

DOES INTELLECTUAL PROPERTY NEED HUMAN RIGHTS?

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I. INTRODUCTION

The relationship between intellectual property (IP) protection and international human rights law has historically been a topic of tension in global economic relations.¹ Following the conclusion of the 1995 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS or TRIPS Agreement),² most scholars agree this relationship has only grown more tense.³ Rival claims about whether strong IP rights pro-

1. Negotiations leading to the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (revised July 14, 1967), and the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention] (last revised July 24, 1971), were marked by serious differences in viewpoints about the economic, moral, and philosophical bases for granting exclusive rights to intellectual creations. See Heinrich Kronstein & Irene Till, *A Reevaluation of the International Patent Convention*, 12 L. & CONTEMP. PROBS. 765, 766–76 (1947). Certainly, with regard to patents, the competing views in the late nineteenth century roughly paralleled what exists today, with countries divided over whether patents should be treated as private property or merely as instruments of public policy. *Id.* The majority proposal for the Paris Convention, based on a view of patents as property, described “the right[s] of inventors and industrial creators in their own work” as one based on natural law. *Id.* at 775. This was countered by a Swiss proposal stating that rights of inventors and creative workers are a creation of “equitable and useful principles of the law of each nation which should reconcile this right . . . with the rights of society.” *Id.* For similar themes in the debates leading up to the Berne Convention, see SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 46–47 (1987). See also P. J. Pointet, *The Role of Industrial Property in the Economic Development of States*, 6 INDUS. PROP. 60, 64–65 (1967) (describing public resentment to patents in some European countries).

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

3. See Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 982–87 (2007) (describing the U.N. Human Rights bodies’ “trenchant critiques” of the TRIPS Agreement); see also Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1041–47 (2007) (observing, for instance, that the “U.N. Sub-Commission on Human Rights recently noted the considerable tension and conflict” between intellectual property and human rights).

mote economic development—and the extent of human welfare costs associated with such rights—compete for dominance in domestic strategies for implementing TRIPS and other international IP obligations. On one side of the debate is a coalition of developed countries, international organizations, multinational firms, and trade associations that continue in the longstanding tradition of rationalizing international IP rules as a pre-requisite for national economic growth and development.⁴ On the other side is a less coordinated, but increasingly effective, alliance of global actors that challenge the international IP system largely on distributive justice grounds, particularly regarding issues such as access to essential life-saving medicines, educational materials, and seeds for farmers in poor countries. These rival viewpoints vie for influence in the international agenda-setting processes of leading multilateral organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). The impassioned contest over the nature, scope, and implications of the IP/human rights interface has important consequences for the way nations understand and comply with their obligations in each field. It also significantly affects the methods and substance of IP technical assistance offered to developing countries.⁵ Intellectual property law and policy thus exist in a persistent state of normative conflict that weighs heavily on the already complex relations among domestic and international actors involved with IP policymaking, cementing a highly politicized environment at all levels of global, regional, and national governance.

4. See, e.g., Okediji, International Copyright Law as Development Policy, *infra* note 7, at 464 (tracing history of compulsory licensing under the Berne Convention in light of developed nations' established policies).

5. Concerns of leading developing countries that WIPO's technical assistance did not address development considerations were central to efforts to establish the WIPO Development Agenda. Of the forty-five Recommendations that constitute the Development Agenda, the first relates to technical assistance. World Intellectual Prop. Org. [WIPO], *The 45 Adopted Recommendations Under the WIPO Development Agenda* (2007), <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf> ("WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States . . .").

This article argues that the human rights framework plays a material role in strengthening IP rights and thus burdens the capacity to use IP doctrines effectively for promoting human welfare objectives. Consequently, this article encourages caution about the contemporary construction of the IP/human rights interface and its sanguine embrace by well-meaning scholars and policymakers alike. The human rights framework is problematic for the development interests and aspirations of most people living in the Global South. This author's skepticism first grew out of concern about the strongly individualistic focus of human rights—both in its ideological orientation towards western liberal tradition and in its reliance of human rights norm-setting institutions on external constituencies for expertise and guidance. At least in the field of IP, those constituencies usually comprise international non-governmental organizations that, while well-meaning, stymie the necessary domestic debate that is a precursor for the development of local actors who can more ably challenge the structural challenges imposed by international IP regimes. The human rights discourse certainly provides important grist for the international debate over global IP norms, but it accomplishes remarkably little on the domestic front. Given the outsized role of international IP in global development, it is unsurprising that IP has played a similarly outsized role in human rights. The instinctive fidelity of relevant UN institutions and processes to a narrative that casts IP as an indispensable hero in the struggle for development in the Global South creates significant challenges for the promise of a redemptive effect of human rights arguments on local IP reform initiatives.⁶

This article presents a series of related claims. First, a human rights framework for IP does not ineluctably facilitate socially desirable outcomes for all countries; slapping human rights ideals on IP regimes can, instead, actually strengthen IP rights in socially harmful ways. Second, human rights-driven responses to the serious global challenges exacerbated by an outsized global IP system are not neutral. To the extent human rights objectives impose important limits on the do-

6. See, e.g., UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INTELLECTUAL PROPERTY IN THE WORLD TRADE ORGANIZATION: TURNING IT INTO DEVELOPING COUNTRIES' REAL PROPERTY 61–63 (2010) (discussing the role of TRIPS in least developed countries).

mestic exercise of IP rights, that progress occurs principally in developed countries. In multilateral arenas where norm-setting agendas are fixed, the most successful IP-related human rights arguments are those that resonate predominantly in the western liberal tradition⁷ or that build on the IP jurisprudence of U.S. and European courts.⁸ Other than where the right to health is involved, concerns that implicate the values and institutions of leading developed countries frequently drive human rights advocacy for IP reform. Third, and most significant, the limited effect of the human rights framework on the IP/human rights interface is attributable to the narrow vision of human rights that has long dominated the discourse—one that excludes economic, social, and cultural rights.

The article proceeds along three main themes. It begins by reviewing the historical context of the relationship between IP and human rights. The analysis emphasizes the inattention of the IP/human rights interface to economic, social, and cultural rights and suggests how that inattention constrains the impact of the human rights framework on global IP norm-setting. Next, the article briefly highlights some recent national case law and other global legal developments involving the IP/human rights interface, showing how some economic, social, and cultural rights have been upheld in specific national contexts. The discussion also points to limits of the human rights

7. I first sketched out this claim in the context of international copyright law in Ruth L. Okediji, *Reframing International Copyright Limitations and Exceptions as Development Policy*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 429, 430 (Ruth L. Okediji ed., 2017) [hereinafter Okediji, *International Copyright Limitations as Development Policy*]. Makau Mutua made a similar claim in his work regarding human rights scholarship more broadly. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT'L L.J.* 201, 204 (2001) [hereinafter Mutua, *Savages, Victims, and Saviors*] (“The human rights corpus, though well-meaning, is fundamentally Eurocentric . . .”). See generally Makau wa Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT'L L.* 589 (1996) [hereinafter Mutua, *Ideology*] (critiquing Western liberal traditions and how they frame human rights).

8. See generally Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 451–60 (pointing to various exceptions and limitations with a counterpart in Western legal tradition); Ruth L. Okediji, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* 211, 228 (Margot E. Salomon, Arne Tostensen & Wouter Vandenhole eds., 2007) [hereinafter Okediji, *Securing Intellectual Property Objectives*] (categorizing human rights in light of IP jurisprudence).

framework in the areas of health and education. Those limits underscore the need for scholars, advocates, and policymakers to more critically question the sanguine appeal of an uncritical human rights endorsement of IP. Finally, the article argues that policymakers accommodate human rights challenges to IP by hiding the fundamental incongruence of the two regimes in the tepid form of limitations and exceptions to the various IP subjects.⁹ There must be a willingness to leverage the array of available legal and political tools in international and domestic law to overcome the assumption that a system that empowers a few can be good for all. Absent such a fundamental shift, IP rules will not facilitate realization of the material benefits envisaged and guaranteed by economic, social, and cultural rights. This article maintains that those benefits are a necessary precursor to the exercise of freedoms that make possible the creation, use, and enjoyment of knowledge assets in the pursuit of development.

The arguments set forth here do not decry a role for human rights altogether. To be clear, human rights arguments including recommendations for IP reform can be beneficial. However, they are limited insofar as they do not offer a meaningful pathway for improving the welfare of people whose conditions of life consistently fall beneath the ideals articulated in international human rights instruments.¹⁰ Reasons for this partly relate to weak or non-existent IP institutions—and institutions more broadly, such as formal laws, conventions, and other stable constraints on human behavior—in many developing and least-developed countries.¹¹ Human rights arguments that have garnered salience proceed on the flawed assumption that solutions to the adverse welfare effects of strong

9. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 450–51 (discussing the difficulty of transplanting modern copyright paradigms into developing and least-developed countries without particular reference to their cultural and economic environments).

10. For a discussion of human rights and IP, see the discussion on the Marrakesh Treaty for visually impaired persons, Section II.A *infra*.

11. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 451 (“In short . . . copyright harmonization has disproportionately adverse effects in countries that are . . . institutionally weak, creating divergent development prospects even where countries arguably start with similar endowments.”). See also Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97–98 (1991) (examining the “informal constraints” and “formal rules” that strong institutions place on societies).

IP rights look and function the same way regardless of the institutional, social, or cultural environments in which those human rights must take root and be realized.¹² Even more troubling, those same arguments assume that IP's human rights problems result principally from the unbridled power of private actors engulfed in rent-seeking behavior. As discussed in Part I of this article, that is not the case. Global IP rules had a human rights problem long before the TRIPS Agreement triggered an IP rights race.¹³

The prevalent view that politics is the problem with IP impoverishes the discourse about the appropriate design of the IP/human rights interface. Given the significant power imbalance in global IP relations, this politics-centric view animates the conclusion that a countervailing force to politics is needed, and that the higher moral power of a human rights framework provides the required counterweight. Moreover, depending on the specific issue in IP, the politics-centric view invariably links past and future successes in IP norm-setting with the efficacy of human rights advocacy, leaving developing and least-developed countries largely dependent on the agen-

12. See, e.g., Okediji, *International Copyright Law as Development Policy*, *supra* note 7, at 433–440 (tracing the history of institutions and rhetoric surrounding international copyright).

13. Certainly, the adverse effects of international IP rules on the material well-being of developing countries have been well recognized since the integration of those countries in the international legal order following independence. See Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 L. & POL'Y 315, 323–328 (1996) [hereinafter Gana, *The Myth of Development*] (arguing that any human right to IP must be understood in the context of the right to development and the right to self-determination in order to protect the right of developing countries to establish IP regimes consistent with their unique socioeconomic and cultural norms and with development objectives). Technical assistance efforts in the field have largely revolved around ways to accommodate the interests of developing and least-developed countries. *Id.* at 338. Largely framed in the discourse of “development,” these efforts fundamentally are about human rights goals. See *id.* at 336–39 (describing the interplay between human rights and development discourse in the context of intellectual property rights regimes). See also Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 119–121 (1995) [hereinafter Gana, *Has Creativity Died*] (Tracing the impact of Western European and American economic theory on conflicting value sets in developing and least-developed countries).

das of international human rights actors.¹⁴ Certainly, in the context of the right to health, this linkage has considerable merit when considering the importance of these actors to outcomes such as the Doha Declaration,¹⁵ as well as other ongoing gains in the area of access to essential medicines.¹⁶

However, as elaborated in Part II, there is reason to be skeptical about claims regarding a unique positive value associated with a human rights approach to IP. On close reflection, most of the successes potentially attributable to the human rights/IP interface are anchored in norms and values that are *already* quite authoritative in the standalone IP or constitutional frameworks of developed countries. Intellectual property law is directed at human welfare;¹⁷ when properly designed and implemented it can accomplish human rights goals without any resort to human rights norms and obligations.¹⁸ This article asserts that a key incentive to articulate a distinct human rights framework for IP is the possibility that doing so might provide a welfare surplus beyond what IP doctrines can accomplish. In other words, this article explores whether there claims that human rights law can make, or outcomes it

14. See Okediji, *International Copyright Law as Development Policy*, *supra* note 7, at 465–466 (noting the general backlash and mobilization of human rights organizations in response to TRIPS).

15. World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001 ¶ 4, WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

16. See Kelly Morris, *Global Initiatives to Promote Wider Access to Medicines*, 8 LANCET INFECTIOUS DISEASES 535, 535 (2008), [https://www.thelancet.com/pdfs/journals/laninf/PIIS1473-3099\(08\)70197-X.pdf](https://www.thelancet.com/pdfs/journals/laninf/PIIS1473-3099(08)70197-X.pdf) (discussing international organizations' roles in the creation of patent pools and other initiatives); see also Promoting Innovation & Access to Health Tech., Rep. of the U.N. Secretary-General's High-Level Panel on Access to Med., at 3 (2016) [hereinafter High-Level Panel Report], <http://www.unsgaccessmeds.org/final-report/> (describing the health-promoting goals of the U.N. High-Level Panel as well as its collaboration with international partners).

17. The TRIPS Agreement recognizes the public interest in Article 7 which sets forth its objectives: “[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” TRIPS Agreement, *supra* note 2, art. 7.

18. See Okediji, *Securing Intellectual Property Objectives*, *supra* note 8, at 213–14 (arguing that intellectual property's tools, when properly deployed, can achieve human rights ends).

could facilitate, that would not otherwise be possible within IP law's own normative design.

An overarching theme in the article is that advances based on human rights arguments that principally impact developed countries, or that improve norm coherence across regimes, are significant feats in their own right. Developing countries enjoy collateral benefits from efforts to enhance dissemination of knowledge, secure privacy, and promote liberty—all of which are guaranteed by human rights instruments.¹⁹ Access to knowledge is especially crucial in a global economy increasingly reliant on transnational innovation network support of technology flows in aid of production and trade. Nonetheless, as illustrated in Part III, the deployment of human rights frameworks for IP must be done with greater attention to the specific needs and constraints of developing countries *as countries* for the ideals enshrined in human rights law to meaningfully benefit all peoples and for the genuinely transformative vision of international human rights to be more equally realized.

Stakeholders must be willing to reorient the discourse to address the appropriate design of the IP/human rights interface and to accept solutions that look nothing like the legal obligations that TRIPS and other multilateral IP arrangements characteristically dictate. Human rights frameworks should constrain state decision-making along a continuum of possible models that incentivize innovation and facilitate access to and dissemination of technologies. They should do so without mandating the dislocation of cultural values around which each society best functions. To this end, consideration of the IP/human rights interface must extend beyond discussion of the IP rights currently recognized in international human rights instruments and embrace possibilities for IP reform that could emerge from a serious engagement with a panoply of economic, social, cultural, and group rights. It is these rights, this article argues, that will most deeply and genuinely inform

19. See, e.g., International Covenant on Economic, Social and Cultural Rights art. 5, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (preventing states from justifying human rights restrictions on the basis of a lack of enumeration in ICESCR)); GA Res. 217 (III) A, Universal Declaration of Human Rights, art. 27 (Dec. 12, 1948) [hereinafter UDHR].

meaningful prospects for human and economic development.²⁰

II. THE INCOMPLETE EVOLUTION OF THE IP AND HUMAN RIGHTS INTERFACE

Historically, there was very little formal interaction between IP and human rights law, though this has changed dramatically as both fields expanded in scope.²¹ The international legal framework for IP emerged in the early nineteenth century, a time in which the leading industrialized countries did not evenly accept the grant of a limited term monopoly for innovative creations.²² Over time, however, the idea of recognizing proprietary rights for inventions and works of authorship continued developing through a series of IP-specific bilateral, regional, and eventually multilateral conventions. The early foundational agreements in this respect are the Paris

20. Ruth L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 U. PA. J. INT'L L. 191, 204 (2014) [hereinafter Okediji, *Legal Innovation*] (noting that “access to technology and cultural goods materially affects individual exercises of social and political rights vital to innovation and creativity [T]he relationship between the production and use of knowledge cannot be sensibly divorced from the equality-related aspirations that define most of the societies in which IP rights have been an important part of economic and political flourishing.”). See generally COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2017) (exploring the role of copyright law in shaping social, economic and political interactions).

21. Professor Laurence Helfer has produced a leading body of work exploring the historical development of the two regimes. See, e.g., LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (2011); Laurence R. Helfer, *Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines*, in TRANSNATIONAL LEGAL ORDERS 311, 312 (Terence C. Halliday & Gregory Shaffer eds., 2015) [hereinafter Helfer, *Pharmaceutical Patents*]; Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 47–51 (2003) (“Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows. For decades, the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.”).

22. See, e.g., Helfer, *Pharmaceutical Patents*, *supra* note 21, at 314; Kronstein & Till, *supra* note 1, at 773–76.

Convention for Industrial Property²³ and the Berne Convention for Literary and Artistic Works.²⁴ The conclusion of these Great Conventions initiated a progressive era of expanding protectable subject matter and the delineation of a robust system of exclusive rights for each type of IP subject matter. However, the early, formative years of the multilateral IP system contained few substantive rules and no effective enforcement tools,²⁵ permitting countries freedom to shape their national regimes in a way that cohered with domestic development goals and strategies.

Over time, the passionate moral justifications for IP in the nineteenth century—championed in the field of copyright by prominent authors such as Victor Hugo²⁶—yielded to the incentive theory of the twentieth century, which justified IP almost exclusively in terms of national technical advancement and economic progress.²⁷ The rapid expansion of trade and

23. See Paris Convention, *supra* note 1.

24. See Berne Convention, *supra* note 1.

25. See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 10 (2d ed. 2003) (“The two fundamental perceived flaws of the Paris and Berne Conventions were (a) the absence of detailed rules on the enforcement of rights before national judicial administrative authorities; and (b) the absence of a binding and effective dispute settlement mechanism (for disputes between states).”).

26. See Tim Wu, *On Copyright’s Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 340 (“Think of a man like Dante, Molière, Shakespeare. Imagine him at the time when he has just finished a great work. His manuscript is there, in front of him; suppose that he gets the idea to throw it into the fire; nobody can stop him. Shakespeare can destroy Hamlet, Molière Tartufe, Dante the Hell.”) (quoting Victor Hugo). Cf. *Victor Hugo Still Rules EU Copyright*, SCIENCEGUIDE (Oct. 16, 2013), <https://www.scienceguide.nl/2013/10/victor-hugo-still-rules-eu-copyright/> (“Continental European copyright is based on the idea that there is a strong link between the maker and his work. You might say a part of the author’s identity is contained in the book. The central figure of this thinking is Victor Hugo who in 19th century France fought for authors rights. Today, we are still very much at that stage of thought.”). But see James Boyle, *Victor Hugo: Guardian of the Public Domain*, PUB. DOMAIN (Jul. 18, 2014), <http://www.thepublicdomain.org/2014/07/18/victor-hugo-guardian-of-the-public-domain/> (noting that Hugo spoke “about the need to create a system that respected not just the rights of authors [sic] but the public’s rights, the public’s *ownership* of the public domain . . . Victor Hugo, guardian of the public domain and a proponent of the exact kind of right of the public to the public domain . . .”).

27. See TRIPS Agreement, *supra* note 2, pmb1. (stating that part of the motivation for TRIPS was the desire “to reduce distortions and impediments to international trade, and taking into account the need to promote effec-

technological innovation played a pivotal role in developing a robust private technology sector with powerful political capital.²⁸ As global competitiveness intensified and the terms of competitive trade demanded greater access to overseas markets, leading technology sectors in the United States, Japan, and the European Union leveraged their political power in an extraordinary undertaking to introduce new rules for IP protection in the international trade system.²⁹ The singular success of this effort brought nations together at the Uruguay Round multilateral trade negotiations, resulting in the conclusion of the TRIPS Agreement.³⁰ The package deal secured at the Uruguay Round established an unprecedented baseline for modern IP relations.³¹ In addition, the Uruguay Round set

tive and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”); *see also* Kronstein & Till, *supra* note 1, at 765 (describing the International Treaty for the protection of Industrial Property regarding patents as “the most perfect example of a multilateral convention affecting economic matters.”) (citations omitted); Pointet, *supra* note 1, at 63 (“Technical progress is the essential condition of all economic development.”); Alois Troller, *Intellectual Property and Justice*, 3 INDUS. PROP. 119, 122 (1964) (observing that the debate at that time over the usefulness of patent law was grounded “in the assumed or disputed increase of production, and in the development of techniques In its eyes, the increase in national wealth and income becomes identified with the public good.”).

28. *See* SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 18–19 (2003) (discussing the powerful private actors influencing the development of international IP policy); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 845–47 (2003) (discussing cooperation of US, Japan and EU firms in getting their governments to push the TRIPS Agreement through); *see also* Helfer, *Pharmaceutical Patents*, *supra* note 21, at 314 (noting how the pharmaceutical industry launched a campaign for stronger IP rights and “framed its objection [for the lack of IP rights in medicines] in economic and moral terms. The unfettered copying of patented medicines was, the industry complained, a competitive disadvantage for industrialized economies and a deplorable form of modern-day ‘piracy.’”).

29. Okediji, *supra* note 28, at 845–48; *see also* SELL, *supra* note 28, at 104 (detailing Japanese and EU cooperation during pre-negotiations).

30. *See* note 29, *supra*, and accompanying text.

31. *See generally* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT’L LAW. 345, 346–51 (1995) (describing the principles belying the universal standard created by the TRIPS Agreement).

forth a complex institutional global agenda that implicates the realization of a wide range of human rights.³²

A. *The TRIPS Agreement: Human Rights in the International IP System*

The TRIPS Agreement dramatically altered the normative contours of international IP law by obligating adherence of all WTO members to certain minimum standards of IP protection, including the requirement that nations recognize patents in all fields of technology.³³ In addition, the TRIPS Agreement broadened the infamous three-step test against which domestic law exceptions to the mandatory minimum international rules for patent and copyright protection are assessed.³⁴ Importantly, unlike the Paris and Berne Conventions, the TRIPS Agreement came with legal teeth. Under the Agreement, allegedly non-compliant WTO members are subject to the WTO's dispute settlement system with the prospect of meaningful trade sanctions.³⁵ Finally, to accommodate the significant changes required to become TRIPS compliant, the drafters

32. There is a vast body of literature on trade and human rights expressing a wide range of opinions about the impact of the WTO on human rights. For a particularly trenchant critique arguing that the WTO is a vexatious instrument where human rights are concerned, see J. Oloka-Onyango & Deepika Udagama (Special Rapporteurs on Globalization and Human Rights to the Sub-Comm'n on the Promotion and Prot. of Human Rights), *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, ¶¶ 15–17, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000). For another view concluding that “[e]conomists will find little merit in most of the human rights critique . . . the evidence suggests that the growth of the trading system generally tends to promote rather than undermine human rights,” see Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective* 23 (Univ. of Chi. Law Sch., John M. Olin Law & Economics Working Paper No. 188, 2003). For a seminal comprehensive mapping of the intersections between IP and human rights, see HELFER & AUSTIN, *supra* note 21.

33. TRIPS Agreement, *supra* note 2, art. 27.1. See generally Reichman, *supra* note 31, at 346–51 (surveying the logic and basic principles of the TRIPS Agreement contributing to the creation of a minimum standard).

34. TRIPS Agreement, *supra* note 2, arts. 13, 30.

35. *Id.* arts. 63–64; see also Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 276 (1997) (“There were two major breakthroughs in the Uruguay Round. The one that seems to have been the most surprising to the participants was agreement on a strict and binding system of dispute settlement and enforcement.”).

built certain flexibilities into the Agreement—offering specific and important benefits for developing and least-developed nations.³⁶ For reasons already well-developed in the IP literature, and others elaborated upon further by this article, these flexibilities have not been successful in promoting the interests of developing countries.³⁷

Since the conclusion of the Uruguay Round, human rights have impacted global IP norms far less than might have

36. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804, 876 (2008) (“Organizing around law has helped not only to galvanize the A2K mobilization, but also to shape its language and self-construction. This is evident in the architecture of the mobilization, in the investment of A2K actors in arguments and strategies that operate internal to the logic of the law and legal discourse of IP, and in the tendency of movement actors strategically to modulate their claims by, for example, embracing TRIPS flexibilities rather than opposing TRIPS. These are effects of what I call the gravitational pull that law exerts on framing processes.”); J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 *CASE W. RES. J. INT’L L.* 441, 456–64 (2000) (discussing the need for a cooperative and, at times, flexible approach to the TRIPS Agreement from the standpoint of developing countries and examining some of the elements of this approach); World Intellectual Prop. Org. [WIPO], *Advice on Flexibilities Under the TRIPS Agreement*, http://www.wipo.int/ip-development/en/policy_legislative_assistance/advice_trips.html (last visited Oct. 1, 2018) (identifying four clusters of flexibilities: (i) flexibilities as to the method of implementing TRIPS obligations; (ii) flexibilities as to substantive standards of protection; and (iii) flexibilities as to mechanisms of enforcement; (iv) flexibilities as to areas not covered by the TRIPS Agreement). *But see* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 *SMU L. REV.* 975, 1040 (2011) (“Second, even if countries are aware of the flexibilities that have been built into the agreement, policymakers may be strongly discouraged from introducing limitations and exceptions. For example, they may face external pressure from their powerful trading partners . . .”).

37. For a leading account of the pathologies of TRIPS implementation in developing and least-developed countries, see CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 64–104, 196–232 (2008); *see also* James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime*, 18 *MINN. J.L. SCI. & TECH.* 427, 429 (2017) (suggesting that investor-state disputes have the potential to systematically undermine built-in TRIPS flexibilities). *Cf.* Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 *J. INTELL. PROP. L.* 325, 332 (2011) (exploring the relationship between TRIPS flexibility provisions and TRIPS-plus free trade agreements).

been anticipated given the intense global mobilization against the TRIPS Agreement.³⁸ Progressive harmonization of international IP law has continued in various fora, exacerbating historical and continuing burdens on the economic prospects of developing and least-developed countries.³⁹ In particular, multilateral, regional, and bilateral trade agreements have assumed a crucial role in the creation of new international IP norms,⁴⁰ with even stronger requirements and fewer safeguards for public welfare interests. Many of these trade agreements, coined “TRIPS-plus”⁴¹ agreements, oblige the contracting parties to heighten IP protections beyond that which is required by the TRIPS Agreement and to compromise, or abandon altogether, built-in TRIPS flexibilities. Norm-setting activities also continue in WIPO where proposals for new IP agreements are on the active agenda⁴² while longstanding pro-

38. See *supra* note 14 and accompanying text.

39. See Okediji, *International Copyright Law as Development Policy*, *supra* note 7, at 480–82 (noting the historical use of limitations and exceptions as incompatible with the needs of developing and least-developed countries).

40. See Okediji, *Legal Innovation*, *supra* note 20, at 194 (noting that “new sites of resistance to the built-in normative flexibility recognized by the TRIPS Agreement have become entrenched in a viral web of bilateral, regional and plurilateral agreements.”); see also *id.* at 251–59 (briefly reviewing some of the post-TRIPS multilateral initiatives). See generally Henning Grosse Ruse-Khan, *Protecting Intellectual Property under BITs, FTAs, and TRIPS: Conflicting Regimes or Mutual Coherence?*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 485, 490–508 (Chester Brown & Kate Miles eds., 2011) (analyzing the impact of free trade agreements on the policy space afforded by TRIPS, with a focus on public health-related concerns).

41. Helfer, *supra* note 3, at 982 n.28 (“These treaties are referred to as ‘TRIPS Plus’ because they contain intellectual property protection rules more stringent than those found in TRIPS, obligate developing countries to implement TRIPS before the end of its specified transition periods, or require such countries to accede to or conform to the requirements of other multilateral intellectual property agreements.”); GENETIC RES. ACTION INT’L, “TRIPS-PLUS” THROUGH THE BACK DOOR: HOW BILATERAL TREATIES IMPOSE MUCH STRONGER RULES FOR IPRS ON LIFE THAN THE WTO 1–5 (2001), <https://www.grain.org/article/entries/5-trips-plus-through-the-back-door>.

42. See, e.g., Jeremy Malcolm, *The WIPO Broadcasting Treaty Would Be a Body Blow for Online Video*, ELEC. FRONTIER FOUND. (May 2, 2017), <https://www.eff.org/deeplinks/2017/05/wipo-broadcasting-treaty-would-be-body-blow-online-video> (advocating against the adoption of the Broadcasting Treaty proposal); Catherine Saez, *Potential Treaty to Protect Broadcasters’ IP Rights: Technicalities Explained*, INTELL. PROP. WATCH (Feb. 8, 2017), <http://www.ip-watch.org/2017/02/08/potential-treaty-protect-broadcasters-ip-rights-technicalities-explained/> (explaining the more complex provisions of

posals for establishing new limitations and exceptions for libraries, museums, and archives languish despite years of discussion.⁴³

Beyond these manifestations of the ongoing expansion of IP law⁴⁴ is an elaborate network of technical assistance programs that profoundly drives the extent to which IP norms apply to advance or retard states' capacity to integrate human rights obligations, much less aspirations, as key considerations of IP treaty implementation.⁴⁵ For example, a recent review of WIPO's technical assistance programs notes a variety of concerns related to how activities directed at developing and least-developed countries fall short of enabling domestic development interests.⁴⁶ This article will not review these well-known criticisms of WIPO and the international IP system.⁴⁷ Suffice it to say, technical assistance should become a far more significant focus of concern in securing the vision of human well-

a potential treaty to protect broadcasting companies); Catherine Saez, *Geographical Indications, Design Law Treaty Up Next At WIPO*, INTELL. PROP. WATCH (Nov. 14, 2015), <https://www.ip-watch.org/2015/11/14/geographical-indications-design-law-treaty-up-next-at-wipo/> (discussing negotiations for a potential treaty on industrial designs).

43. See World Intellectual Prop. Org. [WIPO], *Standing Committee on Copyright and Related Rights (SCCR)*, <http://www.wipo.int/policy/en/sccr/> (last visited Oct. 1, 2018) (listing items under discussion); see also Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 489–94 (discussing how WIPO's Standing Committee on Copyright and Related Rights (SCCR) adopted “a work plan” in 2010 to consider issues relating to libraries and archives).

44. See, e.g., World Intellectual Prop. Org. [WIPO], *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications*, WIPO Doc. LI/DC/19 (May 20, 2015).

45. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 1–10 (detailing technical assistance programs through WIPO).

46. CAROLYN DEERE BIRKBECK & SANTIAGO ROCA, *AN EXTERNAL REVIEW OF WIPO TECHNICAL ASSISTANCE IN THE AREA OF COOPERATION FOR DEVELOPMENT*, at ii–iv (2011).

47. Criticism of WIPO has been an enduring feature of scholarly and other commentary on the international IP system. For some important works touching on this topic, see CHRISTOPHER MAY, *THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA 95–105* (2007); SISULE F. MUSUNGU & GRAHAM DUTFIELD, *MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) 16–17* (2003); James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 9 *DUKE L. & TECH. REV.* 1, 3–4 (2004).

being and progress enshrined in international human rights instruments—a vision placed under tremendous pressure by the global IP system.⁴⁸ This ongoing confluence of new trade agreements with TRIPS-plus provisions, continuing IP harmonization, and new tools such as investor-state provisions in investment agreements, challenges the notion that human rights frameworks have a significant or distinct impact on international IP norms. As discussed further below, the limited effect of the current human rights regime on IP reform is attributable to the narrow vision of human rights—one that excludes economic, social, and cultural rights—that has dominated the IP/human rights interface.

B. *Assimilating Intellectual Property in the International Human Rights Framework*

The international human rights regime is of a more recent vintage than international IP law. Scholars generally credit the beginning of the modern human rights legal framework to the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.⁴⁹ Participating nations agreed that individuals should be guaranteed certain rights including, among others, freedom of expression, the right to a standard of living adequate for health and well-being, the right to education, the right to freely to participate in cultural life, and the right to the protection of moral and material interests resulting from any scientific, literary, or artistic creations.⁵⁰

The international community eventually concluded work on other treaties designed to solidify legal obligations out of

48. There is a large body of literature on the impact of the global intellectual property system on developing countries, including what opportunities exist to design national IP laws to address distributional or development needs. A few leading discussions include Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735 (1996); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115 (2009). See generally INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT (Mario Cimoli et al. eds., 2014) (examining, among other things, the effects of intellectual property rights on the process of innovation diffusion with respect to developing countries).

49. UDHR, *supra* note 19.

50. *Id.*

the general principles of the UDHR. One such treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵¹ Adopted by the U.N. General Assembly in 1966, the ICESCR recognizes the importance of securing certain material, social, and cultural conditions to facilitate human progress and national development. Article 15 of the ICESCR mirrors Article 27 of the UDHR, which provides for the right of individuals “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” and “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁵² These provisions clearly recognize a right to engage with, own, and earn rent or reward from one’s created works. To the extent other provisions in international human rights instruments purport to place limits on the scope and exercise of IP rights, those limits certainly have not displaced the political, moral, or legal premium associated with the unequivocal recognition of authorial interests found in Article 15 of the ICESCR and Article 27 of the UDHR.

Next, the meaning of the text codified in the international human rights instruments is worth examining to understand the impulse behind more IP-friendly interpretations. The historical record fails to offer much insight into what the drafters intended by the chosen text contained in the UDHR and ICESCR.⁵³ Nonetheless, these instruments serve as the basis for claims that IP rights are human rights and they have long been the formal hook upon which human rights argu-

51. ICESCR, *supra* note 19. With respect to IP, human rights scholars have paid an increasing attention to the moral and material interests of creators. Closely tracking article 27(2) of the UDHR, article 15(1)(c) of the ICESCR requires each state party to the Covenant to “recognize the right of everyone . . . to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.” *Id.* art. 15(1)(c). The third treaty referenced above, the International Covenant on Civil and Political Rights (ICCPR), focuses on the civil and political dimensions of human rights and figures less prominently into the issues presented in this article. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

52. UDHR, *supra* note 19, art. 27(1)–(2).

53. Paul L.C. Torremans, *Copyright as a Human Right*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION – INTELLECTUAL PROPERTY – PRIVACY* 1, 5 (Paul L.C. Torremans ed., 2004).

ments in support of strong national and international IP rights have hung.⁵⁴ Reinforcing this perspective is the fact that the Committee charged with monitoring state compliance with the ICESCR has provided interpretive guidance to governments through its General Comment 17.⁵⁵ This General Comment affirms Article 15 as an obligation to protect author's rights, even though neither the UDHR nor the ICESCR use the phrase "intellectual property." Strong versions of this view claim that IP is a human right *per se*,⁵⁶ emphasizing the depen-

54. Victor Hugo's speech in 1878 to the Congress of Literary, Industrial and Artistic Property, Paris, certainly reflects this view. See Victor Hugo, Address of Victor Hugo to the International Literary Congress, in COPYRIGHT PERSPECTIVES: PAST, PRESENT AND PROSPECT 1, 1–6 (Brian Fitzgerald & John Gilchrist eds., Benedict Atkinson trans., 2015) (speaking of the rights of authors couched in human rights terminology). Indeed, the Congress adopted the resolutions among which was a resolution that "[t]he right of the author in his work constitutes, not a concession by the law, but one of the forms of property which the legislature must protect." RICKETSON, *supra* note 1, at 46; see also Stojan Pretnar, *Contemporary Problems of the Rights of the Authors of Scientific Discoveries*, 11 INDUS. PROP. 264, 265 (1962) (noting that the UDHR helped keep alive the idea of a right of authors/creators in the period following World War II: "[b]y introducing paragraph 2 of Article 27 into the Universal Declaration of Human Rights, proclaiming the right of the material and moral interests to protection in favour of the authors of every industrial production . . . and of literary and artistic works, the United Nations have, without doubt, renewed and accentuated the movement which, in the second half of the nineteenth century, enabled the foundation of the Berne and Paris Conventions to take place.").

55. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant)*, U.N. Doc. E/C.12/GC/17 (Jan. 2006) [hereinafter *General Comment No. 17*].

56. See Mary Robinson & Kamil Idris, *Foreword to World Intellectual Prop. Org. [WIPO] & Office of the High Comm'r for Human Rights [OHCHR], Intellectual Property and Human Rights*, WIPO Doc. 762(E) (1999) [hereinafter *Intellectual Property and Human Rights*] (stating that "[i]ntellectual property rights are enshrined as human rights in the [Universal Declaration of Human Rights]"). More recently, however, the UN Special Rapporteur in the field of cultural rights has adopted a more nuanced approach to the relationship between IP and human rights. Among other things, two reports on copyright and patent law note that considerations of human rights must prevail over IP rights. Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Copyright Policy and the Right to Science and Culture*, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) [hereinafter "2014 Shaheed Report"]; Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Rep. of*

dence of human progress on the technologies and cultural goods incentivized by IP regimes.⁵⁷ The result is that the human rights/IP framework has largely operated as a justification for the core architecture of the international IP system, with human rights considerations channeled through doctrines already hard-wired in contemporary IP jurisprudence.

Although General Comment 17 on ICESCR Article 15(1)(c) appears to subordinate IP to human rights, it does so by attempting to distinguish IP principally as an instrumentalist tool used by states to achieve broader public aims. According to the Comment, “[h]uman rights are fundamental, inalienable and universal entitlements belonging to individuals” while IP rights are “first and foremost means by which States seek to provide incentives for inventiveness and creativity . . . for the benefit of society as a whole.”⁵⁸

This utilitarian justification for IP, however, hardly tells the full story. Other theories of IP—and some historical accounts of debates leading to the Great Conventions—unequivocally assimilate IP into human rights frameworks reinforced by ideals of freedom and justice.⁵⁹ While it is true, as the ICESCR Committee notes, that a state’s chosen ideological justification for IP may produce differences in scope between IP

the Special Rapporteur in the Field of Cultural Rights, U.N. Doc. A/70/279 (Aug. 4, 2015) [hereinafter “2015 Shaheed Report”]. The Special Rapporteur notes explicitly, for example, that the human right to the protection of moral and material interests arising from authorship or inventorship: “In her thematic report on the right to science, the Special Rapporteur stressed that innovations essential for a life with dignity should be accessible to everyone, in particular marginalized populations. From a human rights perspective, mechanisms are needed to protect to the public interest wherever a particular technology is critical to human welfare, as might be the case in areas of health, agriculture or housing.” 2015 Shaheed Report, ¶ 49.

57. Aigul Shakhmova, *Intellectual Property and Scientific-Technological Development: In the Prospect of Human Rights Protection*, 3 EASTERN EUR. SCI. J. 135, 135 (2014) (“The role of intellectual Property law in the progress of societies cannot be overemphasized.”).

58. *General Comment No. 17*, *supra* note 55, ¶ 1.

59. Troller, *supra* note 27, at 122–23 (arguing that the protection of IP is a moral necessity and important for developing human identity, social relations and ensuring freedom to develop as a person). These themes are, of course, central to Hegel’s view of real property. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–91 (1982) (surveying Hegel’s property views and their relation to conception of personhood).

rights and human rights law,⁶⁰ the foundational premise that creators have fundamental rights that states can only curtail in extraordinary circumstances is an idea with a strong historical pedigree in the IP field. The ICESCR Committee urges that “it is . . . important not to equate intellectual property rights with the human right recognized in article 15,”⁶¹ but it nevertheless adopts a strong position limiting the extent to which States may interfere with the rights of creators.⁶²

In the last several years, however, the UN Special Rapporteur in the field of cultural rights adopted a more nuanced approach to the relationship between IP and human rights. In the field of patent law, the Special Rapporteur’s Report explicitly states that the human right to the protection of moral and material interests arising from authorship or inventorship,

cannot be used to defend patent laws that inadequately respect the right to participate in cultural life, to enjoy the benefits of scientific progress and its applications, to scientific freedoms The human rights perspective demands that patents do not extend so far as to interfere with individuals’ dignity and well-being. Where patent rights and human rights are in conflict, human rights must prevail.⁶³

Similarly, the Special Rapporteur’s Report on Cultural Rights firmly states that an author’s right to remuneration does not entitle an author to every possible revenue stream

60. *General Comment No. 17*, *supra* note 55, ¶ 2.

61. *Id.* ¶ 3.

62. For example, the Committee recognizes that the right to the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions is “subject to limitations” and “must be balanced with the other rights recognized in the Covenant.” *Id.* ¶ 22. It further states that “limitations on the rights protected under article 15, paragraph 1 (c), 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.” *Id.*; see also Laurence R. Helfer, *Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 75, 95 (Daniel Gervais ed., 2d ed. 2010) (noting “the stringent standard” for assessing the legality of state limitations’ of the rights in the ICESCR).

63. 2015 Shaheed Report, *supra* note 56, at 2.

associated with the copyrighted work.⁶⁴ It remains to be seen whether and how these reports will influence national IP law-making, particularly in the developing countries where the power of human rights rhetoric is usually a less persuasive platform for domestic legal reform.⁶⁵ Moreover, the international NGO's that are crucial for ensuring positive domestic action following a Special Rapporteur's report⁶⁶ largely do not exist in areas of IP, other than in the area of access to medicines and, more limitedly, access to knowledge.⁶⁷

Ultimately, to the extent the *soft* weight of a Report is countered by the more formal *hard* position institutionalized in General Comment 17, the latter is likely to hold more sway. Despite important caveats, admonitions to states to adopt a balanced approach to IP rights, and highlighting the need to protect the rights of indigenous peoples, General Comment 17 appears mainly to establish the point that IP rights are an imperfect, but legitimate, expression of the obligations con-

64. "In contrast to the perpetual moral interests of authors, the Committee on Economic, Social and Cultural Rights has emphasized that the material interests of authors need not necessarily be protected forever, or even for an author's entire life (general comment No. 17, para 16). The human right to protection of authorship is fully compatible with an approach to copyright that limits the terms of protection in order to ensure a vibrant public domain of shared cultural heritage, from which all creators are free to draw." 2014 Shaheed Report, *supra* note 56, ¶ 50.

65. In addition, as Molly Land observes, Special Rapporteur reports on intellectual property rights are likely to be less impactful in developing and less-developed countries due to the lack of domestic interest groups interested and equipped to engage in advocacy efforts. This is especially true in the context of sub-Saharan Africa. Molly K. Land, *The Marrakesh Treaty as "Bottom Up" Lawmaking: Empowering Local Human Rights Action on IP Policies*, 8 U.C. IRVINE L. REV. 513, 523–24 (2018).

66. See, e.g., JO BECKER, *CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE* 77–94 (2013) (documenting "examples of collaboration between NGOs and special procedures that resulted in concrete human rights improvements"); SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 61–65 (2006) (describing success on this front in the context of the campaigns addressing violence against women).

67. See Duncan Matthews, *NGO Coalitions and the Global Access to Medicine Campaign: The Impact of Intellectual Property Rights on Developing Countries*, in *GLOBAL MATTERS FOR NON-GOVERNMENTAL PUBLIC ACTION* 66–92 (J. Howell ed.) (2012).

tained in the international human rights framework.⁶⁸ In doing so, it adopts not only the instrumentalist vision of IP, but also the set of values underlying that vision—values that inform ideas about human dignity, freedom, culture, and society in liberal developed countries.

Many commentators and leading stakeholders also view the protections required in the UDHR and ICESCR as synonymous with, or expressed by, the rights recognized in international IP instruments.⁶⁹ An official publication by WIPO and the Office of the United Nations Commission for Human Rights asserts that “[i]ntellectual property rights are enshrined as human rights” in the UDHR and ICESCR,⁷⁰ and that “[h]uman rights and the equitable treatment of authors and inventors . . . remain the underpinnings of IP systems.”⁷¹ This

68. See *General Comment No. 17*, *supra* note 55 (“The right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions . . . is intrinsically linked to [] other rights [including] the right to take part in cultural life . . .”).

69. Cf. Maria Green, Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Background Paper: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, ¶ 45, U.N. Doc. E/C.12/2000/15 (Nov. 27, 2000) (“By raising both [access and protection] to the level of human rights, the drafters set up a tension that must be resolved if Article 15 is to be made effective. It is fascinating to note, however, that the distinguished men and women who gave us the ICESCR did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property.”).

70. *Intellectual Property and Human Rights*, *supra* note 56.

71. U.N. Secretary-General, *Intellectual Property Rights and Human Rights*, UN Doc E/CN.4/Sub.2/2001/12, at 7 (June 14, 2001). In general, scholars and international organizations have not always been clear when describing the relationship between the IP and human rights, at times referencing IP rights as human rights and, at other times, distinguishing between the “moral and material interests of authors” and IP rights. For the latter approach, see 2015 Shaheed Report, *supra* note 56, at 2. Consistently defining these terms will improve the discourse on this burgeoning legal intersection. Cf. Helfer, *supra* note 3, at 975–77 (“Both the . . . UDHR . . . and the . . . ICESCR . . . recognize the moral and material interests of authors and inventors and the right ‘to enjoy the arts and to share in scientific advancement and its benefits’ . . . Without elaboration, however, these textual provisions provide only a faint outline of how to develop human rights-compliant mechanisms to promote creativity and innovation. They also invite governments and activists on both sides of the [IP] divide to use the rhetoric of human rights to bolster arguments for or against revising [IP] protection standards in treaties and in national laws. Without greater normative clarity, however, such ‘rights talk’ risks creating a legal environment in which every

de facto equality of IP and human rights means that the interaction of the two regimes requires or warrants reconciliation between their competing means. Reconciliation *itself*—not fulfillment of human rights ends or development goals—thus becomes an added obligation of states, and a central preoccupation of government efforts to implement IP rights even when those rights clearly inhibit human rights aspirations. Reconciliation requires acceptance of, and adherence with, established premises of the global IP system, consequently restricting the extent to which states might challenge or re-design the interface of human rights obligations and IP laws. As this author concludes elsewhere:

At its core, the human rights [framework] does not encounter intellectual property as much as it complements it; it does not resist it as much as it attempts to contain its effects. The . . . [IP/human rights interface] frames human rights as a redemptive discipline important to the mission of recognizing and protecting the ability of people to participate in the public interest goals animating the intellectual property system. The point of the human rights [framework] is not to transform intellectual property rights [i]ndeed, the human rights [framework] sees the intellectual property system as a constitutive part of the universal values it seeks to affirm in and among states⁷²

The project of reconciling IP and human rights is a priority in the international human rights agenda. Its importance is evident in the bulk of scholarly commentary on the IP/human

claim (and therefore no claim) enjoys the distinctive protections that attach to human rights. The skeletal and under-theorized [IP] provisions of human rights law also leave critical questions unanswered. What, for example, is the relationship between the [IP] clauses of the UDHR and ICESCR and the remaining civil, political, social, and economic rights enshrined in human rights pantheon? And how do human rights law's [IP] rules interface with the rules set out in multilateral agreements emanating from WIPO, the WTO, and regional and bilateral trade and investment treaties?" (citations omitted).

72. Ruth L. Okediji, *The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 355, 367–68 (Daniel J. Gervais ed., 2007) [hereinafter Okediji, *The Limits of Development Strategies*].

rights interface, in official documents of the U.N. Sub-Commission on Human Rights,⁷³ and in the ICESCR Committee.⁷⁴ The project is also dominant in advocacy initiatives by many international non-governmental organizations (INGOs). The effort by human rights actors and institutions charged with providing guidance to states about the obligations in the UDHR and the ICESCR has fixated on a search to balance the interests of the two regimes, rather than to (re)conceive a vision of IP rights informed by a more comprehensive analysis that includes the full range of human rights.

Certainly, the practical activities of leading INGOs, such as Médecines Sans Frontières and Oxfam, focus on prioritizing human rights ends. Nonetheless, the thick jurisprudence of the international IP framework, reinforced by the international human rights discourse, continues to bedevil prospects for the kind of wide-scale transformative redirection of norms necessary to ensure that policymakers can reflect the enabling power of group, economic, cultural, and social human rights when enacting legislation or ratifying treaties. As a result of this thick international IP jurisprudence, the IP/human rights interface flourishes most around issues implicating individual rights that are quasi-political or within a creator's "zone of individual autonomy."⁷⁵

Finally, the IP/human rights interface relies almost solely on limitations and exceptions to IP as the dominant technique for rationalizing or reconciling IP rights and human rights. Freedom of speech, freedom to compete, and privacy rights are well-established limits to IP rights. These limitations and exceptions serve as important, public-minded carve-outs to the otherwise robust endowment of private control over knowledge assets. However, a realistic and meaningful human rights framework requires consideration of all human rights—including economic, cultural, and social rights—to advance the vision of a "common standard of achievement for all peoples and all nations."⁷⁶

73. See, e.g., Sub-Commission on Human Rights Res. 2000/7 (Aug. 17, 2000).

74. See *General Comment No. 17*, *supra* note 55.

75. Okediji, *The Limits of Development Strategies*, *supra* note 72, at 360; see also Helfer, *supra* note 62, at 87 (identifying Collective Management Organization activities that enhance the human rights of creators and users)

76. UDHR, *supra* note 19, pmbl.

For example, this author argued that “[r]arely is the right to development raised as part of the [human rights] discourse; instead . . . human rights analyses are predicated on the articulation of [a limited set of individual] rights.”⁷⁷ Even with the relatively more ambitious work of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, now the Human Rights Council, concerning the right to health, the focus has been to decry the absence of a human rights approach to TRIPS implementation, “rather than [deal] with state obligations to create substantive legal regimes to address innovation needs relevant to the specific national context.”⁷⁸ Given this narrow focus on individual civil and political rights instead of broader general human rights, the IP/human rights interface is underdeveloped and incomplete; its evolution must remain a work in progress for scholars, advocates, and international institutions.

C. *The Limits of Framing Intellectual Property Rights as Expressions of Human Rights Obligations*

So-called group rights and economic, social, and cultural rights have historically faced resistance in the industrialized countries, even among human rights scholars and activists.⁷⁹ These rights are also largely ignored in the human rights frameworks of the global IP regime.⁸⁰ Yet, it is precisely the pressures of ongoing national health, education, environmental, or other development challenges that evoke the most intense interactions between human rights and IP laws. The

77. Okediji, *The Limits of Development Strategies*, *supra* note 72, at 359–60. Indigenous rights are a notable exception to this tendency.

78. *Id.* at 366.

79. Mutua, *Ideology*, *supra* note 7, at 617–18; *see also* Okediji, *Securing Intellectual Property Objectives*, *supra* note 8, at 217–18 n.25 (providing various sources to support the proposition). *But see* Katharine G. Young, *The New Economic and Social Rights*, 107 AM. SOC’Y INT’L L. PROC. 486, 486 (2013) (stating that “[i]n the last two decades, economic and social rights have experienced a notable repositioning in international law. No longer a proxy for the ideological standoffs of the Cold War, such rights are now embraced as a fundamental part of the international human rights agenda.”).

80. *But see* Gana, *The Myth of Development*, *supra* note 13, at 315 (arguing that the human right to intellectual property must be understood in context with the right to development and self-determination); Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT’L L.J. 637, 637 (2010).

TRIPS Agreement and other IP instruments provide legal and normative space for countries to address these challenges in an ad hoc, case-by-case resolution of specific claims through limitations and exceptions to IP rights recognized in IP treaties and in national laws.⁸¹

This approach, though imperfect, works to address some of the interests and concerns of consumers in developed countries. However, it ignores entirely the structural conditions that exist in most least-developed and developing countries, and it belies what development economists counsel is required for development progress.⁸² Further, the unpredictability of ad hoc determinations regarding the applicability, scope, and meaning of any of the limitations and exceptions available in IP law is at odds with the direction provided by the ICESCR Committee which, in General Comment 17, emphasizes the need for security for creators in the realization of the rights granted in the ICESCR.⁸³ The quest for balance or reconciliation that permeates the IP/human rights literature reflects an implicit assumption—or acceptance of the assumption—that IP rights are optimal means to advance human development in a globalized world. With the premise that the two regimes are formal equals, discussed above in Part I, the discourse of reconciliation reinforces the legitimacy of the current version of IP rights and fosters acceptance of the idea that IP and human rights are justifiably in a competitive jostle over which should prevail as the dominant paradigm for promoting human welfare.

Below, this article highlights two problematic aspects of the current human rights framework which are also reflected somewhat in the ICESCR Committee's General Comment: i) the importance of the collective for the realization of rights enshrined in the ICESCR, and ii) the unsuitability of IP limitations and exceptions designed for individuals to satisfy the obligations required of states under the ICESCR.

81. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7.

82. Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 433–47 (developing this claim in the context of international copyright law).

83. *General Comment No. 17*, *supra* note 55, ¶¶ 39–40 (establishing “Core Obligations”).

1. *The Importance of the Collective*

The aspiration of individual liberty at the core of the UDHR is grounded in the physical and intellectual well-being of individuals.⁸⁴ However, aspirations about the socio-material conditions of life find their source and significance in the shared experience of a collective; under Article 22 of the UDHR, individuals hold their rights as members of society and not just as atomistic individuals:

Everyone, *as a member of society*, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.⁸⁵

As Amartya Sen and Martha Nussbaum argue, the freedom to participate in the development process, to pursue and experience justice, to exercise liberty, and to engage on equal terms in the public policy arena all are central aspects of human development.⁸⁶ The capabilities approach to development invites the necessity of the collective not in binary oppo-

84. *Id.*

85. UDHR, *supra* note 19, art. 22 (emphasis added).

86. AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 144 (2000) (discussing her version of Sen's capabilities approach and noting the need for "a theory of human capability that includes accounts of equality and liberty—to provide the normative basis that desire fails reliably to provide us."). See also Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 477–78 (2007) (challenging copyright doctrine that presumptively renders most copying illegal and arguing for a freedom to copy doctrine drawing from the capabilities approach to human development elucidated by Amartya Sen and Martha Nussbaum). Arewa argues "[a]s a result of the stigmatization of copying, legal analysis of copyright, copying, and creation does not sufficiently recognize the importance of the freedom to copy as an integral part of processes of creation. Copyright law . . . needs to better define the scope of acceptable copying in the creation of new works in a predictable way that extends beyond current conceptions of fair use . . . [A]n approach to copyright that incorporates a capabilities approach should recognize that access to knowledge and the ability to participate in creative processes reflect fundamental elements of self-expression that should be taken into account in intellectual property discourse and doctrine." *Id.* at 481, 518.

sition to the individual, but precisely because the collective provides the space and defines the context for individual expression. Individuals hold the rights codified in Article 22 as part of a set of cultural values upon which the State is constituted. Those values define an individual's sense of self, of society, of freedom, and guides her aspirations. In short, cultural values provide the parameters within which human dignity is understood, preserved, and respected.

The ICESCR Committee seems to appreciate the importance of the collective in the realization of human progress. With regard to Article 15 of the ICESCR, which recognizes the right of everyone to take part in cultural life,⁸⁷ the Committee's General Comment 21 provides that the content or scope of the terms "to participate" or "to take part" requires three interrelated components "(a) participation in, (b) access to, and (c) contribution to cultural life."⁸⁸ The Comment goes on to describe access as something which:

[C]overs in particular the right of everyone—alone, in association with others or as a community . . . to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods . . . and to benefit from the cultural heritage and the creation of other individuals and communities⁸⁹

With regard to "contribution to cultural life," General Comment 21 states that this

[R]efers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of

87. ICESCR, *supra* note 19, art. 15(1)(a).

88. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 15, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter *General Comment No. 21*].

89. *Id.* ¶¶ 15(b)–(c).

policies and decisions that have an impact on the exercise of a person's cultural rights.⁹⁰

Commentators rightly view General Comment 21 as an important source of adjustments for the IP system⁹¹—requiring doctrines that permit participation and secure the freedom to engage in the individual and collective creation of culture.⁹² The recommendations flowing therefrom still, nonetheless, largely focus on limitations and exceptions to balance the IP system.⁹³ A human rights framework can and should mean more. The right to participate in cultural life, together with the right to education, the right to health, the right to social security—the bundle of economic, social and cultural rights—create an expectation and place a demand on the governance structures of society to invest in the material conditions that enable humans to flourish, and thus empower human capacity to participate in cultural life.⁹⁴ The ICESCR clarifies that governments bear responsibility for the exercise of political power in designing economic rules and institutions, and that those rules should intentionally promote access to goods, enable development, and foster equality in societies.⁹⁵

Human rights law imposes an obligation on states to address the rights in the ICESCR and to consider legal means to operationalize the loftier principles of the UDHR.⁹⁶ Some states do so by constitutionalizing certain economic, social,

90. *Id.* ¶ 15(c).

91. Shaver & Sganga, *supra* note 80, at 639.

92. *Id.* at 643–48.

93. *Id.* at 654 (“One essential means to strike the appropriate balance between cultural participation and protection of authorship is through exceptions and limitations to copyright. Common examples include exceptions to permit the free use of copyrighted materials for: classroom use, scholarship, personal copies, format conversion, library lending, archiving, criticism and comment, translation into lesser-used languages, reverse-engineering for interoperability, research purposes, disabled accessibility, distance education, time-shifting, sampling, etc.”).

94. *See* Young, *supra* note 79, at 486–87 (emphasizing that the modern economic and social rights movement identifies with “dignity and human flourishing”).

95. *See General Comment No. 17, supra* note 55, at 25.

96. *See id.* at 3 (acknowledging legal recognition of article 15 of the International Covenant on Economic, Social and Cultural Rights).

and cultural rights.⁹⁷ As already suggested, the right to education, the right to health, and the right to participate in culture are rights that facilitate the exercise of political power and market processes. Since the ICESCR is directed towards states, individuals must be able to make claims for rules and norms that offer a pathway to the conditions that economic, social and cultural rights seek to secure.

For example, in India, with respect to the right to education, or the right to participate in cultural life, and in Kenya, with respect to the right to health, such claims have been presented to and affirmed by courts.⁹⁸ In general, economic, social, and cultural rights are increasingly justiciable in some developing countries, and they represent a rising sophistication in the ability of those countries to innovate around and within the rules imposed by TRIPS and other multilateral IP arrangements.⁹⁹ This legal innovation is an important exercise of the right to self-determination, and represents a significant step in addressing development goals burdened by IP rights but nevertheless compelled by the ICESCR.

Group economic, social, and cultural rights must assume a far greater role in human rights frameworks directed at international IP law and policymaking. Today more than ever, the exercise of IP rights is essential for individuals to flourish. In the digital environment, personal and national advancement requires access to technologies and access to knowledge.¹⁰⁰ Intellectual property policies are the tools that gov-

97. *Id.* at 486–87.

98. See *Univ. of Oxford v. Rameshwari Photocopy Servs.*, (2016) RFA(OS) 81 (India), <http://lobis.nic.in/ddir/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf> (allowing a broad educational use exception); *Asero Ochieng v. Attorney-General* (2010) K.L.R. (H.C.K.) (Kenya), <https://www.escr-net.org/sites/default/files/Judgment-Petition-No-409-of-2009%20Anti%20counterfeit%20case.pdf> (holding that the Anti-Counterfeit Act violated the Kenyan Constitution because it precluded access to essential medicines and therefore infringed the fundamental right of life, human dignity, and health).

99. See Okediji, *Legal Innovation*, *supra* note 20, at 211–25, 230–41 (discussing challenges facing IP structures in developing countries and innovations to address these issues, including three case studies).

100. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 8 (2012); Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 429; Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTER-

ernments use for redistributing knowledge across society; the design of IP policy is central to the realization of human rights at the individual level.

On the other hand, economic, social, and cultural human rights impose affirmative duties on states concerning the way IP law is formulated and implemented in a systemic, institutional, and collective context. These rights, at a minimum, require justification for choices made by states in the exercise of sovereign power to shape legislation that reaches beyond the protection of individual rights, but that also consider the well-being of the collective. Economic, social and cultural rights require vigilance by human rights activists and IP scholars in evaluating the structure of IP laws and the scope of rights that states guarantee in domestic policy instruments. This should include whether states use existing normative tools to address issues such as access to knowledge and access to medicines. A greater appreciation for the importance of the collective could also materially strengthen arguments for new IP norms in other areas such as the environment and access to green technologies.¹⁰¹ The privatization of tools that are essential for addressing pollution, mitigating climate change through intellectual property rights, or generating energy has profound consequences for the growth, development, and security of the poorest regions and peoples in the world.¹⁰²

2. *Limitations and Exceptions*

Despite recognition of the many challenges imposed by IP rules, with dogged persistence, scholars and policymakers, continue deferring to the notion of balance within the IP system—and between IP and human rights—as the best response

NATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142, 148 (Keith E. Maskus & Jerome H. Reichman eds., 2005) [hereinafter Okediji, *Sustainable Access*]; Shaver & Sganga, *supra* note 80, at 640–42.

101. See Abbe E. L. Brown, *Lessons from Technology and Intellectual Property in the Oil and Gas Industry in Scotland: A Scholarly Journey and an Empirical Review*, 11 SCRIPTED 9, 18–19 (2014), <https://script-ed.org/article/lessons-technology-intellectual-property-oil-gas-industry-scotland-scholarly-journey-empirical-review/> (suggesting new norms within the energy industry (and elsewhere) built around collectivity and sharing in the development of new technologies).

102. See *id.*

to the human welfare costs of global IP rules. The leading human rights institutions do the same. As an example, the ICESCR Committee in General Comment 17 states that

The right to the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be balanced with the other rights recognized in the Covenant. However, limitations on the rights protected under article 15, paragraph 1 (c), 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 society¹⁰³

The Committee further states that:

Limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in article 15, paragraph 1 (c), which lies in the protection of the personal link between the author and his/her creation and of the means which are necessary to enable authors to enjoy [sic] an adequate standard of living.¹⁰⁴

Intellectual property scholars will note the close parallels between these provisions in General Comment 17 and the leading multi-factor tests such as the U.S. fair use doctrine¹⁰⁵ or the various iterations of the three-step test.¹⁰⁶ The language of balance, proportionality, and compensation are standard

103. *General Comment No. 17*, *supra* note 55, ¶ 22.

104. *Id.* ¶ 23. Extrapolating from the Special Rapporteur's arguments, the right to an adequate standard of living does not mean that authors and inventors can control all uses of their creative works. *See* 2015 Shaheed Report, *supra* note 56, ¶¶ 105–06 (arguing that, on an international level, countries should refrain from pressuring one another to join TRIPS-plus, and on a domestic level, judges and other actors should “enable . . . the public to request the implementation and expansion of exclusions, exceptions and flexibilities” under the IP agreements).

105. 17 U.S.C. § 107 (2012).

106. WIPO Copyright Treaty art. 10, Dec. 20, 1996, S. TREATY DOC. NO. 105–17; World Intellectual Property Organization: Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 36 I.L.M. 76; TRIPS Agreement, *supra* note 2, art. 13; Berne Convention, *supra* note 1, art. 9(2).

features of the judicial application of limitations and exceptions in IP law.¹⁰⁷ Limitations and exceptions to IP rights certainly can address specific challenges, but rarely are they sufficient to meet the development-related challenges—such as bulk access to educational works—facing many least-developed and developing countries.¹⁰⁸

When dealing with individual cases involving an author and user, the most well-known doctrines regarding limitations and exceptions wield important influence in ensuring that specific applications of law consider multiple competing interests—such as those between the author and the state, the user and the state, and between authors and users at large—consistent with broader national policies. The application of the first sale doctrine, freedom of speech, and other limitations reflect the balance required by IP law, but typically only with respect to the specific individual and the specific knowledge asset at issue. Existing limitations and exceptions available in international copyright law, and in many domestic copyright laws, do not extend to institutional, community or group needs.¹⁰⁹ To the contrary, national exceptions to copyright are *required* to be limited to special cases.¹¹⁰ Simply put, the broader the exception the less likely countries and users can be confident the exception complies with international IP and human rights obligations.¹¹¹

107. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7.

108. See Okediji, *Sustainable Access*, *supra* note 100, at 181 (“Under these abject circumstances, bulk and creative access is an indispensable part of building capacity in developing countries for their social, economic and political process in the digital age.”).

109. Okediji, *International Copyright Law as Development Policy*, *supra* note 7, at 444 (discussing application of the three-step test for copyright limitations and exceptions).

110. Even under the exceptional Marrakesh Treaty for Visually Impaired Persons, the question whether the treaty—whose benefits are limited to persons who are visually impaired—satisfies the three-step test was left unanswered. LAURENCE R. HELFER, MOLLY K. LAND, RUTH L. OKEDIJI & JEROME H. REICHMAN, *THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS 67–74* (2017) [hereinafter *MARRAKESH TREATY GUIDE*].

111. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 *COLUM. J. TRANSNAT'L L.* 75, 114–23 (2000) (detailing the history of the U.S. fair use doctrine's compliance with the Berne Convention).

Even where they exist, broad, open-ended doctrines, such as the U.S. fair use doctrine,¹¹² do not guarantee users the dignity, security, and freedom to participate in culture as envisioned by the UDHR and ICESCR.¹¹³ Fair use and the three-step test are famously ambiguous, with little certainty about whether a particular user can engage in activities and under what terms or conditions she may do so.¹¹⁴ Moreover, books are needed in bulk to educate entire populations when the focus is not on individuals.¹¹⁵ Similarly, medicines need to be available for all and not only for those who can afford them.¹¹⁶ The right to education and the right to health, in particular, are elemental to the discourse of emancipation that is core to the human rights project.¹¹⁷ They are fundamental to development. The State has an obligation to adopt policies that can achieve the realization of these rights as a necessitous people cannot be free.¹¹⁸

Intellectual property doctrines that are primarily intended to balance the interests of individual authors and users are ill-suited to address the collective interest in, and need for, consistent and effective access to knowledge goods. At a minimum, different kinds of limitations and exceptions to IP rights

112. 17 U.S.C. § 107 (2012).

113. See *supra* note 56 and accompanying text.

114. See Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 186 (2017) (describing the exceedingly permissive nature of U.S. fair use doctrine).

115. See Okediji, *Sustainable Access*, *supra* note 100, at 148–52 (addressing the need for bulk access to copyrighted works).

116. High-Level Panel Report, *supra* note 16, at 15 (noting that “[c]ost is one of the key determinants of access, both in situations when patients pay out-of-pocket and when governments are making choices about what to fund under national health and treatment programmes 400 million people worldwide lack healthcare, including access to medicines, vaccines and diagnostics and medical devices. Those who lack access are disproportionately poor, and three-quarters of them live in so-called middle-income countries.”) (citations omitted).

117. See Okediji, *International Copyright Law as Development Policy*, *supra* note 4, at 466–69.

118. Here, I am paraphrasing Franklin D. Roosevelt’s 1944 State of the Union Address in which he declared that “[n]ecessitous men are not free men.” Franklin D. Roosevelt, President of the U.S., State of the Union Message to Congress (Jan. 11, 1944).

are needed.¹¹⁹ An appropriately conceived IP/human rights interface requires international legal recognition not just of an obligation to have the right kind of national IP policy, but the freedom and obligation to implement such a policy for the collective good. In sum, the call for balance reflected in General Comment 17 and in the IP/human rights literature unhelpfully substitutes the internally required balance of IP rights considering the collective with what human rights law requires of states in pursuit of the highest ideals of human flourishing.

General Comment 21 emphasizes both a descriptive view of the right to participate in culture as well as a set of prescriptions that make the realization of that right feasible.¹²⁰ Read in conjunction with the other economic, social, and cultural rights, the Comment arguably recognizes that IP policy should, in some sense, be an expression of the cultural distinctiveness of each society—enabling learning, facilitating access to cultural goods, and ensuring the exercise of freedoms of expression and association.¹²¹ The Comment could also extend to an obligation to facilitate access to technologies that are indispensable to civic and economic engagement, such as the internet.¹²² As viewed from Article 27 of the UDHR and Article 15 of the ICESCR, the IP/human rights interface extends beyond IP. The General Comment paints a picture of a human rights regime that reflects values and accomplishes goals in a broad cultural context, and that promotes human accomplishment and success in ways that are deeply meaningful to each society and the individuals that constitute them.¹²³

119. With regard to copyright, I have suggested that certain limitations and exceptions should be mandatory. Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 489–94. I have also suggested the need for limitations and exceptions for libraries, archives and educational institutions—actors that are vital to assuring access to works on a large scale. *Id.* at 479–80.

120. See *General Comment No. 21*, *supra* note 88, ¶¶ 9–16, 21–24.

121. See, e.g., *General Comment No. 21*, *supra* note 88, ¶ 35 (requiring balance).

122. See Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L.J. 393, 394 (2013) (discussing the current “international law problem[s]” associated with regulating the Internet).

123. As the *General Comment* states, “[t]he right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15: the right to enjoy the benefits of scientific progress and its applications

Successfully achieving this vision is far beyond what limitations and exceptions to IP alone can accomplish.

III. DEFINING THE NEW ENGAGEMENT OF IP AND HUMAN RIGHTS INTERFACE

A properly constructed human rights framework for IP should bring more to bear on the conditions that destabilize expectations for material well-being for a substantial majority of the world's population. The project of designing the most balanced IP policy and delineating appropriate limitations and exceptions is valuable. However, without more, the best IP policies cannot meaningfully advance, much less achieve, change in the rules that currently reinforce deep disparities between those that have access to knowledge goods that are essential to human flourishing and those that do not.

There are at least three ways that a broadened vision of the IP/human rights interface might produce a richer discourse for IP reform: 1) economic, social, and cultural rights offer room to argue for doctrines that allow for use of knowledge goods at a greater *scale* than IP law currently allows, thus impacting a greater number of users; 2) economic, social and cultural rights could facilitate rules that require recognition of users rights and require states to *ensure justiciability* of these rights in domestic law; 3) economic, social and cultural rights could be used to require individual state accountability for its choices with respect to the *implementation* of international IP obligations. Indeed, the ideals expressed in economic, social, and cultural rights may require states to consider more seriously new models of innovation, including new business models, that can ensure returns to creators and access to users.

In sum, the vision of human dignity reflected in the economic, social, and cultural rights guaranteed in the UDHR, and made more concrete in the ICESCR, require a change in the core rules and assumptions that pervade the IP system.

(art. 15, para. 1 (b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1 (c)); and the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3). The right of everyone to take part in cultural life is also intrinsically linked to the right to education (arts. 13 and 14) . . .” *General Comment No. 21, supra* note 88, ¶ 2.

What economic, cultural, and social rights offer is a framework basis to challenge existing rules, to question settled assumptions about the content of specific IP norms, and to create additional space to assert State responsibility for promoting structures that more easily align with human welfare. As one scholar asserts, “economic and social rights offer a rich set of tools to analyze the distributive impact of the background laws—the rights, immunities, and privileges—that undergird market arrangements.”¹²⁴ These collective human rights strip away any pretense of neutrality and permit scrutiny of, or legal challenges to, private laws with distributive implications that undercut the ideals of human progress and development. Economic, social, and cultural rights are therefore particularly important for the future of human rights as a justification for IP reform, both nationally and globally.

To be clear, the point is not simply that IP rules are skewed against the public interest unless they are tempered by appropriate limits. The point is that IP laws cannot—regardless of how carefully they are designed—effectively meet the most critical needs of human development. Economic, social, and cultural rights require the State to be responsive to the material environment in which its citizens live. Framing IP rights as private, individual rights does not free the State from this responsibility. Below, this article addresses two well-known examples to highlight the difficulty of overcoming structural rules that systemically make it unlikely that balanced IP policies, without more, can effectuate the material goals and aspirations embedded in the ICESCR. The examples are the fail-

124. Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 MD. J. INT’L L. 182, 203 (2009). One aspect of such market arrangements that must be re-examined if economic, social, and cultural rights are to become a more prominent moral guide in the systemic design of IP policies are the types of business models that leverage and rely on IP protection. In opening the IP discourse to these values, lawmakers must dislodge themselves from the rigidity of a property-rule-only construct and consider an array of regulatory, policy, and fiscal tools with which to accommodate human rights and development-oriented considerations. Cf. Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User Rights Approach*, in COPYRIGHT IN AN AGE OF LIMITATIONS AND EXCEPTIONS 132, 147–48 (Ruth L. Okediji ed., 2017); Michael Geist, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users’ Rights in Copyright Law*, in COPYRIGHT IN AN AGE OF LIMITATIONS AND EXCEPTIONS 169, 183–88 (Ruth L. Okediji ed., 2017).

ure of the Doha Declaration's paragraph 6 solution with respect to access to medicines, and the demand for an international treaty mandating a copyright exception to address the needs of visually impaired persons despite there being no prohibition in international copyright law to adopting such an exception domestically.

A. *Intellectual Property, Access to Medicines, and Access to Literary Works*

Since the TRIPS Agreement, considerable attention has been paid to how human rights can reshape and reframe IP to address human welfare needs¹²⁵ and, by extension, to pursue development goals.¹²⁶ No issue has attracted as much attention—and dominated the IP/human rights interface—like the right to health. Indeed, the challenge of access to medicines has become *the* central policy concern of the human right to health.¹²⁷ Galvanized by the HIV/AIDS crisis of the late 1990's,¹²⁸ the use of patent protection to secure export markets for drugs, with resulting monopoly prices, led to a global outcry in and on behalf of consumers in developing and least-

125. Econ. & Soc. Council, 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*, ¶ 60, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) (“Members should therefore implement the minimum standards of the TRIPS Agreement bearing in mind both their human rights obligations as well as the flexibility inherent in the TRIPS Agreement, and recognizing that ‘human rights are the first responsibility of Governments.’”).

126. See Okediji, *International Copyright Law as Development Policy*, *supra* note 4, at 460–63 (describing the importance of educational rights to development policy).

127. See HELFER & AUSTIN, *supra* note 21, at 90–171 (providing an in-depth historical and analytical account of the importance of the right to health and access to medicine).

128. See, e.g., Helfer, *Pharmaceutical Patents*, *supra* note 21, at 311 (“Disputes over the regulation of [access to medicine] are occurring in multiple transnational, national, and local venues, including the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the UN Human Rights Council (UNHRC), the World Health Organization (WHO), bilateral treaty negotiations, national parliaments, constitutional courts, and domestic administrative agencies. Competing groups of states and non-state actors shift horizontally and vertically among these forums in an effort to develop competing legal rules over the propriety of granting intellectual property (IP) protection to newly developed life-saving drugs.”).

developed countries.¹²⁹ Since then, public health concerns and the impact of patents on access to drugs and adequate healthcare has remained among the single most vexing problems of the global IP system¹³⁰ and of the IP/human rights interface.

The right to health is guaranteed by various international instruments. It was first defined in the constitution of the World Health Organization (WHO), which describes the right to health as “one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.”¹³¹ In addition, Article 25 of the UDHR states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”¹³² The ICESCR similarly provides that states “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹³³

As explained by the UN Secretary-General’s High-Level Panel on Intellectual Property and Access to Medicines (High-Level Panel), these considerations are in tension with IP in part because

Policies and agreements related to human rights, trade, [IP] rights and public health were developed with different objectives at different times. State obligations include duties not only to respect, but to protect and fulfil the right to health. This requires taking proactive measures to promote public health [E]nsuring access to medicines, and particularly to essential medicines, is a fundamental element of these obligations. Trade rules and [IP] laws were developed to promote economic growth and incentive innovation. On the one hand, governments seek the

129. *See id.* at 327–32 (discussing the steps taken by some developing countries (notably Brazil and South Africa) to campaign for access to medicine).

130. *Id.* at 332–33.

131. World Health Org. [WHO], *Constitution of the World Health Organization* (entered into force Apr. 7, 1948), <http://apps.who.int/gb/gov/assets/constitution-en.pdf> (last visited Oct. 2, 2018).

132. UDHR, *supra* note 19, art. 25.

133. ICESCR, *supra* note 19, art. 12.

economic benefits of increased trade. On the other, the imperative to respect patents on health technologies could, in certain instances, create obstacles to the public health objectives of [WTO] members.¹³⁴

Prior to the TRIPS Agreement, many states, including some developed nations, resisted the expansion of patent law to pharmaceutical medications as a matter of policy.¹³⁵ These states argued that excluding pharmaceuticals from the limited term monopoly system of IP would contribute to society by ensuring the free-flow of generic medicines.¹³⁶ The TRIPS Agreement's requirement that patents be available to "all fields of technology," including pharmaceutical products and processes, represented a major victory for the pharmaceutical industry.¹³⁷ The backlash that resulted from this attempt to standardize and expand IP protection was swift and strategic. It ultimately resulted in high profile litigation that sought to enforce patent rights over antiretroviral medications for HIV/AIDS in Brazil and South Africa.¹³⁸

Following a period of intense advocacy resulting in the publication of a General Comment on the right to health and a resolution on IP and human rights by the U.N. Sub-Commission on the Promotion and Protection of Human Rights,¹³⁹ the international community emerged with the consensus that the human right to health includes the right to access life-saving medicines.¹⁴⁰ Policymakers argued in both domestic and

134. High-Level Panel Report, *supra* note 16, at 7.

135. Helfer, *Pharmaceutical Patents*, *supra* note 21, at 314; *see also* Okediji, *Legal Innovation*, *supra* note 20, at 227–29 (discussing India and Brazil).

136. Helfer, *Pharmaceutical Patents*, *supra* note 21, at 314.

137. *Id.* at 322.

138. Ellen 't Hoen, Jonathan Berger, Alexandra Calmy & Suerie Moon, *Driving A Decade of Change: HIV/AIDS, Patents and Access to Medicines for All*, 14 J. INT'L AIDS SOC'Y 1, 3–4 (2011), <https://onlinelibrary.wiley.com/doi/epdf/10.1186/1758-2652-14-15>.

139. Helfer, *Pharmaceutical Patents*, *supra* note 21, at 325–28.

140. *Id.* at 327–28 (outlining various statements endorsing one or both of these principles including "declarations by the UN General Assembly in 2001 and 2006; resolutions of the Commission on Human Rights in 2001, 2002, 2003, and 2005; a 2001 study by the UN High Commissioner for Human Rights; several reports of Special Rapporteurs on the right to health; Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines adopted in 2008; a 2001 Statement on Human Rights and Intellectual Property by the ICESCR Committee; a 2003 general comment by

international fora that the human right to health takes moral and legal precedence over IP rights.¹⁴¹ This position and subsequent advocacy campaign—the Access to Medicines Movement—resulted in a number of victories for developing nations, NGOs, and human rights activists.¹⁴² The most visible of these triumphs occurred in 2001 with the signing of the Declaration on TRIPS and Public Health at the November 2001 Ministerial Conference that launched the Doha Round of WTO trade negotiations.¹⁴³ The Doha Declaration balanced the TRIPS Agreement by explicitly recognizing the freedom of countries to tailor their domestic IP regimes to address public health concerns.¹⁴⁴ Further, in paragraph 5(b), the Declaration explicitly adopted a practical solution to the problem of access to medicines by recognizing the right of qualifying countries to import and export drugs manufactured under a compulsory

the UN Committee on the Rights of the Child; and a 2008 resolution of the African Commission on Human and Peoples' Rights. . . .”).

141. *Id.* at 327 (“The UN Sub-Commission’s attention to access to medicines originated in a statement by a consortium of NGOs that forcefully asserted ‘the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as TRIPS are based.’”) (citations omitted).

142. A corollary movement, reacting to international copyright obligations, the access to knowledge movement, also emerged. *See, e.g.*, Kapczynski, *supra* note 36, at 820–51.

143. The declaration accomplished many goals, including: (1) the affirmation of WTO members to protect the right to health and to use TRIPS flexibilities to support that right; and (2) the grant of an additional ten years for least-developed countries to defer IP protection of pharmaceutical products. Helfer, *Pharmaceutical Patents*, *supra* note 21, at 329–30. In addition, the declaration resolved to find a mechanism for more efficient generic drug importation for those countries who needed it, a goal that was later realized in 2003 when the TRIPS Council waived the domestic use requirement for compulsory licenses. *Id.* at 330. In 2005, that waiver was made permanent by way of an amendment to TRIPS, which, to date, marks the only formal revision of that treaty. *Id.*

144. Doha Declaration, *supra* note 15, ¶ 4. (“We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.”).

license.¹⁴⁵ Laudable and important as these developments are, access to medicines remains a key and growing challenge in virtually all countries.¹⁴⁶

Addressing the cost of essential medicines in developed and developing countries is a central aspect of, on the one hand, managing global IP relations and, on the other hand, managing international public health and human rights obligations. While the Access to Medicines Movement campaign was successful—at least in terms of maintaining political pressure on the issue—meaningful and sustainable access to essential medicines still eludes a substantial percentage of the world’s population.¹⁴⁷ For a number of reasons, the paragraph 5 solution has not succeeded in ensuring that those who need medicines actually receive them.¹⁴⁸ In the meantime, costs for drugs continue to rise and the world faces new global health challenges for which incentives in the form of IP rights are simply ineffective.¹⁴⁹ As explained by the High-Level Panel,

Market-driven R&D has been credited by some for producing a number of important health technologies that have improved health outcomes significantly worldwide. However, significant gaps in health technology innovation and access persist Rare diseases that affect comparatively small proportions of the population have not traditionally attracted investments although this is changing. Various efforts are being undertaken by governments, philanthropic organizations, international entities, civil society groups

145. *Id.* ¶ 5(b). (“[W]e recognize that these flexibilities include . . . [that e]ach Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.”)

146. See High-Level Panel Report, *supra* note 16, at 3 (juxtaposing the successes in science and technology with the continuing lack of access to such developments for many people).

147. *Id.*

148. See, e.g., Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries and the Doha “Solution”* 10–22 (Univ. of Chi. Law Sch., John M. Olin Law & Economics Working Paper No. 140, 2002) (offering an economic perspective on how the declaration undermines patent rights in developing nations). See generally Brook K. Baker, *Arthritic Flexibilities for Accessing Medicines: Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, 14 *IND. INT’L & COMP. L. REV.* 613 (2004) (offering a historical account and critique of the paragraph 6 solution).

149. High-Level Panel Report, *supra* note 16, at 8.

and the private sector to resolve the incoherence between market-driven approaches and public health needs. However, such efforts tend to be fragmented, disparate and insufficient to deal with priority health needs on a sustainable, long-term basis. A much greater effort must be directed to supplementing the existing market-driven system by investing in new mechanisms that delink the costs of R&D from the end prices of health technologies.¹⁵⁰

In short, despite significant political pressure regarding the right to health, the formal balance achieved with respect to the IP regime and access to medicines has been relatively unsuccessful in meaningfully advancing realization of the right to health.

Another significant development in the IP/human rights interface emerged with respect to the rights of visually impaired persons to access copyrighted works. Shortly after the Doha Declaration, INGOs, and particularly Knowledge Ecology International,¹⁵¹ began giving increasing attention to the so-called book famine that existed with respect to print materials available in accessible formats for visually impaired persons (VIPs).¹⁵² When these efforts began, over 300 million people in the Global South lacked access to books and other print materials.¹⁵³ The consequences of insufficient access to books for visually impaired persons are profound, even in the most developed countries.¹⁵⁴

150. *Id.*

151. KNOWLEDGE ECOLOGY INT'L, <https://keionline.org/> (last visited Oct. 2, 2018).

152. MARRAKESH TREATY GUIDE, *supra* note 110, at xxi (“This global famine is alarming in its scope and impact. Many of the estimated 300 million print-disabled persons around the world, especially those living in developing countries, lack adequate access to printed materials in accessible formats even though the technology to create such works has long existed and continues to evolve rapidly.”).

153. *Id.* at 16.

154. According to a 2016 WIPO report, 285 million people worldwide are blind or visually impaired, 90% of which live on low incomes in development and least developed nations. World Intellectual Prop. Org. [WIPO], *The Marrakesh Treaty-Helping to End the Global Book Famine*, at 2 (2016), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf. Only 1-7% of books are published in accessible formats for VIPs. *Id.* As many scholars highlight, part of the challenging nature of addressing the global

In 2006, the U.N. Convention on the Rights of Persons with Disabilities affirmed state obligations to “take appropriate steps . . . to ensure that laws protecting [IP] rights do not constitute an unreasonable or discriminatory barrier to access by [VIPs] to cultural materials.”¹⁵⁵ Only a third of Berne Convention members had copyright exceptions for the visually impaired, and there existed a critical problem of cross-border sharing of accessible copyright works.¹⁵⁶ The Berne Convention, although lacking in many respects in the arena of limitations and exceptions, did not foreclose exceptions in national copyright laws for visually impaired persons.¹⁵⁷ However, many states simply did not enact such exceptions. Where such an exception existed, cross-border exchanges of works typically were deemed illegal.¹⁵⁸

In 2013, fifty one states gathered in Marrakech, Morocco to sign the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (VIP Treaty).¹⁵⁹ The treaty was a significant breakthrough with respect to “[e]nsuring that visually impaired persons have sustainable access to published works on the same terms as sighted persons” and “realizing the vision of

book famine stems from the multifaceted nature of improving text accessibility, a broad and encompassing concept that includes access to the physical environment, transportation, information and communication technology, education, and other facilities necessary to enjoy printed materials in the same or similar manner as sighted individuals. See Kartik Sawhney, *End the ‘Book Famine’ with Better Technology, Attitudes and Copyright Law*, in THE STATE OF THE WORLD’S CHILDREN 2013 82, 82 (2013), https://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf (concluding based on an informal survey of nearly 60 VIP Indian children that less than 20 percent had access to material in their preferred format, and less than 35 percent to material in any format).

155. MARRAKESH TREATY GUIDE, *supra* note 110, at 9 n. 7 (citations omitted).

156. *Id.* at 13.

157. *Id.* at 22.

158. *Id.* at xxii (“[T]he scarcity of copyrighted works in accessible formats is a global problem that requires a global solution. All national laws limit copyright protection to achieve important public policy goals, and exceptions for the blind are among the most long-standing of these limitations. Nonetheless, more than two thirds of countries have not adopted such exceptions. In addition, many of the exceptions that exist do not fully satisfy the needs of print-disabled persons, especially in developing nations and with respect to new technologies such as e-books and audiobooks.”).

159. *Id.* at xvii.

a world in which all persons can participate fully and equally in the political, economic, and cultural life of society.”¹⁶⁰ The treaty’s milestone achievements are many, but chief among them are its requirements that signatories: (1) establish mandatory exceptions to the exclusive rights of copyright owners; and (2) permit the import and export of accessible formats of works without the permission of the copyright holder.¹⁶¹

As with the right to health and its reinforcement in the WTO system via the Doha Declaration, the VIP Treaty’s power to meet human rights obligations lies not in what the treaty says but in what the treaty does. A human rights approach to implementation of the treaty requires methods of compliance by state actors that are intentional about achieving the treaty’s human rights ends.¹⁶² An IP-centric approach could require something entirely different.¹⁶³ Which approach a state adopts, and the options for redress available for the treaty’s beneficiaries, will depend significantly on the way the state views the IP/human rights interface. If the primary factors are grounded in the human right of protecting the interest of individual authors,¹⁶⁴ realization of the aspirations of the

160. *Id.* at xv.

161. *Id.* at 1–14.

162. *Id.* at xviii–xix (explaining that the WBU Guide “views the MT as an international agreement that employs the legal doctrines and policy tools of copyright law to advance human rights ends. This approach is inspired by several features of the Treaty, including its express references to widely-adopted international human rights instruments in the first paragraph of the Preamble, its status as the first multilateral agreement to establish mandatory exceptions to the exclusive rights of copyright owners, and its designation of print-disabled individuals as the Treaty’s beneficiaries.”).

163. See Mihály J. Ficsor, *Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired*, COPYRIGHT SEE-SAW 6 (Oct. 11, 2013), <http://www.google.com> (search in search bar for “Commentary to the Marrakesh Treaty on Accessible Format Copies”; then download archival version of full article) (noting that the basic structure of copyright treaties remains even in Marrakesh).

164. See MARRAKESH TREATY GUIDE, *supra* note 110, at xxiii (“As the first international agreement to require exceptions to copyright in order to enhance the human rights of a specific population, the Marrakesh Treaty lies at the intersection of international human rights law and international intellectual property law. In interpreting and implementing the MT, therefore, public officials and private actors must strive to comply with both sets of legal obligations.”).

UDHR, the ICESCR, and the Convention of the Rights of Persons with Disabilities will undoubtedly be at risk.

Take, for example, the so-called commercial availability provision in Article 4(4) which states that a “[c]ontracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.” Article 4(5) further provides, “[i]t shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.” This provision is one of the most contentious aspects of the Treaty. It allows a state to choose to implement the treaty by conditioning access to the accessible format copies on whether or not the copyrighted work is commercially available. States and scholars debate the meaning of commercial availability and the Treaty offers no specific guidance to enacting governments. Commercial availability could mean that rights holders can charge more than most beneficiaries under the Treaty can afford—a problem that also exists under the compulsory license provisions in relation to the paragraph 6 solution regarding public health. Meaningful access to knowledge goods requires terms, especially price, that ensure that those who need such goods can afford them. The World Blind Union Guide identifies a number of unresolved questions about the meaning of commercial availability,¹⁶⁵ and counsels States to eschew this option. According to the Guide,

165. The Guide asks:

“What does commercial *availability* entail? Does it require availability in bookstores? Online? Do bookstores carrying the accessible format copy need to be accessible to beneficiaries in terms of geographic location and physical accessibility? Should the notion of availability include affordability?”

What does *commercial* mean? Does the work need to be offered by a for-profit entity? Or does “commercial” refer to how widely the accessible copy is offered?

When should availability be assessed? At the time of publication of the work, at the time a print-disabled person seeks to purchase the work, or at some other time?

Where should commercial availability be assessed? Globally? Regionally? In the relevant national market of a print-disabled person?”

Such a restriction would be fundamentally inconsistent with the MT's overarching goal of ensuring that individuals with print disabilities have an equal opportunity to enjoy covered works on the same terms as sighted persons. The restriction also risks restricting the rights that print-disabled individuals have under other copyright E&Ls, such as exceptions for private copying. The lack of clarity about what constitutes commercial availability would also create significant legal risks for authorized entities and beneficiaries that could deter the effective exercise of their rights under the Treaty.¹⁶⁶

However, given the limitations in General Comment 17 imposed on states attempting to limit authorial rights, and the requirements for proportionality, compensation, etc., in the same Comment, a country could impose the commercial availability requirement as part of its domestic implementation of the Treaty and still claim compliance with the UDHR and ICESCR.¹⁶⁷ Indeed, a number of countries, including least-developed countries, have done just that.¹⁶⁸ The commercial availability option allows states to tilt towards strong IP rights in a way that remains arguably acceptable under the traditional IP/human rights framework. As noted earlier, the contemporary IP/human rights framework tends to devolve very quickly to a defense of IP interests—rather than a promotion of human rights ends as envisioned in the economic, cultural, and social rights.

Id. at 48–49.

166. *Id.* at 49.

167. See *General Comment No. 17*, *supra* note 55, ¶ 24 (“The imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.”).

168. See, e.g., Press Release, Elec. Info. for Libraries, African Library & Info. Ass'ns and Insts. & Int'l Fed'n of Library Ass'ns & Insts., Malawi: Embrace the Spirit of The Marrakesh Treaty—No Commercial Availability Test (Aug. 4, 2017), http://eifl.net/system/files/resources/201708/malawi_marrakesh_statement.pdf (explaining the organizations' “call for the removal of a commercial availability test on the making of accessible format copies in Malawi. Inclusion of this test in the Malawi law undermines the objective of the Marrakesh Treaty which is to end the global ‘book famine’ for persons with print disabilities.”).

However, invoking these rights in evaluating compliance methods by states opens up a realm in which states must defend the chosen implementation method in view of its effect on the goals animating the VIP Treaty. Given how many VIPs live below the poverty line, how few are able to attend institutions of higher learning, and the overwhelming gap in the number of books available to sighted persons, there can be no question that adopting provisions that burden access to works by VIPs gives rise to a claim of a violation of rights guaranteed by the ICESCR.¹⁶⁹ Moreover, a state that chooses to implement the VIP Treaty using the safe-harbor provisions, such as in Articles 4, 5 and 6, should be utterly immune from claims of violations of IP rights,¹⁷⁰ regardless of whether the claims of violation arise under TRIPS or under the UDHR and ICESCR.

B. *Civil and Political Rights as the Prototype of IP/Human Rights Interface*

Beyond the multilateral treaty platform, national and regional courts in developed countries rely heavily on human rights ideals when addressing IP disputes,¹⁷¹ and particularly rights that implicate political freedoms and liberty considerations. In the United States, for example, the First Amendment plays a major role in copyright jurisprudence, with leading scholars suggesting that an uncensored marketplace of ideas is a fundamental justification for the copyright system.¹⁷² In case after case, the First Amendment is heralded as a robust limit

169. See MARRAKESH TREATY GUIDE, *supra* note 110, at 13, 16, 124.

170. See *id.* at 45–57 (discussing the safe-harbor options under articles 4, 5, and 6).

171. See Laurence R. Helfer, *Mapping the Interface Between Human Rights and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 6, 7–8 (Christophe Geiger ed., 2015) (describing recent case law in Europe and Latin America implicating the rights to expression and health in the context of copyright and patent disputes, respectively).

172. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347 (1996) (noting that the production function of copyright law “encourages creative expression on a wide array of political, social, and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society.”).

on IP rights.¹⁷³ As explained by the Supreme Court of the United States,

The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.¹⁷⁴

Since the TRIPS Agreement, human rights arguments have figured increasingly in the adjudication of IP rights in Europe.¹⁷⁵ Recently, the European Court of Human Rights (ECtHR) discussed the role of the right to freedom of expression when ruling on a pair of high profile digital copyright cases.¹⁷⁶ In *Ashby Donald and Others v. France*, the ECtHR was presented with three petitioners, photographers who had violated French copyright law by publishing pictures online taken

173. For a compelling argument about the absolute limit of the First Amendment on copyright protection, see DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 305–327 (2009).

174. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citations omitted); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“[C]opyright’s idea/expression dichotomy ‘strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”) (citations omitted).

175. See Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 *HARV. INT’L L.J.* 1, 11–35 (2008) (discussing relevant cases which reflect the use of such arguments).

176. *Neij v. Sweden*, App. No. 40397/12, Eur. Ct. H.R. (Feb. 19, 2013); *Donald v. France*, App. No. 36769/08, Eur. Ct. H.R. (Jan. 10, 2013).

during various Paris fashion shows without the permission of five fashion houses.¹⁷⁷ For the first time, the ECtHR clarified that Article 10 of the European Convention of Human Rights serves as an independent, external limit on copyright.¹⁷⁸ In other words, strict prohibition of copyright infringement may, under certain circumstances, interfere with the human right to expression. This argument may furthermore be a valid defense to infringement.¹⁷⁹

Similarly, in *Neij and Sunde Kolmisoppi v. Sweden*, the co-founders of the Pirate Bay, one of the largest file-sharing services on the internet, were convicted by a Swedish court of illegally allowing users to share and distribute copyrighted works through the service.¹⁸⁰ The ECtHR held that sharing, or allowing others to share, copyrighted works on the internet, even for commercial gain, was covered by the right to “receive and impart information” under Article 10.¹⁸¹ Nonetheless, in both the French and Swedish cases, the ECtHR gave a wide margin of appreciation to the ways the national courts balanced conflicts between the fundamental rights at issue and thus upheld their decisions.¹⁸²

177. See Helfer, *supra* note 171, at 7.

178. *Id.* (“The outcomes of these cases [are] less significant than the ECtHR’s reasoning, which for the first time affirmed that the enforcement of IP laws interfere with the right to receive and impart information and ideas and must therefore be prescribed by law and necessary in a democratic society for the achievement of certain societal aims, such as the rights and freedoms of others. The decisions suggest that Strasbourg judges may one day conclude that national IP laws transgress these principles and thus violate the right to freedom of expression protected by the European Convention on Human Rights (ECHR).”).

179. *Id.*

180. *Id.*

181. Dirk Voorhoof & Inger Høedt-Rasmussen, *ECHR: Copyright vs. Freedom of Expression II (The Pirate Bay)*, KLUWER COPYRIGHT BLOG (Mar. 20, 2013), <http://copyrightblog.kluweriplaw.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/?print=print> (“In the present case, the Court was called upon to weigh, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other, the interest in protecting the rights of the copyright-holders. Thus, the Swedish authorities had to balance two competing interests which were both protected by the Convention.”).

182. *Id.*; see also Dirk Voorhoof & Inger Høedt-Rasmussen, *ECHR: Copyright vs. Freedom of Expression*, KLUWER COPYRIGHT BLOG (Jan. 25, 2013), <http://copyrightblog.kluweriplaw.com/2013/01/25/echr-copyright-vs-freedom-of-expression/>.

These human rights cases in the United States and in Europe reflect strong democratic commitments to liberal values of human liberty. The freedoms of speech, competition, and privacy certainly are part of the UDHR and its vision of human emancipation.¹⁸³ However, at the national level in developed countries, a human rights framework does not appear to add much to what national IP law or national constitutions already guarantee. In these cases, the phrase human rights is simply another way of saying intellectual property.

C. *Economic, Social, and Cultural Rights at the IP/Human Rights Interface*

Some developing countries approach the IP/human rights interface somewhat differently. As observed earlier, economic and social rights are increasingly embedded in national constitutions, providing a significant legal weight not typically associated with these rights in international human rights law.¹⁸⁴ The constitutionalization of economic and social rights offers an independent premise to transform the ideals of the UDHR and ICESCR into concrete rights for citizens. In the case of *Asero Ochieng v. Attorney-General*, the Kenyan High Court overturned a TRIPS-driven anti-counterfeiting statute¹⁸⁵ in order to preserve access to generic medicines.¹⁸⁶ The Court reasoned that the statute did not effectively distinguish between counterfeit drugs and generic medicines, and so undermined the fundamental human right to health guaranteed by the Kenyan Constitution¹⁸⁷ and by the ICESCR. According to the Court,

[U]ntil the passage of the Industrial Property Act in 2001 (Act No. 3 of 2001), it was not possible for poor people infected with HIV/AIDS to access anti-retroviral medication as the only ones available were expensive branded medicine. Generic anti-retroviral

183. See UDHR, *supra* note 19, at arts. 12, 19.

184. Young, *supra* note 79, at 487.

185. The Anti-Counterfeit Act, No. 13 (2008) KENYA GAZETTE SUPPLEMENT No. 97.

186. *Asero Ochieng v. Attorney-General* (2010) K.L.R. (H.C.K.) (Kenya), <https://www.escr-net.org/sites/default/files/Judgment-Petition-No-409-of-2009%20Anti%20counterfeit%20case.pdf>.

187. *Id.* ¶¶ 75–78.

drugs were not available in Kenya as the existing legislation did not allow parallel importation of generic drugs and medicines [The new law] allowed the parallel importation of generic drugs. It is on the basis of this legislation that availability and access to anti-retroviral drugs has increased and greatly enhanced the life and health of persons such as the petitioners who have been living with HIV/AIDS. It is against this context that any legislative measure that would affect accessibility and availability of anti-retroviral medicines must be viewed. If such measure would have the effect of limiting access, then such measure would ipso facto threaten the lives and health of the petitioners and others infected with HIV and Aids, and would be in violation of their rights under the Constitution.¹⁸⁸

Notably, the Court referred to the ICESCR and General Comment 14 on the right to health, as well as General Comment 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.¹⁸⁹ The Court concluded,

[T]he right to health, life and human dignity are inextricably bound¹⁹⁰ The ‘socio-economic factors that promote conditions in which people can lead a healthy life’ [set forth in the ICESCR Committee General Comment 14] imply . . . a situation in which people have access to the medication they require to remain healthy. If the state fails to put in place such conditions, then it has violated or is likely to violate the right to health of its citizens¹⁹¹ The state’s obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential

188. *Id.* ¶¶ 51–52.

189. *Id.* ¶ 61, 64

190. *Id.* ¶ 56.

191. *Id.* ¶ 63.

medicines. Any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the state's obligations¹⁹²

Kenya's codification of economic, social, and cultural rights in the national constitution afforded a level of justiciability for claims by individuals who rarely have the political capital to influence legislative change. Certainly, in the African context, these cases on the right to health offer new possibilities for the IP/human rights interface by illustrating legal avenues to hold states accountable for human rights obligations. Deploying claims for access to knowledge goods within a constitutionally guaranteed arrangement, while leveraging norms from international human rights instruments, helped guide the Court in delineating the substantive contours of the rights at issue without sacrificing cultural values. Cases on the right to health are few in number and represent activity in only two countries in sub-Saharan Africa—Kenya and South Africa.¹⁹³ It is unclear how widely these developments will spread or if they will be sustainable. Nonetheless, they illuminate the power of economic, social, and cultural rights to transform a general principle into clear legal entitlement for citizens limiting the state's power to simply effectuate laws without regard for its welfare effect.

A seminal copyright case in India confirms the importance of the national legal context in securing significant human rights gains that advance development goals. Though not framed explicitly in human rights language, an Indian Court interpreted the Indian Copyright Act in a manner that arguably implements the right to education and the right to participate in cultural life.¹⁹⁴ In 2012, three large international publishers—Oxford University Press, Cambridge University Press, and Francis & Taylor—sued Delhi University for the sale of photocopied books and pages of copyrighted texts to students. The University argued that “the use of photocopied copyrighted books by students was a ‘reasonable educational

192. *Id.* ¶ 66.

193. See, e.g., *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.).

194. See *Univ. of Oxford v. Rameshwari Photocopy Servs.*, (2016) RFA(OS) 81 (India), <http://lobis.nic.in/ddir/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf>.

needs” and that this form of reproduction of copyrighted books for educational purposes qualified under India’s fair dealing exception and under its separate educational use exception.¹⁹⁵

Agreeing with Delhi University, the Delhi High Court interpreted India’s educational use exception in the Copyright Act broadly. It held that that the exception included the process of imparting instruction by the teacher and,

The entire academic session for which the pupil is under the tutelage of the teacher . . . a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring . . . that the pupil stands instructed in what he/she has approached the teacher to learn.¹⁹⁶

This appears to be the first definition by a developing country of the inchoate education exception recognized by most countries, and it clearly goes against the grain of established jurisprudence and practice in the developed countries.¹⁹⁷ According to the Indian Court,

Copyright, specially in literary works, is . . . not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.

195. Rocky Soibam Singh, *Publishers Lose Copyright Case Against DU’s Photocopy Shop*, HINDUSTAN TIMES (Sept. 16, 2016), <http://www.hindustantimes.com/delhi-news/publishers-lose-copyright-case-against-du-s-photocopy-shop/story-Yly8FJ1mNjf71snIL8tpvO.html>.

196. Anubha Sinha, *Delhi High Court’s Ruling Against Publishers is a Triumph for Knowledge*, WIRE (Sept. 23, 2016), <https://thewire.in/68151/delhi-hc-ruling-photocopying-du//> (citing the High Court).

197. See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (rejecting a fair use defense for a copy shop that copied excerpts from the publishers’ books and sold the copies for profit in course packs to students for use in colleges); see also *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1232 (11th Cir. 2014) (providing detailed analysis of fair use doctrine factors); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (en banc) (similar facts and outcome as *Basic Books, Inc.*).

Copyright is intended to increase and not to impede the harvest of knowledge.¹⁹⁸

Certainly, Articles 9 and 10 of the Berne Convention and Article 13 of TRIPS could be read to bar an exception of such breadth; indeed, the plaintiffs made this argument.¹⁹⁹ However, the Court held that India's legislators were aware of the country's international copyright obligations and that the legislature was empowered to determine justified or reasonable exceptions to the legitimate interests of authors.²⁰⁰ On these grounds, the court denied the publishers an interim injunction in September 2016 and dismissed the lawsuit.²⁰¹ Three months later, in December 2016, a Division Bench of the Delhi High Court also denied an interim injunction to the publishers, agreeing that Article 13 of TRIPS and Article 9 of the Berne Convention provided sufficient leeway for nations to design their domestic copyright laws with the aim of promoting dissemination of creative works.²⁰² Following these defeats, the publishers dismissed the suit.²⁰³

Neither the fair use doctrine nor any traditional limitation and exception to copyright could produce a result in which large numbers of students receive, on a regular basis, affordable access to copyrighted works for educational purposes. Indeed, similar cases involving course packs and applying the fair use standard have not been equivocally favorable for educational use defendants in other jurisdictions.²⁰⁴ Moreover, if one takes seriously the requirements in General Comment 17 regarding domestic limits to authorial rights, India's Copyright Act and its interpretation eschews both the con-

198. See *Univ. of Oxford v. Rameshwari Photocopy Servs.*, (2016) RFA(OS) 81, ¶ 80 (India), <http://lobis.nic.in/ddir/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf>.

199. *Id.* ¶ 14.

200. *Id.* ¶ 97.

201. *Id.* ¶ 103.

202. See Krishna & Saurastri Assocs. LLP, *The Appeal Bench's Decision Delhi University Photocopying Case: Fair Use Re-visited*, LEXOLOGY, Jan. 9, 2017, <https://www.lexology.com/library/detail.aspx?g=bb41f1ab-d0b8-4706-8b7b-87342c645351>.

203. *Id.*

204. See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (en banc); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).

straints of international copyright law and international human rights law. Yet, the Court's decision arguably advances access to knowledge and other human rights.

IV. FINDING SOLUTIONS IN THE CURRENT HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

The manner in which the right to health, freedom of expression, access to knowledge, and the rights of disabled persons have been recently addressed in the IP regime indeed suggest that human rights ends can be accomplished within flexible IP frameworks. The IP/human rights interface offers a platform for creating new spaces or appealing to alternative institutions where IP rights can be challenged, modified, and otherwise balanced.²⁰⁵ Despite this, IP rights continue to grow and enhance protection for intellectual creations is still a high priority for developed countries. As the interaction between IP and human rights continues to unfold, certain key limitations of placing IP in a human rights framework where development is concerned have emerged.

A. *Re-considering the Limits of Intellectual Property for Innovation*

First, as highlighted by the ongoing challenge of access to medicines,²⁰⁶ the utilitarian justification that drives the IP system falls significantly short of ensuring the supply of medicines required to address the disease burden in the developing world.²⁰⁷ Despite the virtues of the incentive theory, dependence on private sources for research and development in health related technologies simply cannot cover the serious gap in technologies that exist to treat different categories of disease.²⁰⁸ This is particularly true with respect to rare orphan diseases, or drug-resistant viruses or bacteria—which require years of expensive research with little, if any, financial re-

205. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 27–52 (2004).

206. See High-Level Panel Report, *supra* note 16, at 7 (“Despite . . . noteworthy progress, millions of people continue to suffer and die from treatable conditions because of a lack of access to health technologies.”).

207. *Id.*

208. *Id.* at 8.

ward.²⁰⁹ Likewise, diseases affecting people in the developing world who have relatively little purchasing power are systematically ignored, despite the potentially vast number of citizens impacted.²¹⁰

These limits to IP as a tool for innovation suggest that the current human rights framework is most useful to the extent the underlying legal regime delivers expected technologies through market incentives. When market incentives fail, the moral utility of the current IP/human rights interface is far more difficult to defend. New models for innovation and new rules to incentivize research for treatment of diseases in poor populations are important pieces of the puzzle of human rights and IP. A broader conception of the IP/human rights framework could facilitate claims that require states to take concrete action with respect to addressing the need for new innovation models. Indeed, the ICESCR offers a framework

209. *Id.*; see also Orphan Drug Act of 1983, Pub. L. No. 97-414, § 1(b), 96 Stat. 2049 (1983) (“The Congress finds that: (1) there are many diseases and conditions, such as Huntington’s disease, myoclonus, ALS (Lou Gehrig’s disease), Tourette syndrome, and muscular dystrophy which affect such small numbers of individuals residing in the United States that the diseases and conditions are considered rare in the United States; (2) adequate drugs for many of such diseases and conditions have not been developed; (3) drugs for these diseases and conditions are commonly referred to as “orphan drugs”; (4) because so few individuals are affected by any one rare disease or condition, a pharmaceutical company which develops an orphan drug may reasonably expect the drug to generate relatively small sales in comparison to the cost of developing the drug and consequently to incur a financial loss; (5) there is reason to believe that some promising orphan drugs will not be developed unless changes are made in the applicable Federal laws to reduce the costs of developing such drugs and to provide financial incentives to develop such drugs; and (6) it is in the public interest to provide such changes and incentives for the development of orphan drugs.”).

210. High-Level Panel Report, *supra* note 16, at 16 (“Another key aspect of incoherence lies in the misalignment between market-based models that incentive innovation and the need to obtain treatment for patients. State obligations include duties not only to respect, but to protect and fulfill the right to health; which requires States to take proactive measures to promote public health. As reaffirmed by a recent resolution of the Human Rights Council, ensuring access to medicines, and particularly to essential medicines, is a fundamental element of these obligations. Yet, insufficient investment is being made in R&D for disease that predominantly affect the poor. Furthermore, prices charged by some rights holders place severe burdens on health systems and individual patients, in wealthy and resource-constrained countries alike.”).

that obligates and urges states to undertake necessary regulatory and policy initiatives to address a series of serious global health challenges that affect human welfare in all countries, and especially the least-developed countries.²¹¹

Second, and relatedly, concerns regarding the pricing of IP-related goods continue to hinder human rights agendas within the technology sector.²¹² As demonstrated recently by a number of high-profile cases in the United States, public health technologies remain subject to the economic forces of market demand.²¹³ Despite the life-saving nature of certain patented innovations or copyrighted knowledge goods, ultimately the development cost of IP products must be allocated somewhere. Accordingly, private or public financiers must have sufficient incentives to make their investment advantageous while at the same time ensuring that IP products go to market at affordable prices that ensure large scale availability.²¹⁴ The human rights framework today provides no clear answer to the question upon whom these financial burdens should fall.²¹⁵ The aspirations embedded in the UDHR and ICESCR require serious and unrelenting attention by states to

211. See *General Comment No. 17*, *supra* note 55, at 25–34, 41–46 (noting state legal obligations and violations).

212. *Id.*

213. See, e.g., Daniel Kozarich, *Mylan's EpiPen Pricing Crossed Ethical Boundaries*, FORTUNE (Sept. 27, 2016), <http://fortune.com/2016/09/27/mylan-epipen-heather-bresch/> (“EpiPen has gone from \$100 for a two-pack in 2009 to \$608 today. Usually, companies would be applauded for the ability to create revenue through such pricing power. But when it comes to life-saving drugs, consumers interpret these significant increases as the producer profiteering off a person’s life or death need.”).

214. See High-Level Panel Report, *supra* note 16, at 9–10, 15–16 (discussing the recommendations for wider access to medicines as well as the reasons for such challenges). Indeed, such concerns about pricing with respect to essential medicines was expressly stated in the Doha Declaration. Doha Declaration, *supra* note 15, ¶ 3. (“We recognize that [IP] protection is important for the development of new medicines. We also recognize the concerns about its effect on prices.”).

215. High-Level Panel Report, *supra* note 16, at 55 (“The huge achievements of the current system of healthcare innovation are often ignored or taken for granted. Equally, although many different stakeholders (particularly academia and public and philanthropic funding institutions) contribute significantly, it is often forgotten that almost all of the world’s medical technology has come directly from, or with the enormous contribution of, the research-based pharmaceutical, biotechnology and medtech industries. Those contributions have been largely stimulated by incentives underpinned

seek effective solutions; reliance on market mechanisms is insufficient to fulfill the requirements of economic, social, and cultural rights.

B. *The Persistence of Institutional Weakness*

Finally, the human rights framework fails to account for powerful, institutional constraints in the developing and least-developed countries. As discussed above, the IP/human rights interface is preoccupied with establishing flexibilities to the IP system, such as the Bolar exception in patent law,²¹⁶ the legitimacy of compulsory licenses, or fair use and other limitations and exceptions in copyright law. Limitations and exceptions require institutions—relatively sophisticated institutions—to effectively apply and enforce limits on IP.²¹⁷ In least-developed countries, such institutions are lacking or are insufficiently mature to deploy existing limitations and exceptions—much less creatively assert new ones within the unsettled context of international IP laws. Moreover, if all that the IP/human rights interface produces are outcomes that could be achieved without resorting to human rights, it is difficult to justify the need to resort to human right frameworks in the first place. For developing and least-developed countries, the types of IP limits that are necessary—such as exceptions for institutional users or an explicit right of translation—are difficult to reconcile with the existing international IP system.²¹⁸

by intellectual property. The approaches and partnerships referenced above all operate within and alongside the IP system.”).

216. *After Roche Prods. v. Bolar Pharms. Co.*, 733 F.2d 858 (Fed. Cir. 1984), which led the U.S. Congress to allow generic drug companies to engage in premarket clearance research during the patent term.

217. Justin Hughes, *Fair Use and Its Politics—At Home and Abroad*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 234, 351–355 (Ruth L. Okediji ed., 2017).

218. *Cf.* Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 429 (“There is very little that aligns the current design of international copyright law with the requirements for economic development. This chapter advances the proposition that copyright limitations and exceptions (L&Es) needed to promote economic development differ in important respects from the set of L&Es around which there is international consensus. Existing international copyright L&Es do not allow access to copyrighted works at a scale, or on terms, needed for economic development progress; they also insufficiently enable key stakeholders, such as educational institutions and libraries, to facilitate access to knowledge in sup-

Education, for example, commands no mandatory privilege in international IP treaties such as the Berne Convention.²¹⁹ Thus, unsurprisingly, in countries where the copyright lobby is strong, the level of flexibility with respect to access to copyrighted works for educational purposes remains critically low.²²⁰ As the post-TRIPS experience shows, developing countries have rarely fully employed available flexibilities within their domestic IP systems.²²¹ In fact, many countries have gone beyond the level of protection required by the TRIPS Agreement.²²² Thus, while the human rights narrative *can* certainly promote the use of flexibilities and advance welfare benefits,

port of human capital formation.”). See 2014 Shaheed Report, *supra* note 56, ¶ 70 (noting the difficulty of applying the exceptions that do exist for developing countries).

219. Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 463–65. The human rights framework could certainly supply the external demand for change in this regard. To do so effectively, however, human rights law will require a distinct vision of IP—one that, perhaps, may need to be delinked from the extant provisions in the UDHR and its progeny. The idea of a conception of human rights not grounded in the UDHR may appear blasphemous. Or it could be liberating, at least in the IP space. But this is a claim to be tackled another day.

220. *Cf. id.* at 468 (“A good example is L&Es in national copyright laws to support access to educational materials. The scenario is not complicated; in most countries, the cost of educational materials for primary education is borne by the government. In low-income countries, the cost of such materials can be prohibitive, contributing to low quality education. The situation usually worsens as children advance from primary school to tertiary education where the cost of textbooks makes them inaccessible to most families. An insufficiently educated workforce has implications for the labor market and for domestic productivity. Firms are unable to employ workers with suitable technical skills, and so are less likely to adopt technologies that require skilled labor.”).

221. See Gaëlle Krikorian, *The Politics of Patents: Conditions of Implementation of Public Health Policy in Thailand*, in *POLITICS OF INTELLECTUAL PROPERTY: CONTESTATION OVER THE OWNERSHIP, USE, AND CONTROL OF KNOWLEDGE AND INFORMATION* 29, 49 (Sebastian Haunss & Kenneth C. Shadlen eds., 2009) (“So far, very few countries have exercised their right to issue compulsory license. The experience of Thailand with CL points to the difficulties that may exist for developing countries to establish and maintain the political conditions in which they can make a concerted use of TRIPS flexibilities.”).

222. Helfer, *supra* note 3, at 982–87.

whether or not countries who ultimately need those same flexibilities receive or deploy them is unclear.²²³

Ultimately, the current narrow construction of the IP/human rights interface provides reprieve from the grander, more contested, distributive justice-oriented vision of human progress and flourishing embodied in the economic, social, and cultural rights. To be sure, a human rights framework offers new language and a moral hegemony that can be usefully leveraged to support important public welfare goals. However, the practical outworking of these broad efforts has had limited effects on the real needs and interests of most of the world's population, while the agenda for stronger IP rights continues unabated.

C. *Re-imagining the Human Rights Framework*

In other work considering use of the international copyright system for development, this author suggested a mandatory obligation for developing and least-developed nations to employ copyright limitations and exceptions.²²⁴ The same principle could easily extend to patents. For example, Article 27 of the TRIPS Agreement provides crucial policy space to create definitions of patentability and invention that foster human health development goals, such as curtailing the “evergreening” of patents through successive applications for protection for similar compounds.²²⁵ Few developing countries capitalize on these or other policy tools.²²⁶ In order to effectively utilize pro-development norms in the context of comprehensive sustainable IP reform, institutions such as the WHO, WIPO, and WTO must cooperate and support countries who take on development challenges in a meaningful

223. See DEERE, *supra* note 37, at 196–232 (discussing factors contributing to how different developing countries implemented TRIPS in divergent manners).

224. See Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7.

225. High-Level Panel Report, *supra* note 16, at 9.

226. *Id.* at 8. And, to ensure compulsory licensing work to the benefit of human rights objectives, the license system should be designed in a manner that maximally efficient, predictable, and transparent, so that both public and private actors can ensure essential technologies are available on reasonable terms. *Id.* at 9.

way.²²⁷ To do so under a human rights framework will require systematic support for local IP and human rights agencies working, ideally, in cooperation to demand changes to laws that hinder meaningful access to the knowledge assets needed to foster human flourishing.²²⁸

Second, considering to the increasing difficulty of implementing comprehensive IP policies that promote meaningful domestic development agendas, this article reinforces the call for a moratorium of IP harmonization efforts at the regional and multilateral levels.²²⁹ Skepticism of aggressive global IP harmonization efforts is not new;²³⁰ for more than two decades, IP scholars have: (1) warned that the lack of consensus on how a global IP system can effectively serve both developed and developing countries would cause disproportionate harm to the Global South; and (2) urged a thin harmonization, if any.²³¹

227. Reichman, *supra* note 48, at 1172–80.

228. See High-Level Panel Report, *supra* note 16, at 9–10 (discussing recommendations to implement moving forward to gain further access to medicines).

229. Cf. Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85, 86 (2007) (“More controversially, we argue that a deep harmonization would boomerang against even its developed country promoters by creating more problems than it would solve. There is no vision of a properly functioning patent system for the developed world that commands even the appearance of a consensus. The evidence shows, instead, that the worldwide intellectual property system has entered a brave new scientific epoch, in which experts have only tentative, divergent ideas about how best to treat a daunting array of new technologies. The proposals for reconciling the needs of different sectors, such as information technology and biotechnology, pose hard, unresolved issues at a time when the costs of litigation are rising at the expense of profits from innovation. These difficulties are compounded by the tendency of universities to push patenting up stream, generating new rights to core methodologies and research tools. As new approaches to new technologies emerge in different jurisdictions, there is a need to gather empirical evidence to determine which, if any, of these still experimental solutions are preferable over time.”).

230. Cf. *id.* at 123 (“Nonetheless, modest harmonization of the standards of patentability could dramatically lower private costs and make work sharing among national patent offices feasible. It is not, however, necessary to rely on top-down negotiation at WIPO; beneficial moves toward a more unified approach could be made even in the face of a moratorium on new international lawmaking.”).

231. See *id.* at 93–102 (“Although TRIPS specifically leaves room for nations to tailor their laws to their internal needs and pace of intellectual ad-

A moratorium need not be permanent; it could be designed simply to offer more time for governments to better align policy initiatives with the complex dynamics of innovation efforts in a global knowledge economy. Moreover, a moratorium is arguably a necessary feature of embracing economic, social, and cultural rights. The text of the ICESCR was purposefully drafted in an ambiguous manner and designed to be implemented progressively depending on the state of social, political, and legal affairs of a given country.²³² Progressive implementation implies both time to adapt to the impact of global economic arrangements, as well as the policy space to do so. One might argue that the extended period for implementation of certain TRIPS obligations, and other forms of special and differential treatment for developing countries, is consistent with the obligations of the ICESCR. A moratorium on stronger IP rights, coupled with constructive, creative engagement with the obligations in the ICESCR—including the development of domestic institutions—may ultimately create domestic IP regimes in which these complicated global norms can be more firmly deployed to the benefit and flexibility of all countries in their pursuit of sustainable development goals.

Third, there is a need for a built-in compliance and reporting infrastructure for TRIPS flexibilities similar to that which is in place for human rights.²³³ In the human rights context, periodic reporting on issues related to compliance is a

vancement, experience shows that emerging economies are, in fact, greatly challenged by the costs and hardship associated with adjusting their development strategies to new legal realities and that successive rounds of negotiations tend to reduce the flexibilities available for nations to tailor intellectual property law to their own needs.”).

232. See Helfer, *supra* note 3, at 987–88 (“Its provisions are drafted in gradualist and ambiguous language that requires each ratifying state to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”); see also DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 100–03 (4th ed. 2001) (discussing the ambiguous language of human rights instruments designed for progressive implementation).

233. See MARRAKESH TREATY GUIDE, *supra* note 110, at 75–89, 172 (highlighting how states can “achieve effective implementation by creating legal remedies that allow beneficiaries and authorized entities to assert their rights . . . by vesting authority . . . in appropriate human rights and IP institutions, and by authorizing those institutions to engage in monitoring and enforcement activities”).

fundamental requirement for the effective protection of human rights guarantees.²³⁴ For example, Article 17 of the ICESCR requires participating countries to conduct both an initial report within a period of time following ratification and periodic compliance updates thereafter.²³⁵ Such reports must include “factors and difficulties affecting the degree of fulfillment of obligations” under the Covenant.²³⁶ However, no such reporting requirement exists within the context of TRIPS, except for compliance with the obligation to protect IP rights.²³⁷ This one-sided process shields states from accountability for the conditions that undermine human rights goals and subordinates compliance with flexibilities to compliance with authorial rights.

Fourth, various, development-oriented limitations and exceptions could be made mandatory across global copyright regimes. For instance, copyright law must: “(1) facilitate the production of knowledge consistent with a robust public domain; (2) facilitate access to information; [and] (3) assist in the formation of human capital and absorptive capacity by; (4) supporting access to knowledge and education.”²³⁸ Mandatory limitations and exceptions for developing and least developing countries play a crucial role in supporting the free flow of knowledge goods to support development.²³⁹ To foster a society where knowledge is accessible and enables development, mandatory limitations and exceptions must be focused on building up robust institutional intermediaries and distribution channels.

As an example, a comprehensive education exception, applicable not only to individuals, but also museums, archives, and libraries would serve to support the international copy-

234. See *Human Rights Reports*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/> (last visited Oct. 2, 2018) (providing access to the U.S. annual Country Reports on Human Rights Practices).

235. ICESCR, *supra* note 19, art. 17.

236. *Id.* Unfortunately, the ICESCR did not initially create a body to receive these reports, making this lever far weaker than was the case with other human rights treaties. The problem was remedied in 1985 with the creation of the ESCR Committee. See Econ. & Soc. Council Res. 1985/17 (May 28, 1985).

237. See TRIPS Agreement, *supra* note 2, art. 63, § 2.

238. Okediji, *International Copyright Limitations as Development Policy*, *supra* note 7, at 463.

239. *Id.* at 480–82.

right framework in promoting critical human rights objectives.²⁴⁰ Moreover, an international fair-use, or similar doctrine, would support a diffusion of knowledge that “ensure[s] a dynamic interplay between the public domain and production and introduction of new goods in society,” consistent with the cultural values of different human societies.²⁴¹

V. CONCLUSION

One reason why states and international organizations employ human rights frameworks is to challenge the rules that limit or deny opportunities for human progress and development. The intensity of the IP/human rights interface has increased because the welfare considerations animating concerns over IP are no longer limited to the developing or least-developed world. In addition to mounting concerns over access to medicines and healthcare in the developed and developing countries, the pervasive reach of digital technologies has fundamentally altered the nature and range of individual choices and the exercise of individual freedoms in all societies.²⁴² Arguments and methods steeped in the human rights framework are important as a universal language uniting opposition to the excesses of the IP system. It appears that the IP/human rights interface is poised to become even more influential given the shared interests of citizens across the globe in the power wielded by IP owners over knowledge goods that are fundamental to living meaningful lives. However, this influence tends to privilege values and concerns that resonate in the developed world; the current IP/human rights interface cannot deliver sustained welfare outcomes to developing and least-developed countries.

Both the IP and human rights regimes ostensibly seek to accomplish human welfare goals linked, ultimately, to human and economic development. In isolation, both fall short. In actuality, both regimes protect the IP status quo. The guarantees enshrined in the UDHR and ICESCR generate important momentum toward the goals of equality, security, human dig-

240. *Id.* at 487.

241. *Id.* at 487–94.

242. COHEN, *supra* note 100; *Cf. Neij v. Sweden*, App. No. 40397/12, Eur. Ct. H.R. (Feb. 19, 2013) (discussing the right to freedom of expression in the context of an online, file sharing copyright case).

nity, and freedom. Progress toward attaining the highest levels of human flourishing will require novel approaches in the IP *and* in the human rights legal space. In this context, IP flexibilities are certainly important. However, also crucial is the ability of nations to enact different kinds of rules, choose different models of innovation, and live under their own set of values, all while leveraging domestic norms to help shape cultural and technological conditions that strengthen their capacity to participate meaningfully in a globalized world.

As human rights frameworks continue exerting moral force on the direction and exercise of IP rights, they also must exert similar force on the design of those rights and the means by which states become obliged to adopt them within local conditions. As currently practiced and conceptualized, human rights norms will not inexorably facilitate outcomes consistent with human flourishing in the way that resonates with communities laboring under distinct cultural, social, and institutional environments. Intellectual property scholars must remain attentive to the distributive justice elements and inherent biases of the human rights framework as much as they are alert to those in the IP framework. The task ahead requires ongoing commitment to evaluating the interaction between global human rights law and international IP laws through a critical lens so that each legal regime, applied independently and in concert, can be molded and used in ways that meaningfully respond to the serious challenges that constitute barriers to human well-being.

