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Chapter 3

Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited

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1 INTRODUCTION

Public and private organizations and associations that collectively administer copyright and neighbouring rights on behalf of creators and rights owners operate under a diverse array of contracts, laws and regulations. At the centre of this regulatory matrix are agreements that define the organizations' relationship with the individuals and corporations that are its members. These agreements address issues such as the criteria for membership and affiliation, the licensing, monitoring and enforcement authority that the organization possess, and the rules for allocating and distributing royalties. Moving outward from this contractual core are specialized laws that recognize collective management organizations (CMOs) and regulate their activities. Laws of general applicability form the outermost layer of regulation. These laws include copyright statutes, legislation regulating corporations and business associations and, most famously, competition laws that prevent abuses of the dominant market positions that often follow from the

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concentration of licensing authority within a single entity or a very small number of entities.[1]

Given this complex regulatory environment, it may be surprising and perhaps unwelcome news to CMOs and their members that another body of law is relevant to the collective administration of copyright. Yet for more than fifty years, treaties and customary international law have recognized certain moral and material interests of creators of intellectual property as human rights. Until recently, the conceptualization of these interests as internationally protected human rights was all but unexplored. Although both the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR or 'the Covenant') protect the moral and material interests of authors and inventors,[2] as well as the public's right 'to enjoy the arts and to share in scientific advancement and its benefits',[3] these provisions provide only a skeletal outline of how to develop human rights-compliant rules and policies for governments to promote creativity and innovation. They also leave unanswered the critical question of how those rules and policies interface with existing intellectual property protection systems.

Recent events have highlighted the need to address these issues and to develop a distinctive 'human rights framework' for intellectual property.[4] Over the last decade, intellectual property protection standards have expanded dramatically, both in their subject matter and in the scope of the economic interests they protect. Nation states have also linked these rights to the world trading system, creating new opportunities for enforcement at the international and national levels. These twin developments have made intellectual property protection rules relevant to an expanding array of value-laden economic, social and political issues, including public health, education, agriculture, privacy and free expression.[5]

This chapter considers in depth one aspect of this emerging human rights framework – the relevance of the 'creators' rights'[6] provisions of the ICESCR

1. For a comprehensive discussion of these laws, regulations, and contacts, see D. Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations* (Boston: Little Brown & Co., 1993), 866 at 519–620.
2. Universal Declaration of Human Rights, Art. 27(2); International Covenant on Economic, Social and Cultural Rights, Art. 15(1)(c) & 15(1)(b).
3. UDHR, *ibid.*, Art. 27(1).
4. L. Helfer, 'Toward a Human Rights Framework for Intellectual Property', *U.C. Davis Law Review* 40 (2007): 971. For a more detailed analysis, see L. Helfer & G. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011) (forthcoming).
5. For further discussion of these trends, see L. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' *Netherlands Quarterly of Human Rights* 22 (2004): 167, at 171–175; L. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', *Yale International Law Journal* 29 (2004): 1, at 26–45.
6. To avoid confusion with terms such as *droit d'auteur*, this chapter uses the phrase 'creators' rights' to describe the legal entitlements for authors and inventors recognized in international human rights law. As explained in greater detail below, these legal protections are not coterminous with those of copyright or *droit d'auteur*. For a general discussion of the distinctions

to the collective administration of copyright in general and to the policies and practices of CMOs in particular. It also addresses other human rights treaty provisions and international court rulings that are relevant to collective rights management.

The chapter focuses primarily on two documents issued by the Committee on Economic, Social and Cultural Rights ('the ICESCR Committee' or 'the Committee'). The Committee is a supervisory body of eighteen human rights experts who monitor the implementation of the Covenant – a treaty that imposes legally binding obligations upon 156 member nations.[7] Because many of the Covenant's provisions are ambiguously worded, one of the Committee's principal functions is to provide guidance to member nations as to the treaty's meaning. This guidance takes the form of nonbinding but persuasive recommendations that can serve as focal points for legal change at the national level. Formally, these recommendations are directed to governments and other state actors. But their scope – like that of the ICESCR itself – is not limited to public laws or regulations. They extend as well to individuals, groups and business associations – including CMOs – whose actions implicate social, economic and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations.[8]

The ICESCR Committee's initial foray into the intellectual property arena began in 2001, when it published an official Statement on Human Rights and Intellectual Property[9] that contained a preliminary analysis of creators' rights and their relationship to other economic and social rights. The Statement contemplated that the Committee would eventually publish more extensive 'general comments' on Article 15, the provision of the Covenant most relevant to intellectual property issues.[10] The first of these general comments, an exegesis on Article 15(1)(c) – 'the

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between the latter two concepts, see A. Strowel, *Droit D'auteur et Copyright: Divergences et Convergences* (Paris: Librairie générale de droit et de jurisprudence, 1993) (comprehensively comparing *droit d'auteur* and copyright).

7. United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, Signatories and States Parties, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (last visited: 9 Sep. 2009.
8. For a thoughtful and influential analysis of these issues, see A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1996), 422.
9. Committee on Economic, Social and Cultural Rights, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Follow-up to the day of general discussion on Article 15.1(c), Monday, 26 November 2001' (14 Dec. 2001), E/C.12/2001/15, [Statement on Human Rights and Intellectual Property], online: <www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf> (last visited: 9 Sep. 2009).
10. *Ibid.*, at para. 2. In addition to reviewing periodic reports by States on the measures they have taken to comply with the Covenant, the ICESCR Committee periodically issues 'general comments' that infuse the treaty with greater clarity and meaning. Although these interpretative statements do not bind states parties, they create widely shared expectations as to the meaning of the treaty's text. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995). General comments

right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' – was published by the Committee in 2005.[11]

These two documents provide a partial outline of a human rights framework for intellectual property, one aspect of which I analyse in the remainder of this chapter. Most importantly, the documents demonstrate that such a framework is not restricted to protecting creators and innovators and the fruits of their intellectual endeavours. Rather, it gives equal importance to protecting the rights of the public to benefit from the scientific and cultural progress that intellectual property products can engender. However, one of the most challenging tasks for the ICESCR Committee is how to strike an appropriate balance between these two sets of rights – a balance that promotes compliance with treaty obligations and their underlying human rights values, and that provides a coherent interface with national and international intellectual property laws.

A few caveats are in order before turning to an analysis of how these issues play out in the specific context of CMOs. This chapter assumes that readers have at least a rudimentary understanding of copyright and neighbouring rights laws and how creative works protected by such laws are collectively administered,[12] but it does not presume familiarity with international human rights law or its recent application to intellectual property issues. In addition, the chapter does not provide an exhaustive treatment of the many intersections between human rights and copyright,[13]

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specify States' commitments in far greater detail than the treaty itself, for example, by identifying certain core obligations for states to provide 'at the very least, minimum essential levels of each of the rights' in the treaty. See Committee on Economic, Social and Cultural Rights, 'General Comment No. 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant)' (1990), E/1991/23 at para. 10 [General Comment No. 3], online: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument> (last visited: 9 Sep. 2009) (in which core obligations are distinguishable from 'obligations of result', which States may achieve by a variety of means over time).

11. Committee on Economic, Social and Cultural Rights, 'The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art. 15(1)(c) of the Covenant)', General Comment No. 17 (21 Nov. 2005) [hereinafter General Comment], online: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.17.En?OpenDocument> (last visited: 9 Sep. 2009). In December 2009, the Committee issued 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)', online: <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (last visited: 4 May 2010).
12. For a 'basic definition' of the functions that collective management organizations perform, see M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), 165 at 17 (stating that the 'owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and . . . collect remuneration, and distribute it among the owners of rights').
13. Readers seeking additional analysis of these issues may wish to consult the following sources: P. Torremans (ed.), *Intellectual Property and Human Rights* (The Hague: Kluwer Law International, 2008); P. Torremans (ed.), *Copyright and Human Rights: Freedom of*

but instead analyses a selection of salient legal and policy issues relating to collective.

The remainder of the chapter proceeds as follows. Section 2 provides an overview of the ICESCR Committee's statement on human rights and intellectual property and of its General Comment. It highlights basic distinctions between the Committee's approach to protecting creators and the approach adopted in intellectual property treaties and national intellectual property laws, with the goal of making the Committee's analysis more accessible to intellectual property lawyers and legal scholars. Section 3 provides an overview of the key concepts in the Committee's analysis relevant to the collective administration of copyright and neighbouring rights. It argues that a human rights framework for intellectual property supports many of the functions that CMOs already perform. Part 3 notes, however, that certain practices and policies of CMOs may be in conflict with the analysis of the Covenant enunciated by the ICESCR Committee. Section 4 considers in greater depth two legal and policy issues with important human rights implications: whether membership in CMOs should be mandatory or voluntary and whether CMOs should promote national culture. Section 5 concludes with an analysis of the practical implications of adopting a human rights framework for analysing the collective administration of copyright and for the international intellectual property system more generally.

2 INTRODUCING A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

If intellectual property lawyers were asked to list the freedoms and liberties that international human rights law protects, they would likely name widely recognized civil and political rights, such as the prohibitions of slavery, torture and the crime of genocide or perhaps due process rights and freedom of expression, association or privacy. More internationally minded responses might mention economic and social guarantees, including the right to health care, food and education. These are also internationally protected human rights, although their precise scope – as well as their recognition by a few countries such as the United States – remains a subject of genuine debate.

But few observers, if any, would list the rights of authors, creators and inventors as human rights. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of foundational principles than the UDHR includes in its catalogue of rights and freedoms a statement that 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he

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Expression – Intellectual Property – Privacy (The Hague: Kluwer Law International, 2004), 181; J. Griffiths & U. Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005), 474; J. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 2003), 1357.

[or she] is the author'.[14] The UDHR's drafting history makes clear that the protection of creators' rights was no accident, even if the drafters' precise intentions remain elusive.[15] Support for these rights also finds expression in nearly identical language in the ICESCR, which makes the UDHR's economic and social guarantees binding as a matter of treaty law.[16]

The endorsement of creators' rights in these documents establishes broad areas of overlap between human rights law and intellectual property law. But these texts also suggest many important differences between the two fields – differences in philosophy, regulatory objectives and the subject matter and scope of legal protection for the products of human creativity.

In part, these differences are textually engendered. The thrust of multilateral intellectual property treaties such as the Berne, Rome and Paris Conventions and the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement is to establish minimum standards of protection for authors, inventors and other owners of intellectual property products.[17] These treaties also recognize the public's interest in the distribution of and access to those products. However, they do so principally in the form of carefully constrained exceptions and limitations to authors' and inventors' exclusive rights. Two provisions of the TRIPS Agreement, which set out the treaty's 'objectives' and 'principles', indicate that the protection and enforcement of intellectual property rights should contribute to the 'mutual advantage' of 'producers and users of technological knowledge'[18] and should 'promote the public interest in sectors of vital importance to [members'] socio-economic and technological development'.[19] But these provisions are, at least at present, under-enforced and have yet

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14. UDHR, *supra* n. 2, Art. 27(2).
15. J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 378 at 220–221. As one scholar recently observed, although the motivations of governments who favoured inclusion of Art. 27 in the UDHR are somewhat obscure, the proponents appear to be divided into two camps:

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

    P. Torremans, 'Copyright as a Human Right', in *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy, supra* n. 13 at 6.
16. See M. Green, 'Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights' (9 Oct. 2000), E/C.12/2000/15, online: <www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088/$FILE/G0044899> (last visited: 9 Sep. 2009).
17. Berne Convention for the Protection of Literary and Artistic Works [Berne Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [Rome Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement].
18. TRIPS Agreement, Art. 7.
19. *Ibid.*, Art. 8.1.

to affect the interpretation of TRIPS' substantive intellectual property provisions by World Trade Organization (WTO) dispute settlement panels.[20]

In contrast to this approach, a human rights framework for intellectual property puts the public's interest front and centre and on an equal footing with property rights in intangibles. Indeed, the very same ICESCR article that protects the rights of creators also requires states to protect 'the right of everyone' to 'enjoy the benefits of scientific progress and its applications' and to take steps 'necessary for the conservation, the development and the diffusion of science and culture'.[21] The Committee will eventually elucidate these rights of the public when it issues general comments interpreting the relevant provisions of the Covenant. In the discussion that follows, however, the analysis focuses more heavily on the creators' rights provisions of the ICESCR.

2.1 The ICESCR Committee's General Comment No. 17

The Committee's General Comment on creators' rights reveals the difficulties of translating the text of Article 15(1)(c) of the Covenant into a coherent framework for analyzing intellectual property from a human rights perspective. The General Comment is a lengthy, densely worded and somewhat repetitive document of 57 paragraphs divided into six parts: (1) an introductory section that explains the basic's premises of the Committee's analysis; (2) a close textual reading of Article 15(1)(c)'s 'normative content'; (3) a section outlining States parties' legal obligations, including general, specific, core and related obligations; (4) an analysis of actions or omissions that would violate the Article; (5) a section on how creators' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations.

This organizational structure may seem unfamiliar or even mystifying to intellectual property lawyers, in particular the distinction between 'legal obligations' and 'violations'. But the methodology should be recognizable to foreign ministries, human rights scholars and others familiar with social and economic rights, who have followed the Committee's efforts, in past general comments, to provide detailed and concrete interpretations of the ICESCR's many ambiguous clauses. The Committee has struggled to clarify the meaning of a treaty whose open-ended provisions are to be realized over time, taking into account the limited resources available to Member States, particularly to developing countries.[22]

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20. See R. Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times', *Journal of World Intellectual Property* 3 (2000): 493 at 502; R. Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement', *Emory International Law Review* 17 (2003): 819 at 914.
21. ICESCR, *supra* n. 2, Art. 15(1)(b) & 15(2). For a comprehensive analysis, see A. Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and its Applications', *Journal of Human Rights* 8 (2009): 1.
22. The ICESCR requires States' parties to 'take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in

To prevent these limiting principles from emptying the Covenant's economic, social and cultural rights of all meaning, the Committee has developed a 'violations approach' that distinguishes 'core obligations' – to which all States must give immediate effect – from other obligations that may be achieved progressively as additional resources become available.[23]

These core commitments include obligations to respect, protect and fulfil the rights of authors. As the Committee explains:

> The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to protect requires States to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).[24]

These three core obligations, although framed in the distinctive language of human rights law, should, on further reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar States from violating creators' material and moral interests, most notably in the form of infringements by government agencies or officials;[25] they mandate 'effective protection' of those interests by means of legislation recognizing creators' rights and specifying the modes for their protection, including protection of 'works which are easily accessible or reproducible through modern communication and reproduction technologies',[26] and they require States to provide judicial and administrative remedies and other measures for creators to prevent unauthorized uses of their works (i.e., injunctions), to recover compensation for such uses (i.e., damages) and, more broadly, to facilitate creators' participation in decisions that affect their moral and material interests.[27]

These obligations also overlap with certain provisions in intellectual property treaties, most notably the Berne Convention's reproduction right, the 'making available' right in the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty and the enforcement provisions in the TRIPS Agreement.[28] This commonality suggests that States can

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the present Covenant by all appropriate means'. ICESCR, *supra* n. 2, Art. 2(1). These provisions establish programmatic and flexible commitments that are to be achieved over time.

23. General Comment No. 3, *supra* n. 10 at para. 10. See also A. Chapman, 'Conceptualizing the Right to Health: A Violations Approach', *Tennessee Law Review* 65 (1998): 389.
24. General Comment, *supra* n. 11 at para. 28; see also *ibid.*, at paras 44–46 (discussing actions and omissions that violate these three obligations).
25. *Ibid.*, at paras 30 and 44.
26. *Ibid.*, at paras 31 and 45.
27. See *ibid.*, at paras 34 and 46.
28. Berne Convention, Art. 9; WIPO Copyright Treaty, Art. 8; WIPO Performances and Phonograms Treaty, Art.10; TRIPS Agreement, Arts 41–51 & 61.

meet the requirements of Article 15(1)(c), at least in part, by ratifying international intellectual property agreements and enacting national copyright and neighbouring rights laws. The ICESCR's reporting procedures strongly support this claim.[29] Since the early 1990s, States parties have regularly cited such treaties and laws to demonstrate their compliance with the creators' rights provisions in the Covenant.[30]

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

2.2 Developing a Distinctive Human Rights Framework for Creators' Rights

The General Comment gives detailed attention to the differences between creators' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the 'scope of protection' of creators' rights in Article 15(1)(c) 'does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements'.[31] But what, precisely, are these differences in scope?

29. ICESCR, *supra* n. 2, Art. 16 (requiring states to submit periodic 'reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized' in the Covenant).
30. See, for example, Committee on Economic, Social and Cultural Rights, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Third periodic report: Cyprus' (6 Jun. 1996), E/1994/104/Add.12 at para. 420, online: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.Add.12.En?Opendocument> (last visited: 9 Sep. 2009) (citing ratification of Berne Convention and domestic copyright legislation to demonstrate compliance with Art. 15(1)(c)); Committee on Economic, Social and Cultural Rights, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial report: Israel' (20 Jan. 1998), E/1990/5/Add.39(3) at paras 782–788, online: <www.unhchr.ch/tbs/doc.nsf/23a89bf90e53e6ccc125656300593189/41e674c4a2affbd480256617004768f5?OpenDocument#PART%20III> (last visited: 9 Sep. 2009) (discussing evolution and expansion of copyright legislation and ratification of numerous international agreements to demonstrate compliance with Art. 15(1)(c)); Committee on Economic, Social and Cultural Rights, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second periodic report: Jordan' (23 Jul. 1998), E/1990/6/Add.17 at para. 151, online: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/7eb0986e8af3f29c802567240056ca4c?Opendocument> (last visited: 9 Sep. 2009) (citing amendments to Copyright Protection Act that conform to international copyright treaties and government's intent to ratify such treaties to demonstrate compliance with Art. 15(1)(c)).
31. General Comment, *supra* n. 11 at para. 2; see also *ibid.*, at para. 3. ('It is . . . important not to equate intellectual property rights with the human right recognized in Article 15, paragraph 1(c).')

The Committee first compares foundational principles. It notes that:

> human rights are fundamental as they are inherent in the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity for the benefit of society as a whole.[32]

Intellectual property rights are granted by the State, and thus they may also be taken away by the State. They are temporary, not permanent; they may be 'revoked, licensed or assigned';[33] and they may be 'traded, amended or even forfeited',[34] commensurate with the regulation of a 'social product [that] has a social function'.[35] By contrast, human rights are enduring, 'fundamental, inalienable and universal entitlements'.[36] These statements reflect a vision of creators' rights that exist independently of the vagaries of state approval, recognition or regulation.

Turning from lofty principles to specifics, the Committee identifies several distinctive features of creators' rights. For example, Article 15(1)(c) applies only to 'individuals, and under certain circumstances groups of individuals and communities'.[37] Corporations and other legal entities are expressly excluded.[38] This represents a profound departure from Anglo-American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products, for example, of works made for hire.[39]

Moreover, the legal protections provided to natural persons have a distinctive human rights flavour. Consider the issue of equality. A cornerstone of intellectual property treaties is the 'national treatment' of foreign authors.[40] A human rights approach also encompasses the principle of equality between domestic and foreign creators. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement,

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32. *Ibid.*, at para. 1.
33. *Ibid.*, at para. 2.
34. *Ibid.*
35. Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 4.
36. *Ibid.*, at para. 6.
37. General Comment, *supra* n. 11 at para. 1.
38. See *ibid.*, at para. 7 (stating that the drafters of ICESCR Art. 15 'considered authors of scientific, literary or artistic productions to be natural persons'); Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 6 (contrasting human rights approach authors' rights with that of intellectual property regimes which 'are increasingly focused on protecting business and corporate interests and investments').
39. 17 U.S.C. § 201(b). ('In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright.')
40. See, for example, S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*: *1886–1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987), 981 at 17–38; D. Vaver, 'The National Treatment Requirements of the Berne and Universal Copyright Conventions' *International Review of Industrial Property and Copyright Law* 17 (1986): 577.

including access for 'vulnerable or marginalized groups'.[41] Equality also has a process dimension, which requires states to provide creators with information 'on the structure and functioning of . . . legal or policy regime[s]', and to facilitate their participation in 'any significant decision-making processes with an impact on their rights and legitimate interests', either directly or through 'professional associations'.[42]

These comparisons between human rights law and intellectual property law have some surprising consequences. If the moral and material interests of creators are fundamental, then the ability of governments to regulate them – either to protect other human rights or to achieve other social objectives – ought to be exceedingly narrow. Indeed, the Committee has developed a stringent test for assessing the legality of state limitations of social and economic rights,[43] a standard that it reaffirms in the General Comment on Article 15(1)(c).

According to this test, governmental restrictions on creators' rights must be '[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, and [4] and must be strictly necessary for the promotion of the general welfare in a democratic society'.[44] In addition, such limitations must 'be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed'.[45] This highly restrictive, multi-part standard is far more constraining than the now ubiquitous 'three-step test' used to assess the treaty-compatibility of exceptions and limitations in national copyright laws.[46]

Yet if restrictions on creators' rights are to be so rigidly scrutinized (and, presumably, so rarely upheld), how, then, are governments to strike a balance between those rights on the one hand and the public's interest in access to knowledge on the other – a balance that the Committee views as a key feature of Article 15(1)(c) and that it emphasizes throughout the draft?[47] A close parsing

41. General Comment, *supra* n. 11 at para. 39; see also Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 7 (stating that 'human rights instruments place great emphasis on protection against discrimination', and that the rights guaranteed in the Covenant 'must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status').
42. General Comment, *supra* n. 11 at paras 18 and 14.
43. See Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 – The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (8 2000), E/C.12/2000/4 at para. 28, online: <www.unhchr.ch/tbs/doc.Nsf/(symbol)/E.C.12.2000.4.En?OpenDocument> (last visited: 9 Sep. 2009) (discussing government's burden to demonstrate legality of limitations on the right to health).
44. General Comment, *supra* n. 11 at para. 22 [bracketed numbers added].
45. *Ibid.*, at para. 23 [bracketed numbers added].
46. See J. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions', *Revue Internationale du Droit d'Auteur* 187 (2001): 3; M. Ficsor, 'How Much of What?: The "Three-Step Test" and Its Application in Two Recent WTO Dispute Settlement Cases', *Revue Internationale du Droit d'Auteur* 192 (2002): 110.
47. See General Comment, *supra* n. 11 at paras 22, 35 and 39.

of the text suggests a blueprint from which the Committee may ultimately construct a distinctive human rights framework for intellectual property.

The key to understanding this framework is to identify the purposes of recognizing authors' moral and material interests as human rights. According to the Committee, such rights serve two essential functions. First, they 'safeguard the personal link between authors and their creations and between people or other groups and their collective cultural heritage'.[48] Second, they protect 'basic material interests which are necessary to enable authors to enjoy an adequate standard of living'.[49]

These two statements, which recur throughout the document,[50] suggest the existence of an irreducible core of rights – a zone of personal autonomy in which creators can achieve their creative potential, control their productive output and lead independent intellectual lives that are essential requisites of any free society.[51] Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But they are not required under Article 15 of the Covenant and, as a result, are not subject to the restrictive exceptions and limitations test quoted above. Stated differently, once a country guarantees creators these two core rights – one moral and the other material – any additional intellectual property protections the country provides 'must be balanced with the other rights recognized in the Covenant', and must give 'due consideration' to 'the public interest in enjoying broad access to authors' productions'.[52] The ICESCR thus gives each State discretion to eschew these additional legal protections altogether or, alternatively, to shape them to take account of the particular economic, social and cultural conditions within its borders.[53]

Seen from this perspective, creators' rights are both more and less expansive than copyright and neighbouring rights regimes. They are more expansive in that rights within the core zone of autonomy are subject to a far more stringent test for restrictions than the test applicable to exceptions and limitations in copyright and

48. *Ibid.*, at para. 2. This 'personal link' is protected by legislation that enables authors 'to claim authorship for their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their works, which would be prejudicial to their honour or reputation'. *Ibid.*, at para. 41(b). The Committee's language closely tracks the moral rights provisions in Art. 6*bis* of the Berne Convention and in many national laws.
49. *Ibid.*, at para. 2.
50. The Committee repeats variants of the 'personal link' language a total of six times, and it reasserts the 'adequate standard of living' formulation no less than nine times – repetitions that suggest the importance of these concepts to its analysis.
51. Cf. Torremans, *supra* n. 15 at 5 (drafters of UDHR believed that the best way to avoid recurrence of abuses of science, technology and copyrighted propaganda that occurred during Second World War would be 'to recognize that everyone had a share in the benefits and that . . . those who made valuable contributions were entitled to protection').
52. General Comment, *supra* n. 11 at paras 22 and 35. See also *ibid.*, at para. 11 (stating that nothing in Art. 15(1)(c) prevents states parties from 'adopting higher protection standards' in intellectual property treaties or national laws, 'provided that these standards do not disproportionately impede the enjoyment by others of their Covenant rights').
53. See *ibid.*, at para. 18 (stating that 'the precise application' of authors' and inventors' moral and material interests 'will depend on the economic, social and cultural conditions prevailing in a particular State party').

neighbouring rights treaties and national laws. They are less expansive, however, in that a state need not recognize additional creators' rights lying outside of this zone or, if it does recognize such rights, must give appropriate weight to other human rights, to the public's interest and to other policy objectives – calibrations that may permissibly vary from one country to another.

3 HUMAN RIGHTS AND THE COLLECTIVE ADMINISTRATION OF COPYRIGHT: A PRELIMINARY ASSESSMENT

Where does the collective administration of copyright and neighbouring rights fit within this emerging legal paradigm? Although the General Comment references issues of collective administration only sparingly, the Committee's detailed analysis of Article 15(1)(c) suggests several ways in which CMOs can help to enhance creators' rights. However, that analysis also reveals certain collective management practices that are in tension with the Covenant's intellectual property provisions. The discussion below provides an overview of these competing perspectives.

The only express mention of CMOs in the General Comment appears in the discussion of how to protect creators against infringement by third parties. This is hardly surprising, inasmuch as the obligation 'to protect' is the legal 'hook' that the ICESCR Committee has used to require governments to regulate the activities of non-state and private actors (in contrast to other Covenant provisions that impose obligations on state actors alone).[54] One method for States to provide such protection is 'by establishing systems of collective administration of authors' rights'.[55] Collective administration is particularly appropriate, in the Committee's view, where works are 'easily accessible or reproducible through modern communication and reproduction technologies'.[56] A second, more oblique reference to CMOs appears in the discussion of the obligation 'to fulfil', which requires governments 'to promote the realization' of Article 15(1)(c).[57] These conditions include funding and other affirmative measures to facilitate 'the formation of professional associations', and 'to ensure the active and informed participation' of authors in those associations to protect their moral and material interests.[58]

3.1 CMO Activities That Enhance the Human Rights of Creators and Users

Although the references to collective administration in the General Comment are sparse, the document's overall analysis supports many of the activities that

54. *Ibid.*, at para. 31.
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*, at para. 46.
58. *Ibid.*, at paras 34 and 46.

CMOs perform. In fact, where prevailing modes of exploiting protected works make it difficult or impossible for authors to control their creations on an individualized basis, CMOs are likely to be essential features of human rights-compliant, twenty-first century copyright systems.

Distilled to their essence, CMOs enable copyright owners to enforce their rights where the transaction costs of negotiating individual licenses and pursuing individual enforcement preclude mutually beneficial transactions with users.[59] In particular, CMOs perform two functions that the Committee identifies as necessary for the 'effective protection' of creators' rights: (1) they prevent infringement by third parties, and (2) they collect and distribute compensation for authorized uses of protected works.[60] CMOs also make it possible for copyright owners to retain exclusive control over their creative output in situations in which user groups are likely to pressure legislators to convert such control into the lesser right to receive remuneration from compulsory licenses.[61]

In addition to these core functions, CMOs also carry out a variety of ancillary activities that provide human rights benefits. These include representing the interests of creators before legislatures and administrative agencies, providing social services such as health benefits and pensions for authors, and promoting creativity through awards, prizes and fellowships.[62] By engaging in these additional functions, CMOs not only assist States in complying with Article 15(1)(c) but also help them to satisfy the obligations of other United Nations (UN) treaties.[63] It is not

59. See L. Helfer, 'World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act', *Boston University Law Review* 80 (2000): 93 at 110. ('These [transaction] costs include identifying numerous potential licensees in disparate locations, negotiating with them over payment terms, monitoring compliance with each licensing agreement and taking legal action to prevent infringements.')
60. See General Comment, *supra* n. 11 at paras 31 and 45; see also Helfer, *ibid.*, at 110 (stating that CMOs 'reduce transaction costs in several significant ways. They provide a clearinghouse for users seeking licenses, they collect and distribute revenues to the songwriters, composers and publishers who are their members, they monitor the activities of licensees and they take enforcement action where necessary to vindicate their members' rights'.).
61. See Ficsor, *supra* n. 12 at 17 (arguing against pressures to abolish exclusive rights and convert them to a 'mere right to remuneration' and proposing collective management of rights as an alternative).
62. See, for example, *ibid.*, at 149–50; Sinacore-Guinn, *supra* n. 1 at 211–212.
63. The UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 Oct. 2005 and entered into force 18 Mar. 2007, recommends that States parties adopt measures to encourage the 'creation, production, dissemination, distribution and enjoyment of . . . domestic cultural activities, goods and services' and those 'aimed at nurturing and supporting artists and others involved in the creation of cultural expressions'. Article 6(2)(b) and 6(2)(g). The Convention also encourages States parties 'to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate and have access to their own cultural expressions [and] to have access to diverse cultural expressions from within their territory as well as from other countries of the world'. Article 7(1)(a) and 7(1)(b). CMOs could serve as vehicles for helping States to achieve these objectives.

    CMOs could also assist States parties to the Convention on the Rights of Persons with Disabilities, adopted 13 Dec. 2006 and entered into force 3 May 2008, to meet their obligation to

surprising, therefore, that several States parties to the ICESCR have referred favourably to legislation establishing collective management systems in their reports to the Committee.[64]

'take all appropriate steps . . . to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'. Art. 30(3). For example, CMOs may facilitate – either on their own or in response to government incentives – the conversion of copyrighted materials into media accessible to persons with disabilities, and the distribution of those materials to such persons by means of blanket licensing agreements.

64. See, for example, Committee on Economic, Social and Cultural Rights, 'Fourth Periodic Reports: Mexico, Implementation of the International Covenant on Economic, Social and Cultural Rights' (25 Feb. 2005), E/C.12/4/Add.16 at para. 883, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/5e44a3f92c77e707c12570ab0059563c/$FILE/G0540525.pdf> (last visited: 9 Sep. 2009) (referring to 'the National Copyright institute authoriz[ing] the formation and operation of collectively managed societies'); Committee on Economic, Social and Cultural Rights, 'Initial Reports: Slovenia, Implementation of the International Covenant on Economic, Social and Cultural Rights' (26 May 2004), E/1990/5/Add.62 at para. 915, online: <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/ba2445d14057821cc1257067003238cd/$FILE/G0441926.pdf> (last visited: 9 Sep. 2009) (discussing the difficulty of establishing 'collective organizations for creative (copyright) workers'); Committee on Economic, Social and Cultural Rights, 'Initial Reports: China, Implementation of the International Covenant on Economic, Social and Cultural Rights' (4 Mar. 2004), E/1990/5/Add. 59 at paras 234, 258, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9fbfe806f28f1eb4c1256f4a004bc5d8/$FILE/G0440656.pdf> (last visited: 9 Sep. 2009) (referring to 'collectively administering copyright' as a means of 'protect the cultural rights of [China's] citizens' and discussing China's 'first institution for the collective management of intellectual property rights'); Committee on Economic, Social and Cultural Rights, 'Fourth Periodic Reports: Norway, Implementation of the International Covenant on Economic, Social and Cultural Rights' (26 Feb. 2004), E/C.12/4/Add.14 at para. 461, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4b7cddf05a594cbac1256f42004d4d3b/$FILE/G0442518.pdf> (last visited: 9 Sep. 2009) (referring to laws created 'to provide for collective arrangements whereby remuneration is paid through the state budget to funds administered by various copyright organizations'); Committee on Economic, Social and Cultural Rights, 'Third Periodic Reports: Chile, Implementation of the International Covenant on Economic, Social and Cultural Rights' (14 Jul. 2003), E/1994/104/Add. 26 at paras 877–881, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/91ef5d1ff1e1525cc1256f16004aa896/$FILE/G0343617.pdf> (last visited: 9 Sep. 2009) (discussing the emergence of collective management societies protecting rights in the music sector, and protecting rights of image artists, playwrights and screenwriters, and actors); Committee on Economic, Social and Cultural Rights, 'Initial Reports: Lithuania, Implementation of the International Covenant on Economic, Social and Cultural Rights' (9 Dec. 2002), E/1990/5/Add. 55 at paras 657–658, 667, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/1eaf91a2843227dfc1256e78004a2b55/$FILE/G0246237.pdf> (last visited: 9 Sep. 2009) (discussing the importance of collective administration of copyright and referring to the Lithuanian laws and agency that govern collective administration of copyright); Committee on Economic, Social and Cultural Rights, 'Initial Reports: Greece, Implementation of the International Covenant on Economic, Social and Cultural Rights' (23 Oct. 2002), E/1990/5/Add. 56 at paras 670, 678, online: <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fc0f67050f79d862c1256d5f00565ee6/$FILE/G0245183.pdf> (last visited: 9 Sep. 2009) (discussing both self-managed and publicly managed collective management organizations); Committee on Economic, Social and Cultural Rights, 'Initial Reports: Bolivia, Implementation of the International Covenant on Economic, Social

Collective management of copyright also enhances the rights of consumers under Article 15 of the Covenant, although the benefits are more equivocal than those accruing to creators.[65] Blanket licenses, the mainstay of so many CMOs, authorize the unlimited use of all works within the organization's repertoire for a specific period of time. Such licenses avoid the time and expense of negotiating specific uses for specific works. For users who require immediate access to a broad array of creative consent, blanket licenses also promote spontaneity in exploiting protected works.[66] For those with more particularized needs, however, the benefits of blanket licenses are less clear, because the 'all or nothing' bargains they embody compel consumers to purchase more works at higher prices than they would otherwise be willing to pay.[67] Whether the aggregate benefits to the public outweigh the costs depends in part on the extent to which governments regulate CMO licensing practices, a subject addressed in greater detail below.

3.2 CMO Activities That Detract from the Human Rights of Creators and Users

Some form of collective management of creators' rights is essential to ensure compliance with Article 15(1)(c) where the transaction costs of individual licenses are high. Not all of the functions that CMOs perform are human rights enhancing, however. On the contrary, the monopoly position that CMOs enjoy – both in relation

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and Cultural Rights' (9 Dec. 1999), E/1990/5/Add.44 at para. 506, <www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/5e41566ff361c211c12569220048364e/$FILE/G9946227.pdf> (last visited: 9 Sep. 2009) (discussing the Copyright Act's 'establishment of societies of authors and artists, with a view to assuming responsibility for the administration of their property rights'); Committee on Economic, Social and Cultural Rights, 'Second periodic reports: Belgium, Implementation of the International Covenant on Economic, Social and Cultural Rights' (5 Mar. 1998), E/1990/6/Add. 18, <www.unhchr.ch/tbs/doc.nsf/0/9b1e64652f3a69cc8025678a00318bfb?OpenDocument> (last visited: 9 Sep. 2009) (describing provisions of new copyright law that 'provides for the formation of royalty management companies (or collective management)' which 'makes it obligatory for these societies to intervene to ensure that certain types of remuneration are received').

65. See generally, G. Davies, 'The Public Interest in the Collective Administration of Rights' *Copyright* (March, 1989), 81 at 84–87.
66. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1 at 20 (United States Supreme Court), <caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=441&invol=1> (last visited: 9 Sep. 2009). ('Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights.') This need for immediate access is one reason why blanket licenses are the norm for public performance rights for musical works. See Ficsor, *supra* n. 12 at 37–48 and Sinacore-Guinn, *supra* n. 1 at 747–768.
67. See A. Katz, 'The Potential Demise of Another Natural Monopoly: New Technologies and the Future of Collective Administration of Copyrights' (May 2004), *U Toronto Law and Economics Research Paper No. 04-02*, <http://ssrn.com/abstract=547802> or <law.bepress.com/cgi/viewcontent.cgi?article=1034&context=alea> (last visited: 9 Sep. 2009); Stanley M. Besen, S. Kirkby & S. Salop, 'An Economic Analysis of Copyright Collectives', *Virginia Law Review* 78 (1992): 383 at 393.

to users and, in some cases, in their dealings with the creators who are their members – generate incentives for the organizations to behave in ways that limit the human rights of both groups. These incentives highlight the need for governments to regulate (1) the licenses that CMOs offer to users, (2) the relationships between CMOs and their members and (3) the relationships among the members themselves.[68]

As to the first issue, governments in nearly all countries in which CMOs operate exercise some form of regulatory control over licensing practices to prevent abuse of their dominant positions. The source, extent and enforcement of these regulations vary widely, however. In some countries, copyright laws limit CMO activities. In others, administrative agencies, tribunals or other specialized regulatory bodies monitor CMO activities and adjudicate complaints by licensees. In yet other nations, users seek relief from the courts by filing competition or antitrust claims against CMOs, leading to judicial monitoring of licensing practices in the form of detailed consent decrees.[69]

How do human rights principles inform government regulation of CMOs? As explained above, a human rights framework for intellectual property requires a balance between the rights of creators and the rights of the public. In striking this balance, 'the private interests of authors and inventors should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration'.[70] Regulation of licensing practices is one way to avoid such undue advantage. According to the ICESCR Committee, states must prevent private parties from imposing 'unreasonably high' license fees or royalties that interfere with other rights in the Covenant, including the right to education and to culture.[71]

The consequences of this statement for government regulation of CMOs are somewhat uncertain, however. The Committee provides no guidance for determining when royalties are unreasonably high. In addition, the examples that it identifies as potentially problematic – high costs of access to essential medicines, plant seeds, schoolbooks and other learning materials[72] – do not include the works of entertainment or popular culture that are often subject to collective management. Nevertheless, the Committee's reference to the price that consumers pay to access copyrighted works as part of the overall balance of creators' rights suggests that States must provide some form of meaningful regulation of CMO licensing practices to comply with their obligations under the Covenant.

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68. Cf. Sinacore-Guinn, *supra* n. 1 at 237. ('The disadvantages of private [CMOs] fall into two general categories: problems in relationship to the organization's activities on the creator's behalf and problems related to the relationship between the organization and the creator.')
69. See Ficsor, *supra* n. 12 at 142–44; Helfer, *supra* n. 59 at 110–111 and n. 64; see also S. Helm, 'Intellectual Property in Transition Economies: Assessing the Latvian Experience', *Fordham Intellectual Property Media & Entertainment Law Journal* 14 (2003): 119 at 200–201 (discussing supervisory functions performed by Ministry of Culture in relation to Latvian copyright collectives).
70. General Comment, *supra* n. 11 at para. 35; see also Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 17 (similar quotation).
71. General Comment, *supra* n. 11 at para. 35.
72. *Ibid.*

The second and third areas of human rights scrutiny concern the relationship between CMOs and their members, and among their members *inter se*. Two provisions of the General Comment are relevant to these issues: the restriction of creators' rights to natural persons and the more capacious equality norms that the ICESCR endorses.

The exclusion of corporations and other business entities from the rights protected in Article 15(1)(c) suggests that States parties must give special solicitude to individual creators who are compelled, either by law or as a practical matter, to enforce their rights through collective management systems. This is particularly true for CMOs organized in a form other than an authors' association, in which creators may exercise somewhat greater control.[73] Government supervision to ensure equal treatment of individual creators encompasses a broad range of issues, including the terms of CMO membership, transfers of rights from individuals to the collective, the distribution of royalties and participation by copyright owners in CMO decisions that affect their interests.[74]

Corporate and equality issues also arise in another area of CMO governance – the relationship between individual creators and business owners who belong to the same CMO. Several scholars have noted the growing conflicts between these two classes of rights holders from the agglomeration of intellectual property-related businesses and the concomitant expansion of corporate influence over CMO decision making.[75] Although principles of 'equity' and 'solidarity' among rights holders are enshrined in many CMO charters, the recent erosion of these principles highlights the potential of the Covenant's broader non-discrimination rules to bolster equality for individual creators in their relations with corporate rights owners.[76]

4 TWO HUMAN RIGHTS CONCERNS OF COLLECTIVE ADMINISTRATION: MANDATORY MEMBERSHIP AND PROMOTING NATIONAL CULTURE

The preceding section provided a thumbnail sketch of a human rights framework for the collective administration of copyright and neighbouring rights, emphasizing both the benefits and the detriments of CMOs for achieving the balanced

73. See Sinacore-Guinn, *supra* n. 1 at 235–236 (discussing distinction between 'membership organizations' and 'corporate non-membership organizations').
74. See Ficsor, *supra* n. 12 at 21, 132 and 143. Where a CRO is a public entity – as is often true in developing countries – the government is required to address these issues as part of its obligation 'to respect' the rights of creators. See General Comment, *supra* n. 11 at paras 30 and 44.
75. See R. Wallis, C. Baden-Fuller, M. Kretschmer & G. Klimis, 'Contested Collective Administration of Intellectual Property Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity', *European Journal of Communication* 14 (1999): 5 at 6–8 (analysing the consequences of increasing concentration of ownership and integration in the music industry); G. Jokhadze, 'The Big Ones of the Music Industry: Copyright and Human Rights Aspects of the Music Business', in *Expanding The Horizons of Human Rights Law*, ed. I. Ziemele (Boston: Martinus Nijhoff Publishers, 2005), 290 at 237–238 (same).
76. See Wallis et al., *supra* n. 75 at 14–15, 19 and 22–23.

protection of creators' rights indicated by the ICESCR Committee. This section contains a more detailed analysis of two legal and policy questions with important human rights implications: (1) whether participation in CMOs should be voluntary or mandatory and (2) whether such organizations should promote national culture in addition to the licensing, enforcement and royalty distribution activities that comprise the core of their work.

4.1 Should Membership in CMOs be Mandatory or Voluntary?

The question of whether creators should be required to join CMOs has long vexed intellectual property commentators. On the one hand, mandatory membership, and the exclusion of other modes of exploitation it implies, help to achieve the economic efficiencies and practical benefits that justify collective administration in the first instance, such as issuing blanket licenses and reducing the costs of negotiations, enforcement actions and royalty distributions. However, mandatory participation in a CMO also raises serious concerns for creators. In its most extreme incarnation, compulsory membership precludes creators from issuing individual licenses for their own works, compels participation in an organization whose policies they may disfavour (and that they may be legally or practically precluded from modifying) and requires affiliation with other creators with whom they may not wish to associate.[77]

Similar concerns led the European Court of Human Rights (ECHR) to find 'closed-shop agreements' – contracts that require employees to join a trade union as a condition of gaining or maintaining employment – to violate the right to freedom of association.[78] Article 11 of the European Convention on Human Rights guarantees freedom of association, 'including the right to form and to join trade unions'.[79] It does not, however, expressly mention a right *not* to associate. Nevertheless, in *Sørensen and Rasmussen v. Denmark*, the ECHR found that compelling an employee to join a union impermissibly interfered with the rights guaranteed by Article 11.[80]

In reaching this result, the court explained that States have a positive obligation to intervene in private employment relationships to secure the rights

77. For a discussion of these competing viewpoints, see Sinacore-Guinn, *supra* n. 1 at 289–303. For an analysis of when compulsory membership is compatible with international copyright and neighbouring rights agreements, see M. Ficsor, 'Collective Management: Voluntary? Extended? Obligatory? International Norms and the "Acquis Communautaires"' (2003), Eleventh Annual Conference on International Intellectual Property Law and Policy, Fordham University School of Law, New York City, 24–25 Apr. 2003.
78. *Sørensen and Rasmussen v. Denmark*, Application Nos 52562/99 & 52620/99, Eur. Ct. H.R. (2006) (Sørensen).
79. Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, ETS No. 5 (European Convention), Art. 11.
80. Sørensen, *supra* n. 78, para. 36.

guaranteed in Article 11.[81] In reviewing this intervention, the ECHR considers whether the government has struck 'a fair balance . . . between the competing interests of the individual and of the community as a whole',[82] weighing the State's justification for permitting closed shop agreements against the extent to which they frustrate an employee's right to freedom of association.[83] In *Sørensen and Rasmussen*, the ECHR found that most States parties to the European Convention no longer support closed shop agreements, suggesting that the agreements were no longer 'an indispensible tool for the effective enjoyment of trade union freedoms'.[84] In light of this growing regional trend, the court found that Denmark's interest in maintaining closed shop agreements was insufficient to outweigh the harm to the employees' freedom of association.[85]

Although labour unions and CMOs are not directly analogous, the human rights concerns raised by compulsory membership in a labour unions may have repercussions for compulsory membership in CMOs. Both closed shop agreements and compulsory CMO membership affect a individual's livelihood. However, whereas closed shop agreements threaten the loss of employment for failure to join a union, mandatory membership in a CMO helps to ensure that creators receive revenue from the licensing of their works.

Nevertheless, there are strong arguments that mandatory membership in CMOs impermissibly interferes with freedom of association, at least in industrialized countries. In particular, compulsory membership rules are an overly broad means of advancing society's interest in facilitating access to creative works through a single licensing mechanism. The obvious efficiency gains of collective rights management will convince most rights holders to join CMOs voluntarily. These incentives are strong enough to enable CMOs to withstand the modest diminution of membership and revenue that would result from offering creators an exit option, a choice among multiple organizations or permitting individual or open-content licensing.[86]

The application of the ECHR's balancing test to mandatory CMO membership may differ, however, for developing countries with nascent creative industries. Many developing countries have only limited experience in encouraging creativity within their borders and in promoting the licensing of copyrighted works. As one commentator has explained:

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81. *Ibid.*, at para. 57.
82. *Ibid.*, at para. 58.
83. *Ibid.*, at para. 58.
84. *Ibid.*, at para. 75.
85. *Ibid.*
86. Cf. D. Gervais, 'Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective', *Canadian Journal of Law and Technology* 1 (2002): 21 at 26, online: <cjlt.dal.ca/vol1_no2/pdfarticles/gervais.pdf>, 9 Sep. 2009. ('In the same way that rightsholders should be free to decide whether they want to be part of a collective scheme (except perhaps where individual management is impossible), they should be free to create new Collective Management Organizations.')

> [T]he national cultural industries in these developing nations are frequently underdeveloped and the national repertoire underutilized. . . . From the government's perspective, and that of many creators as well, [initiatives to promote creativity] will be weakened to the extent that a significant number of national creators fail to participate in this collective effort. Furthermore, in many such countries, the number of creators involved is relatively small and so lacking in income that there is little potential for the native industry to develop without a coordinated comprehensive (and often subsidized) governmental effort.[87]

Mandating membership in CMOs is an appropriate response to these economic and social conditions. It centralizes public and private efforts to promote local culture and creativity in a single entity, enhancing their effectiveness. Such an approach is also consistent with a recognition of the special needs of developing countries that the ICESCR Committee emphasizes in its General Comment.[88] Admittedly, the freedom of choice and associational rights of individual creators are constrained by compulsory membership.[89] Under the conditions described earlier, however, in which collective management not only generates royalties but also helps to build the requisites of a national copyright culture, restrictions on the rights of individual creators can be justified under the stringent standard that the ICESCR Committee endorses as well as under the ECHR's balancing test in the *Sørensen and Rasmussen* case.[90] As economic and cultural conditions in developing countries improve, however, such restrictions will become increasingly difficult for governments to justify.

For many years, freedom of association concerns relating to mandatory CMO membership were of mostly theoretical interest.[91] As a practical matter, certain modes of exploiting protected works required collective action, and creators had little choice but to license these works collectively rather than individually. It thus made little difference whether the government formally mandated CMO membership.[92] Recently, however, two legal and technological developments have

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87. Sinacore-Guinn, *supra* n. 1 at 291. See also E. Nwauche, 'Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options For Sub Saharan African Countries' (2003), Copyright Workshop, Zimbabwe International Book Fair, 30 Jul. 2003, at 10, <www.kopinor.org/content/download/1777/13422/file/zibf.pdf> (last visited: 9 Sep. 2009). ('Apart from South Africa where the collecting societies began operations in the sixties, most of the other [Sub-Saharan African] collecting societies are of a recent origin.')
88. See General Comment, *supra* n. 11 at para. 40.
89. The Covenant protects these associational rights expressly. See ICESCR, *supra* n. 2, Art. 8(1)(a) (recognizing the right 'of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests').
90. See General Comment, *supra* n. 11 at paras 22–23; Sørensen, *supra* n. 78, at para. 58; see also *supra*, Part I.B.
91. Sinacore-Guinn, *supra* n. 1 at 289 (stating that the issue of 'voluntary versus nonvoluntary collective affiliation' is 'rarely addressed directly in the legal literature or by governmental authorities').
92. World Intellectual Property Organization, 'Collective Administration of Copyright and Neighboring Rights' (1989), *Copyright* 309 at 342 (WIPO, *Collective Administration*).

increased the salience of analyzing mandatory participation from a human rights perspective.

The first development concerns online licensing of copyrighted works. Digital media and Internet technologies create new opportunities for exploiting protected works, opportunities that collective rights management can greatly facilitate. But the ease of digital communications, the pervasive labelling of works with rights management information, and the security provided by technological protection measures also enable creators to negotiate with users directly and to license their works themselves.[93]

The practical feasibility of issuing individual licenses substantially raises the stakes associated with CMO membership rules. Many, perhaps most, creators will continue to manage their works collectively. For these individuals, it may seem of little consequence whether membership is mandatory or permissive. But the collective enterprise as a whole may suffer if rights owners are not required to participate.[94] This is particularly true if global media companies that control large portfolios of protected works withdraw them from the system of collective licensing.[95] It is also a risk if popular creators or performing artists opt out of the collective to demand higher royalties than a CMO can negotiate on their behalf as part of a blanket license.[96] In either case, it is smaller and less well known individual creators who may suffer.[97]

Whether and to what extent these dark predictions come to pass affects whether state regulation of CMO membership rules is consistent with international human rights law. If a mass exodus of corporate rights owners or popular artists from the collective denies other creators the opportunity 'to enjoy an adequate standard of living' from their creative endeavours,[98] a human rights framework may require governments to favour exclusive participation in such organizations

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93. See C. Graber, C. Govoni, M. Girsberger & M. Nenova (eds), *Digital Rights Management: The end of Collecting Societies?* (Berne: Staempfli Publishers Ltd., 2005), 251; Ficsor, *supra* n. 12 at 96–106; Gervais, *supra* n. 86 at 21.
94. A. Dietz, 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe', *Journal of the Copyright Society of the U.S.A.* 49 (2002): 897 at 911 (noting arguments that 'an unduly rapid transition from collective management to individual management of rights [in digital networks] could disturb the established, socially balanced system of distribution').
95. Wallis, *supra* n. 75 at 21–22 (discussing the 'threat to the stability of collecting societies' from the withdrawal of multinationals' repertoires from collective administration).
96. See Ficsor, *supra* n. 12 at 97–98 (noting this possibility but arguing that it is counterproductive for individual creators and for the collective as a whole).
97. As one group of commentators recently stated:

    > The threats [from recent challenges to CMOs] are greatest to those who earn modest royalties, especially from companies not linked with [major multinational conglomerates]. These artists . . . will find themselves squeezed twice. First, the collective agencies may ignore them, as their needs are costly to service. Second, the companies which represent them will have to be more aggressive if they are to survive.

    Wallis, *supra* n. 75 at 25.
98. General Comment, *supra* n. 11 at para. 2.

and to refocus regulation on providing members with the means to hold CMOs accountable and to participate in CMO decisions that affect their interests.[99] These concerns could also justify government-mandated CMO membership rules under the ECHR's balancing test. On the other hand, individual and collective licensing may coexist harmoniously in certain media. Where they do, a human rights framework weighs strongly in favour of giving creators the freedom to decide whether to license their works individually or as part of the collective.

A second trend that may alter the calculus of whether CMO memberships should be mandatory or voluntary concerns the rise of Creative Commons and similar organizations that promote open content licensing of copyrighted works.[100] Open content licenses authorize third parties to exercise some or all of a creator's exclusive rights without remuneration for such uses. In doing so, they facilitate sharing of ideas, information and protected content between authors and users and directly promote 'the public interest in enjoying broad access to new knowledge' – two goals endorsed by Article 15 of the Covenant and by the ICESCR Committee.[101] Some advocates of open content licensing also make the more controversial assertion, that a limited relinquishing of exclusive rights promote creativity more effectively than existing proprietary models.[102]

Whatever the merits of this claim, there can be little doubt that open content licenses challenge the economic interests of CMOs.[103] They thus create potential conflicts between CMOs and their members that raise human rights concerns. One recent proposal would resolve these conflicts by allowing creators to assign all of their works to CMOs on a nonexclusive basis, thereby preserving the right to distribute those same works through open content licenses.[104] This approach accords with the diversity of arrangements (many of them nonexclusive) by which

99. *Ibid.*, at paras 18 and 34.
100. See, for example, 'Creative Commons', <creativecommons.org/> (last visited: 9 Sep. 2009); A Guide to Open Content Licenses, online: <pzwart.wdka.hro.nl/mdr/research/lliang/open_content_guide/> (last visited: 9 Sep. 2009); Open Content, online: <opencontent.org/> (last visited: 9 Sep. 2009); Open Music, online: <openmusic.linuxtag.org/modules/freecontent/content/openmusic/> (last visited: 9 Sep. 2009).
101. ICESCR, *supra* n. 2, Art. 15(2) (requiring states parties to take steps 'necessary for the conservation, the development and the diffusion of science and culture'); General Comment, *supra* n. 11 at para. 35 (asserting that states parties must give 'due consideration' to 'the public interest in enjoying broad access' the production of authors).
102. See, for example, *A Guide to Open Content Licenses, supra* n. 100 (discussing models of collaborative production that are alternatives to copyright).
103. See Gervais, *supra* n. 86 at 28 and fn. 77 (reproducing statement by a Canadian collecting society urging authors to 'be prudent in granting free permissions', because the frequent grant of such permissions could be interpreted 'as a lack of support for the collective licensing system', and urging authors to forward all requests for free licenses to the CMO for processing).
104. See [A2k] Comments: Art. 8.1, <lists.essential.org/pipermail/a2k/2005-May/000360.html> (last visited: 9 Sep. 2009) (proposing for inclusion in new 'Access to Knowledge Treaty' a provision to 'ensure that copyright holders that are members of collecting societies are entitled to make available individual works outside of the framework of collecting societies').

creators currently transfer their rights to CMOs.[105] But it elides the difficulties that widespread open content licensing would engender for collectives and for the human rights benefits they produce for creators and users.[106]

More nuanced solutions are needed to balance the competing interests at stake. These could include requiring creators to transfer exclusive rights to the collective for an initial term of years or authorizing transfers on a work-by-work basis, thereby preserving some works for open content licensing. A more comprehensive solution might involve adapting the extended collective licensing system used in Scandinavian countries. Under this system, 'as soon as a substantial number of rights holders of a certain category agree to participate in a collective scheme, the scheme is automatically extended not only to other national rights holders in works of the same category, but to all foreign ones as well'.[107] Creators are not required to participate, however, and they may opt out of the collective system or veto the use of their works.[108] Such an approach places the burden on creators to exclude their works from the collective.

4.2 Should CROs Promote National Culture?

In addition to collecting and distributing royalties on behalf of their members and enforcing their rights against licensees and infringers, many CMOs engage in a broad range of social, educational, and cultural activities. In the cultural field, these activities seek to 'promot[e] the creation of new works and the use of all national works' through grants to creators; competitions, awards and scholarships; workshops and educational programmes; and the promotion of works by local artists, creators and performers.[109] In some countries, these cultural activities are mandated by statute; in others they are permitted but not required by law; and in still others, cultural promotions are wholly private ventures.[110]

Commentators continue to debate the legality and wisdom of entrusting CMOs with the promotion of culture. Those who favour such a policy argue that cultural activities provide at least an indirect benefit to CMO members by encouraging public respect for creators and their works. Cultural promotions also provide additional incentives for creativity (especially by new or impecunious authors) and highlight classes of works that would otherwise go unnoticed or underappreciated by consumers.[111]

Opponents counter that authorizing CMOs to perform promotional activities conflicts with creators' exclusive rights and risks diminishing the public legitimacy of CMOs. As to the first issue, opponents claim that authors give only nominal

105. See Gervais, *supra* n. 86 at 27–32.
106. See *supra* Part 3.1.
107. Gervais, *supra* n. 86 at 29.
108. Sinacore-Guinn, *supra* n. 1 at 405 and 407.
109. *Ibid.*, at 479 and 484–485.
110. See Dietz, *supra* n. 94 at 912–913.
111. See *ibid.*, at 913; Sinacore-Guinn, *supra* n. 1 at 484–493.

consent for expenditures on cultural activities by joining an organization that already engages in such practices. As to the second issue, the monopoly licensing powers that CMOs possess already generate suspicion of collective entities in the eyes of user groups. 'In the face of such suspicion, it is appropriate that the collective only undertake to do that which is absolutely essential to its primary mission: the administration of creative rights.'[112]

To balance these competing perspectives, the amount deducted for cultural activities has remained generally 10% or less of royalties collected.[113] Within the last decade, however, some CMOs have urged their fellow organizations to reduce or even eliminate the deduction for cultural activities, both to maximize the distribution of royalties and to ensure that foreign authors do not subsidize the promotion of culture in other countries.[114] This trend has been most pronounced among CMOs operating in common law countries; it has made less headway in European collection societies.[115]

The cultural activities that CMOs perform – and the debates over their propriety – have never been assessed in human rights terms. Commentators analyzing the issue from an intellectual property perspective make a strong case that the promotion of culture by CMOs can weaken creators' exclusive rights. But a human rights framework proceeds from a very different premise. So long as CMOs perform their core functions and provide sufficient remuneration for authors 'to secure . . . an adequate standard of living' from their creative endeavours, then the state – by assisting CMOs to perform these functions – has complied with Article 15(1)(c)'s mandate to protect creators' 'basic material interests'.[116]

Having satisfied this obligation, however, any additional royalties that the organizations collect need not be distributed to their members. Such royalties fall outside the zone of autonomy mandated by Article 15(1)(c) and within the scope of a state's discretion to weigh creators' private interests in receiving additional remuneration against other cultural goals that benefit the public at large.[117] It is a proper exercise of this discretion for States parties to delegate to CMOs a broad array of functions 'necessary for the conservation, the development and the diffusion of science and culture'.[118] Such functions undoubtedly include the promotional activities that CMOs already perform. And there is no reason – from a human

112. Sinacore-Guinn, *supra* n. 1 at 499.
113. WIPO, *Collective Administration, supra* n. 92 at 348.
114. See Competition Commission of the United Kingdom, 'Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights' (1 Feb. 1996) at 141, <www.competition-commission.org.uk/rep_pub/reports/1996/fulltext/378c9.pdf> (last visited: 9 Sep. 2009). The full version of the report can be viewed online: <www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm#full> (last visited: 9 Sep. 2009).
115. *Ibid.*
116. General Comment, *supra* n. 11 at para. 2.
117. See *supra* Part 2.2.
118. ICESCR, *supra* n. 2, Art. 15(2).

rights perspective, at least – why funding for such activities should be limited to 10% of royalties collected.[119]

Of course, nothing in the ICESCR requires states parties to appoint CMOs as their agents to conserve, develop and diffuse national culture. Many other options are available, including the creation of educational, not-for-profit or other specialized entities dedicated to studying, preserving and disseminating cultural products.[120] These activities may be undertaken by government agencies directly or by private actors operating with state support.

Alternatives that decouple the promotion of culture from CMOs' core functions have the advantage of respecting the wishes of creators who object to cultural subsidies but who are required, either by law or as a practical matter, to participate in the collective administration of their works.[121] However, such alternatives require governments to fund the promotion of culture from public revenues that are already overburdened. Officials may therefore be tempted to place the financial burden of promoting culture on CMOs rather than diminish the resources available for more pressing government programmes, including those implementing other social and economic rights protected by the Covenant.[122]

One final area of CMO cultural activities requires separate analysis – the promotion of national culture in developing countries with funds acquired from licensing the works of foreign creators. Commentators have long noted the tension between cultural promotion activities by CMOs and the national treatment rules of intellectual property treaties. Because foreign rights holders do not benefit from most cultural programmes undertaken in other nations, the argument goes, they do not receive same treatment that domestic rights owners enjoy.[123] Consequently, 'deductions for cultural activities are only allowed if . . . foreigners, directly or indirectly (thought their representatives) approve them'.[124]

This issue continues to be debated in intellectual property circles. According to one influential report by the WIPO, the Berne and Rome Conventions categorically preclude Member States from imposing cultural deductions on foreign creators in their national laws, at least with respect to exclusive rights protected by

119. The more complex legal issues raised by funding cultural activities with the royalties collective on behalf of foreign creators are discussed in greater detail below.
120. See Sinacore-Guinn, *supra* n. 1 at 505–507 (discussing alternative methods for promoting culture by entities other than CMOs).
121. See *supra* Part 4.1.
122. ICESCR, *supra* n. 2, Art. 2(1) (requiring states parties to 'take steps . . . to the maximum of [their] available resources' to fully realize the rights in the Covenant). See also S. Chavula, 'Cultural, Social and Economic Aspects of Authors' Rights: Legal and Practical Challenges in a Developing Country', Kopinor 25th Anniversary International Symposium, Oslo, Norway, 20 May 2005 at 5, <www.kopinor.org/content/download/2136/15475/file/Legal%20and%20practical%20challenges-kopinor.pdf> (last visited: 9 Sep. 2009) (stating that '[c]ulture is generally . . . given very low priority in the national budget [of Malawi] as compared to health, agriculture and education').
123. Sinacore-Guinn *supra* n. 1 at 491 and 502; WIPO, *Collective Administration, supra* n. 92, at 348.
124. WIPO, *Collective Administration, supra* n. 92 at 348.

those treaties.[125] But a more recent WIPO study, written by a leading scholar of collective management of copyright and neighbouring rights, suggests a way to resolve the national treatment issue voluntarily in the case of developing countries. According to the study, the 'foreign partner organizations [of developing country CMOs] may find it appropriate to allow an even higher level of cultural and social deductions [than ten percent] in order to assist those organizations to establish an appropriate management system and copyright infrastructure and to encourage creativity'.[126]

A human rights framework favours this special solicitude for developing states and eschews an expansive interpretation of the national treatment rule. 'International assistance' from rich to poor nations is an important dimension of rights protection in the ICESCR.[127] More importantly, the Covenant provides special rules for developing countries, which 'with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.[128]

At first glance, this text appears to conflict with the national treatment rule to the extent that it authorizes developing countries to enact legislation that mandates or permits public or private CMOs to discriminate against foreign creators and rights holders.[129] The Committee's interpretation of this provision, however, suggests that the creators' rights provisions of the Covenant apply both to foreigners and to a State's own nationals.[130] This interpretation also raises – but does not resolve – the more difficult question of how to resolve conflicts between a state's obligations under a human rights treaty and the commitments the state has undertaken by ratifying intellectual property conventions.[131]

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125. *Ibid.* (unequivocally responding in the negative to the question whether 'any discrimination by collective administration organizations (or by legislation regulating their activities'' [is] permissible to the detriment of rights owners who are . . . foreigners').
126. Ficsor, *supra* n. 12 at 151.
127. ICESCR, *supra* n. 2, Art. 2(1).
128. *Ibid.*, Art. 2(3).
129. Of course, no treaty prevents foreign CMOs and their members from entering into agreements with CMOs in developing countries to authorize the withholding of foreign works royalties for cultural purposes in those countries. See Ficsor, *supra* n. 12 at 151. The plausibility of such voluntary contributions seems questionable, however. If, as noted earlier, rights holders are pressuring CMOs to reduce or eliminate domestic cultural promotions, it seems unlikely that they will support cultural deductions that provide benefits only in other countries.
130. General Comment, *supra* n. 11 at para. 21.
131. Perhaps surprisingly to intellectual property lawyers, the Committee has suggested that these conflicts should be resolved in favour of compliance with human rights treaty obligations. See Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 12 (emphasizing that 'any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party'). For an overview of the murky and unresolved rules for reconciling treaty conflicts, see L. Helfer, 'Constitutional Analogies in the International Legal System', *Loyola of Los Angeles Law Review* 37 (2003): 193 at 216–219.

5 CONCLUSION: THE PRACTICAL CONSEQUENCES OF A HUMAN RIGHTS FRAMEWORK FOR THE COLLECTIVE ADMINISTRATION OF COPYRIGHT

This chapter has explored how a human rights framework for creators' rights – as outlined by the ICESCR Committee in the General Comment on Article 15(1)(c) and in the Statement on Human Rights and Intellectual Property – intersects with the collective administration of copyright and neighbouring rights. Before concluding the analysis of these issues, it is worth considering two broader questions: first, what are the practical consequences of a human rights framework for the regulation of CMOs and, second, does that framework improve upon the existing legal and policy landscape?

In answering the first question, it bears re-emphasizing that the Committee's analysis of the interface between human rights and intellectual property is still in its early stages. In particular, the Committee has yet to publish general comments interpreting all of the subsections of Article 15, several of which protect the rights of the public. Until the Committee completes its analysis of all of the interrelated clauses of Article 15, a human rights framework will remain a work in progress, subject to revision and, possibly, contestation by states parties.

Recall too that the Committee's general comments are only non-binding, albeit highly persuasive, interpretations of the ICESCR. Given this soft law status, it remains open to governments to challenge the Committee's legal analysis. States have opposed previous general comments issued by other UN human rights treaty bodies.[132] And such opposition may be a plausible option for some industrialized countries if the Committee ultimately interprets Article 15 to give primacy to the Covenant's economic and social rights over the obligations of intellectual property treaties – a result suggested by its preliminary review of the human rights – intellectual property interface.[133]

Assuming, however, that most States parties endorse or at least acquiesce in the Committee's analysis, the general comments on Article 15 can serve more useful and less contentious functions. They can assist governments in reporting to the Committee on the steps they have taken, and the difficulties they have encountered, in implementing the treaty domestically.[134] The general comments

132. A decade ago, the United States objected to a general comment issued by the UN Human Rights Committee, the treaty body that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR). See General Comments – Government Responses, *Observations on General Comment No. 24 (52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, United States of America*, CCPR A/50/40/Vol.1, Annex VI (1995) (contesting the authority of the UN Human Rights Committee to issue binding interpretations of the ICCPR), <www.bayefsky.com/general/a_50_40_vol._i_1995.php> (last visited: 9 Sep. 2009).

133. See Statement on Human Rights and Intellectual Property, *supra* n. 9 at para. 12.

134. ICESCR, *supra* n. 2, Arts 16–17 (setting forth reporting obligations of states parties to the ICESCR).

also can act as a catalyst for generating information about state practices concerning the human rights dimensions of intellectual property, including the regulation of CMOs.[135] From this fund of knowledge and experience, the Committee can then provide more detailed guidance to governments on how to balance the competing human rights concerns raised by the collective administration of copyright, including the issues discussed in this chapter.

The answer to the second question posed above – whether a human rights framework for intellectual property improves upon the existing legal and policy landscape – depends in part on whether affected parties believe that the current system is in need of reform. In the past, user groups have been the most frequent and vociferous critics of collective management of copyright.[136] But recent developments, such as the online distribution of protected works and the growing number of works controlled by corporate rights owners,[137] are increasing conflicts among actors who create and exploit intellectual property products – including tensions between individual and corporate rights owners and between CMOs and their members.[138] In this climate, a consensus may eventually develop on the need for change. If so, a human rights framework offers a possible focal point around which all parties can structure a revised regulatory regime.

It is unclear, however, whether all of the relevant actors will in fact endorse the approach to CMO regulation that is implied by the Committee's analysis. For one thing, not all countries are bound by the ICESCR. This includes, most significantly, the United States, which has signed the Covenant but shows no intention of ratifying it.[139] For another, the Committee has not yet provided a fully developed vision of how to regulate the collective administration of copyright consistently with international human rights law. These factors increase the risk of treaty conflicts and of applying different legal rules to different nation states. They also create an uncertain regulatory environment for private actors whose conduct transcends national borders.

The dangers of fragmentation and incoherence are real, but they are not insuperable. The creators' rights provisions in the Covenant and the UDHR have remained hidden in the shadows for far too long. In addition, the Committee has only recently begun the slow and difficult process of giving a more precise meaning to these provisions. To convince observers of the value of adopting a human rights framework for intellectual property, including collective management, the Committee must lead with the persuasive force of its reasoning. Only by demonstrating the values of this approach can the Committee hope to alter the behaviour of governments and, through them, private parties, and thereby affect the lives of the individuals and groups whose rights it is charged with protecting.

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135. Given the many complex and contested issues that Art. 15 encompasses, however, the Committee will need to make a particular effort to discuss CMOs in its dialogues with government representatives during the state reporting process.
136. See Helfer, *supra* n. 59 at 113–119; Sinacore-Guinn, *supra* n. 1 at 238–39.
137. See Graber, *supra* n. 93; Jokhadze, *supra* n. 75; Wallis, *supra* n. 75.
138. See *supra* Part 3.2.
139. See D. Weissbrodt, J. Fitzpatrick and F. Newman, *International Human Rights: Law, Policy, and Process*, 3rd edn. (Cincinnati: Anderson Publishing, 2001), 1196 at 122 and 134–43.