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TEN COMMON QUESTIONS ABOUT INTELLECTUAL PROPERTY AND HUMAN RIGHTS

Peter K. Yu*

INTRODUCTION

With the entering into effect of the Agreement on Trade-Related Aspects of Intellectual Property Rights¹ (“TRIPs Agreement”) and growing respect for the rights of indigenous peoples and traditional communities, the human rights implications for intellectual property protection have attracted unprecedented attention. When policymakers, international bureaucrats, intergovernmental and nongovernmental organizations, and scholars examine these implications, they usually employ one of two approaches: the conflict

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1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

approach or the coexistence approach.² While the conflict approach views the two sets of rights as being in fundamental conflict, the coexistence approach considers them essentially compatible.

For example, the U.N. Sub-Commission on the Promotion and Protection of Human Rights has taken the conflict approach, noting that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights”³ Meanwhile, the World Trade Organization (WTO) has embraced the coexistence approach, emphasizing the availability of built-in flexibilities in existing international trade agreements.⁴ Taking a similar approach, the High Commissioner of Human Rights also noted that “[t]he balance between public and private interests found under [the international human rights instruments] is one familiar to intellectual property law.”⁵

Although each of these approaches has its benefits and drawbacks, both of them ignore the fact that *some attributes of intellectual property rights are protected in international or regional human rights instruments while other attributes do not have any human*

2. For discussions of the two approaches, see Paul Torremans, *Copyright as a Human Right*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY* 1, 2–3 (Paul L.C. Torremans ed., 2004); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 *MINN. INTELL. PROP. REV.* 47, 48–49 (2003).

3. Intellectual Property Rights and Human Rights, Sub-Comm’n on Human Rights Res. 2000/7, pmbi., recital 11, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) [hereinafter Resolution 2000/7], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>; see Intellectual Property and Human Rights, Sub-Comm’n on Human Rights Res. 2001/21, pmbi., recital 11, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001) (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”), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2001.21.En?Opendocume](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocume) nt.

4. See WORLD TRADE ORG. [WTO], *Protection of Intellectual Property Under the TRIPS Agreement*, ¶ 9, U.N. Doc. E/C.12/2000/18 (Nov. 27, 2000) [hereinafter *WTO Submission*], available at <http://www.unhchr.ch/tbs/doc.nsf/0/292864197888d603c12569ba00543291?Opendocument>.

5. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report 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](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.pdf).

rights basis at all. Thus, instead of inquiring whether human rights and intellectual property rights conflict or coexist with each other, it is important to identify the human rights attributes of intellectual property rights and distinguish them from the non-human rights aspects of intellectual property protection.

To avoid confusion with the so-called intellectual property rights—a catch-all term that is used to describe copyrights, patents, trademarks, trade secrets, and other existing or newly-created related rights—this article uses the term “the right to the protection of moral and material interests in intellectual creations”—or, its shorter form, “the right to the protection of interests in intellectual creations.” Although these terms seem long and clumsy, they are superior to their shorthand counterparts, as the latter tends to “obscure the real meaning of the obligations that these rights impose.”⁶

In a recent article, I explored 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.⁷ As the article noted, it is important to separate the conflicts between human rights and intellectual property rights into two sets of conflicts: external conflicts and internal conflicts. While external conflicts lie at the intersection of the human rights and intellectual property regimes, internal conflicts exist only within the human rights regime.

With respect to external conflicts, it is important to separate the human rights aspects of intellectual property protection from others that have no human rights basis. Once the human rights attributes have been identified, one can use the principle of human rights primacy to resolve the conflicts. While the principle may be useful in many cases, it does not resolve all conflicts, especially those in areas in which the concerned human right is only vaguely defined or its outer contours insufficiently developed.

6. MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 8 (2003).

7. Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007).

Thus, it is important to ensure that the principle not be abused in efforts that seek to discredit existing intellectual property rights. To be certain, the continuous *expansion* of intellectual property rights is alarming and has greatly threatened the interests of many less developed countries. However, unjustified *restriction* of intellectual property rights is equally dangerous, as it would undermine, rather than correct, the balance of the intellectual property 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, it is important to appreciate and carefully evaluate the many important interests protected by the non-human rights attributes or forms of intellectual property rights.

With respect to internal conflicts, however, the principle of human rights primacy is inapplicable, because all of the conflicting rights have a human rights basis. Thus, one has to rely on one or more of the three complementary approaches—the just remuneration approach, the core minimum approach, and the progressive realization approach. 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.⁸ 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.⁹ 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.¹⁰ This final approach

8. For a discussion of the just remuneration approach, see *id.* at 1095–1105.

9. For a discussion of the core minimum approach, see *id.* at 1105–13.

10. For a discussion of the progressive realization approach, see *id.* at 1113–23.

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.¹¹

Notwithstanding the importance of developing a human rights framework for intellectual property and the ability to use that framework to develop a more balanced intellectual property system, the proposed framework has raised many difficult questions—some of them are foundational, some of them conceptual, and the remainder merely implementational. This Article tackles in turn ten questions I frequently encounter in discussing the development of this framework. Although I organize this article around these questions, it is important to keep in mind that each of these questions often raises other issues that have been addressed elsewhere. Thus, the discussion in one part of the article may inform or be informed by discussion in another part. It is my hope that a better understanding of the answers to these ten questions will help promote a constructive and fruitful dialogue concerning the interplay of intellectual property and human rights.

QUESTION 1: ARE INTELLECTUAL PROPERTY RIGHTS HUMAN RIGHTS?

The characterization of the right to the protection of interests in intellectual creations as a human right has invited questions concerning why that particular right—and, sometimes more broadly, intellectual property rights—should be equated with fundamental human rights, which include 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. As some commentators point out, the inclusion in the human rights debate of a relatively trivial item like intellectual property

11. See, e.g., Fons Coomans, *In Search of the Core Content of the Right to Education*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 217, 219 (Audrey Chapman & Sage Russell eds., 2002) [hereinafter CORE OBLIGATIONS] (characterizing the right to education as an empowerment right); Yu, *supra* note 7, at 1114 (characterizing the right to the protection of interests in intellectual creations as an empowerment right).

protection would undermine the claim that human rights are of fundamental importance to humanity.¹² Such inclusion may also revive the old, and somewhat lingering, debate about whether economic, social, and cultural rights should be considered as significant as civil and political rights, or the so-called “first generation” human rights.¹³

During the drafting of the Universal Declaration of Human Rights (UDHR), delegates already questioned whether the right to the protection of interests in intellectual creations should be considered a basic human right. As British delegate F. Corbet noted, “the declaration of human rights should be universal in nature and only recognize general principles that were valid for all men [and women].”¹⁴ Alan Watt, her Australian colleague, also added 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.”¹⁵ It is therefore no surprise that Audrey Chapman found that the drafting history supported “relatively weak claims of intellectual property as a human right.”¹⁶

Nevertheless, regardless of whether one agrees that the right to the protection of interests in intellectual creations should be elevated to a human right, that right was explicitly recognized in the UDHR and the International Covenant on Economic, Social, and Cultural Rights

12. See 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); 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.

13. For discussions of the separation between “first generation” rights and “second” or “third generation” rights, see sources cited in Yu, *supra* note 7, at 1074 n.143.

14. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 221 (1999).

15. *Id.*

16. Audrey R. Chapman, *Core Obligations Related to ICESCR Article 15(1)(c)*, in *CORE OBLIGATIONS*, *supra* note 11, at 305, 314.

(ICESCR). Article 27(2) of the UDHR states that “[e]veryone 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.”¹⁷ Article 15(1)(c) of the ICESCR also requires each state party to the Covenant 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.”¹⁸ Because human rights are “universal, indivisible and interdependent and interrelated,”¹⁹ the right to the protection of interests in intellectual creations should be treated just like any other human rights.

Objections, however, can be raised about whether human rights should be interpreted by reference to international or regional human rights instruments. As Richard Falk explained, there are two different jurisprudential schools of human rights:

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.²⁰

According to William Fisher and Talha Syed, the positivist approach has two main weaknesses:

17. Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

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

19. 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) [hereinafter *Vienna Declaration*] (“All human rights are universal, indivisible and interdependent and interrelated.”), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En).

20. Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44, 44 (Abdullahi Ahmed An-Naim ed., 1992) [hereinafter HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES].

First, by tying a right to health strictly to what is recognized in legal documents 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.²¹

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.

Notwithstanding these weaknesses, future human rights discussions in the intellectual property area are likely to focus on positive rights that are explicitly recognized in international or regional human rights instruments, rather than conceptual rights that are derived from abstract moral considerations. There are at least three primary reasons. First, as the histories of the UDHR and the ICESR have shown, it was difficult enough for states to achieve a *political* consensus on the rights recognized in the two instruments. Given the divergent interests, backgrounds, beliefs, and philosophies, it is virtually impossible to achieve an international *philosophical* consensus on these rights.²² Thus, it makes great pragmatic sense to focus on a right that has already attained international consensus, if not universal agreement. If countries cannot agree on what the rights and obligations are, they are unlikely to be able to resolve the conflict between human rights and the non-human rights aspects of intellectual property protection.

21. 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).

22. The fact that humanity or human nature serves as the source of human rights has made it particularly difficult to achieve this consensus. As Jack Donnelly reminded us, “few issues in moral or political philosophy are more contentious or intractable than theories of human nature.” JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 16 (2d ed. 2003).

Second, international human rights instruments, like the UDHR and the ICESCR, thus far have received significant attention in the international debate concerning the human rights implications for intellectual property rights. The plain language of these instruments, therefore, is likely to have a significant impact on the future development of the international intellectual property regime. While commentators may still question whether the UDHR has now achieved the status of customary international law,²³ there is no denial that the Declaration, along with other international or regional human rights instruments, has achieved an international normative consensus.²⁴ National governments and intergovernmental organizations, such as the WTO or the World Intellectual Property Organization (WIPO), are likely to refer to these documents in their discussion of the tension and conflict between human rights and intellectual property rights.

Third, based on how international agreements are usually drafted, the provisions in the international or regional human rights instruments do not necessarily have a commonly agreed-upon purpose (other than a broad one, such as the promotion of human dignity and respect). Indeed, as James Nickel pointed out, “people can agree on human rights without agreeing on the grounds of human rights.”²⁵ During treaty drafting processes, delegates often harbor disparate concerns and vote for the provisions based on different motivations. In the context of article 27 of the UDHR, these motivations included the protection of moral rights, international harmonization, and collateral realization of other human rights. No one can pinpoint exactly what motivated the delegates to adopt that particular provision.

23. See Yu, *supra* note 7, at 1046 n.16.

24. See DONNELLY, *supra* note 22, 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”).

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

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

[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.²⁶

As Jack Donnelly noted, 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.”²⁷

QUESTION 2: BESIDES ACCESS TO MEDICINES, ARE THERE OTHER INTELLECTUAL PROPERTY ISSUES THAT IMPLICATE THE PROTECTION OF HUMAN RIGHTS?

Thus far, the lack of access to medicines in Africa and other less developed countries and the resulting public health crises concerning HIV/AIDS, tuberculosis, and malaria have caught widespread international attention.²⁸ However, access to medicines is not the only intellectual property issue implicating the protection of human rights.

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

27. DONNELLY, *supra* note 22, at 1.

28. See Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria, Comm'n on Human Rights Res. 2004/26, U.N. Doc. E/CN.4/2004/127 (Apr. 16, 2004) [hereinafter Res. 2004/26], available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-26.doc. 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 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).

Other important issues include access to computer software, cultural and educational materials, patented seeds and food products as well as the protection of traditional knowledge and indigenous materials. Among the rights implicated in these situations are the right to food, the right to health, the right to education, the right to self-determination, the right to freedom of expression, the right to cultural participation and development, and the right to the benefits of scientific progress.

One may question whether the lack of, say, access to cultural and educational materials poses as grave a danger as the lack of access to medicines. While the latter threatens the lives of millions of people,²⁹ the former seems to have only limited effects on individual lives. As Leslie Kurtz recently noted, issues related to culture and creativity are generally not considered “life and death issues.”³⁰ Professor Kurtz may be correct, but the lack of access to cultural and educational materials should not be ignored.

The difference between the lack of access to medicines and the lack of access to cultural and educational materials is like the difference between dying now and dying slowly later. While the lack of access to medicines will lead to deaths in the immediate future, the lack of access to educational and cultural materials may result in slow deaths in the distant future, sometimes across generations. As Professor Nickel reminded us, “[s]aving people’s lives will often have special priority, but life loses much of its value if the other requirements of making it decent are not met.”³¹ Recently, Margaret Chon also noted that “[t]o the extent that development is driven not only by economic growth but also by cultural and social change,

29. See Comm’n on Intellectual Prop. Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* 30 (2002) (stating that HIV/AIDS, tuberculosis and malaria “claimed nearly six million lives [in 2001], and led to debilitating illness for millions more”), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

30. Leslie A. Kurtz, *Copyright and the Human Condition*, 40 U.C. DAVIS L. REV. 1233, 1233 (2007).

31. NICKEL, *supra* note 25, at 67.

education is foundational.”³² Thus, the only redeeming differences between the lack of access to medicines and the lack of access to cultural and educational materials seem to be urgency and the fact that the damage caused by the latter can be alleviated—or even reversed, if given enough time and attention.

Some commentators may further question the need for the development of a human rights framework for intellectual property by pointing out that the conflicts between human rights and intellectual property rights arise in only a few areas.³³ According to them, the two sets of rights coexist peacefully and happily in a large number of areas. Many of them, such as the right to freedom of expression, even have common goals. As Justice Sandra Day O’Connor reminded us in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, “it should not be forgotten that the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression.”³⁴

There are several responses, however. To the extent that human rights and intellectual property rights serve similar goals, the development of a human rights framework can only be beneficial, because it will promote and reinforce the underlying goals of these two sets of rights. To the extent that human rights and intellectual property rights are in conflict, however, the framework is urgent and necessary. The fact that there are limited or no conflicts in other areas does not mean that the existing conflicts are unimportant. Moreover, as intellectual property rights continue to expand, the expanded rights are likely to pose conflicts in other unforeseen areas. The sooner we

32. Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 819 (2007); see also RUTH L. OKEDJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES 2 (2006) (“[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.”), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf.

33. Thanks to Beryl Jones for pushing me on this important question.

34. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

take account of the needs for human rights protection, the more balanced the intellectual property system will become.

QUESTION 3: SHOULD PATENTS BE SEPARATED FROM COPYRIGHTS IN THE HUMAN RIGHTS DEBATE?

In a recent article, Rochelle Dreyfuss distinguished the human rights basis of patents from that of copyrights. As she explained:

There may well be important differences between the intellectual endeavors protected by copyrights and the material protected by patents. It is far easier to see a human rights dimension in the case of the former. After all, expression and personality are intimately intertwined. Because one can learn a great deal about a person from what he has said and how he has said it, protecting expression safeguards human dignity. But it is hard to make that case for a product or process, where value resides in functionality and not in the identity of the inventor. There is nothing about a product or a process (or for that matter, a newly discovered principle of nature) that trenches upon the personality of the inventor. For example, we know a great deal about Thomas Edison. But we know it from reading his papers, not from turning on his light bulb. Accordingly, while a case can be made for giving Edison control over his output as an *author*, it is hard to argue that he deserves that protection as an *inventor*.³⁵

Professor Dreyfuss's careful analysis is strongly supported by the design of the existing patent system. While individual inventors enjoy the right to have their names attached to a patent,³⁶ they do not have a

35. Rochelle Cooper Dreyfuss, *Patents and Human Rights: Where Is the Paradox?* (footnote omitted), available at <http://ssrn.com/abstract=929498>; accord Wendy J. Gordon & Keren Ben Shahr, Current Patent Laws Cannot Claim the Backing of Human Rights (unpublished manuscript, on file with author).

36. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, art. 4ter, 21 U.S.T. 1538, 828 U.N.T.S. 305 (stipulating that "the inventor shall have the right to be mentioned as such in the patent").

legal right to protect the integrity of their inventions.³⁷ Nor does the law allow a second inventor to make, use, offer for sale, sell, or import the same or an “equivalent” invention.³⁸ As the late Robert Nozick pointed out: “An inventor’s patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object.”³⁹

While the denial of human rights basis of patents and the subordination of those rights under the principle of human rights primacy no doubt would promote other human rights, such as the right to health or the right to food, there is considerable evidence to suggest that inventors should not be excluded from human rights protection. First, the texts of international human rights instruments, such as the UDHR or the ICESCR, recognize explicitly “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.”⁴⁰ Although the texts mention only the “author,” but not the “inventor,” they use the phrase “scientific, literary or artistic production,” rather than the phrase “literary, artistic or scientific work”—the phrase that was originally proposed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) during the drafting of the now-abandoned Covenant on Human Rights, the single-covenant predecessor to the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).⁴¹ By using the phrase “scientific production,” the instruments therefore offer broader protection than the mere protection of scientific works.

37. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 351 (1988).

38. For discussions of the doctrine of equivalents, see generally Michael D. Pendleton, *When the Same Patent Means Different Things in Different Jurisdictions: A Comparative Analysis of Patent Interpretation*, in 2 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 83 (Peter K. Yu ed., 2007); Joshua D. Samoff, *Patent Protection Under the Modern Doctrine of Equivalents and Implied Disclaimer Doctrines*, in 2 INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra*, at 55.

39. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 182 (1974).

40. UDHR, *supra* note 17, art. 27(2); ICESCR, *supra* note 18, art. 15(1)(c).

41. Maria Green, Int’l Anti-Poverty L. Ctr., *Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, ¶ 16, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.2000.15.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.2000.15.En?Opendocument).

Second, the word “scientific” has been used in other provisions in the instruments, and the right to the protection of interests in intellectual creations is “intrinsically linked” to such other rights as the right to cultural participation and development and the right to the benefits of scientific progress.⁴² During the drafting of the UDHR, the delegates were widely concerned about the abuse of science and technology during the Second World War and the wide use of conscripted scientists and engineers in Nazi Germany and Stalinist Russia.⁴³ They therefore called for stronger protection of intellectual labor in the human rights regime. For example, 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.”⁴⁴ Likewise, after discussing an article that dealt with freedom of thought, Peruvian delegate José Encinas stated that “it seemed pertinent now to recognize freedom of creative thought, in order to protect it from harmful pressures which were only too frequent in recent history.”⁴⁵

Similar statements can be found in the drafting history of the ICESCR. The Swedish delegation stated that “the protection of those rights [in article 15] would be an encouragement to science and creative activity.”⁴⁶ The Israeli delegation maintained that “[i]t would be impossible to give effective encouragement to the development of

42. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)*, ¶ 4, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter *General Comment No. 17*] (stating that the right to the protection of interests in intellectual creations is “intrinsically linked to the other rights recognized in article 15 of the Covenant”), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf).

43. See AUDREY CHAPMAN, A HUMAN RIGHTS PERSPECTIVE ON INTELLECTUAL PROPERTY, SCIENTIFIC PROGRESS, AND ACCESS TO THE BENEFITS OF SCIENCE 6 (1998) (“Like other provisions of the UDHR, the context for drafting Article 27 was the widespread reaction to the Nazi genocide and the brutality of World War II.”), <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/chapman.pdf>; Richard Pierre Claude, *Scientists’ Rights and the Human Right to the Benefits of Science*, in CORE OBLIGATIONS, *supra* note 11, at 247, 249–50 (discussing the abuse of science and scientists for purposes of power aggrandizement).

44. MORSINK, *supra* note 14, at 221.

45. *Id.* at 218.

46. Green, *supra* note 41, ¶ 38.

culture unless the rights of authors and scientists were protected.”⁴⁷ Even today, the Committee on Economic, Social and Cultural Rights (CESCR), the authoritative interpretive body of the ICESCR, describes the obligations in articles 15(1)(c) and 15(3) as “a material safeguard for the freedom of scientific research and creative activity.”⁴⁸

Third, patent protection was specifically discussed during the drafting of the ICESCR. As Maria Green recounted:

[Chilean delegate Valenzuela] fully sympathized with the praiseworthy intentions of the French delegation and agreed that intellectual production should be protected; but there was also need to protect the under-developed countries, which had greatly suffered in the past from their inability to compete in scientific research and to take out their own patents. As a result, they were in thrall to the technical knowledge held exclusively by a few monopolies. As the French amendment would perpetuate that situation, he would have to vote against it. In general, the subject was so complex that it would have to be dealt with in a separate convention than in a single article of the covenant on human rights.⁴⁹

Responding to his concern as well as to those of others, French delegate Pierre Juvigny stated that “[h]e did not agree with the Chilean representative that monopoly in the field of patents represented such a grave danger; moreover, the absence of protection was not a remedy for the unfavourable situation in under-developed countries.”⁵⁰ His British colleague, Sir Samuel Hoare, expanded on this point at greater length:

47. *Id.*

48. *General Comment No. 17, supra* note 42, ¶ 4.

49. Green, *supra* note 41, ¶ 29.

50. *Id.* ¶ 31.

The Chilean representative had raised an interesting point: the conflict between the conception that the rights of the creative worker must be protected and the principle that there should be no obstruction to the general utilization of the results of his work in the interests of humanity. In the light of these remarks, subparagraph (b) of the original article 30 deserved further examination. He had always understood it to mean that the benefits of scientific progress were to be made available to all within the limits and by use of the machinery which already existed. If the Chilean representative believed that the clause was intended to do away with all the intermediaries between the inventor and the general application of his invention, he was proposing to reform the world by one brief article. Such a conception went far beyond the scope of the covenant, and the United Kingdom delegation could not subscribe to it.⁵¹

Notably, all of these delegates distinguished patents from copyrights based on their impact, rather than their human rights bases or the lack thereof. Even the Chilean delegate seemed to have agreed that the present language would cover both copyright and patent protection.

Finally, the increased corporatization of industrial research and development and the simultaneous lack of focus on “heroic inventors” may have colored the perception that patent protection lacks any human right basis.⁵² In the copyright area, commentators have discussed extensively and warned about the construction of the romantic author.⁵³ An equivalent notion of the “lone inventor,”⁵⁴

51. *Id.*

52. For a discussion of the “heroic inventor” in patent law, see Mark D. Janis, *Patent Abolitionism*, 17 BERKELEY TECH. L.J. 899, 908–22 (2002).

53. See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., 1994); Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793*, 30 REPRESENTATIONS 109 (1990); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of “Authorship,”* 1991 DUKE L.J. 455; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

54. Janis, *supra* note 52, at 911.

however, does not exist in the patent area, except within the patent bar or in the legislative arena. Indeed, very few commentators, most notably my former colleague Adam Mossoff, have argued for a strong natural rights justification for patents.⁵⁵

Nevertheless, the inventor has not always been a pawn of a faceless corporation. Before the Second World War, there were still many glorious individual inventors that deserved recognition. As children have been taught in elementary schools—whether entirely correct or not—Samuel Morse invented the telegraph, Alexander Graham Bell the telephone, Thomas Edison the gramophone and the light bulb, and Guglielmo Marconi the radio.⁵⁶ As the focus on individual inventors increases and their human dimensions are revealed, the human rights of individual inventors become more recognizable.⁵⁷ Thus, one could make a strong claim that the right to the protection of interests in intellectual creations extends to individual inventions and that the human rights debate should not separate patents from copyrights.

QUESTION 4: ARE ALL FORMS OF INTELLECTUAL PROPERTY RIGHTS HUMAN RIGHTS?

In *General Comment No. 17*, the authoritative interpretation of article 15(1)(c) of the ICESCR, the CESCR distinguished the right to the protection of interests in intellectual creations, which “derives from the inherent dignity and worth of all persons,” from other legal entitlements currently recognized in the intellectual property regime.⁵⁸ As the Committee declared:

55. See, e.g., Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255 (2001); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953 (2007).

56. For an interesting discussion of disputes among major inventors, see generally HAL HELLMAN, *GREAT FEUDS IN TECHNOLOGY: TEN OF THE LIVELIEST DISPUTES EVER* (2004).

57. Cf. Hughes, *supra* note 37, at 344 (“With inventions, the object may precede the personality stake, but with time the scientist or engineer comes to identify himself with his scientific or technological advances.”).

58. *General Comment No. 17*, *supra* note 42, ¶ 1.

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. 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.⁵⁹

While the two sets of rights can coincide *in theory*, they diverge *in practice* today, due to the high level of protection in the existing intellectual property system and the system's continuous expansion at the expense of human rights protection.

Out of all the so-called intellectual property rights, the protection of corporate trademarks is unlikely to be considered a human right.⁶⁰ Likewise, trade secrets that are owned by corporations do not have any human rights basis, because they are created or developed by somebody else—their employees.⁶¹ Other examples of existing intellectual property rights that lack human rights aspects are works-made-for-hire, employee inventions, neighboring rights, database

59. *Id.*

60. *But see* Anheuser-Busch, Inc. v. Portugal, No. 73049/01 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber) (holding that Article 1 of Protocol No. 1 to the European Convention of Human Rights protects both registered marks and trademark applications of a multinational corporation). The approach taken by the European Court of Human Rights is questioned in discussion *infra* notes 71–73.

61. Compare Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 46 (1989) (“Trade secrets are not defensible on grounds of privacy either. A corporation is not an individual and hence does not have the personal features privacy is intended to protect.”), with Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 251 (1991) (“If a person has any right with respect to her ideas, surely it is the right to control their initial disclosure. A person may decide to keep her ideas to herself, to disclose them to a select few, or to publish them widely.” (footnote omitted)).

protection, data exclusivity protection, and other rights that protect the economic investments of institutional authors and inventors.⁶²

QUESTION 5: CAN CORPORATIONS BRING CLAIMS OF VIOLATION OF THEIR RIGHT TO THE PROTECTION OF INTERESTS IN INTELLECTUAL CREATIONS?

Although there has been a growing expansion of corporate intellectual property rights, none of these rights would qualify as a human right. Indeed, as Maria Green pointed out, “the 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.”⁶³ Similarly, in *General Comment No. 17*, the CESCR noted that while human rights focus on individuals, groups of individuals, and communities, “intellectual property regimes primarily protect business and corporate interests and investments.”⁶⁴ Because corporations remain outside the protection of human rights instruments, “their entitlements . . . are not protected at the level of human rights.”⁶⁵

Moreover, human rights are inalienable. While corporations may have obtained rights from individual authors and inventors through assignment or under a work-made-for-hire arrangement, the human-rights-based interests of these individuals are not transferable. The two strongest claims corporate rights holders could make are as follows: first, because their intellectual property interests were initially derived from the human-rights-based interests of individual authors or inventors, damage to corporate interests would jeopardize these individual interests by reducing the opportunities the individuals have and the remuneration they will receive; and second,

62. See Chapman, *supra* note 16, 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”).

63. Green, *supra* note 41, ¶ 45.

64. *General Comment No. 17*, *supra* note 42, ¶ 2.

65. *Id.* ¶ 7.

because corporate rights holders are seeking protection on behalf of individual shareholders of the human rights-based property interests in their investments, corporate intellectual property rights need to be strongly protected.

These claims are rather weak. Even if they were accepted, the reduction of opportunities and remuneration might not reach the level of a human rights violation. The protection corporations request might also exceed the protection of those “basic material interests which are necessary to enable authors to enjoy an adequate standard of living.”⁶⁶ As I have discussed elsewhere, the right to the protection of interests in intellectual creations “was not designed to protect the unqualified property-based interests in intellectual creations.”⁶⁷ Rather, the right was instituted to “protect the narrow interest of just remuneration for intellectual labor.”⁶⁸

To be certain, states are free to enact laws to protect the human-rights-based interests of individual authors or inventors that are now assigned to corporations. They can also grant to corporations or other collective entities human rights-like protection. As Craig Scott pointed out, “[w]ithin the European regional human rights system, powerful companies no less than wealthy individuals may bring, and have indeed brought, claims of violation of their ‘human’ rights before the European Court of Human Rights [ECHR].”⁶⁹ Although litigants “have had very limited success invoking Article 1 of Protocol No. 1 due to the European Court’s relatively ‘social’ conception of both the state and the function of property,”⁷⁰ their

66. *Id.* ¶ 2.

67. Yu, *supra* note 7, at 1129.

68. *Id.*

69. Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 563, 564 n.3 (Asbjørn Eide et al. eds., 2001) [hereinafter *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*]. For discussions of the relationship between human rights obligations and private actors, see ALISON BRYSK, *HUMAN RIGHTS AND PRIVATE WRONGS: CONSTRUCTING GLOBAL CIVIL SOCIETY* (2005); ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993); MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (2006); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443 (2001).

70. Scott, *supra* note 69, at 564 n.3; see also Uma Suthersanen, *Towards an International Public Interest Rule? Human Rights and International Copyright Law*, in *COPYRIGHT AND FREE SPEECH:*

likelihood of success has been greatly enhanced by the recent judgement of *Anheuser-Busch, Inc. v. Portugal*, in which the Grand Chamber of the ECHR held that Article 1 protects both registered marks and trademark applications of a multinational corporation.⁷¹

To ensure that corporate intellectual property rights will not be ratcheted up through their association with human rights, it is therefore important to distinguish between corporate actors that have standing to bring human rights claims and those that actually claim that their “human” rights have been violated. While it is acceptable, and socially beneficial at times, to allow corporate actors to bring human rights claims on behalf of individuals whose rights have been violated, it is disturbing that these collective entities can actually claim that their “human” rights have been violated.⁷² As Jack Donnelly put it emphatically, “[c]ollectivities of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept.”⁷³

COMPARATIVE AND INTERNATIONAL ANALYSES 97, 107 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (“[T]he property provision under the [European Convention on Human Rights] is qualified in that deprivation or third-party use of property is expressly allowed for ‘public interest’ or ‘general interest’ reasons.”).

71. *Anheuser-Busch, Inc. v. Portugal*, No. 73049/01 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber). For a discussion of the increasing role of the European Court of Human Rights in innovation and creativity policies in Europe, see Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT’L L.J. 1 (2008). For a discussion of the emerging fundamental rights discourse on intellectual property in Europe, see Christophe Geiger, “Constitutionalizing” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 371 (2006).

72. For example, 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.

73. DONNELLY, *supra* note 22, at 25.

QUESTION 6: DOES THE RIGHT TO PRIVATE PROPERTY ALREADY PROVIDE ADEQUATE PROTECTION TO INTERESTS IN INTELLECTUAL CREATIONS?

The intellectual property industries and some commentators often equate intellectual property protection with the protection of private property. As two advocates of strong property rights stated:

IP protection has long been recognized as a basic human right, and the tension between the rights of the creators and the rights of consumers has been successfully resolved by the development and modification of intellectual property protections over the years.

Those who want to weaken IP protections are really tapping into a failed and discredited economic theory that the public doesn't benefit from privately owned goods. However, expropriation of others' property not only undermines creation and invention, it also undermines economies and societies. It is, ironically, one of the most "anti-human rights" actions governments could take.⁷⁴

Likewise, the entertainment industries have repeatedly condemned the unauthorized use of copyrighted materials as "theft" and illegal file-sharers as "shoplifters."⁷⁵ According to Frances Preston, the former president and CEO of Broadcast Music, Inc., a U.S. performing rights organization: "Illegal downloading of music is

74. Tom Giovanetti & Merrill Matthews, *Intellectual Property Rights and Human Rights*, IDEAS, Sept. 2005, [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/00393D8B1791936F862570EE00779CFC/\\$File/IPandHumanRights.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/00393D8B1791936F862570EE00779CFC/$File/IPandHumanRights.pdf?OpenElement); see also Robert L. Ostergard Jr., *Intellectual Property: A Universal Human Right?*, 21 HUM. RTS. Q. 156, 175 (1999) ("The basis for such a claim without doubt lies in the Western conception of property rights.").

75. See Press Release, Recording Indus. Ass'n of Am., Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File "Sharers" Who Illegally Offer Music Online (June 25, 2003) (including quotes that described unauthorized use of copyrighted materials as "theft" and illegal file-sharers as "shoplifters"), http://www.riaa.com/newsitem.php?news_year_filter=&resultpage=46&id=2B9DA905-4A0D-8439-7EE1-EC9953A22DB9.

theft, pure and simple. It robs songwriters, artists and the industry that supports them of their property and their livelihood.”⁷⁶

Despite this modern-day tendency to consider intellectual property as private property, the international or regional human rights instruments neither endorse nor reject the use of property rights to protect interests in intellectual creations. Instead, the instruments merely identify two distinct interests that are covered by the right to the protection of interests in intellectual creations: moral interests and material interests. While the former “safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage” and is generally considered outside the coverage of the right to private property, the latter “enable[s] authors [and inventors] to enjoy an adequate standard of living.”⁷⁷

On its face, the phrase “material interests” seems to cover the various forms of economic interests usually protected by the right to private property. As the CESCR noted in its *General Comment No. 17*, that phrase “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.”⁷⁸ When examined closely against the drafting history, however, the phrase seems to cover a type of economic interest that is narrower than those usually protected under the right to private property. As I pointed out elsewhere, that right does not cover all forms of economic rights as protected in the existing intellectual property system, but rather the limited interests of authors and inventors in obtaining just remuneration for their intellectual labor.⁷⁹

76. *Id.* (quoting Frances Preston, former president and CEO of Broadcast Music, Inc.). For an explanation of why the recording industry did not make the right analogy when it compared individual file-sharers to shoplifters, see Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 667–68 (2005).

77. *General Comment No. 17*, *supra* note 42, ¶ 2; *cf.* ICESCR, *supra* note 18, art. 11(1) (recognizing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”).

78. *General Comment No. 17*, *supra* note 42, ¶ 15.

79. See Yu, *supra* note 7, at 1088.

Moreover, due to cold-war politics and concerns raised by Socialist countries, both the ICCPR and ICESCR do not include a provision on the right to private property.⁸⁰ Although the cold war ended, it remains unclear whether countries would agree readily to a new provision on the right to private property.⁸¹ Thus, construed in light of the omission of this provision in the ICESCR and the lack of evidence to suggest that the delegates agreed to make a special exception for property rights in intellectual creations, the right protected in article 15(1)(c) of the Covenant should be considered a right that exists independently of property rights.

Similarly, although article 17 of the UDHR covers the right to own property, it does not protect the right to own *private* property.⁸² In fact, due to similar concerns raised by the Soviet Union and other Eastern bloc countries and a strong push by Latin American countries, the delegates eventually reached a compromise by omitting the word “private” and by including the phrase “alone as well as in association with others.”⁸³ As Mary Ann Glendon recounted:

The United States strongly supported a right to own private property and to be protected against public taking of private property without due safeguards. The United Kingdom’s Labour government representatives, however, took the position that the article should be omitted, arguing that regulation of property rights was so extensive everywhere in the modern world that it made no sense to speak of a right to ownership. Many Latin Americans took an entirely different tack: they wanted the article

80. See *id.* at 1085 n.179.

81. Nevertheless, as Graeme Austin suggested to the author, the holistic approach adopted in the Draft United Nations Declaration on the Rights of Indigenous Peoples may provide some helpful hints to how the right to property may be addressed in a post-cold-war environment. ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/29 (Aug. 26, 1994), reprinted in 34 I.L.M. 541 (1995) [hereinafter *Draft Declaration*].

82. See Scott, *supra* note 69, at 564 (“[P]ost-war notions of the redistributive role of modern states, as well as newly-decolonized states’ reactions to Western corporate power, meant that the right to property in its classical liberal form did not survive as a self-standing right within a United Nations’ human rights treaty order.”).

83. UDHR, *supra* note 17, art. 17(1).

to specify a right to enough private property for a decent existence. The Soviets, for their part, objected to the idea that a decent existence should be grounded in private property and insisted that the article should take account of the different economic systems in various countries.⁸⁴

In the end, article 17 “omitt[ed] the word *private*” and was reduced to “a high level of generality.”⁸⁵ It now reads: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”⁸⁶ While “the right to own property alone” undoubtedly provides a strong textual basis for unqualified intellectual property rights, the “right to own property . . . in association with others” provides an equally compelling textual basis for the creation of a rich public domain and for unrestricted access to protected materials—quite different from the traditional conception of the public domain as “a residual category of material that for various reasons is not protected by a property right.”⁸⁷ Because of this dual nature, article 17 is at best ambiguous about whether property rights provide the basis for the right to the protection of material interests in intellectual creations in article 27(2). In fact, the drafting history seems to suggest otherwise: countries appear free to decide whether they want to offer strong intellectual property protection or whether they want to promote the creation of a rich public domain.

Compared to international human rights instruments, the regional instruments offer more explicit protection to the right to private

84. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 182 (2001); see also MORSINK, *supra* note 14, at 139–52 (discussing the drafting of the right to property provision); Chapman, *supra* note 16, at 314 (“The socialist bloc’s opposition to property rights had already played a major role in the decision of the Covenant’s drafting committee not to include the text of Article 17 of the UDHR recognising the right to tangible forms of property in the Covenant.”).

85. GLENDON, *supra* note 84, at 183.

86. UDHR, *supra* note 17, art. 17.

87. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 184 n.2 (2004); see also Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y U.S.A. 137, 137 (1993) (exploring whether the public domain is “simply whatever is left over after various tests of legal protection have been applied”).

property. For example, article 28 of the American Declaration on the Rights and Duties of Man states that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”⁸⁸ However, as Chilean delegate Hernan Santa Cruz elaborated on that particular provision during the UDHR drafting process, “[o]wnership of anything more than [what is required under this language] might not be considered a basic right.”⁸⁹ The right to the protection of interests in intellectual creations therefore covers only the protection of *sufficient* intellectual property-based interests; it does not include the protection of additional interests that are generally not required to meet the essential needs of decent living or to maintain human dignity.

Finally, the existing international or regional human rights instruments do not endorse any particular modality of protection of interests in intellectual creations. Nor do they delineate the scope of the right to such protection. Thus, although a property-based intellectual property system would offer the needed protection to material interests in intellectual creations, such a regime is not the only acceptable, or even the best, modality of protection that can be used to realize the right to the protection of material interests in intellectual creations. Instead, it merely provides an option, the effectiveness of which depends on the local conditions of each state. As *General Comment No. 17* declared:

The term of protection of material interests under article 15, paragraph 1(c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an

88. American Declaration of the Rights and Duties of Man art. 23, May 2, 1948, OEA/Ser. L./V./II.23, doc. 21 rev. Done in Bogotá, Colombia, the American Declaration is sometimes referred to as the Bogotá Declaration.

89. MORSINK, *supra* note 14, at 145; *see also* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 100 (1987) (denying that “there is a good case on moral grounds for a secure claim to property rights in land and other major productive resources” and that “the expropriation of such property, when it does not threaten one’s ability to obtain the necessities of life, is a violation of human rights”).

adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his [or her] scientific, literary or artistic production.⁹⁰

Based on this general interpretative comment, states can satisfy article 15(1)(c) obligations by deploying such systems as liability rules, awards or prize funds, or even non-property-based authorship protection. As the CESCR explained, “the 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.”⁹¹ The key criterion for satisfying the material interests obligation is not whether the offered protection is based on the property rights model, but whether the existing system provides meaningful protection of material interests in the creations by authors and inventors.

QUESTION 7: CAN THE PROTECTION OF HUMAN RIGHTS INTERESTS BE BUILT INTO THE INTELLECTUAL PROPERTY SYSTEM?

When conflicts between human rights and intellectual property rights arise, policymakers and commentators often explain how flexibilities can be built into intellectual property systems to accommodate human rights interests. For example, they describe how limitations and exceptions can be used to balance the non-human rights aspects of intellectual property protection against a country’s international human rights obligations. As Audrey Chapman stated, “[a] human rights approach to intellectual property takes what is often an implicit balance between the rights of inventors and creators

90. *General Comment No. 17*, *supra* note 42, ¶ 16; *see also* Torremans, *supra* note 2, at 8 (“[A] lot of freedom is left to Contracting States in relation to the exact legal format of th[e] protection [for the interests of authors and creators].”).

91. *General Comment No. 17*, *supra* note 42, ¶ 10.

and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting.”⁹²

Similarly, in a background paper submitted to the U.N. Sub-Commission on the Promotion and Protection of Human Rights, the WTO explained how the international trade agreements contain flexibilities that are needed for the accommodation of human rights interests. As the WTO stated:

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.⁹³

However, the existence of these built-in flexibilities by no means guarantees the adequate protection of human rights. While limitations and exceptions tend to allow states to discharge their access-related human rights obligations, the inclusion of these safeguards may also undermine the right to the protection of *moral* interests in intellectual creations. For example, a broad fair use or fair dealing privilege, or other limitations or exceptions that loosen up control of copyrighted works, may weaken the personal link between authors and their creations. Thus, if a state takes seriously its human rights obligations, it has to ensure at least the proper identification and attribution of the creative work and that the work not be recoded or otherwise modified in a manner that would prejudice the author’s honor or reputation.

92. CHAPMAN, *supra* note 43, at 1.

93. WTO Submission, *supra* note 4, ¶ 9.

QUESTION 8: WILL THE HUMAN RIGHTS FRAMEWORK RATCHET UP
EXISTING INTELLECTUAL PROPERTY PROTECTION?

One of the most predominant concerns about developing a human rights framework for intellectual property is the ratcheting up of the already very high protection under the existing international intellectual property system.⁹⁴ As a public domain advocate once told me, if intellectual property rights are elevated to human rights, “We are doomed!” Most recently, Kal Raustiala also warned 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.”⁹⁵

Indeed, an emphasis on the human rights attributes of intellectual property rights is likely to further strengthen intellectual property rights, especially in civil law countries where judges are more likely to uphold rights that are considered human rights. The development of a human rights framework for intellectual property therefore may result in what I have described elsewhere as the undesirable “human rights ratchet” of intellectual property protection.⁹⁶ Such development would exacerbate the already severe imbalance in the existing intellectual property system and would ultimately backfire on those who seek to use the human rights forum to enrich the public domain and to set maximum limits of intellectual property protection.

While I am sympathetic to these concerns, the existing international human rights instruments have recognized only *certain*

94. The converse is also true, at least from the perspective of intellectual property rights holders. Just as public domain advocates are concerned about the *upward* ratchet of intellectual property rights, intellectual property rights holders are equally concerned about the *downward* ratchet of intellectual property rights. The latter are understandably concerned, 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.

95. Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1032 (2007).

96. Yu, *supra* note 7, at 1124.

attributes of existing intellectual property rights as human rights.⁹⁷ Because only some attributes of intellectual property rights can be considered human rights, international human rights treaties do not protect the remaining non-human rights attributes of intellectual property rights or those forms of intellectual property rights that have no human rights basis at all.⁹⁸ As the CESCR reminded governments in its *Statement on Intellectual Property Rights and Human Rights*, states have duties to take into consideration their human rights obligations in the implementation of intellectual property policies and agreements and to subordinate those policies and agreements to human rights protection in the event of a conflict between the two.⁹⁹

Moreover, although states have obligations to fully protect the human rights aspects of intellectual property protection, their ability to fulfill these obligations is often limited by the resources available to them and the competing demands of other human rights obligations. Indeed, the right to the protection of interests in intellectual creations has been heavily circumscribed by the right to cultural participation and development, the right to the benefits of scientific progress, the right to food, the right to health, the right to education, the right to self-determination, as well as many other human rights.

Some public interest advocates may remain concerned about the “marriage” of human rights and intellectual property rights by pointing out that, in a human rights framework, the status of *all* intellectual property rights, regardless of their basis, will be elevated to that of human rights *in rhetoric* even if that status will not be elevated *in practice*. Indeed, intellectual property rights holders have widely used the rhetoric of private property to support their lobbying efforts and litigation,¹⁰⁰ despite the many limitations, safeguards, and obligations in the property system. The property gloss over intellectual property rights has also confused policymakers, judges,

97. For a discussion of these attributes, see *id.* at 1081–92.

98. For earlier examples, see *supra* text accompanying notes 61–62.

99. See Resolution 2000/7, *supra* note 3, ¶ 3 (articulating the principle of human rights primacy).

100. See sources cited in Yu, *supra* note 7, at 1127 n.319.

jurors, and commentators, even though there are significant differences between the attributes of real property and those of intellectual property.¹⁰¹

While the concerns over rhetorical effects are valid and important, the best response to alleviate these concerns is not to dissociate intellectual property rights from human rights or to cover up the fact that *some* attributes of intellectual property rights are, indeed, protected in international or regional human rights instruments. Rather, it is important to clearly delineate which attributes of intellectual property rights would qualify as human rights and which attributes or forms of those rights should be subordinated to human rights obligations due to their lack of any human right basis. In doing so, a human rights framework will highlight the moral and material interests of individual authors and inventors while exposing the danger of increased expansion of those attributes or forms of intellectual property rights that have no human rights basis at all.

QUESTION 9: WILL THE HUMAN RIGHTS FRAMEWORK PROMOTE THE INTERESTS OF INDIGENOUS PEOPLES AND TRADITIONAL COMMUNITIES?

When the UDHR and the ICESCR were drafted, the drafters did not have indigenous groups and traditional communities in mind. As *General Comment No. 17* noted, the words “everyone,” “he,” and “author” “indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without at that time realizing that they could also be groups of individuals.”¹⁰² The double use of the definite article in “the right freely to participate in *the* cultural life of *the* community,” as compared to “a right ‘to participate in the cultural life of *his or her*

101. For discussions of these differences, see generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417 (2005). For a discussion of the controversy surrounding the term “intellectual property,” see Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 1–6.

102. *General Comment No. 17*, *supra* note 42, ¶ 7 (footnote omitted).

community,” also betrayed the framers’ intent.¹⁰³ As Johannes Morsink observed, “[a]rticle 27 seems to assume that ‘the community’ one participates in and with which one identifies culturally is the dominant one of the nation state. There is no hint here of multiculturalism or pluralism.”¹⁰⁴ In fact, Morsink has shown convincingly why historical memories, political circumstances, concerns of the colonial powers, and the lack of political organization had caused the UDHR drafters to omit a provision on the right to protect minorities.¹⁰⁵

To make things more complicated, many commentators have pointed out accurately that the existing intellectual property regime has ignored the interests of those performing intellectual labor outside the Western model, such as “custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties.”¹⁰⁶ By emphasizing individual authorship and scientific achievement over collective intellectual contributions, the drafters of the UDHR and the ICESCR seemed to have subscribed to the traditional Western worldview of intellectual property protection.

Nevertheless, the fact that the drafters might not have foreseen the extension of article 27 of the UDHR and article 15(1)(c) of the ICESCR to traditional communities or other groups of individuals does not mean that the documents cannot be broadly interpreted to incorporate collective rights. To begin with, human rights instruments contain considerable language that allows one to explore collective rights. Although article 27 of the ICCPR, as compared to a provision in the UDHR or the ICESCR, is the only article in the International Bill of Rights that specifically addresses the cultural rights of minorities,¹⁰⁷ references to cultural participation and development

103. See MORSINK, *supra* note 14, at 269 (discussing the double use of definite article in article 27).

104. *Id.*

105. See *id.* at 269–80.

106. Bellagio Declaration, reprinted in JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192, 193 (1996).

107. Article 27 of the ICCPR provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

appear in many international and human rights instruments, including the U.N. Charter, the UNESCO Constitution, the Declaration of the Principles of International Cultural Co-operation, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁰⁸

In addition, the International Bill of Rights has undertaken a collective approach to specific rights, including “self-determination, economic, social and cultural development, communal ownership of property, disposal of wealth and natural resources, and intellectual property rights.”¹⁰⁹ As Donald Kommers pointed out in his comparison of the German and U.S. Constitutions, there can be two visions of personhood: “One vision is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other vision is partial to the city perceived as a public realm where individual and community are bound together in some degree of reciprocity.”¹¹⁰ Drawing on this distinction, Professor Glendon suggested that the drafters of the UDHR might have embraced the latter vision:

In the spirit of [this] vision, the Declaration’s “Everyone” is an individual who is constituted, in important ways, by and through relationships with others. “Everyone” is envisioned as uniquely valuable in himself (there are three separate references to the free development of one’s personality), but “Everyone” is expected to act toward others “in a spirit of brotherhood.” “Everyone” is depicted as situated in a variety of specifically named, real-life

the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 27, 999 U.N.T.S. 171 (1976).

108. See Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights*, in CORE OBLIGATIONS, *supra* note 11, at 279, 282.

109. *Id.* at 288 (footnote omitted).

110. Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 867 (1991), *quoted in* GLENDON, *supra* note 84, at 227.

relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order. Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in “a spirit of brotherhood” and ends with community, order, and society.¹¹¹

Moreover, human rights continue to evolve and expand,¹¹² and there has been a growing trend to extend human rights to groups, despite the original intentions of the framers of the UDHR and the ICESCR. As *General Comment No. 17* stated:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, *under certain circumstances, groups of individuals and communities*. . . . Although the wording of article 15, paragraph 1(c), generally refers to the individual creator (“everyone”, “he”, “author”), the right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions can, under certain circumstances, also be enjoyed by groups of individuals or by communities.¹¹³

The CESCR’s interpretative comment is strongly supported by international law. As the International Court of Justice declared in the *Namibia Advisory Opinion*, “[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*.”¹¹⁴ The Vienna Convention on the Law of Treaties also requires subsequent

111. GLENDON, *supra* note 84, at 227.

112. See Audrey R. Chapman & Sage Russell, *Introduction to CORE OBLIGATIONS*, *supra* note 11, at 1, 13 (“[H]uman rights standards evolve over time and in the direction of expansiveness.”); see also SEPÚLVEDA, *supra* note 6, at 81–84 (discussing the evolutive interpretation of human rights treaties).

113. *General Comment No. 17*, *supra* note 42, ¶¶ 1, 8 (emphasis added).

114. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. 31, ¶ 53 (June 21) (emphasis added).

agreement and practice to be taken into account in treaty interpretation.¹¹⁵

In the context of cultural rights, this comment also makes a lot of sense. As Asbjørn Eide aptly observed, “[t]he basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up. The preservation of that identity can be of crucial importance to well-being and self-respect.”¹¹⁶ It is therefore no surprise that *General Comment No. 17* stated that “States parties in which ethnic, religious or linguistic minorities exist are under an obligation to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures.”¹¹⁷ As the Draft Declaration on the Rights of Indigenous Peoples recognized:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral tradition, literatures, designs and visual and performing arts.¹¹⁸

As indigenous rights strengthen, the use of the human rights regime may even alleviate the existing bias against those performing intellectual labor outside the Western model.¹¹⁹

115. Vienna Convention on the Law of Treaties art. 31(3), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).

116. Asbjørn Eide, *Cultural Rights as Individual Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 69, at 289, 291.

117. *General Comment No. 17*, *supra* note 42, ¶ 33.

118. *Draft Declaration*, *supra* note 81, art. 29.

119. Thanks to Katja Weckstrom for making this suggestion.

QUESTION 10: WILL THE HUMAN RIGHTS FRAMEWORK PROMOTE THE INTERESTS OF LESS DEVELOPED COUNTRIES?

Less developed countries have taken advantage of the human rights regime to “grow proposals that seek to roll back intellectual property rights or at least eschew further expansions of the monopoly privileges they confer.”¹²⁰ By shifting from one regime to another, these countries were able to alter the status quo or to create tactical advantages by relocating to a more sympathetic forum, such as the public health or human rights regime.¹²¹ From the standpoint of less developed countries, the human rights regime has several benefits. It contains important built-in institutional safeguards to protect the poor, the marginalized, and the less powerful. In addition, nongovernmental organizations and less developed countries are very well-represented in the regime. They also have been more active than transnational corporations and their supporting developed countries, which often find alien the human rights language and the forum structure.

In recent years, there have been increasing activities in the WTO and WIPO exploring the relationship between human rights and intellectual property rights. For example, in November 1998, WIPO conducted a panel discussion on “Intellectual Property and Human Rights.”¹²² The WTO, in particular the TRIPS Council, has also paid closer attention to the lack of access to patented pharmaceuticals in

120. Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 974–75 (2007).

121. See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 59 (2004) (stating that less developed countries have used regime shifting “as an intermediate strategy . . . to generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO”); Helfer, *supra* note 120, at 974–75 (stating that less developed countries and their supporting nongovernmental organizations “have decamped to more sympathetic multilateral venues . . . where they have found more fertile soil in which to grow proposals that seek to roll back intellectual property rights or at least eschew further expansions of the monopoly privileges they confer”). For discussions of the regime-shifting phenomenon, see generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 564–71 (2000); Helfer, *Regime Shifting*, *supra*; Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 408–16 (2004).

122. World Intellectual Prop. Org., *Panel Discussion on Intellectual Property and Human Rights Geneva* (Nov. 9, 1998), <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/index.html>.

light of HIV/AIDS, tuberculosis, and malaria pandemics in Africa and other less developed countries. Such attention eventually resulted in the adoption of the Doha Declaration on the TRIPS Agreement and Public Health¹²³ and a recent protocol to formally amend the TRIPS Agreement by adding a new article 31*bis*.¹²⁴

Notwithstanding its benefits, a human rights framework for intellectual property does not favor less developed countries on every count. Indeed, the right to the protection of *moral* interests in the intellectual creations exceeds even the high standards of protection offered under U.S. intellectual property laws. As Professor Helfer put it:

A human rights framework for authors' rights is thus both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy [that is protected by human rights instruments] are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws. It is also less protective, however, in that a state need not recognize any authors' rights lying outside of this zone or, if it does recognize such additional rights, it must give appropriate weight to other social, economic, and cultural rights and to the public's interest in access to knowledge.¹²⁵

123. WTO, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, ¶ 7, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002). The Doha Declaration delayed the formal introduction of patent protection for pharmaceuticals and of the protection of undisclosed regulatory data in least developed countries until January 1, 2016.

124. If adopted, article 31*bis* would allow those WTO member states that had insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals. See Council for Trade-Related Aspects of Intellectual Property Rights, Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Proposal for a Decision on an Amendment to the TRIPS Agreement, IP/C/41 (Dec. 6, 2005), available at http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc. For a discussion of the proposed article 31*bis*, see Yu, *supra* note 28, at 872–86.

125. Helfer, *supra* note 120, at 997.

Such protection therefore may limit access to protected materials and frustrate projects that facilitate greater unauthorized recoding or re-use of existing creative works.

Indeed, *General Comment No. 17* included a more stringent test than the three-step test laid out in the Berne Convention, the TRIPs Agreement, and the WIPO Internet Treaties,¹²⁶ which “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”¹²⁷ As the CESCR stated, to be compliant with the ICESCR, the limitations “must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant.”¹²⁸ They must also be proportionate and compatible with other provisions and must offer a least restrictive means to achieve the goals.¹²⁹ Under certain circumstances, “[t]he imposition of limitations may . . . require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.”¹³⁰

Moreover, there remains continuous tension between human rights protection and economic development.¹³¹ Although commentators and policymakers have explained at length why stronger intellectual

126. *See id.* at 994–95 (observing that CESCR’s test for assessing legality of state restrictions on the right to the protection of interests in intellectual creations is “far more constraining than the now ubiquitous ‘three-step test’ used to assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws” (footnote omitted)). For the incorporation of the three-step test in international intellectual property treaties, see WIPO Copyright Treaty art. 10, *adopted* Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art. 16(2), *adopted* Dec. 20, 1996, 36 I.L.M. 76; TRIPs Agreement, *supra* note 1, arts. 13, 30; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, art. 11, 25 U.S.T. 1341, 828 U.N.T.S. 221.

127. TRIPs Agreement, *supra* note 1, art. 13.

128. *General Comment No. 17*, *supra* note 42, ¶ 22.

129. *See id.* ¶ 23.

130. *Id.* ¶ 24 (footnote omitted).

131. For discussion of the tension between human rights and economic development, see generally DONNELLY, *supra* note 22, at 109–10, 194–203. For an excellent discussion of how to recalibrate the concept of intellectual property in light of the development concept, see generally Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

property protection would promote economic development, there is significant empirical evidence showing that stronger protection does not benefit countries that lack a strong imitative capacity and a sufficiently large market.¹³² There also remains a serious challenge concerning whether less developed countries would be able to consider the right to the protection of interests in intellectual creations as important as such other human rights as the right to food, the right to health, the right to education, the right to cultural participation and development, the right to the benefits of scientific progress, and the right to self-determination—all of which are presumed to be “universal, indivisible and interdependent and interrelated.”¹³³

Finally, some commentators may question whether the human rights framework will be sensitive to the needs and interests of less developed countries, rather than simply reinforcing values that are already accepted in the Western developed world. Indeed, when the UDHR was being drafted, the American Anthropological Association sent a long and now-infamous memorandum to the Human Rights Commission, expressing its concern, or even fear, that the Declaration would become an ethnocentric document. As the Association’s executive board put it, “the primary task confronting those who would draw up a Declaration on the Rights of Man is . . . , in essence, to resolve the following problem: How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?”¹³⁴

One may also recall the Bangkok Declaration at the Asian preparatory regional conference before the World Conference on

132. See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* 173, 176–80 (Daniel J. Gervais ed., 2007).

133. *Vienna Declaration*, *supra* note 19, ¶5.

134. Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 539 (1947).

Human Rights in 1993.¹³⁵ Although that document did not mention the oft-discussed “Asian values,” it states explicitly that, “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”¹³⁶

Fortunately, the right to the protection of interests in intellectual creations presents fewer cultural problems than civil and political rights. To begin with, the drafting history strongly suggests the drafters’ determination to create a universal document and their reluctance to introduce language that was tailored toward a particular form of political or economic system.¹³⁷ The government delegates had diverse cultural and religious backgrounds,¹³⁸ and a large array of governments, intergovernmental and nongovernmental organizations, and private entities participated in the drafting process.¹³⁹ Even when countries, in particular those from the Eastern Bloc, abstained from voting for the final adoption of article 27 of the UDHR and article 15 of the ICESCR, they were able to influence the outcome by joining the discussions; submitting comments, drafts, and amendments; and participating in some of the preliminary voting.¹⁴⁰ Thus, as Lebanese delegate Charles Malik recounted, “[t]he genesis of each article, and each part of each article, [in the UDHR] was a dynamic process in

135. World Conference on Human Rights, Regional Meeting for Asia, Mar. 29–Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. Doc. A/Conf.157/PC/59 (Apr. 7, 1993), available at <http://www.unhchr.ch/html/menu5/wcbangk.htm>.

136. *Id.* ¶ 8. For discussions of Asian values and the Bangkok Declaration, see sources cited in Yu, *supra* note 7, at 1142 n.380.

137. See MORSINK, *supra* note 14, at 149 (“It is this dual character [in article 17] that makes the Universal Declaration condone both the capitalist and socialist ways of organizing a national economy.”).

138. See *id.* at 21; DONNELLY, *supra* note 22, at 22 n.1.

139. See MORSINK, *supra* note 14, at 9 (noting the presence of a large number of nongovernmental organizations in the Second Session of the Human Rights Commission).

140. See *id.* at 21 (“Even the abstaining delegations had cooperated in the procedures. They too had sent delegates to the sessions and these representatives had made comments, voted numerous times, and even submitted drafts or amendments.”).

which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.”¹⁴¹

Even if one questions the diversity of the perspectives advanced by delegates from non-European countries in light of their educational or colonial backgrounds,¹⁴² one cannot ignore the fact that many Western countries, in particular Britain and the United States, had been reluctant to recognize economic, social, and cultural rights as human rights during the UDHR and ICESCR drafting processes. It is no accident that those rights were left out of the initial discussions of the now-abandoned Covenant on Human Rights. Nor is it a surprise that economic, social, and cultural rights have remained “the least well-developed and the least doctrinally prescriptive.”¹⁴³ In fact, “[w]ithin some societies in the West, cultural traditions persist based on a strong faith in full economic liberalism and a severely constrained role for the state in matters of welfare.”¹⁴⁴

More importantly, the United States, along with Britain, consistently opposed the recognition of the right to the protection of interests in intellectual creations during the formative periods of both the UDHR and ICESCR. During the drafting of the UDHR, both U.S. delegate Eleanor Roosevelt and British delegate Geoffrey Wilson objected to the inclusion of draft article 43 in the UDHR in anticipation of the creation of the Universal Copyright Convention, a

141. GLENDON, *supra* note 84, at 225 (quoting Charles Habib Malik, *Introduction to O. FREDERICK NOLDE, FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE* 11, 11–12 (1968)).

142. As one commentator noted:

[T]hose members of the [Human Rights] Commission who represented non-European countries were, themselves, largely educated in the European tradition, either in Europe or the United States or in the institutions established in their own countries by representatives of European colonial powers. Although there were occasional references to relevant ideas in non-European traditions such as Confucian or Islamic thought, a European and American frame of reference dominated the deliberations from which the Universal Declaration emerged.

M. Glen Johnson, *A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights*, in M. GLEN JOHNSON & JANUSZ SYMONIDES, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION, 1948–1998*, 19, 46–47 (1998).

143. Helfer, *supra* note 120, at 987; accord CHAPMAN, *supra* note 43, at 3 (characterizing article 15 of ICESCR “as the most neglected set of provisions within an international human rights instrument whose norms are not well developed”).

144. Asbjørn Eide, *Economic Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 69, at 9, 11.

Berne-minus international copyright treaty created under the auspices of UNESCO.¹⁴⁵ As they claimed, “this right belonged more properly ‘to the domain of copyrights.’”¹⁴⁶ Later, during the drafting of the now-abandoned Covenant on Human Rights, Roosevelt stated:

In her delegation’s opinion the subject of copyright should not be dealt with in the Covenant, because it was already under study by UNESCO which . . . was engaged on the collation of copyright laws with the object of building up a corpus of doctrine and in due course drafting a convention. Until all the complexities of that subject had been exhaustively studied, it would be impossible to lay down a general principle concerning it for inclusion in the Covenant.¹⁴⁷

In sum, the right to the protection of interests in intellectual creations is not as biased against non-Western countries and traditional communities as some might have thought. Instead, it represented protection that Western countries, in particular the United States, were very reluctant to accept (at least shortly after the Second World War).

There remains the challenging question about whether a human rights framework for intellectual property can be designed in a way that will avoid the creation of the notorious one-size-fits-all templates that have been used to transplant intellectual property laws from developed to less developed countries. Fortunately, the ECHR has

145. Universal Copyright Convention, Sept. 6, 1952, *revised at Paris* July 24, 1971, 25 U.S.T. 1341. The Universal Copyright Convention allowed the United States to participate without either lowering the existing standards of the Berne Convention for the Protection of Literary and Artistic Works or requiring the United States to offer the higher protection required by the latter. For discussions of the Convention, see ARPAD BOGSCH, *UNIVERSAL COPYRIGHT CONVENTION: AN ANALYSIS AND COMMENTARY* (1958); *UNIVERSAL COPYRIGHT CONVENTION ANALYZED* (Theodore R. Kupferman & Matthew Foner eds., 1955).

146. MORSINK, *supra* note 14, at 220.

147. Green, *supra* note 41, ¶ 23.

advanced a deferential approach that allows for a “wide margin of appreciation.”¹⁴⁸ As Professor Helfer noted:

[T]he ECHR gives significant deference to “the legislature’s judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation.” It also stresses the “wide margin of appreciation” that states enjoy “with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”¹⁴⁹

If this approach is incorporated into the framework, countries are likely to be able to develop a balanced intellectual property system that takes into consideration their international human rights obligations while at the same time maintaining the policy space needed for the development of a system that appreciates their local needs, national interests, technological capabilities, institutional capacities, and public health conditions.¹⁵⁰

CONCLUSION

With the continuous expansion of intellectual property rights, a growing need for the development of a human rights framework for intellectual property has arisen. Developing such a framework, however, is not easy. It raises more questions than it answers, and its advocates often have to defend positions that please neither intellectual property rights holders nor public domain activists. In fact, *both* groups are likely to find the framework unsatisfactory, even though such a framework is preferable to the alternative proposed by

148. For a discussion of the margin of appreciation doctrine embraced by the ECHR, see Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 404–05 (1998) (footnotes omitted).

149. Helfer, *supra* note 71, at 10–11 (footnote omitted).

150. For a discussion of the enclosure of the policy space less developed countries have in designing intellectual property systems that fit their needs, interests, and goals, see generally Yu, *supra* note 28.

either group. Thus, if one expects clear-cut answers to his or her questions, one should avoid asking questions about the *partial* marriage of intellectual property and human rights.

