

HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Mapping the Global Interface

This book analyzes the interface between intellectual property and human rights law and policy. The relationship between these two fields has captured the attention of governments, policymakers, and activist communities in a diverse array of international and domestic venues. These actors often raise human rights arguments as counterweights to the expansion of intellectual property in areas including freedom of expression, public health, education, privacy, agriculture, and the rights of indigenous peoples. At the same time, creators and owners of intellectual property are asserting a human rights justification for the expansion of legal protections.

This book explores the legal, institutional, and political implications of these competing claims in three ways: (1) by offering a framework for exploring the connections and divergences between these subjects; (2) by identifying the pathways along which jurisprudence, policy, and political discourse are likely to evolve; and (3) by serving as a teaching and learning resource for scholars, activists, and students.

Laurence R. Helfer is the Harry R. Chadwick, Sr., Professor of Law at Duke University School of Law, where he codirects the Center for International and Comparative Law and is a member of the faculty steering committee of the Duke Center on Human Rights. He has authored more than 50 publications and has lectured widely on his diverse research interests, which include interdisciplinary analysis of international law and institutions, human rights, and international intellectual property law and policy. He is the coauthor of *Human Rights* (2d ed., 2009) and the author of *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments* (2004).

Graeme W. Austin is a Professor of Law at Melbourne University and Victoria University of Wellington. Until 2010, he was the J. Byron McCormick Professor of Law at the University of Arizona. He has lectured on intellectual property law in a variety of settings and is an elected member of the American Law Institute. He has published widely on the topic of intellectual property, including in the *Law Quarterly Review* and the *International Review of Intellectual Property and Competition Law*. He is coauthor of *International Intellectual Property: Law and Policy* (2008).

Human Rights and Intellectual Property

Mapping the Global Interface

LAURENCE R. HELFER

Harry R. Chadwick, Sr., Professor of Law
Duke University School of Law

GRAEME W. AUSTIN

Professor of Law
Melbourne University
and Victoria University of Wellington



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521711258

© Laurence R. Helfer and Graeme W. Austin 2011

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data
Austin, Graeme.

Human rights and intellectual property : mapping the global interface / Graeme
W. Austin, Laurence R. Helfer.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88437-2 (hardback) – ISBN 978-0-521-71125-8 (pbk.)

1. Intellectual property. 2. Intellectual property (International law) 3. Human
rights. I. Helfer, Laurence R. II. Title.

K1401.A98 2011

346.04'8-dc22 2010031359

ISBN 978-0-521-88437-2 Hardback

ISBN 978-0-521-71125-8 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for
external or third-party Internet Web sites referred to in this publication and does not guarantee that
any content on such Web sites is, or will remain, accurate or appropriate.

Contents

<i>Preface</i>	<i>page xi</i>
1. Mapping the Interface of Human Rights and Intellectual Property	1
1.1. <i>Thematic Overview and Introduction</i>	1
1.2. <i>The International Human Rights System: A Substantive and Institutional Overview</i>	3
A. The U.N. Human Rights Treaty System	5
B. Mechanisms for Protecting Human Rights under the U.N. Charter	14
1.3. <i>The International Intellectual Property System: A Substantive and Institutional Overview</i>	16
A. Types of Intellectual Property	16
B. Rationales for Intellectual Property	18
C. The International Institutional Framework	24
1.4. <i>Historical Isolation of the Human Rights and Intellectual Property Regimes</i>	31
1.5. <i>Catalysts for the Expanding Intersection of the Human Rights and Intellectual Property Regimes</i>	34
A. International Intellectual Property Protection Standards and Enforcement Mechanisms: Reactions and Counterreactions	34
1. Pressure by U.S. Intellectual Property Industries to Expand Intellectual Property Protection Standards and Enforcement Mechanisms	35
2. The Shift from WIPO to GATT to TRIPS	36
3. The Impact of TRIPS and the Rise of TRIPS Plus Treaties	39

4. Access to Knowledge and the New Politics of Intellectual Property	43
B. New Developments in Human Rights	48
1. The Rights of Indigenous Peoples and Traditional Knowledge	49
2. Conflicts between TRIPS and Economic, Social, and Cultural Rights	52
3. The Human Rights Obligations of Transnational Corporations	57
4. The Human Right of Property and Corporate Intellectual Property Interests	61
1.6. <i>Competing Conceptual Frameworks for Mapping the Interface of Human Rights and Intellectual Property</i>	64
A. Conflict	65
B. Coexistence	73
C. Beyond Conflict and Coexistence	81
2. The Human Right to Health, Access to Patented Medicines, and the Restructuring of Global Innovation Policy	90
2.1. <i>Introduction</i>	90
2.2. <i>Background on the HIV/AIDS Pandemic and Access to Antiretroviral Drugs</i>	92
2.3. <i>The Human Right to Health and the Emerging Right of Access to Medicines</i>	98
A. Justifications for and Critiques of the Human Right to Health	98
B. The Normative Development of the Human Right to Health and of Access to Medicines	105
2.4. <i>Patent Protection for Pharmaceuticals and Revising the TRIPS Agreement to Enhance Access to Medicines</i>	119
A. An Overview of TRIPS Patent Provisions Relating to Access to Medicines	119
B. Recent Examples of Compulsory Licenses to Promote Access to Medicines	127
2.5. <i>Human Rights Approaches to Closing the “Global Drug Gap” Created by Patented Pharmaceuticals</i>	140
A. Are Patents a Barrier to Access to Medicines?	142
B. Human Rights Contributions to Closing the Global Drug Gap	144
C. Implications for Other Intellectual Property Rights	169

3. Creators' Rights as Human Rights and the Human Right of Property	171
3.1. <i>Introduction</i>	171
3.2. <i>Definitional Issues</i>	173
3.3. <i>Drafting History of UDHR Article 27 and ICESCR Article 15(1)(c)</i>	176
3.4. <i>General Comment No. 17: An Overview</i>	188
3.5. <i>Domestic Law Reform and Creators' Human Rights: Three Case Studies</i>	199
A. <i>Limiting the Reproduction Right for Musical Works</i>	200
B. <i>Restricting the Scope of the Derivative Work Right</i>	203
C. <i>Resurrecting Copyright Formalities</i>	206
3.6. <i>The Human Right of Property</i>	212
4. Rights to Freedom of Expression, to Cultural Participation, and to Benefit from Scientific Advancements	221
4.1. <i>Introduction</i>	221
4.2. <i>Rationales for the Right to Freedom of Expression</i>	222
4.3. <i>International, Regional, and Domestic Law Sources</i>	227
4.4. <i>Rights to Participate in Culture and to Benefit from Scientific Progress</i>	233
4.5. <i>Intersections between Freedom of Expression and Intellectual Property</i>	242
A. <i>Copyright</i>	243
1. <i>The First Amendment to the U.S. Constitution</i>	243
2. <i>Article 10 of the European Convention on Human Rights</i>	259
B. <i>Trademarks</i>	283
1. <i>The "Essential Function" of a Trademark</i>	286
2. <i>Freedom of Expression and Trademark Doctrine</i>	290
C. <i>Patents</i>	312
5. The Right to Education and Copyright in Learning Materials	316
5.1. <i>Introduction</i>	316
5.2. <i>The Right to Education: Justifications and Rationales</i>	320
5.3. <i>The Right to Education in International Law</i>	326
5.4. <i>The Provision of Learning Materials and the Human Right to Education</i>	332
5.5. <i>Copyright in Textbooks and Learning Materials</i>	335
5.6. <i>Other Impediments to the Provision of Learning Materials</i>	349

5.7. <i>Mapping the Interface between Copyright and the Right to Education</i>	357
6. The Human Right to Food, Plant Genetic Resources, and Intellectual Property	364
6.1. <i>Introduction</i>	364
6.2. <i>The Evolution of the Right to Food and of Intellectual Property Protection for Plant-Related Innovations</i>	366
A. The Right to Food	366
1. Justifications for and Critiques of the Human Right to Food	366
2. The Normative Evolution of the Human Right to Food	371
B. Intellectual Property Protection for PGRs	379
1. Justifications for and Critiques of Intellectual Property Protection for PGRs	379
2. The Evolution of Intellectual Property Protection for PGRs	381
a. Plant Variety Protection	382
b. Patent Protection for Plant-Related Innovations	386
3. Legal Rules and Policy Objectives in Tension with Intellectual Property Protection for Plant-Related Innovations	390
a. Farmers' Rights	390
b. Regulating Access to PGRs in Nature and in Global Seed Banks	393
c. "Biopiracy" and Intellectual Property Protection of Raw Plant Materials	394
6.3. <i>Specific Controversies Involving the Right to Food and Intellectual Property Protection for PGRs</i>	400
A. The Response to Expanding Intellectual Property Protection for PGRs in the United Nations Human Rights System	400
B. Genetically Modified Seeds and the Right to Food in India	409
1. The Protection of Plant Varieties and Farmers' Rights Act, 2001, and the Seeds Bill, 2004	409
2. Constitutional Protection of the Right to Food and the Review of India's 2008 Report to the Committee on Economic, Social and Cultural Rights	415

7. Indigenous Peoples' Rights and Intellectual Property	432
7.1. <i>Introduction</i>	432
7.2. <i>International Human Rights Law Relating to Indigenous Peoples</i>	438
7.3. <i>Human Rights, Self-Determination, and the Protection of Indigenous Peoples' Intellectual Property</i>	447
7.4. <i>Indigenous Peoples' International Initiatives Relevant to Intellectual Property</i>	457
7.5. <i>Intellectual Property Protections for Traditional Knowledge and Traditional Cultural Expression</i>	461
7.6. <i>Individual and Collective Interests in Indigenous Cultural Productions</i>	483
7.7. <i>Intersections between Indigenous Human Rights and Intellectual Property Issues</i>	496
8. Conclusion	503
8.1. <i>The Unavoidable Intersection of Human Rights and Intellectual Property</i>	504
8.2. <i>Assessing Existing Proposals to Reconcile Human Rights and Intellectual Property</i>	506
8.3. <i>Toward a Human Rights Framework for Intellectual Property</i>	512
A. <i>The Protective Dimension of the Framework</i>	513
B. <i>The Restrictive Dimension of the Framework</i>	516
<i>References</i>	523
<i>Acknowledgments</i>	539
<i>Index</i>	543
<i>Cases Discussed (Selected)</i>	550

Preface

The key terms in this book's subtitle – “mapping,” “global,” and “interface” – reflect our approach to analyzing the relationship between human rights and intellectual property.

Consider first the cartographical trope, “mapping.” It is possible to envision intellectual property law and human rights law as the product of the gradual accretion and spread of international and domestic laws and institutions. The terrain of international intellectual property law was the first to emerge. Initially the subject of discrete bilateral agreements between sovereign nations, its modern form came to be established with the two great multilateral intellectual property treaties from the end of the 19th century: the Paris Convention on industrial property (1883) and the Berne Convention on literary and artistic works (1886). The international human rights regime emerged more recently, with the founding of the United Nations after World War II, and, in particular, the adoption of the Universal Declaration of Human Rights (1948).

From these beginnings, the terrain occupied by both issue areas has expanded significantly in substantive reach, in prescriptive detail, and in geographic scope. In the intellectual property context, the international law relating to patents illustrates this point. At the end of the 19th century, the desirability of domestic – let alone international – patent protection was a matter of sharp debate, even among industrialized nations. For this reason, the Paris Convention contains few substantive rules – although its national treatment and international priority rules for patent registrations were important achievements – and (like the Berne Convention) it has no effective enforcement mechanisms.

Today, in contrast, international intellectual property law imposes a significant and detailed array of substantive and enforcement obligations. The Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which came into force in 1995, obliges member states to recognize patents

in all fields of technology (subject to transitional arrangements for developing nations). TRIPS also dictates the standard by which domestic law deviations from international patent rules are to be tested, and it sets forth detailed requirements in areas such as domestic enforcement procedures. Perhaps most significantly, noncompliance with TRIPS can trigger meaningful sanctions, as a result of the treaty's integration into the international trade regime now administered by the World Trade Organization. That body, through its dispute settlement system, also contributes to the development of international intellectual property norms, along with a number of other key agencies, most notably the World Intellectual Property Organization (WIPO). The expansion of international patent law did not stop with TRIPS. International norms continue to emerge and develop as a result of multilateral, regional, and bilateral agreements. A potentially important new initiative, the Anti-Counterfeiting Trade Agreement (ACTA), is currently being negotiated. If adopted, ACTA will shape international intellectual property rules and enforcement mechanisms in a range of different contexts.

The space occupied by the international human rights regime has also grown significantly since its inauguration in the middle of the 20th century. The Universal Declaration gave birth to two foundational treaties that entered into force in 1976 – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The Covenants, together with the general comments, case law, and recommendations of their respective treaty bodies, and the decisions of regional human rights courts and commissions, have significantly bolstered the prescriptive force of human rights law. A particularly noteworthy development has been the widening acceptance of social, economic, and cultural rights that, until the 1990s, remained mostly underdeveloped, particularly in the West. New recognition of the human rights of groups has also emerged – commitments that are especially important to the world's indigenous peoples.

In terms of enforcement, the most important activities are occurring at the regional and domestic levels, especially in Europe but also in the Americas and other regions. National courts increasingly adjudicate human rights treaties directly or draw upon international norms when construing national constitutions and statutes. At all levels, multiple review mechanisms and judicial bodies shape human rights law through their investigative and interpretive activities. Indeed, one critique of the international human rights regime is that it suffers from a surfeit of rules, institutions, and decision makers that risks weakening the system as a whole.

As a result of these and related developments, the respective terrains of both the human rights and intellectual property regimes have grown significantly and the intersections between them have expanded. There now exists a

broad range of legal, social, political, practical, and philosophical issues that straddle both fields. These intersections are evolving rapidly, requiring a new conceptual cartography to help map the changing landscape.

We explore a number of these intersections in this book. To continue with the patent example introduced earlier, consider the human right to the highest attainable standard of health in the light of the protection of pharmaceutical patents. Many nations once denied patents for new drugs on public health grounds; today, TRIPS obliges member nations to recognize and enforce patents in all fields of technology, including medicines. As a result of these countervailing legal commitments, government agencies, international organizations, and civil society groups must engage with the disciplines of both human rights and intellectual property to develop effective, just, and enduring responses to public health crises and to identify new mechanisms for harnessing private innovation to serve the wider social good. This is already occurring as a growing number of actors typically concerned with human rights issues are becoming engaged in intellectual property issues and (although perhaps to a lesser extent) vice versa.

This discussion also underscores the salience of the term “global” in the book’s subtitle. State and private actors in legal regimes have long recognized the inadequacy of purely domestic responses. In the human rights context, the atrocities of the Second World War engendered a commitment to the idea that sovereign nations cannot be the sole arbiter of the fundamental human entitlements. The founders of the United Nations and the drafters of the Universal Declaration recognized that human rights must be bolstered by international institutions and international legal obligations. In the intellectual property context, both private firms and governments have long recognized that effective responses to piracy and counterfeiting, and, more recently, the protection of genetic resources and indigenous knowledge, cannot be adequately addressed at the domestic level. In addition, there now exist important feedback mechanisms in intellectual property lawmaking, whereby norms developed at the international and domestic levels mutually influence each other.

As we discuss in Chapter 1, the existence of *any* meaningful engagement between the two areas of law is a relatively recent phenomenon. Scholars and policymakers in each regime are only beginning to recognize areas of mutual concern. Because law is shaped by human agency, the way in which human rights and intellectual property intersect is not an inevitable or predetermined process. The actors who engage with the legal and social policy issues to which both regimes are relevant have a large measure of discretion in determining the character of this interaction. Will there be a seismic clash, a rupturing of tectonic plates, as the two areas move ever closer together and

finally collide? Or will the engagement be carefully considered, nuanced, and accommodating? Our preference is for the latter kind of engagement, and one of the aims of this book is to provide the substantive materials and original analytical content to help others to explore the intersections between the two regimes in a productive and coherent fashion.

These considerations also explain the use of the term “interface” in our subtitle. The most familiar use of the term is in the computing context. It denotes mechanisms for conjoining distinct or contrasting elements and systems: software and hardware, or interfaces between operating systems. Human rights and intellectual property exhibit distinctive systemic characteristics. For the most part they have evolved independently – although, as we discuss in Chapter 3, there is an often-overlooked set of human rights obligations that recognize the rights of creators in their artistic and scientific works – and have been shaped by different sets of actors in distinct institutional contexts and informed by divergent analytical traditions. A key aim of the book, suggested by our use of the term “interface,” is to provide a structure for dialog and engagement between these two – hitherto largely separate – systems.

To that end, Chapter 1 offers a conceptual overview of the relationship between human rights and intellectual property, as well as a brief summary of each area of law. The latter will be useful for readers less familiar with the traditions and substance of one or both areas. Chapter 1 also explores different ways that the relationship between human rights and intellectual property has been understood by scholars and in different legal and policy contexts. The chapters that follow develop the latter theme and present “case studies” of several distinct controversies. Chapter 2 considers the right to health and patented pharmaceuticals; Chapter 3 addresses the human rights associated with certain types of creative activity; Chapter 4 examines the rights of freedom of expression and cultural participation and the right to benefit from scientific progress; Chapter 5 explores the right to education and the potential tensions with copyright protection in learning materials; Chapter 6 examines the human right to food in the context of intellectual property protections in plant genetic materials; Chapter 7 considers the claims that have emerged in the context of indigenous peoples’ struggles for recognition of their rights in respect of traditional knowledge and other forms of cultural production. In a final chapter, we offer a fuller exposition of our own framework for conceptualizing the most productive connections between the human rights and intellectual property regimes.

The decision to defer the exposition of our conceptual framework until the Conclusion in part reflects the genesis of this book. Several years ago, one of us developed a law school course entitled Human Rights and Intellectual

Property. Partly because of the novelty of the topic, no teaching materials existed, a gap that endures today. Teaching the course was a very fulfilling experience. The course brought together students from an array of different backgrounds and with a range of different interests – not only intellectual property and human rights, but also international trade and indigenous peoples’ law and policy issues. The course invited these groups to engage with each other across the intellectual, heuristic, and, sometimes, cultural divides that had informed their thinking about the various issues to which human rights and intellectual property are relevant – issues that we consider at greater length in the case studies in each chapter of this book. The aims of the course included introducing students to the substantive laws, policies, and institutional frameworks of both human rights and intellectual property. But a more ambitious aim was to invite students to develop their own conceptions of how the two areas might interact. Although we have our own views on how the contours of the interface might be mapped, as a pedagogical matter we believe that readers’ engagement with this topic will be richer if they are also encouraged to form their own views as to how this might be achieved. Hence our decision on the placement of the final chapter.

These concerns also reflect the thinking behind our use of the term “mapping” – the present participle form of the verb. Engagement between the two areas of law is a dynamic and evolving process, one to which we hope this book will contribute. But we labor under no pretension that this work is by any measure complete. We look forward to engaging with the responses – including, we imagine, rigorous critiques – that this text might invite.

Our aspirations for the book also extend beyond the classroom context. We hope that it will contribute to the emerging scholarship in the field and to the policy debates that are beginning to occur in both regimes. Here we offer a personal anecdote. When we first entered law teaching in the 1990s, human rights and intellectual property were separate components of our respective research agendas. Our decision to focus our scholarly efforts in these two discrete areas was highly unusual. In fact, a senior colleague counseled one of us to choose one field and abandon the other, warning that there was little benefit – and potentially much risk – in attempting to develop expertise in two such different and unrelated fields. The response offered by the recipient of this well-meaning advice was to acknowledge the lack of substantive connections between the two legal regimes, but to counter that there was much to be learned by interacting with different communities of scholars, government officials, and civil society groups, who rarely, if ever, interacted directly with each other.

More than a decade later, much has changed. When we now explain to colleagues and students that our research explores the intersections between

intellectual property and human rights, the usual response is a gleam of recognition and a question or two – most often about patented medicines and HIV-AIDS, but increasingly about freedom of expression and online technologies or the moral rights of artists. We are hardly alone in exploring these issues. As we indicated earlier, growing numbers of civil society organizations now include both human rights and intellectual property in their mandates, often specializing in subissues such as patents and the right to health, access to knowledge, or the intersection of human rights, intellectual property, and development. And the global network of commentators and journalists who write about the interface of the two fields is expanding, as revealed by the numerous and diverse entries in this book's extensive References.

For law students, as well as students in cognate disciplines, such as political theory and international relations, much of the value of the book may lie in the extensive Notes and Questions that follow the analysis of each substantive topic. These sections invite the kind of deep engagement and interrogation of substantive issues and conceptual frameworks that characterize university-level instruction, at both undergraduate and graduate levels. We also hope that this book will be useful in other contexts and for other actors, including government officials, international organizations, activists, and civil society groups. To that end, discussions of substantive topics often are followed by Issues in Focus. These sections perform a number of functions, including summarizing recent developments and highlighting emerging issues. By deploying a range of different analytical techniques and materials, we hope that the book can be used by, and will be useful for, a wider range of constituencies.

Finally, we would like to acknowledge the many scholars who have contributed to the writing of this book with comments and criticisms. They include Barbara Atwood, Molly Beutz, Jamie Boyle, Audrey Chapman, Graeme Dinwoodie, Maureen Garmon, Toni Massaro, Ruth Okediji, and Peter Yu. We are also grateful for the help of several research assistants, including Laura Duncan, Eric Larson, Lisa Lindemenn, María Méndoza, Casey Mock, Pedro Paranagua, Meryl Thomas, and Amy Zavidow. Erin Daniel provided invaluable assistance in obtaining permissions to reproduce copyrighted materials. Last, but by no means least, are the unswerving dedication and patience of our respective partners, David Boyd and Bryan Patchett, the acknowledgment of whose manifold contributions is itself a reflection of hard-fought human rights struggles.

Laurence R. Helfer
Durham, North Carolina, USA
December 2010

Graeme W. Austin
Wellington, New Zealand

Chapter 8

Conclusion

This book analyzes the interface of human rights and intellectual property from multiple perspectives. Chapter 1 introduces the major legal, institutional, and political aspects of each regime, explains how they came into increasing contact over the past decade, and explores alternative frameworks for conceptualizing their relationship. Each of the remaining chapters adopts a predominantly substantive orientation that examines in depth specific intersections between certain human rights and intellectual property protection rules. In this concluding chapter, we shift focus to elaborate the major transsubstantive themes that are interwoven through the preceding materials. Our aim is twofold. First, and more modestly, we seek to illuminate connections that transcend specific “hot button” controversies and to offer deeper insights about the interconnections between the two legal regimes. Second, and more ambitiously, we offer our own analytical framework to assist scholars, policymakers, civil society groups, and students in conceptualizing the relationship between human rights and intellectual property.

We begin in Section 8.1 by reiterating the inevitability of the human rights–intellectual property interface and by rejecting – both as a matter of principle and as a matter of practical politics – arguments for maintaining a firewall between the two regimes and avoiding the difficult work of normative engagement. Section 8.2 evaluates three proposals to demarcate the boundary lines between human rights and intellectual property, proposals whose particularities we describe in greater detail in previous chapters. Section 8.3 offers our own conception of the human rights–intellectual property interface, synthesizing and expanding upon the ideas developed in previous chapters. We distinguish between the *protective* and *restrictive* functions of international human rights law in the intellectual property context and propose a framework that identifies when human rights concerns favor revising

existing intellectual property protection rules or otherwise restructuring the incentives for human creativity and innovation.

8.1. The Unavoidable Intersection of Human Rights and Intellectual Property

The previous chapters of this book describe the growing network of international organizations, government agencies, civil society groups, attorneys, commentators, and journalists whose work focuses on both human rights and intellectual property issues. Many of the individuals who participate in this network view the increasing intersections between the two regimes as beneficial. Some, however, are suspicious of these developments, preferring instead to maintain or even fortify the boundary between the regimes. Others take aim at specific points of intersection, claiming that the overlap of previously unrelated rules and institutions will result in deleterious legal or policy outcomes.

This opposition is partly engendered by a resistance to change among actors who are habituated to the discourse of one complex legal and political system but not the other. But this resistance is animated by more than a reflexive fear of the unfamiliar. The two communities speak very different languages. Intellectual property commentators, especially those working in the Anglo-American tradition, employ the analytical tools of utilitarianism and welfare economics to evaluate the trade-offs between incentives and access and the consequences for the individuals and firms that create, own, and consume intellectual property products. The international human rights movement, by contrast, engages in a discourse of absolutes that seeks to delineate the negative and positive duties of states to respect and promote inalienable individual freedoms. As a result, to label something as a “human right” often invokes – in rhetoric if not always in reality – a language of trumps and unconditional demands. This emphasis on categorical rights and responsibilities appears ill suited to the rapidly changing technological and economic environment in which intellectual property rules operate, an environment that often engenders calls for incremental recalibrations of the balance between incentives and access.

A second basis for resistance to the intersection of human rights and intellectual property stems not from concerns about each regime as it actually exists, but rather from opposition to actors who make rhetorical and, we believe, inflated claims grounded in one regime to support arguments for changing the other. Commentators on both sides have expressed concerns about such overclaiming. Some in the human rights community, for example, fear that

intellectual property owners – in particular, multinational corporations – will invoke the creators' rights and property rights provisions of international instruments to lock in maximalist intellectual property rules that will further concentrate wealth in the hands of a few at the expense of the many. Parts of the intellectual property community, by contrast, have expressed the concern that seemingly vague calls for states to “respect, protect, ensure, and fulfill” economic and social rights are code words for more radical campaigns to promote government intervention in private innovation markets and radically scale back or even abolish intellectual property protection. A common factor that unites both sets of fears is the focus on extremist arguments that ignore the actual structure and content of each legal regime.

A third explanation for resistance to the human rights–intellectual property interface stems from a concern with fragmentation of international regimes, overlapping competencies of international institutions, and conflicts among legal obligations. Worries that the international legal system is becoming overly fragmented are widespread. That system, unlike its national counterparts, lacks a single legislative, executive, or judicial body with mandatory, universal powers. It is composed of disaggregated and decentralized rules and institutions that include thousands of multilateral, regional, and bilateral treaties and customary laws; myriad nonbinding declarations and resolutions and other “soft law” norms; intergovernmental organizations with diverse memberships and subject matter competencies; international tribunals, review bodies, and arbitral panels with different jurisdictional mandates; and formal and informal networks of government, private, and hybrid regulators.

Anxieties relating to the fragmentation of international legal regimes are exacerbated by institutional competence concerns. Since the adoption of the TRIPS Agreement in the mid-1990s, many important intellectual property controversies have been litigated within the World Trade Organization (WTO). The merger of trade and intellectual property has provoked a wealth of scholarly debate, much of it unflattering. But calls for the international trading system to give greater consideration to human rights concerns – both those related specifically to intellectual property and more generally – raise difficult issues as to whether WTO decision makers are adequately equipped to mediate these competing values.

At the level of rule conflict, fragmentation concerns run especially high where human rights, intellectual property, and trade intersect. The applicable rules often pull in opposite directions, suggesting to some observers that their interaction is a zero sum game in which the only legal and policy choice is between wider access in the present or more innovation in the future,

never both. These concerns have motivated international review bodies and commentators to propose normative hierarchies that privilege one regime over the other where relevant rules conflict. As the analysis of these hierarchies in Chapter 1 reveals, however, these efforts are insufficiently theorized and highly contested. Government officials, adjudicators, nonstate actors, and scholars are unlikely to accept any wholesale normative prioritization of the two regimes, and they will continue to advance competing claims in the many diverse venues made possible by the international legal system's disaggregated structure. Continued engagement of the two regimes is therefore inevitable. Providing a constructive framework for analyzing and facilitating that engagement is one of the principal motivations for writing this book.

8.2. Assessing Existing Proposals to Reconcile Human Rights and Intellectual Property

The analyses in this book and in our previously published articles and essays on which it is based are by no means the only attempts to analyze the relationship between the human rights and intellectual property regimes. A number of scholars and international expert bodies have made thoughtful interventions on these issues over the past decade, and their arguments and proposals have enriched our own ideas about the subject. In previous chapters of this book, we give these commentators and experts pride of place by reproducing and engaging with key extracts of their writings. Here, we paint with a broader brush. We group these contributions into three broad and admittedly simplified categories, highlighting common themes, strengths, and weaknesses and laying the groundwork for our own analysis.

The first group of scholars emphasizes the importance of rediscovering the historical record.¹ For these commentators, resolving the normative tensions engendered by the intersection of human rights and intellectual property requires unearthing the original understanding of the long-forgotten creators' rights and cultural benefit clauses in UDHR Article 27 and

¹ See, e.g., Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Relating to Article 15(1)(c)*, 35 COPYRIGHT BULL. 4 (2001); ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2000/15 (Oct. 9, 2000) (prepared by Maria Green); Lea Shaver, *The Right to Science and Culture*, 2010 WISC. L. REV. 121 (2010); Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WISC. INT'L L. REV. 637 (2009); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); Paul Torremans, *Copyright as a Human Right*, in PAUL L. C. TORREMANS (ED.), COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION – INTELLECTUAL PROPERTY – PRIVACY 1 (2004).

ICESCR Article 15. As we explain in greater detail in Chapter 3, these clauses set forth legal obligations and policy objectives closely analogous to those embodied in intellectual property systems. Like the latter systems, the texts of Article 27 and of Article 15, when read together, obligate governments to recognize and reward human creativity and innovation and, at the same time, to ensure public access to the fruits of those endeavors. Striking the appropriate balance between these two goals is the central challenge that both regimes share.

One of the aims of this historical research is to rediscover how the women and men who wrote Articles 27 and 15 understood that this crucial balance would be struck. By carefully parsing the negotiating histories and the wider political and social contexts that gave birth to these clauses, commentators hope to explain why the drafters included the moral and material interests of creators and the public's right to enjoy the benefits of that creativity in universal human rights instruments. For some scholars, however, this enterprise is also a precursor to a second, more ambitious goal: to provide a historical justification for giving greater weight to the public side of the balance between access and innovation and concomitantly reduced protections for the creators and owners of intellectual property products.

We fully support the first objective but are more skeptical of the second. Shedding light on this obscure corner of the human rights regime is undoubtedly a worthy endeavor. However, the historical record provides only limited and ultimately inconclusive guidance. It demonstrates that the drafters strongly endorsed the right to participate in culture and to enjoy the benefits of scientific progress and its applications, rejected proposals to include copyright protection in the UDHR and ICESCR, and divided over the decision to recognize creators' rights as human rights. In the absence of greater specificity, however, the drafting history is too slender a reed on which to ground an alternative framework for how states should balance these competing goals.

This use of history is misguided in another respect. Human rights law and intellectual property law are both famously dynamic, readily adapting to changing circumstances through new rounds of treaty making, interpretations by international tribunals, and revisions of national laws. A framework that privileges the original understanding of Articles 27 and 15 fails to engage with this dynamism and with the evolutions in law, politics, social values, and technology that engendered these adaptations.

A second group of scholars views the increasing attention to intellectual property issues in the human rights regime as an opportunity to reexamine tools that already exist in national intellectual property laws and treaties that help government decision makers to strike a socially optimal balance between

incentivizing private innovation and enriching the cultural, scientific, and information commons.² For these commentators, gazing at intellectual property through a human rights lens illuminates the fact that governments have rarely used many of these policy levers or have allowed them to fall into desuetude. Once revived or expanded, this argument continues, these tools – which include subject matter exclusions, exceptions and limitations, compulsory licenses, and special and differential treatment of developing countries – can fully achieve the goals that the intellectual property system shares with the human rights regime while avoiding the risks of importing rights claims that are less susceptible to utilitarian balancing.

We endorse calls to revive and expand policy levers that have long been part of the intellectual property regime as a formal matter but that are infrequently utilized in practice, whether because of lack of familiarity or pressure from international organizations, developed countries, or intellectual property industries. And we agree with the conclusions of international expert bodies that the “flexibilities” in intellectual property treaties and statutes are salutary on their own terms as well as essential to maintain compatibility with international human rights law. We part company with these scholars and experts, however, to the extent they assert that bolstering these policy tools is not only necessary but also sufficient to reconcile the human rights and intellectual property regimes.

We reject this conclusion as a matter of both principle and practical politics. As a matter of principle, flexibility mechanisms provide breathing space for governments to promote a wide range of objectives that conflict or are in tension with expansive intellectual property protection rules. Commentators have offered numerous suggestions for manipulating these policy levers to enhance economic development, foster local innovation, and increase technology transfers from developed to developing countries. These are salutary goals, to be sure. But they are insufficiently connected to the protection of fundamental rights and freedoms. Stated another way, intellectual property

² See, e.g., P. B. Hugenholtz, *Copyright and Freedom of Expression in Europe*, in ROCHELLE COOPER DREYFUSS, HARRY FIRST, & DIANE LEHEER ZIMMERMAN (EDS.), *INNOVATION POLICY IN AN INFORMATION AGE* (2000); P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (Mar. 2008), available at <http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>; Ruth Okediji, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in MARGOT E. SALOMON ET AL. (EDS.), *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* 211 (2007); A. Strowel & F. Tulkens, *Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access*, in J. GRIFFITHS & U. SUTHERSANEN (EDS.), *COPYRIGHT AND FREE SPEECH, COMPARATIVE AND INTERNATIONAL ANALYSES* (2005).

flexibility mechanisms expand the regulatory space available to governments. Yet they offer at best only limited guidance for restructuring creativity and innovation policies to promote human rights, including the treaty obligations and customary rules that the vast majority of states have ratified and recognized as legally binding.

As a matter of practical politics, calls to revivify intellectual property flexibility mechanisms face a major structural challenge, one that engagement with the international human rights regime can help to overcome. In the existing intellectual property system, the producers and owners of intellectual property products are the only “rights” holders. All other actors – consumers, future creators, and the public generally – are relegated to an implicitly inferior status. Recognizing this imbalance, commentators have recently introduced proposals for “users’ rights,” “maximum standards” of intellectual property protection, and new international instruments that make exceptions and limitations mandatory rather than permissive.

We believe that many of these initiatives, although beneficial, are misguided in a number of respects. First, the proposals are at odds with more than a century of international intellectual property lawmaking in which treaties establish only basic ground rules (such as national treatment) and minimum standards of protection (such as subject matter eligibility rules and exclusive rights). Expanding this settled approach to embrace user rights and mandatory exceptions and limitations is a challenging and contested enterprise, as demonstrated by recent debates in WIPO on proposals for a treaty on access for the visually impaired.³ In contrast, arguments grounded in human rights reframe the demands of consumers, future creators, and the public as internationally guaranteed entitlements that are conceptually equivalent to those of intellectual property owners and producers.

This linguistic shift is not a semantic trick; nor is it merely a rhetorical move. It also reshapes normative agendas and negotiating strategies. From a normative perspective, such a reframing directs intellectual property reform advocates to work within international human rights venues – in particular the treaty bodies and the special rapporteurs and independent experts of the Human Rights Council whose activities we examine in previous chapters – to clarify ambiguous legal norms and evaluate the human rights consequences of existing intellectual property laws and policies. It would be myopic for

³ See, e.g., James Boyle, *Obama’s Mixed Record on Tech Policy*, FIN. TIMES (Jan. 25, 2010); Manon Röss, *Six Myths about the Treaty for People with Disabilities That Should Be Debunked Next Week?*, Knowledge Ecology International (Mar. 5, 2010), available at <http://keionline.org/node/795>.

these reform advocates to refrain from influencing these human rights actors and, where appropriate, from forging alliances with them, especially now that these actors have devoted significant attention to national and international intellectual property protection rules.

From a negotiating perspective, reform arguments that draw upon the output of these human rights venues have a distinct strategic advantage. They invoke legal rules and norms adopted by institutions whose provenance and legitimacy are well established and that have received the imprimatur of many governments in other international fora. By drawing upon these sources, reform advocates can more credibly claim that a rebalancing of intellectual property protection rules is necessary to harmonize two parallel regimes of internationally recognized “rights.” And they can more easily deflect claims that such rebalancing efforts are merely fig leaves for self-serving legislation by well-resourced user industries or disguised attempts to distort free trade rules or free ride on foreign creators and inventors.

A third approach to reconciling human rights and intellectual property employs the rules of the former regime to bolster arguments for expanding or diminishing the rules of the latter.⁴ Expansionist arguments are often raised by industries that view their business models and financial viability as tied to the exclusive exploitation rights that intellectual property protection confers. Seizing upon (and often misreading) the creators’ rights and property rights clauses of international instruments, these industries seek to lock in maximalist intellectual property protection by invoking the rhetoric of human rights as trumps. A fear of such expansionist claims – and the perceived difficulty of refuting them – explains why some commentators are skeptical of attempts to analyze intellectual property issues in human rights terms.

⁴ See, e.g., Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 8 J. HUM. RTS. 1 (2009); Christophe Geiger, “Constitutionalising” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 371 (2006); Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT’L REV. INTELL. PROP. & COMPETITION L. 268 (2004); Tom Giovanetti & Merrill Matthews, Institute for Policy Innovation, *Intellectual Property Rights and Human Rights*, IDEAS, Sept. 2005, available at <http://www.ipi.org>; Burkhart Goebel, *Geographical Indications and Trademarks in Europe*, 95 TRADEMARK REP. 1165 (2005); see also Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1032 (2007) (stating that “the embrace of [intellectual property] by human rights advocates and entities ... is likely to further entrench some dangerous ideas about property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community”).

These fears are not entirely unfounded, especially in Europe. The recently adopted Charter of Fundamental Rights of the European Union (EU) subsumes intellectual property under the rubric of property, and provides in Article 17(2) that “Intellectual property shall be protected.” References to fundamental rights appear in the recitals of several EU directives on intellectual property. A few national courts in Europe have relied on property guarantees in their respective constitutions when adjudicating intellectual property disputes. And, as discussed in Chapter 3, the European Court of Human Rights has extended the right of property in Protocol No. 1 to the European Convention on Human Rights to copyrights, patents, and trademarks owned by both corporations and individuals.

Viewed in isolation, these trends appear ominous. But they are counterbalanced by a large and growing number of international and domestic decisions, in Europe and elsewhere, that invoke civil and political rights (in particular freedom of expression) and economic and social rights (in particular the right to health) to limit or cabin expansive interpretations of intellectual property protection rules. Commentators and public interest NGOs have endorsed these developments, urging decision makers to reach outside intellectual property’s own flexibility mechanisms and safety valves to impose external limits, or maximum standards of protection, upon intellectual property owners.

These two opposing frameworks share a common methodology. Each begins with the existing baseline of intellectual property protection and then invokes selective provisions of international human rights law to bolster arguments for moving that baseline in one direction or the other. The frameworks also share a common flaw. They encourage uncoordinated interventions at the upper and lower boundaries of intellectual property protection, interventions that, over time, would establish both a floor and a ceiling on intellectual property.

This selective use of human rights law to impose upper and lower limits on intellectual property protection standards is worrisome. These efforts have mostly ignored the creators’ rights and cultural rights provisions of UDHR Article 27 and ICESCR Article 15. They have instead invoked human rights that are unconcerned with balancing the protection of creators and innovators against the public’s right to benefit from the scientific and cultural advances. Lacking a coherent blueprint to undertake the sensitive and policy-laden analysis that such balancing requires, human rights interventions at the upper and lower boundaries of intellectual property law will inevitably be ad hoc. They may also create cycles of underprotection and overprotection, depending on the vagaries of which issues are raised, in which venues, and in what order.

8.3. Toward a Human Rights Framework for Intellectual Property

In this section, we offer our own framework for understanding the interface between human rights and intellectual property. As we explain in greater detail below, our framework differs from the approaches reviewed previously in several important respects. First, it is capacious, encompassing the full panoply of human rights and freedoms whose realization is affected by intellectual property protection rules. Second, our framework rejects arguments that invoke human rights to leverage across-the-board expansions or rollbacks of intellectual property protection. Third, our framework is empirically grounded. It urges governments, before revising the status quo, first to determine whether and to what extent intellectual property – as opposed to other factors – impedes or enhances the attainment of desired human rights outcomes. Fourth, our framework is dynamic. It draws inspiration from the drafting history of the creators' rights and cultural benefit clauses, but recognizes that the human rights and intellectual property regimes are continually evolving in response to changing conceptions of legal entitlements and technological progress.

As an initial matter, we distinguish between the *protective* and *restrictive* dimensions of human rights in the intellectual property context. The protective dimension requires states (1) to recognize and respect the rights of individuals and groups to enjoy a modicum of economic and moral benefit from their creative and innovative activities and (2) to refrain from bad faith and arbitrary interferences with intellectual property rights that the state itself has previously granted or recognized. In contrast, the restrictive dimension, which includes both a process component and a substantive standard, identifies the conditions under which the realization of a specific right or freedom requires (1) a diminution of intellectual property protection standards and enforcement measures, (2) a restructuring of incentives for private creativity and innovation, or (3) both.

Our framework also stresses the importance of the process, transparency, and predictability values that are hallmarks of the rule of law.⁵ The founding documents of the international human rights movement did not emphasize

⁵ There are many different conceptions of the rule of law. See Note, Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and Its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEVELOP. L.J. 178 (2007). For a recent application to international intellectual property, see Laurence R. Helfer, Karen J. Alter, & M. Florencia Guertzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1 (2009).

the rule of law. Today, however, the connection between human rights and the rule of law is well established⁶ and provides additional arguments for contesting intellectual property initiatives that conflict with rule of law values.

A salient recent example is the Anti-Counterfeiting Trade Agreement (ACTA), a proposed multilateral treaty that would establish more robust obligations to suppress unauthorized uses of intellectual property. For two years, ACTA negotiations occurred in secret and governments refused to disclose a draft text of the treaty. Only after a French civil rights NGO leaked a document revealing “contradictions between the text and public comments by negotiators”⁷ did governments release an official text.⁸ Such lack of transparency involving potentially far-reaching changes to intellectual property laws and enforcement mechanisms is disturbing, as is the inability of interested constituencies, in the words of the Committee on Economic, Social and Cultural Rights, to “take part in ... any significant decision making processes that have an impact on their rights and legitimate interests.”⁹

A. The Protective Dimension of the Framework

The protective dimension of the human rights framework for intellectual property is grounded in state obligations to respect, protect, and fulfill creators’ rights and the right of property found in several international instruments, most notably UDHR Article 27, ICESCR Article 15(1)(c), and Article 1 of the European Convention’s First Protocol.

Obligations with regard to creators’ rights encompass modest economic exploitation and personality guarantees that, taken together, are more circumscribed than those imposed by intellectual property treaties. The limited scope of these guarantees can be deduced from the two principal objectives of recognizing the moral and material interests of creators as human rights.

⁶ See generally Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. INT’L L.J. 809 (2005).

⁷ Monika Ermert, *Leaked ACTA Text Shows Possible Contradictions with National Laws*, Intellectual Property Watch (Mar. 29, 2010), available at <http://www.ip-watch.org/weblog/2010/03/29/leaked-acta-text-shows-possible-contradictions-with-national-laws/>.

⁸ The Office of the U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (Apr. 16, 2010), available at <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-ac>. The U.S. Trade Representative stressed that “ACTA will not interfere with a signatory’s ability to respect its citizens’ fundamental rights and liberties, and will be consistent with the ... TRIPS Agreement and will respect the Declaration on TRIPS and Public Health.” *Id.*

⁹ Comm. Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author*, art. 15(1)(c), U.N. Doc. E/C.12/GC17, para. 34 (Jan. 12, 2006).

According to the *General Comment 17* of the Committee on Economic, Social and Cultural Rights, analyzed in depth in Chapter 3, such rights “safeguard the personal link between authors and their creations and between people or other groups and their collective cultural heritage,” and they protect the “basic material interests which are necessary to enable authors to enjoy an adequate standard of living.”

We interpret these two statements, which recur throughout the *General Comment*, to imply the existence of a zone of personal autonomy in which individuals can achieve their creative potential, control their productive output, and lead the independent intellectual lives that are essential requisites of any free society. The legal protections required to establish this zone are, however, significantly narrower than those mandated by intellectual property treaties and statutes. As an initial matter, these protections do not apply to corporations or other business entities. But even as to individuals and groups, a state can satisfy its obligation to protect creators’ rights in myriad and diverse ways. It may, for example, recognize the same exclusive rights as are found in intellectual property treaties and statutes, but radically reduce terms of protection, expand exceptions and limitations, or both. Alternatively, a state could eschew exclusive rights altogether (except for minimal attribution and integrity guarantees) and substitute a system of liability rules, levies, or government subsidies.¹⁰ Under either approach, governments could also designate certain socially valuable uses of knowledge goods as not requiring any remuneration to creators.

The protective dimension of the human rights framework is *more* expansive than existing intellectual property protection rules in only two respects. First, it encompasses all individuals and groups; the categorical exclusion of a class of creators would be inconsistent with the framework. The absence of protection in some countries for the traditional knowledge of indigenous communities is one example, although, as we discuss at the end of Chapter 7, the potential conflicts between the recognition and assertion of rights in indigenous creativity and other human rights must also be considered.

Second, the protective dimension of the framework imposes a more stringent test for evaluating restrictions *within* the irreducible core of rights that establishes the zone of autonomy described earlier. Such restrictions must, among other requirements, be “strictly necessary for the promotion of the general welfare in a democratic society” and must employ “the least

¹⁰ For a thoughtful discussion of liability rules, see Arti K. Rai, Jerome H. Reichman, Paul F. Uhler, & Colin Crossman, *Pathways across the Valley of Death: Novel Intellectual Property Strategies for Accelerated Drug Discovery*, 8 *YALE JOURNAL OF HEALTH LAW, POLICY & ETHICS* 53, 78–80 (2008).

restrictive measures ... when several types of limitations may be imposed.” This standard is substantially more constraining than the now ubiquitous “three-step test” used to assess the TRIPS-compatibility of exceptions and limitations in national intellectual property laws.¹¹ For this reason, the rights included in the core must be concomitantly narrow.

We emphasize, however, the limited practical consequences of these additional obligations. For traditional knowledge, for example, a state could eschew exclusive rights altogether in favor of government assistance programs that seek to preserve the creative works of indigenous communities consistently with their religious beliefs and cultural traditions. As for restrictions on creators’ human rights, these must be interpreted in light of the narrowness of the zone of autonomy itself and the many permissible approaches to establishing that zone.

The protective dimension of the human rights framework for intellectual property may also justify more expansive legal protections for individuals and groups vis-à-vis other actors involved in the production and distribution of knowledge goods. For example, the framework’s emphasis on human creativity rather than economic exploitation may support a more circumscribed approach to work for hire rules that grant authorship and control of copyrighted works to corporate employers at the expense of those who work for them. But nothing requires that any revisions of domestic intellectual property laws adhere to any particular template. To the contrary, the protective dimension of the framework preserves wide latitude for states to regulate innovation and creativity to achieve socially beneficial ends and to tailor regulations to political, economic, and cultural conditions within their borders.

The property rights component of the protective dimension is similarly modest. Government officials included the right of property in the UDHR and in the three regional civil and political rights conventions but excluded it from the ICCPR and the ICESCR. This omission reveals that many countries have no treaty-based obligation to protect private property as a human right, although they may protect property on other legal grounds. And for states that do have such an international obligation, the treaties’ drafting histories evidence a clear intent to preserve latitude for governments to adopt economic and social policies that adversely affect property owners while, at the same time, condemning arbitrary deprivations of property by state actors.

¹¹ For example, Article 13 of the TRIPS Agreement provides that “members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Among the three regional treaties that include a property rights clause, only the European system has considered whether that provision encompasses ownership of intangible knowledge goods. In Chapter 3, we analyze recent rulings of the European Court of Human Rights that answer this question in the affirmative and also emphasize the limited protection that the Court's case law provides. Here we offer more general guidance to decision makers as to how to interpret the human right of property as applied to intellectual property.

Consistent with the rule of law values that these treaty clauses embody, decision makers should find fault only with arbitrary or *ultra vires* exercises of state power and bad faith refusals to follow intellectual property protection rules that the state itself has previously recognized as valid. Such actions include, for example, a government ministry that installs copyrighted software on its desktop computers without providing statutorily mandated remuneration to the software's owner, a state-run enterprise that refuses to pay royalties to an inventor whose locally patented process it had previously licensed, and judicial or administrative rules that eschew minimum procedural guarantees such as the ability to present evidence or legal arguments.

As these examples illustrate, the restrictions imposed by treaty-based property rights clauses are minimal and unobtrusive. They allow governments unfettered discretion to fashion their domestic innovation and creativity policies as they see fit, provided only that they adhere to the previously established rules that embody those policies. This narrow focus also justifies the application of these principles to intellectual property owned by corporations and other business entities, since arbitrary and bad faith deprivations of property are not confined to natural persons.

B. The Restrictive Dimension of the Framework

The restrictive dimension of the framework comes into play where a state expands legal protections for creativity and innovation beyond those required to establish the zone of personal autonomy described in the previous subsection. There are longstanding debates over whether capacious intellectual property protection helps or hinders economic growth, especially in least-developed and developing countries. But even assuming for purposes of argument that advocates for strong intellectual property protection have the better of this debate, they must still contend with the obligations that international human rights law imposes, obligations that may provide an independent legal basis for cabining strong intellectual property protection rules *even if* they enhance economic development. We part company, however, with commentators who invoke human rights to support an across-the-board

rollback of intellectual property without regard to context or to the ways in which it can be harnessed to promote the realization of human rights. We advance instead an approach that is both faithful to the diversity of individual rights and freedoms and grounded in empirical reality.

We begin from the uncontroversial premise that the ends of international human rights law – including noninterference with civil and political rights and guaranteeing minimum levels of economic and social well-being in areas such as health, food, and education – can be achieved in a wide variety of ways. Intellectual property protection can help or hinder the attainment of these ends, or it may be entirely irrelevant to their realization. The first component of the framework's restrictive dimension, therefore, is a process inquiry that seeks to determine what role, if any, intellectual property protection actually plays in this regard.

If the institutions, resources, personnel, and other inputs necessary to achieve desired human rights outcomes do not exist or are inadequate, the issue of whether intellectual property also impedes those outcomes may be entirely irrelevant. Stated differently, the barriers to realizing human rights are often overdetermined, with intellectual property functioning as only one among a multiplicity of barriers, and not necessarily the most important one. This analysis harkens back to debates in the early 2000s, discussed in Chapter 2, as to whether pharmaceutical patents hindered access to HIV/AIDS medications in sub-Saharan Africa. Even if antiretroviral drugs were given to these countries free of charge, proponents of strong patent protection claimed, the public health infrastructure needed to distribute them was inadequate and the individuals who received the medicines were incapable of following directions for their ingestion without the assistance of medical professionals.

Nearly a decade later, these arguments have proven to be mostly groundless. But the basic insight underlying these claims – that multiple factors unrelated to intellectual property often act as barriers to human rights outcomes – remains valid. It is difficult to contend, for example, that copyright in educational materials impedes the right to education if there are no school buildings and no teachers. This illustration is, admittedly, an oversimplification. As the discussion in Chapter 5 reveals, however, even in countries with more fully functional educational systems, the adverse consequences of copyright protection are often minimal in comparison to factors such as language barriers, small domestic publishing industries, and tariffs on paper imports. Another relevant variable is the extent to which educational materials are available online without charge. Empirical analyses that consider such availability should not, however, presume that such materials are uniformly available; nor should they ignore the many economic and technological barriers to online access.

For other human rights, by contrast, the concern is not with structural factors that impede access to goods protected by intellectual property but, to the contrary, with the qualities or attributes of goods that are often widely distributed. As explained in Chapter 6 on the right to food, opposition to intellectual property protection for new plant varieties is often bound up with fears about the health and environmental consequences of genetically modified crops or opposition to the marketing practices of agrobiotechnology firms. These are legitimate concerns. But the proper response to them is not – or at least not necessarily – a diminution of intellectual property protection. Rather, what is first required is a careful evaluation of the human rights implications of these claims and the role that intellectual property does or does not play in exacerbating them. If further studies reveal, for example, that certain genetically modified crops are harmful to human health or to farmers who grow traditional plant varieties, an appropriate response by health, environment, or agriculture ministries would be to regulate or prohibit the distribution and sale of such crops. Similarly, if the consolidation of the commercial seed industry enables a few firms with excessive market power to demand artificially high prices for seeds, the remedy lies in national competition laws rather than in restricting intellectual property rules that create incentives for new plant varieties with desirable characteristics. In addition, it may be useful to distinguish between problems caused by the subsistence of intellectual property rights in genetically modified plant varieties as such, and problems engendered by the decisions of public and private actors to adopt, promote, or subsidize such varieties.

The determination of whether and to what extent intellectual property, as opposed to other factors, impedes the attainment of desired human rights outcomes requires careful, objective, and context-specific empirical assessments. Over the last several years, a growing array of international bodies, NGOs, and scholars have turned their attention to the previously understudied issue of how to measure the enjoyment of human rights. The result has been an outpouring of indicators, metrics, benchmarks, impact statements, and other measurement tools that seek to identify with greater precision the levels of rights protections in individual countries and the factors that contribute to or retard their achievement. Most of these tools focus on economic and social rights, whose realization requires identifying aggregate outcomes at the societal as well as the individual level. These quantitative and qualitative indicators and benchmarks have become key elements of the iterative process by which treaty bodies, special rapporteurs, and national courts monitor the progressive realization of rights that the ICESCR protects.¹²

¹² See, e.g., Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008); Office of

These measurement tools do not, as far as we are aware, systematically assess the positive and negative consequences of intellectual property protection on human rights in general or on economic and social rights in particular. But they could easily be revised to include such an evaluative component. A harbinger of this approach is a 2006 report of the National Human Rights Commission of Thailand, which reviewed a draft Thailand–United States Free Trade Agreement.¹³ Among other issues, the Commission analyzed the treaty’s inclusion of TRIPS Plus provisions from the perspective of the right to health and farmers’ rights. It recommended, *inter alia*, that the Thai government remove from the negotiations stronger intellectual property protection for pharmaceuticals.¹⁴ As other commentators have observed, however, the report also used “emotive language and strong claims about the effects of the FTA without recourse to empirical evidence to support those claims.”¹⁵

The political contestations surrounding the Thai Commission’s report highlight the need to develop, in advance of any particular controversy, measurement tools that have been accepted by stakeholders with divergent viewpoints, or at least that reflect their input. These measurement tools should include at least the following components: (1) an evaluation of whether existing or proposed intellectual property protection rules and policies help or hinder the realization of specific human rights outcomes; (2) an assessment, to the greatest extent possible, of the relative causal contributions of intellectual property rules and policies in comparison to other factors; and (3) an identification of the legal and policy measures, whether or not consistent with the existing intellectual property regime, that will facilitate these human rights outcomes.

If the assessment of these issues reveals that non-intellectual property factors are responsible for the lack of progress in realizing human rights ends,

the High Commissioner for Human Rights, *Report on Indicators for Monitoring Compliance with Human Rights Instruments*, U.N. Doc. HRI/MC/2006/7 (2006); AnnJanette Rosga & Margaret L. Satterthwaite, *Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. 254 (2009); Lea Shaver, *Defining and Measuring Access to Knowledge: Towards an A2K Index*, Yale Law School Student Scholarship Papers, available at http://digitalcommons.law.yale.edu/fss_papers/22/ (2007); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance* (May 2009), available at <http://www.iijl.org/research/documents/I.Merry.MeasuringtheworldASIL.pdf>.

¹³ See National Human Rights Institutions Forum, *Human Rights Impact Assessment of the US–Thai Free Trade Agreement* (Jan. 22, 2007), available at <http://www.nhri.net/news.asp?ID=1115>.

¹⁴ See James Harrison & Alessa Goller, *Trade and Human Rights: What Does “Impact Assessment” Have to Offer?*, 8 HUM. RTS. L. REV. 587, 604 (2008).

¹⁵ *Id.* at 608 (quoting inflammatory statements in the commission’s report, including that the treaty will “pave the way for [transnational corporations] to seize power” and “US demands on patents ... clearly reflect greed on [the] part of US pharmaceutical corporations”).

as may be the case for the example of genetically modified crops discussed earlier, state and nonstate actors should focus their lawmaking and advocacy strategies on those factors and should not treat intellectual property issues as a proxy for them. Such categorical outcomes are likely to be rare, however. A more frequent result of the assessment process will be a finding that the specific intellectual property rule or policy under scrutiny is one among many factors responsible for deleterious human rights conditions. Such a conclusion implicates policy responses that address both the share of the problem attributable to intellectual property and the type and extent of the harm that it engenders. The structure of domestic institutions, the extent of available resources and their reallocation, the sequencing of policy prescriptions, and the interrelationship among government programs will be important issues in this regard. We hope that the analysis set forth in previous chapters of this book will assist all stakeholders in addressing these issues.

In the final analysis, however, national decision makers will need to decide whether to revise existing intellectual property protection rules and how best to do so. It is here that the second, substantive stage of the framework's restrictive dimension comes into play. In deciding what measures to take, we urge decision makers to begin from the premise that the human rights and intellectual property regimes share the same core objective – to encourage creativity and innovation that benefits society as a whole. It is the different ways that each regime achieves this objective, which create the potential for conflicts between them.

In the intellectual property system, most societal benefits accrue far in the future when knowledge goods enter the public domain and may be freely used by all. Flexibility mechanisms such as exceptions to exclusive rights and compulsory licenses mitigate the costs of this delay. But they can only do so much without harming the incentives to create and innovate in the first instance. In contrast, the human rights regime has much shorter time horizons. The legal entitlements it enshrines are both immediate and urgent. The regime has little tolerance for states that lack the present ability to meet their negative obligation to refrain from repression or their positive commitment to protect and fulfill the minimum essential needs of individuals and groups.

Intellectual property-protected knowledge goods help to satisfy these immediate demands when the owners of these goods sell or license them to consumers. But the monopoly power that accompanies intellectual property rights enables owners to maximize profits by offering knowledge goods at supracompetitive prices that exclude consumers who would have purchased or licensed the goods had they been offered in a competitive market. The

result is that individuals with greater financial means can afford knowledge goods whereas those with fewer economic resources cannot.

These disparities in affordability apply to intellectual property-protected goods currently being offered for sale or license. But the disparities are exacerbated when incentives to create and innovate are considered from a dynamic perspective. Intellectual property industries respond to existing market signals by fashioning research and development strategies to satisfy the anticipated demands of consumers with financial means. The pernicious consequences of these dynamic innovation incentives are illustrated most starkly in the area of patented medicines. As we analyze in Chapter 2, pharmaceutical companies devote the bulk of their research efforts to identifying new drugs for ailments common in wealthy industrialized nations while eschewing research on diseases that afflict the world's poor, who cannot afford any treatments the companies might have developed.

The intellectual property system is generally agnostic about both the static and the dynamic distributional consequences of monopoly pricing structures. But these distributional consequences are a central concern of human rights law in general and economic and social rights in particular, which prioritize the needs of the most marginalized and disadvantaged individuals and groups above the needs of those with greater financial means. Stated more pointedly, intellectual property protection may help states to satisfy their obligations to protect and fulfill economic and social rights. But its effect is greatest where it is needed least.

There are short-term and long-term responses to this troubling state of affairs. Both responses depend upon the findings of the indicators and impact statements described previously. If these measurement tools reveal that specific intellectual property protection rules are (or, in the case of proposed rules, would be) an immediate obstacle to the realization of specific human rights, governments should revise those rules or, in the case of new rules, reject proposals to adopt them. Impact statements structured according to our recommendations should also indicate which legal and policy measures would help to achieve this result. All other things equal, we think that governments should favor measures compatible with the existing intellectual property regime over measures that are inconsistent with it. But we also believe that governments should be free to choose intellectual property-inconsistent measures where the indicators and impact statements contain credible evidence that such measures are likely to achieve more extensive human rights benefits. Where the evidence is equivocal or uncertain, measures should be temporary and include sunset clauses to force a reevaluation of their merits an appropriate interval after their adoption.

With regard to long-term responses, indicators and impact statements should provide a roadmap for governments to restructure innovation incentives to further human rights ends. Strategies to encourage research relating to neglected diseases have advanced further in this regard than initiatives in other areas. As described in Chapter 2 on the right to health and pharmaceutical patents, these strategies work *with* intellectual property rather than *against* it. They redirect incentives and channel market forces to achieve socially valuable ends. Thomas Pogge's research program on human rights and global health is perhaps the most advanced proposal in this regard. We urge states, public interest NGOs, and the staff of international organizations to develop similar proposals for other intersections between the human rights and intellectual property regimes and to tailor incentive structures to the diverse economic and political realities that we describe in previous chapters.

In developing these proposals, actors should also consider whether nonproprietary innovation schemes can help to achieve salutary human rights outcomes. For example, open source systems that require follow-on innovators to share their contribution to collectively produced knowledge goods should be encouraged, provided that the system's policies are fully disclosed to participants. Private contracting and delegation mechanisms, such as Creative Commons, that permit creators to disclaim intellectual property protection in whole or in part deserve similar solicitude. But as with online access to educational materials, the widespread accessibility of nonproprietary alternatives should not be assumed. Where access disparities exist, an overemphasis on nonproprietary mechanisms may have the perverse if unintended effect of disfavoring the less technologically adept or those burdened by economic barriers to online access. Inattention to access disparities thus creates a risk that nonproprietary alternatives will be least available to those who require them most.

Even assuming widespread and equitable access, nonproprietary alternatives may appear contrary to the protective dimension of the human rights framework for intellectual property, which, as described previously, protects a zone of personal autonomy for all creators. In practice, there may be no incompatibility if individuals retain the right to be acknowledged as creators and to receive remuneration for at least some uses. The more fundamental point, however, is that although creators and innovators do indeed possess a narrow class of inalienable economic and personality rights, they can choose how best to exercise those rights so as to construct a zone of personal autonomy that is both self-empowering and conducive to the broader public values that the human rights framework for intellectual property seeks to achieve.