

# Human Rights and Intellectual Property: Conflict or Coexistence?

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## I. INTRODUCTION: CONFLICT OR COEXISTENCE?

Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other.

Exactly how this new-found relationship will evolve is being actively studied – and sometimes even fought over – by states and nongovernmental organizations (NGOs) in international venues such as the World Intellectual Property Organization (WIPO), the U.N. Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, the World Trade Organization (WTO), the World Health Organization (WHO), and the Conference of the Parties to the Convention on Biological Diversity (CBD). A review of the lawmaking underway in these fora reveals two distinct conceptual approaches to the human rights-intellectual property interface. These two approaches are premised upon

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radically different normative foundations and they offer divergent prescriptions for how to structure the rights and obligations of nation states and private parties.

The first approach views human rights and intellectual property as being in fundamental conflict.<sup>1</sup> This framing sees strong intellectual property protection as undermining – and therefore as incompatible with – a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights.<sup>2</sup> The prescription that proponents of this approach advocate for resolving this conflict is to recognize the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict.<sup>3</sup>

The second approach to the intersection of human rights and intellectual property sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school views human rights law and

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1. See, e.g., *Intellectual Property Rights and Human Rights*, Res. 2000/7, U.N. Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Sess., pmb. ¶ 11, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 [hereinafter Resolution 2000/7] (stating that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights”).

2. See *id.*

3. See *id.* at ¶ 3 (emphasizing “the primacy of human rights obligations over economic policies and agreements”). Statements by legal commentators and NGOs also advocate the primacy of human rights over economic agreements, including those relating to intellectual property rights. Notably, these assertions of primacy are not limited to *jus cogens* or peremptory norms, which are hierarchically superior to other international law obligations. See, e.g., ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (Int'l Centre for Human Rights & Democratic Dev., Policy Paper, 2000), available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> (last visited Nov. 14, 2003) (“Human rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific, conflicting provisions of treaties such as trade agreements.”); RICHARD ELLIOTT, TRIPS AND RIGHTS: INTERNATIONAL HUMAN RIGHTS LAW, ACCESS TO MEDICINES, AND THE INTERPRETATION OF THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 2 (Canadian HIV/AIDS Legal Network & AIDS Law Project, South Africa, 2001), available at [www.aidslaw.ca](http://www.aidslaw.ca) (asserting that because “States’ binding legal obligations to realize human rights have primacy in international law,” obligations under TRIPS “must be recognized as not binding to the extent there is a conflict with [states’] human rights obligations”).

intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.<sup>4</sup>

Before further exploring the implications of these two approaches to mapping the human rights-intellectual property interface, it is first useful to step back in time to see just how isolated these two issue areas of international law were from each other and what has caused the recent erosion of that isolation.

## II. HISTORICAL ISOLATION OF THE HUMAN RIGHTS AND INTELLECTUAL PROPERTY REGIMES

It is something of a mystery why intellectual property and human rights have remained strangers for so long. No less than human rights law's foundational document – the 1948 Universal Declaration of Human Rights – protects authors' "moral and material interests" in their "scientific, literary or artistic production[s]" as part of its catalogue of fundamental liberties.<sup>5</sup> In the mid-1960s, a similar clause was included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has now been ratified by nearly 150

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4. See, e.g., *Intellectual Property Rights and Human Rights: Report of the Secretary-General*, ESCOR Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4 at 8, U.N. Doc. E/CN.4/Sub.2/2001/12 (2001) (submission by WTO asserting that existing international agreements permit states sufficient room to balance intellectual property and human rights standards, but noting that "[h]uman rights can be used -- and have been and are currently being used -- to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing [intellectual property] rights or by creating new rights"); *Globalization, TRIPS and Access to Pharmaceuticals*, WHO POLICY PERSPECTIVES ON MEDICINES (World Health Organization), No. 3, Mar. 2001, at 5 [hereinafter WHO Policy Perspectives] (asserting that "[a]ccess to essential drugs is a human right" but urging states to use existing "safeguards" within TRIPS to "enhance the affordability and availability" of patented medicines); *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, ESCOR Sub-Comm. on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda Item 4 at 5, U.N. Doc. E/CN.4/Sub.2/2001/13 (2001) [hereinafter High Commissioner Report] (stating that "[t]he balance between public and private interests found under article 15 [of the International Covenant on Economic, Social and Cultural Rights] -- and article 27 of the Universal Declaration -- is one familiar to intellectual property law" but asserting that the key question "is where to strike the right balance").

5. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, art. 27, U.N. Doc. A/810 (1948).

nations.<sup>6</sup> Yet for years, intellectual property remained a normative backwater in the human rights pantheon, neglected by treaty bodies, experts, and commentators while other rights emerged from the jurisprudential shadows.<sup>7</sup>

Nor was human rights law's nominal interest in intellectual property reciprocated by the intellectual property regime. No references to human rights appear in the major intellectual property treaties such as the Paris and Berne Conventions, or in the more recently adopted TRIPS Agreement.<sup>8</sup> These treaties do refer to the protections granted to authors and inventors as "rights."<sup>9</sup> But the principal justification for these agreements lies not in deontological claims about inalienable liberties, but rather in economic and instrumental benefits that flow from protecting intellectual property products across national borders.<sup>10</sup>

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6. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, arts. 15(1)(b) & 15(1)(c), S. EXEC. DOC. D, 95-2, at 18, (1977), 993 U.N.T.S. 3, 9 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR] (recognizing the right "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" and "to enjoy the benefits of scientific progress and its applications"). As of October 2003, 147 states were parties to the ICESCR, 111 of whom were also WTO members. *See* Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (as of Oct. 10, 2003), at <http://www.unhchr.ch/pdf/report.pdf> (last visited Oct. 24, 2003).

7. *See* Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, Panel Discussion on Intellectual Property and Human Rights at 3 (Nov. 9, 1998) (characterizing ICESCR Article 15 as "the most neglected set of the provisions within an international human rights instrument whose norms are not well developed"), at <http://www.wipo.int/globalissues/activities/1998/humanrights/papers/pdf/chapman.pdf> (last visited Oct. 28, 2003).

8. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971, 1161 U.N.T.S. 31 [hereinafter Berne Convention].

9. *See, e.g.*, TRIPS Agreement, *supra* note 8, at pmb1. ("recognizing that intellectual property rights are private rights").

10. For a discussion of this distinction, *see* Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement, The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 397-99 (1998) [hereinafter Helfer, *Adjudicating Copyright Claims*].

What accounts for this jurisprudential separation? In part, the answer is that both bodies of law were preoccupied with more important issues, and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion.

During the decades following World War II, the most pressing concern for the human rights community was elaborating and codifying legal norms and enhancing monitoring mechanisms.<sup>11</sup> This evolutionary process resulted in a de facto separation of human rights into categories, ranging from a core set of peremptory norms for the most egregious forms of state misconduct, to civil and political rights, to economic, social and cultural rights.<sup>12</sup> Among these categories, economic, social, and cultural rights are the least well developed and the least prescriptive, having received significant jurisprudential attention only in the last decade.<sup>13</sup>

For advocates of intellectual property protection, by contrast, the central focus of international lawmaking was twofold: first, the gradual expansion of subject matters and rights through periodic revisions to the Berne, Paris and other conventions, and later, the creation of a link between intellectual property and trade.<sup>14</sup> Human rights law added little to these two enterprises. It provided neither a necessary nor a sufficient justification for strong, state-granted intellectual property monopolies (whether bundled with trade rules or not). Nor, conversely, did it function as a potential check on the expansion of intellectual property law.

### III. TWO HUMAN RIGHTS APPROACHES TO INTELLECTUAL PROPERTY PROTECTION EMERGE

It was the human rights community that first took notice of intellectual property law. Two events caused intellectual property to be placed on the agenda for human rights

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11. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 296-301 (1999) (discussing evolution of UN human rights system and its monitoring mechanisms).

12. See Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982).

13. See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (Oxford Univ. Press) (1995).

14. See TRIPS Agreement, *supra* note 8.

lawmaking. The first was an emphasis on the neglected rights of indigenous peoples.<sup>15</sup> The second was the consequence of linking of intellectual property and trade through the TRIPS Agreement.<sup>16</sup> Both of these events exposed the serious normative deficiencies of intellectual property law from a human rights perspective.<sup>17</sup> Furthermore, both prompted responses and new lawmaking initiatives that generated a growing tension between the conflict and the coexistence approaches to defining the human rights and intellectual property interface.

#### A. THE RIGHTS OF INDIGENOUS PEOPLES AND TRADITIONAL KNOWLEDGE

Beginning in the early 1990s, the U.N. human rights machinery began to devote significant attention to the rights of indigenous communities.<sup>18</sup> Among the many claims that these peoples demanded from states was the right to recognition of and control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture.<sup>19</sup> From an intellectual property perspective, much of this knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private ownership rules.<sup>20</sup> But by treating traditional knowledge as effectively un-owned, intellectual property law made that knowledge available for unrestricted exploitation by outsiders.<sup>21</sup> Many of these outsiders used this knowledge as an upstream input for later downstream innovations that were themselves privatized through patents, copyrights, and plant

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15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. For a more detailed discussion of these events and an analysis of their significance from the perspective of international relations theory, *see* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. (forthcoming 2004) [hereinafter Helfer, *Regime Shifting*].

18. *See* Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 147 (2001).

19. *See id.* at 146.

20. *See* Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 238 (2001) ("TK [traditional knowledge] is often (and conveniently) assumed to be in the public domain. This is likely to encourage the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely.").

21. *See id.* at 247.

breeders' rights.<sup>22</sup> Adding insult to injury, the financial and technological benefits of those innovations were rarely shared with indigenous communities.<sup>23</sup>

U.N. human rights bodies sought to close this hole in the fabric of intellectual property law by commissioning a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples,<sup>24</sup> and Principles and Guidelines for the Protection of the Heritage of Indigenous People.<sup>25</sup> These documents adopt a skeptical approach to

22. See *id.* at 243-49 (explaining how discoveries in traditional knowledge have been used by different intellectual property industries); see also LAURENCE R. HELFER, INTELLECTUAL PROPERTY RIGHTS IN PLANT VARIETIES: AN OVERVIEW WITH OPTIONS FOR NATIONAL GOVERNMENTS 9 (FAO Legal Papers On Line No. 31, 2002), at <http://www.fao.org/Legal/pub-e.htm> (last visited Nov. 11, 2003) (discussing proposals to require intellectual property owners to share benefits with indigenous communities and farmers in developing countries).

23. See *Promotion and Protection of Human Rights: Written Statements Submitted by International Indian Treaty Council, a Non-Governmental Organization in Special Consultative Status*, U.N. ESCOR Comm'n on Human Rights, 59th Sess., Agenda Item 17, U.N. Doc. E/CN.4/2003/NGO/127 (2003):

The theft and patenting of Indigenous Peoples' bio-genetic resources is facilitated by [TRIPS]. Some of the plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred ceremonies since time immemorial have already been patented in the United States, Japan and Europe. A few examples of these are ayahuasca, quinoa, and sangre de drago in South America; Kava in the Pacific; turmeric and bitter melon in Asia.

There are some exceptions, however, particularly in the form of so-called bioprospecting agreements between indigenous groups and entities in the developed world. For a discussion of these agreements and references to the literature, see CHARLES R. MCMANIS, INTELLECTUAL PROPERTY, GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE PROTECTION: THINKING GLOBALLY, ACTING LOCALLY (Univ. of Wash. Sch. of Law, Faculty Working Papers Series No. 02-10-03, 2002).

24. *Discrimination Against Indigenous Peoples: Technical Review of United Nations Draft Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR Comm'n. on Human Rights, Sub-Comm'n. on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

25. See *Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur*, U.N. ESCOR Sub-Comm'n. on Prevention of Discrimination and Protection of Minorities, 47th Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995) (initial text of Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People); *Human Rights of Indigenous Peoples: Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, U.N. ESCOR Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Sess., Agenda Item 7, U.N. Doc. E/CN.4/Sub.2/2000/26 (2000) [hereinafter *Revised Draft Principles and Guidelines*] (revised text of the draft Principles and Guidelines). The Sub-

intellectual property protection. On the one hand, the documents urge states to protect traditional knowledge using legal mechanisms that fit comfortably within existing intellectual property paradigms – such as allowing indigenous communities to seek an injunction and damages for unauthorized uses.<sup>26</sup> But the documents also define protectable subject matter more broadly than existing intellectual property law, and they urge states to deny patents, copyrights, and other exclusive rights over “any element of indigenous peoples’ heritage” that does not provide for “sharing of ownership, control, use and benefits” with those peoples.<sup>27</sup> In short, when indigenous culture is analyzed from a human rights perspective, intellectual property rules are seen as one of the problems facing indigenous communities and – only perhaps – as part of a solution to those problems.

#### B. THE TRIPS AGREEMENT AND HUMAN RIGHTS

The second area of intersection between human rights and intellectual property relates to the TRIPS Agreement, adopted in 1994 as part of the World Trade Organization.<sup>28</sup> TRIPS adopted relatively high minimum standards of protection for all WTO members, including many developing and least developed states whose previous commitment to patents, copyrights, and trademarks was nonexistent or at best equivocal.<sup>29</sup> And unlike earlier intellectual property agreements, TRIPS has teeth.<sup>30</sup> Non-compliance with the treaty can be challenged through the WTO’s hard-edged dispute settlement system, in which rulings by WTO panels and Appellate Body are backed up by the threat

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Commission later adopted the *Revised Draft Principles and Guidelines* and transmitted them to the Commission on Human Rights for its approval. See *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, Decision 2000/107, U.N. Sub-Comm’n. on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/DEC/2000/107 (2000).

26. See *Revised Draft Principles and Guidelines*, *supra* note 25, at 23(b) (national laws to protect indigenous peoples’ heritage should provide the means for indigenous peoples to prevent and obtain damages for “the acquisition, documentation or use of their heritage without proper authorization of the traditional owners”).

27. *Id.* at 23(c).

28. See *supra* note 8.

29. For a review of the changes TRIPS wrought, see J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441 (2000).

30. See *id.* at 443-47.



of trade sanctions.<sup>31</sup>

The U.N. human rights system turned its attention to TRIPS in 2000, just when the treaty's transitional periods were expiring for developing countries.<sup>32</sup> In August of that year, the Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/7 on Intellectual Property Rights and Human Rights.<sup>33</sup> The resolution adopts an antagonistic approach to TRIPS. It stresses that "actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights."<sup>34</sup> These conflicts cut across an exceptionally wide swath of legal terrain, including: (1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders' rights and patenting of genetically modified organisms; (3) bio-piracy; (4) control of indigenous communities' natural resources and culture; and (5) the impact on the right to health from restrictions on access to patented pharmaceuticals.<sup>35</sup>

To address these conflicts, the Sub-Commission set out an ambitious new agenda for reviewing intellectual property issues within the United Nations,<sup>36</sup> an agenda animated by the

31. *See id.*

32. *See id.* at 442.

33. Resolution 2000/7, *supra* note 1. For a discussion of the Resolution's history, see David Weissbrodt & Kell Schoff, *A Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (forthcoming 2003).

34. Resolution 2000/7, *supra* note 1, at pmbl. ¶ 11.

35. *See id.* *See also id.* at ¶ 2 (identifying conflicts between TRIPS and "the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination").

36. The Sub-Commission requested four different sets of actors – national governments, intergovernmental organizations, U.N. human rights bodies, and NGOs – to address the intersection of human rights and intellectual property. It asked national lawmakers to integrate "human rights obligations and principles" into their activities, with a particular focus on the social function of intellectual property. *Id.* at ¶ 5. Similar exhortations were directed to intergovernmental organizations, whom the Sub-Commission in effect urged to act as watch dogs of TRIPS by "deepen[ing] their analysis of the impacts" of the treaty and its human rights implications. *Id.* at ¶¶ 6, 12. The Sub-Commission's most detailed requests were aimed at other U.N. human rights bodies, whom it asked to clarify the relationship between intellectual property and human rights. *Id.* at ¶¶ 9-11 (requesting action by the High Commissioner, the CESCR, and the Special Rapporteurs on Globalization). Finally, to ensure visibility for its new agenda, the Sub-Commission

principle that human rights must be given “primacy . . . over economic policies and agreements.”<sup>37</sup> In the two and a half years since this resolution, the U.N. human rights system has responded enthusiastically to the Sub-Commission’s invitation by devoting unprecedented attention to intellectual property issues. Among the most important actions have been: (1) three resolutions of the Commission on Human Rights on “Access to Medication in the Context of Pandemics such as HIV/AIDS;”<sup>38</sup> (2) an analysis of TRIPS and public health by the High Commissioner for Human Rights;<sup>39</sup> (3) an official “statement” by the Committee on Economic, Social and Cultural Rights that “intellectual property regimes must be consistent with” the rights in the Covenant;<sup>40</sup> and (4) a report by the Special Rapporteurs on Globalization, which argues that intellectual property protection has undermined human rights objectives.<sup>41</sup>

Many of these documents and reports contain trenchant critiques of TRIPS and of expansive intellectual property rules. But some of them also identify shared goals and other points of commonality between the two international regimes and seek to articulate a human rights approach to TRIPS that reconciles states’ treaty obligations.<sup>42</sup> So as with indigenous peoples’ rights and traditional knowledge, the two approaches to reconciling human rights law and intellectual property law

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encouraged civil society groups to lobby governments for economic policies that fully integrated human rights obligations and “to monitor and publicize the effects of economic policies that fail to take such obligations into account.” *Id.* at ¶ 14.

37. *Id.* at ¶ 3.

38. Res. 2001/33, U.N. Comm’n. on Human Rights, U.N. Doc. E/CN.4/RES/2001/33 (2001). This resolution, sponsored by Brazil, mandates that states, in implementing the right to the highest attainable standard of health, “adopt legislation or other measures, in accordance with applicable international law” to “safeguard access” to such medications “from any limitations by third parties.” *Id.* at ¶ 3(b); see also *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Res. 2002/32, U.N. Comm’n. on Human Rights, U.N. Doc. E/CN.4/2002/2000 (2002); *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Res. 2003/29, U.N. Comm’n. on Human Rights, U.N. Doc. E/CN.4/2003/L.11/Add.3 (2003).

39. High Commissioner Report, *supra* note 4, at ¶¶ 10-15, 29-58.

40. *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, 27<sup>th</sup> Sess., ¶¶ 4, 11, U.N. Doc. E/C.12/2001/15 (2001).

41. *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 53<sup>rd</sup> Sess., ¶¶ 19-34, U.N. Doc. E/CN.4/Sub.2/2001/10 (2001).

42. See *supra* notes 38-41 and accompanying text.

each remain in play.

#### IV. FUTURE TRAJECTORIES FOR HUMAN RIGHTS AND INTELLECTUAL PROPERTY

The debate between advocates of a conflict approach and those asserting a coexistence approach to the intersection of human rights and intellectual property is unlikely to be resolved anytime soon. To the contrary, the continuing tension between these two competing frameworks is likely to have at least four distinct consequences for the international legal system.

The first effect will be an increased incentive to develop soft law human rights norms. For those advocating the primacy of human rights over intellectual property protection rules, it is essential to identify precisely which rights are being undermined. Looking simply at treaty texts, however, there appear to be few clear-cut conflicts, at least under the narrow conflicts rules of customary international law.<sup>43</sup> But treaty text alone does not tell the whole story. Human rights law is notably elastic, and contains a variety of mechanisms to develop more precise legal norms and standards over time.<sup>44</sup> Advocates endorsing a conflictual approach to intellectual property are likely to press human rights bodies to develop specific interpretations of ambiguous rights to compete with the precise, clearly defined rules in TRIPS.<sup>45</sup> In addition to

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43. These rules presume that two treaties relating to the same subject matter do not conflict and can be implemented by a state that has ratified both agreements. A conflict exists only where treaty rules are mutually inconsistent, in the sense that a state's compliance with one rule necessarily compels it to violate another. See *Indonesia - Certain Measures Affecting the Automobile Industry: Report of the Panel*, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R & WT/DS64/R at 14-15 (July 2, 1998) available at <http://www.wto.org>. ("[T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously . . . . Not every such divergence constitutes a conflict, however . . . . [i]ncompatibility of contents is an essential condition of conflict.") (quoting 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 468 (North-Holland 1984)); see also Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 *J. WORLD TRADE* 87, 127 n.131 (1999).

44. See Helfer, *Adjudicating Copyright Claims*, *supra* note 10, at 401-07.

45. One important source for such normative genesis will be the Committee on Economic, Social and Cultural Rights, which has already adopted an official Statement on Human Rights and Intellectual Property, and is currently drafting a General Comment on the same topic to interpret the intellectual property provisions of the International Covenant on Economic,

creating fuel for future conflicts claims,<sup>46</sup> this pressure may have a side benefit of speeding the jurisprudential evolution of economic, social, and cultural rights which is a still underdeveloped area of human rights law.

A second paradigm shift that may emerge is the treatment of consumers of intellectual property products as the holders of internationally guaranteed rights. In the world of TRIPS, the producers and owners of intellectual property products are the only “rights” holders.<sup>47</sup> Individuals and groups who consume those products are allocated the (implicitly) inferior status of users. A human rights approach to intellectual property, by contrast, grants these users a status conceptually equal to owners and producers. This linguistic reframing is not simply a matter of semantics. It also shapes state negotiating strategies. By invoking norms that have received the imprimatur of intergovernmental organizations in which numerous states are members, governments can more credibly argue that a rebalancing of intellectual property standards is part of a rational effort to harmonize two competing regimes of internationally recognized “rights,” instead of a self-interested attempt to distort trade rules or to free ride on foreign creators or inventors.

This leads to a third consequence of the new intersection between human rights and intellectual property -- the articulation of “maximum standards” of intellectual property protection. Treaties from Berne to Paris to TRIPS are all concerned with articulating “minimum standards.”<sup>48</sup> But

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Social and Cultural Rights. *See supra* note 40 (noting Committee’s desire to prepare a general comment “as soon as possible”).

46. As conflicts among legal rules increase, government negotiators are likely to come under increasing pressure to reconcile those conflicts. In fact, much of the intellectual property lawmaking that is occurring in the U.N. human rights fora can be seen as an effort to articulate new rules or norms that will aid in the future renegotiations of intellectual property standards in the WTO or in WIPO. The disaggregated and non-hierarchical structure of international lawmaking institutions makes this kind of strategic behavior possible. For a more detailed discussion, see Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. (forthcoming 2004) (symposium on the emerging transnational constitution).

47. *See* TRIPS Agreement, *supra* note 8, at pmb1. (“recognizing that intellectual property rights are private rights”).

48. *See, e.g.*, TRIPs Agreement, *supra* note 8, at art. 1(1) (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement.”); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and*

higher standards are not considered problematic, and nothing in the treaties prevents governments from enacting more stringent domestic intellectual property laws, or from entering into agreements that enshrine such standards.<sup>49</sup> Indeed, since TRIPS entered into force, the United States and the EC have negotiated so-called “TRIPS plus” bilateral agreements with many developing countries.<sup>50</sup> These treaties impose higher standards of intellectual property protection than TRIPS requires.<sup>51</sup> The U.N. High Commissioner for Human Rights and the WHO have voiced strong objections to “TRIPS plus” treaties on human rights grounds.<sup>52</sup> Together with the particularization of soft law norms discussed earlier,<sup>53</sup> these objections may, for the first time, begin to impose a ceiling on the upward drift of intellectual property standards that has accelerated over the past few decades.

Whether maximum standards of intellectual property protection in fact emerge will depend upon a fourth and final issue: how human rights norms are received in established intellectual property lawmaking venues such as WIPO and the WTO. In the fall of 2000, the WIPO General Assembly approved the creation of a new Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional

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*Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 295-304 (1997) (emphasizing the importance of TRIPS' minimum standards framework).

49. See Berne Convention *supra* note 8, at art. 19 (“The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”); *id.* at art. 20 (“The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.”); see also Paris Convention, *supra* note 8, at art. 19 (“It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.”).

50. See Genetic Resources Action International, “*TRIPs-plus Through the Back Door: How Bilateral Treaties Impose Much Stronger rules for IPRs on Life than the WTO* (July 2001) at <http://www.grain.org> (describing bilateral agreements negotiated by the United States and the EU that require developing countries to adopt more stringent intellectual property rules than those found in TRIPS).

51. See *id.*

52. See High Commissioner Report, *supra* note 4, at ¶ 27; WHO Policy Perspectives, *supra* note 4, at 6.

53. See *supra* pp. 57-58.

Knowledge and Folklore (IGC).<sup>54</sup> The Committee held five sessions between September 2000 and July 2003 at which it examined a wide array of issues that were omitted from TRIPS and that respond to the demands of developing countries and indigenous peoples.<sup>55</sup> Most recently, the WIPO General Assembly extended the Committee's mandate, authorizing it to accelerate its work, which may include the development of new international instruments.<sup>56</sup> The High Commissioner for Human Rights, the WHO, and numerous NGOs have been granted observer status to take part in the Committee's discussions, creating opportunities to raise human rights concerns within that forum.<sup>57</sup>

Prospects for integrating human rights into the WTO are significantly more uncertain. The Declaration on the TRIPS Agreement and Public Health<sup>58</sup> adopted in November 2001 clearly reflects human rights advocacy in the area of access to medicines.<sup>59</sup> Additionally, the Doha Ministerial Declaration directs the TRIPS Council to examine "the relationship between [TRIPS] and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members."<sup>60</sup> Yet the United States has so far blocked the CBD Secretariat's application for observer status in the Council, making uncertain the fate of a similar application by the High

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54. For a detailed review of the IGC's work and supporting documents, see <http://www.wipo.org/globalissues/index.html>.

55. These issues include: (1) creating searchable databases of contractual clauses in material transfer agreements that specify the conditions of access to genetic resources and the obligation to share benefits from their use; (2) studying the disclosure of biodiversity-related information in patent applications; (3) creating databases of traditional knowledge; (4) identifying different ways to document traditional knowledge in the public domain; and (5) debating the appropriate legal rules to protect traditional knowledge, including *sui generis* systems of protection. See WIPO Press Release PR/2002/317, IGC Moves Ahead on Traditional Knowledge Protection, (June 25, 2002) available at [wipo.org](http://wipo.org).

56. See Press Release PR/2003/362, WIPO, WIPO Member States Agree to Fast-Track Work on Traditional Knowledge (Sept. 29, 2003) at <http://www.wipo.int/pressroom/en/releases/2003/p362.htm> (last visited Oct. 24, 2003).

57. See *id.*

58. *Declaration on the TRIPS Agreement and Public Health*, WTO Doha Ministerial Conference, 4<sup>th</sup> Sess., WTO Doc. WT/MIN(01)DEC/2 (2001).

59. See Helfer, *Regime Shifting*, *supra* note 17.

60. *Ministerial Declaration*, WTO Doha Ministerial Conference, 4<sup>th</sup> Sess., WTO Doc. WT/MIN(01)DEC/2 ¶ 19 (2001).

Commissioner for Human Rights.<sup>61</sup> Perhaps more importantly, the breakdown of trade talks at the Cancún, Mexico WTO ministerial meeting in September 2003 suggests the possibility of new rifts between developed and developing countries that may make compromises – human rights inspired or otherwise – more difficult.<sup>62</sup>

## V. CONCLUSION

Although the debates within the WTO and WIPO will surely be contentious, trade and intellectual property negotiators should embrace rather than resist opening up these organizations to human rights influence. Allowing greater opportunities for airing a human rights perspective on intellectual property issues will strengthen the legitimacy of these organizations and promote the integration of an increasingly dense thicket of legal rules governing the same broad subject matter. Such integration will also allow national and international lawmakers and NGOs to turn to the more pressing task of defining the human rights-intellectual property interface with coherent, consistent, and balanced legal norms that enhance both individual rights and global economic welfare.

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61. See High Commissioner Report, *supra* note 4, at ¶ 68 (noting that the High Commissioner for Human Rights “intends to seek observer status at the TRIPS Council”).

62. See *The WTO Under Fire: Why Did the World Trade Talks in Mexico Fall Apart? And Who is to Blame?*, THE ECONOMIST, Sept. 20-26, 2003, at 26, 26-28; see also *Cancun Casts Shadow Over WIPO Assemblies*, BRIDGES TRADE BIORES, Oct. 3, 2003 at 1 (stating that during debates in the WIPO Assembly “developed countries appeared much less willing to make concessions than before the Cancún meeting”).