments have been undertaken does not mean . . . that governments will necessarily act to resolve any conflicts that are revealed in their international legal obligations."[240] It is also worth remembering that "developing countries may not have the capacity or infrastructure to undertake assessments by themselves."[241]

2. Monitoring Mechanisms

Countries can also take advantage of the existing human rights infrastructure to monitor the impact of intellectual property rights on the protection of human rights. For example, commentators have suggested the use of monitoring mechanisms to alleviate the tension between intellectual

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238. *See, e.g.*, *General Comment No. 17*, *supra* note 27, ¶ 35 ("States parties should . . . consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions."); Convention on Biological Diversity art. 14(1)(a), June 5, 1992, 1760 U.N.T.S. 143 (requiring contracting parties to "[i]ntroduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures"); COMM'N ON INTELLECTUAL PROP. RIGHTS, INNOVATION & PUB. HEALTH, WORLD HEALTH ORG., PUBLIC HEALTH, INNOVATION AND INTELLECTUAL PROPERTY RIGHTS 10 (2006) (stating that "health policies, as well as inter alia those addressing trade, the environment and commerce, should be equally subject to assessments as to their impact on the right to health"); HARRISON, *supra* note 92, at 228 ("Systematic environmental assessments of trade agreements are relatively common. Norway, the US and Canada all carry out reviews of the environmental impact of trade policies which include some international impact assessment, as do the United Nations Environment Programme and World Wildlife Fund.").

239. *See The 45 Adopted Recommendations Under the WIPO Development Agenda, Cluster D: Assessment, Evaluation and Impact Studies*, WORLD INTELL. PROP. ORG., http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited Feb. 3, 2012) (outlining recommendations within the assessment, evaluation, and impact studies cluster).

240. HARRISON, *supra* note 92, at 233. Nevertheless, as Professor Harrison acknowledges:

> [S]uch impact assessments can make the general public aware of the negative human rights impact of signing up to particular trade obligations, and become the basis for opposition parties, and domestic and international civil society groups, campaigning for changes to agreements to make them compatible with international human rights obligations.

Id.

241. *Id.* at 234.

property and human rights.[242] Such monitoring can occur at both the international and domestic levels.[243] In addition to national governments and international intergovernmental organizations, it can also involve individuals, communities, and the private sector.

While these monitoring mechanisms may not be as powerful as a mandatory conflict resolution procedure, they have significant benefits. As Professor Molly Beutz Land explains:

> Although these institutions do not have the ability to sanction or reward states based on their records of compliance other than by publishing conclusions regarding the state's compliance, the very act of a state reporting to a committee fosters greater transparency, provides human rights organizations with an opportunity to expose and challenge state actions and decisions, and forces the state to provide reasons for its conduct.[244]

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242. *See High Commissioner's Report*, *supra* note 25, ¶ 61 (encouraging "States to monitor the implementation of the TRIPS Agreement to ensure that its minimum standards are achieving this balance between the interests of the general public and those of the authors" and supporting the WHO's statement that "'countries are advised to carefully monitor the implementation of the TRIPS Agreement in order to formulate comprehensive proposals for the future review of the TRIPS Agreement'" (quoting World Health Org., *Globalization, TRIPS and Access to Pharmaceuticals*, WHO POLICY PERSPECTIVES ON MEDICINES, Mar. 2001, *available at* http://apps.who.int/medicinedocs/pdf/s2240e/s2240e.pdf)); *see also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 338–40 (1997) (providing an overview of the reporting process used by the U.N. Human Rights Committee, which is charged with the supervision of states parties' compliance with the ICCPR).

243. As James Harrison states:

> It is important that impact assessments are conducted both at the international and national level. Individual countries need to undertake human rights assessments of trade liberalisation policies, and utilise these assessments in a variety of different ways, including[:] in WTO negotiations over future commitments; to revise their national policies so as to ensure they are in accordance with international human rights obligations; and as a defence to actions brought by other States in dispute settlement proceedings alleging breaches of WTO obligations. They should also present the information obtained before relevant Committees of the WTO. Individual national assessments need to be complemented by international assessments which can uncover trends at the regional or global level about how particular trade rules are impacting upon human rights in particular ways. This will lead to better identification of where national impact assessments should be focused.

HARRISON, *supra* note 92, at 227 (footnotes omitted).

244. Land, *supra* note 170, at 29–30; *see also* Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555, 1573–76 (1999) (evaluating the importance of reporting obligations in the context of international environmental treaties).

CONCLUSION

In the past decade, high- and middle-income countries have pushed aggressively for the establishment of bilateral, plurilateral, and regional trade and investment agreements. Thus far, the high standards for intellectual property protection and enforcement incorporated into these agreements have raised significant tension between the intellectual property and human rights systems. While some provisions in the agreements arguably have strengthened those attributes of intellectual property rights that have human rights status, others have created considerable impediments to the protection of human rights. It is therefore imperative that countries strike a more appropriate balance between the protection and enforcement of intellectual property rights and the commitments made in international or regional human rights instruments.