

Global Perspectives and Challenges for the Intellectual Property System

A CEIPI-ICTSD publication series



# Intellectual Property and Access to Science and Culture: Convergence or Conflict?

Edited by Christophe Geiger

**With contributions by**

Christophe Geiger, Farida Shaheed, Mylène Bidault, Lea Shaver, Carlos M. Correa, Rochelle Cooper Dreyfuss, Rebecca Giblin, Kimberlee Weatherall, and Peggy Ducoulombier



International Centre for Trade  
and Sustainable Development



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## Abbreviations and Acronyms

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ACTA	Anti-Counterfeiting Trade Agreement
CESCR	Committee on Economic, Social and Cultural Rights
ECtHR	European Court of Human Rights
EPO	European Patent Office
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
IP	intellectual property
NIH	National Institutes of Health (US)
OHCHR	Office of the High Commissioner for Human Rights
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USPTO	US Patent and Trademark Office
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## Foreword

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The Center for International Intellectual Property Studies (CEIPI) and the International Centre for Trade and Sustainable Development (ICTSD) are pleased to present the third issue of the publication series on Global Perspectives and Challenges for the Intellectual Property System. This issue continues to develop what the publication series intends to provide: high quality academic and policy-oriented papers dealing with topics that are of global importance because of their normative pre-eminence, economic relevance and socioeconomic impact.

CEIPI and ICTSD decided to launch this common project convinced by the synergies existing between both organisations. We share a common interest in intellectual property (IP) as a tool for innovation, development and the pursuit of broader societal interests, being profoundly engaged in knowledgeable and informed reflection and international debates touching upon how intellectual property can fulfil these important goals. This series of papers aims, therefore, at provoking consideration of contemporary issues thanks to the collaboration of recognised scholars and experts, giving voice to them, enriching the academic debate and feeding policymakers with high quality materials.

The series wishes to reach a broader audience, ranging from academics to public officials, including civil society, experts, business advisers and the broad membership of the intellectual property community. We also have in mind the actual implementation of intellectual property—how IP works in practice—without losing sight of public policy objectives, including its intersection with innovation, creativity and sustainable development goals.

We sincerely hope you will find this third issue of the series dealing with Intellectual Property and Access to Science and Culture a useful contribution to a better understanding of the complexities of the interface between intellectual property and broader ethical goals involved with innovation policy.



**Christophe Geiger**

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# Introduction

Christophe Geiger



## Introduction

If promoting scientific progress and creativity undoubtedly lies at the very core of the justifications for the protection of intangibles, the relationship of intellectual property with access to the fruits of science and culture has always been tumultuous. For several reasons, their interaction has in recent times received increased attention: "access" to creative and innovative works has certainly become a central element in the intellectual property debate,<sup>1</sup> the blocking effects of exclusive rights in specific innovation sectors being lately subject to enhanced scrutiny and sometimes even questioned, in particular by economists.<sup>2</sup> At the same time, the importance placed on the human right to science and culture has considerably grown, as these rights have progressively been invoked in different contexts, including intellectual property, following quite a long period of relative neglect since their legal recognition by several international conventions. Both are in fact not new to the normative landscape: cultural rights were already formally recognised with the creation of the United Nations Educational, Scientific and Cultural Organization in 1945,<sup>3</sup> and the right to science and culture was included in Article 27 of the Universal Declaration of Human Rights back in 1948.<sup>4</sup> Subsequently, in 1966, these rights were incorporated in Article 15 of the legally binding International Covenant on Economic, Social and Cultural Rights.<sup>5</sup> However, despite this universal recognition, for many decades the right to science and culture has been largely marginalised, not only in the more recent "human rights-intellectual property" debate,<sup>6</sup> but among human rights as such.<sup>7</sup> It is only in recent years that significant efforts have been undertaken at scholarly and policy levels to develop the analysis and interpretation of the rights to science and culture, with the objective of determining their concrete legal impact, including the specific obligations of states resulting from them.<sup>8</sup>

- 1 See for example F. Gurry, "Developments in the International Intellectual Property System," in C. Geiger (ed.), *The Intellectual Property System in a Time of Change: European and International Perspectives* (Paris: LexisNexis, 2016), underlying that "access is the reason for which we are interested in cultural production," 61.
- 2 See e.g., among many others, the critical chapter on intellectual property rights by the Nobel laureate Joseph E. Stiglitz in *Making Globalization Work* (New York: Norton, 2006). In this spirit, many intellectual property scholars have recently called for more evidence-based intellectual property policies. See I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, An Independent Report (May 2011), inviting the legislature "to ensure that in the future, policy on Intellectual Property issues is constructed on the basis of evidence, rather than weight of lobbying," 1; J. Poort, *Empirical Evidence for Policy in Telecommunication, Copyright and Broadcasting* (Amsterdam: Amsterdam University Press, 2015); J. De Beer, "Evidence Based Intellectual Property Policy Making," paper presented at the 35th annual conference of the Association of Teachers and Researchers in Intellectual Property, in Krakow, Poland on 26–29 June 2016; C. Geiger, "Moving Out of the Economic Crisis: What Role and Shape for Intellectual Property Rights in the European Union?" in H. Kalimo and M. S. Jansson (eds), *EU Economic Law in a Time of Crisis* (Cheltenham, UK: Edward Elgar, 2016), 148.
- 3 See Article 1(1) of the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 November 1945, 4 UNTS 275.
- 4 See United Nations General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III).
- 5 See United Nations General Assembly, International Covenant of Economic, Social and Cultural Rights (ICESCR), 16 December 1966, UNTS, vol. 993, 3.
- 6 See for example on this issue, C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK: Edward Elgar, 2015); P. Torremans (ed.), *Intellectual Property and Human Rights*, 3rd ed. (Boston: Kluwer Law International, 2015); L. R. Helfer and G. W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011).
- 7 For example, Janusz Symonides described cultural rights as "'poor relatives' of other human rights," see J. Symonides, "Cultural Rights: A Neglected Category of Human Rights," *International Social Science Journal* 50.158 (1998): 559–72, at 559; or Yvonne Donders has called them "the Cinderella of the human rights family," see Y. Donders, "The Legal Framework of the Right to Take Part in Cultural Life," in Y. Donders and V. Volodin (eds), *Human Right in Education, Science and Culture: Legal Developments and Challenges* (Farnham, UK: Ashgate, 2007), 231–72, at 232.
- 8 For more details see C. Sganga, "Right to Culture and Copyright: Participation and Access," in Geiger, *Research Handbook*, 560–76.

Interestingly, the intangible rights of creators and the right to science and culture have been linked from the beginning in the relevant international legal instruments.<sup>9</sup> In fact, Article 27 of the UDHR and Article 15 of the ICESCR provide for the right to science and culture but they equally incorporate "the right to the protection of the moral and material interests" of creators, causing therefore a potential tension between these rights. Surprisingly, however, their interface was not greatly discussed for a significant period of time. This seems to have changed, in particular with the adoption of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights in 1994,<sup>10</sup> which marked the beginning of the so-called global expansion of the intellectual property regime and brought with it an entire set of development issues in the debate on its appropriate international legal framework, including its interactions with international human rights instruments.<sup>11</sup> Thus, in recent years, the relationship between intellectual property rights and the right to science and culture has been the source of increased legal scholarship<sup>12</sup> and reports from international organisations.<sup>13</sup> Nevertheless, despite a relatively rich wave of interest, the exact implications of the provisions in Article 27 of the UDHR and Article 15 of the ICESCR still remain unclear. The United Nations Special Rapporteur in the field of cultural rights issued two well-noted reports in 2014 and 2015 on the intellectual property regimes and the right to science and culture,<sup>14</sup> which shed some light on their complex relationship but also generated further discussions.

It is for this reason that in May 2015, the Center for International Intellectual Property Studies (CEIPI) organised a roundtable dedicated to this subject, with the title "Intellectual Property and Access to Science and Culture: Convergence or Conflict?", inviting prominent scholars from both the intellectual property and human rights fields to exchange their views with those of the representatives of human

- 9 See more detailed C. Geiger, "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles," in Geiger, *Research Handbook*, 661–89; A. Chapman, "Approaching Intellectual Property as a Human Right (Obligations Related to Art. 15(1)(c))," *Copyright Bulletin* 35 (2001): 4–36.
- 10 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is reproduced as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994.
- 11 See for example on the interface of the TRIPS Agreement with international human rights, H. Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford: Oxford University Press, 2007); E. B. Ituku, *Propriété intellectuelle et droits de l'homme. L'impact des brevets pharmaceutiques sur le droit à la santé dans le contexte du VIH/ SIDA en Afrique* (Zurich: Schulthess, 2007); H. M. Haugen, "Human Rights and TRIPS Exclusion and Exception Provisions," *Journal of World Intellectual Property* 5/6 (2009): 345–74; R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: International Centre for Human Rights and Democratic Development, 2000); R. D. Anderson and H. Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy," *Journal of International Economic Law* 9.3 (2006): 707–47, at 721ff.
- 12 See for example L. Shaver, "The Right to Science and Culture," *Wisconsin Law Review* 1 (2010): 121–84; L. Shaver and C. Sganga, "The Right to Take Part in Cultural Life: Copyright and Human Rights," *Wisconsin International Law Journal* 27.4 (2010): 637–62; Sganga, "Right to Culture and Copyright"; A. Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science," *Human Rights Quarterly* 35.1 (2013): 143–75; C. Geiger, "Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests," *Max Planck Institute for Innovation and Competition Research Paper* No. 15-07 (2015), forthcoming in R. Giblin and K. G. Weatherall (eds), *What If We Could Reimagine Copyright?* (Canberra: Australian National University Press, 2016).
- 13 See for example UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Article 15, Paragraph 1(a), of the International Covenant on Economic, Social and Cultural Rights)* (General Comment No. 21), UN Doc. E/C.12/GC/21, 20 November 2009; Committee on Economic, Social and Cultural Rights, *General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant)* (General Comment No. 17), UN Doc. E/C.12/GC/17, 12 January 2006.
- 14 See United Nations Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Copyright Policy and the Right to Science and Culture*, A/HRC/28/57, 24 December 2014; United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights, Patent Policy and the Right to Science and Culture*, A/70/279, 4 August 2015.

rights institutions. This volume, the third issue of the publication series jointly conducted by the International Centre for Trade and Sustainable Development (ICTSD) and CEIPI at the University of Strasbourg, includes the papers presented during this roundtable. The contributors addressed a range of fundamental questions with regard to the interface between intellectual property rights and the human right to science and culture: for example, to what extent may the right to science and culture be understood as covering a field as complex and varied as intellectual property? Do Article 27 of the UDHR and Article 15 of the ICESCR confer human rights protection to all traditionally recognised intellectual property rights or only to certain components thereof? Additionally, if the scope is extended to all IP rights, how can this protection be reconciled with the other interests of fundamental importance that it may contradict? Should the guarantee to be able to participate fairly in the fruits of the commercial exploitation of one's creation be subject to promoting intellectual variety and spreading culture and science? Further and more fundamentally, the contributors also aimed at reflecting on how to design an intellectual property system that can foster economic growth while at the same time encouraging non-economic values and objectives of human development. In particular, the relationship between patent law and policy and the right to enjoy the benefits of scientific progress and its applications was addressed. Further explored — through the prism of the right to culture — was the way in which the copyright system can be reimagined in order to benefit the interests of both creators and the public in an equitable way.

The different contributions have been structured in two parts. The first part is dedicated to the 2014 and 2015 reports of the UN Special Rapporteur in the field of cultural rights, helping to understand the relationship between intellectual property and the right to science and culture as addressed in these documents. This part is introduced by the former United Nations Special Rapporteur in the field of cultural rights Farida Shaheed herself, who kindly agreed to shed some light on the challenging task she undertook with the drafting of these two reports. In the following chapter, Mylène Bidault from the Office of the High Commissioner for Human Rights (OCHCR) describes in detail the policy and diplomatic context of the work and actions of the United Nations Special Rapporteur in the field of cultural rights on human rights and intellectual property and reveals briefly what could be the follow-up actions in the future. Lea Shaver then provides an in-depth analysis of the reports and their impact on various intellectual property regimes and the right to science and culture. Having served as a consultant to the Special Rapporteur, she offers very valuable insights, in particular examining the origins, development, and conclusions of these reports.

The second part of the issue then turns to the assessment of the reports and more generally of the relationship between intellectual property and the right to science and culture. Carlos Correa first analyses the relationship between intellectual property and access to science through the lens of recent developments in patent law, which, according to him, progressively seem to have expanded into the scientific realm. This has led in certain situations to the appropriation of scientific knowledge that by its very nature should remain in the public domain, thus impacting on its dissemination and further use.

Rochelle Dreyfuss then examines questions arising from the "the paradox" of the relationship between patents and human rights, mainly from the point of view of the new challenges in the patent system, such as those posed by pandemics, terrorism, or climate change. The chapter critically discusses the conclusions of the 2015 "patent" report of the United Nations Special Rapporteur in the field of cultural rights in these respects.

Rebecca Giblin and Kimberlee Weatherall further take a fundamental approach and address the issue of access to culture by looking at the concept of public interest and its possible consequences within copyright law. Using methods developed in social and political philosophy, their purpose is to propose different narratives that could address some of the difficulties in formulating good copyright policy by re-examining the place of "the public interest" in copyright legal discourse.

In the following contribution, Peggy Ducommun analyses the case law of the European Court of Human Rights in relation to intellectual property and access to science and culture, concluding that despite engaging in a balancing exercise, the Court seems so far rather protective towards intellectual property rights.

And finally, my paper argues that recent developments in copyright law attest to the need to rethink copyright in order to adapt its rules to its original dual character: as a right to secure and organise cultural participation and access to creative works on the one side, and as a guarantee for the creator to participate fairly in the fruit of the commercial exploitation of his or her works on the other. In these respects, it is proposed that copyright is to be (re)conceived as a right to access rather than a right to forbid, thereby emphasising the inclusive rather than the exclusive nature of copyright protection.

It is sincerely hoped that this volume will help to clarify the important interactions between intellectual property and the right to science and culture and therefore bring a new and clearer understanding of their conceptual and practical relationship. More generally, it is also hoped that this publication, which includes contributions from several internationally renowned experts, can advance the growing debate on intellectual property and human rights and stimulate some further research in order to bring systematisation in the analysis and implementation of the right to science and culture in the intellectual property context.







## **Part One**

# **Understanding the Relationship between Intellectual Property and the Right to Science and Culture:**

The 2014 and 2015 Reports of the UN Special  
Rapporteur in the Field of Cultural Rights



## Introductory Remarks by the Special Rapporteur

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### Farida Shaheed

The relationship between human rights and intellectual property regimes is an important and complex one that has witnessed growing concern in recent times. In order to move the discussion forward, at the end of my mandate as United Nations Special Rapporteur in the field of cultural rights (2009–15), I wrote two consecutive reports on intellectual property policies and their impact on the enjoyment of the right to science and culture. This was certainly one of the most challenging tasks I have undertaken.

Adopting a human rights perspective on intellectual property issues is both crucial and urgent, for such an approach focuses attention on a host of important themes that may get lost when copyrights and patents are treated primarily in terms of trade. These include the social function and human dimension of intellectual property, the public interests at stake, the importance of transparency and public participation in policymaking, the need to design alternative incentive regimes to promote research, creativity and innovation, the importance of broad diffusion and scientific and cultural freedoms, the importance of not-for-profit production and innovation, and the special consideration to be given to marginalised and vulnerable groups.

While a number of human rights are at stake, such as the right to food and the right to health, my reports propose to address the unresolved tensions between intellectual property laws and human rights through the lens of the right to science and culture. The right to science and culture, as well as the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author, are enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights. They are human rights principles designed to work in tandem, and striking an appropriate balance between the two goals is essential. The fulcrum of the human right to science and culture is human creativity, understood as the right to fully explore and develop one's creative potential, to benefit from the human creativity of others, and to enjoy and further develop this creativity in self-determined and empowering ways. This I believe provides a crucial human rights framework within which to reconsider intellectual property policies. My reports emphasise both the need for protection of authorship and expanding opportunities for participation in cultural life in both the artistic and scientific arenas.

Let me clarify, however, that the right to the protection of the moral and material interests of authors does not establish a human right to copyright or patent protection, as there are many other ways to protect these interests. Intellectual property rights are not human rights, and the right to protection of moral and material interests cannot, and should not, be used to defend intellectual property laws that inadequately respect human rights. Intellectual property laws are but one element in the protection of the interests of authors, and should be understood as part of a larger set of policies to promote the cultural and scientific sectors and the right to science and culture. From the human rights perspective, intellectual property policies must be judged by how well they serve the interests of human authors, as well as the public's interest in participation and access to science and culture.

Striking an appropriate balance requires taking human rights seriously. This means that states have a positive obligation to provide for a robust and flexible system of copyright and patent exceptions and limitations to honour their human rights obligations.

The trend for copyright and patent protection to be strengthened with little consideration given to human rights issues grows, and it is essential to ensure that this does not extend so far as to interfere with the dignity and well-being of individuals. In this regard, it is important to overcome the worrying tendency for trade negotiations to be conducted amid great secrecy, with substantial corporate participation but without an equivalent participation of elected officials and other public interest voices. International intellectual property instruments, including trade agreements, should be negotiated in a transparent way, permitting public engagement and commentary.

My reports contain a series of recommendations, which I encourage all stakeholders to take into consideration. I take this opportunity to once again thank all the experts who so generously contributed to my reports, through their submissions, comments and insightful discussions, with special thanks to Lea Shaver.

I congratulate the Center for International Intellectual Property Studies (CEIPI), for continuing the debate around the crucial issues of how to design an intellectual property system that can foster economic growth while at the same time encouraging non-economic values and objectives of human development, which are at the centre of my own reflection. This joint CEIPI-ICTSD publication is a timely and valuable contribution that will help move the discussion forward.

# Intellectual Property Policies and the Right to Science and Culture: The Work of the Special Rapporteur in Context

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**Mylène Bidault**

## 1. General Context

When the mandate of the United Nations Special Rapporteur in the field of cultural rights was established in 2009 by the Human Rights Council,<sup>1</sup> fears and scepticism were expressed among the diplomatic community as well as non-governmental organisations about what exactly the mandate would be about and the direction it would take.

Main concerns related to the possible promotion of cultural relativism through cultural rights, to the detriment of human rights as a whole. Culture, tradition and religion, it was stressed, were too often brought forward as a justification for infringing human rights, in particular women's rights. In her first report submitted in 2010 to the Human Rights Council, the Special Rapporteur Farida Shaheed recalled that, as enshrined in the Universal Declaration on Cultural Diversity, no one could invoke cultural diversity to infringe upon human rights guaranteed by international law, or to limit their scope. She stressed from the outset that not all cultural practices could be considered as protected under international human rights law, and reassured all stakeholders that she would not confuse the need to respect cultural diversity with cultural relativism.<sup>2</sup>

Other obstacles, however, also contributed to the late establishment of this important mandate within the human rights system, in particular a fierce disagreement about the consequences of the free market and globalisation on cultural diversity, and about whether cultural goods and services should be considered as commodities of a unique kind, understood as vectors of identity, values and meaning, and not only as mere commodities. It is probably not a coincidence, therefore, that the mandate was established several years after the adoption of the UNESCO Universal Declaration on Cultural Diversity (2001) and Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

Cuba was the main sponsor of Resolution 10/2 establishing the mandate. This means it conducted the process leading up to the adoption of the resolution by the Human Rights Council, procedurally, but also diplomatically and politically.<sup>3</sup> Cuba is also in charge of the yearly resolutions of the Council taking note of the work accomplished by the Special Rapporteur, and for the renewal of the mandate every three years. No false assumptions should be made at this point, regarding the extent to which Cuba could have influenced the direction adopted by the mandate. This country was always very

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1 In 2009, the mandate established was that of "an independent expert in the field of cultural rights" (Resolution 10/2 of the Human Rights Council), which was transformed into a "Special Rapporteur in the field of cultural rights" in 2012 (Resolution 19/6). One can hardly see any difference between an independent expert and a special rapporteur, and it is not uncommon to refer generally to the "Special Rapporteur" in speaking about the mandate on cultural rights since its establishment in 2009.

2 A/HRC/14/36, esp. paras 32–4.

3 All resolutions discussed and adopted at the Council have to be introduced by a member state of the Council.

cautious never to jeopardise the independence of the Special Rapporteur, who was entirely free to address difficult issues such as artistic freedoms and the cultural rights of women. Cuba never requested particular issues to be emphasised.

Farida Shaheed was the first Special Rapporteur in the field of cultural rights (2009–15). The tasks she faced were enormous, as she was requested to identify best practices in and obstacles to the promotion and protection of a category of rights that had never been defined before within the international or the regional human rights systems, and had received little attention from states, the academic community or non-governmental organisations.<sup>4</sup>

One of the first tasks was thus to identify the legal basis for cultural rights, which are not limited to but also include Article 27 of the Universal Declaration on Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>5</sup> These provisions protect the right of every person to participate in cultural life, to enjoy the arts and the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

More or less following the structure of Article 15 of the ICESCR, the work began to explore the contours and contents of cultural rights, leading to the adoption of 10 thematic reports, relating to a general definition of cultural rights and exploration of its relationship with the universality of human rights and cultural diversity (2010), the right to access and enjoy cultural heritage (2011), the right to enjoy the benefits of scientific progress and its application (2012), cultural rights of women on an equal basis with men (2012), the right to the freedom of artistic expression and creativity (2013), the writing and teaching of history (2013), memorialisation processes (2014), the impact of advertising and marketing practices on the enjoyment of cultural rights (2014), and finally the reports that are at the centre of this conference and publication, the impact of copyright and patent policies on the enjoyment of the right to science and culture (both published in 2015).<sup>6</sup>

## 2. *Premises of the Work on Intellectual Property Policies*

This list of thematic reports may appear eclectic. Many issues, however, are transversal to these reports, which are all linked and articulated together in various ways and degrees. For the theme of intellectual property, at least two additional reports must be mentioned beyond the two 2015 reports entirely devoted to this issue: the 2012 report on the right to benefit from scientific progress (A/HRC/20/26), and the 2013 report on the right to freedom of artistic expression and creativity (A/HRC/23/34). Those two reports led to the 2015 reports and explain why the topic of intellectual property was addressed, beyond the mere necessity to address one crucial aspect of Article 15 of ICESCR, that is, the right of every person to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

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4 For an overview, see Mylène Bidault, *La protection internationale des droits culturels* (Brussels: Bruylant, 2009).

5 For more information, see the first thematic report of the Special Rapporteur, which includes a whole chapter on the legal basis for the mandate, and was careful in not restricting it to the ICESCR, also encompassing key provisions from the International Covenant on Civil and Political Rights (ICCPR).

6 All reports are available on the website of the Office of the High Commissioner for Human Rights at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/AnnualReports.aspx>.



## 2.1 The Right to Enjoy the Benefits of Scientific Progress and Its Applications

In 2011, the Special Rapporteur Farida Shaheed began to explore the right to enjoy the benefits of scientific progress and its application. The decision to choose that topic for the third thematic report of the mandate was a signal that the Special Rapporteur would study all aspects of Article 15 of ICESCR, including the ones that did not raise much interest such as the right to science. It was also a key step for the mandate, as the Special Rapporteur came to the conclusion that the rights to science and culture had to be understood as inherently interlinked, since both related to the pursuit of knowledge and understanding and to human creativity in response to a constantly changing world.<sup>7</sup> The report came with a proposed normative content for the right to science, as including (a) access to the benefits of science by everyone, without discrimination; (b) opportunities for all to contribute to the scientific enterprise and freedom indispensable for scientific research; (c) participation of individuals and communities in decision-making; and (d) an enabling environment fostering the conservation, development and diffusion of science and technology.<sup>8</sup>

While working on the right to enjoy the benefits of scientific progress and its application, it became obvious that a report on intellectual property would soon be needed. Indeed, the Special Rapporteur identified intellectual property rights as an area requiring further consideration. She stressed the need to guard against promoting the privatisation of knowledge to an extent that deprived individuals of opportunities to take part in cultural life and to enjoy the fruits of scientific progress, which would also impoverish society as whole. She also recommended reconsidering the current maximalist intellectual property approach and exploring the virtues of a minimalist approach to intellectual property protection, while further developing and promoting creative mechanisms for protecting the financial interests of creators and the human rights of individuals and communities. Key principles were already included in that report, in particular that intellectual property rights were not human rights, and that exceptions and flexibilities under international intellectual property treaties had to be explored further and applied more consistently.<sup>9</sup>

## 2.2 The Right to Freedom of Artistic Expression and Creativity

In 2013, the Special Rapporteur reflected upon the growing worldwide concern that artistic voices had been or were being silenced by various means and in different ways, stressing that underlying motivations were most often political, religious, cultural or moral, or lay in economic interests, or were a combination of those. Her report on the right to freedom of artistic expression and creativity addressed not only laws and regulations restricting artistic freedoms, but also economic and financial issues significantly impacting on such freedoms.

A specific section is devoted in the report to intellectual property issues.<sup>10</sup> Importantly, the Special Rapporteur recalled that, as stressed by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 17, the protection of the moral and material interests of authors was not to be equated with legal entitlements recognised in intellectual property systems. She also questioned the assumption that copyrights ensured the fair remuneration of artists,

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7 A/HRC/20/26, para. 3.

8 A/HRC/20/26, para. 25.

9 See for example A/HRC/20/26, paras 57 and 59.

10 A/HRC/23/34, paras 79–84.

by stressing the need to acknowledge the percentages of royalties that go to publishing houses/ copyright holders rather than to the artists themselves, and by addressing concerns expressed about coercive contracts, under which creators sign away all their rights to their creation in order to gain a commission for creating a work. The Special Rapporteur acknowledged the existence of a highly debated issue on whether the moral rights and copyright systems had evolved in such a manner that the balance between the rights of authors and artists on the one hand, and the need to promote creativity and access to culture on the other, was no longer achieved.

The report stressed that the protection of corporate interests, including the protection of a specific logo or brand, could play an important role in art restrictions.<sup>11</sup> The striking example of the young Danish/Dutch artist Nadia Plesner was mentioned. Nadia Plesner's drawing entitled *Simple Living* (2007), inspired by the artist's reaction to mass media prioritising between world matters and celebrity gossip, depicted an undernourished African child holding a little dog and a handbag with the Louis Vuitton monogram on it. Sued by Louis Vuitton, Nadia Plesner fought to include references to status symbols in her art works, and was declared by a court in The Hague to be free to exhibit the drawing as well as *Darfurnica*, a larger painting also featuring the little African child with its bag.<sup>12</sup> In her recommendations, the Special Rapporteur stressed the right of artists to dissent and to use political, religious and *economic* symbols as a counter-discourse to dominant powers.<sup>13</sup>

### 2.3 A Political Divide

On a yearly basis, the Special Rapporteur presents her thematic report to the Human Rights Council, which is followed by an interactive dialogue with states and other stakeholders. States regularly pick and choose reports that they support; hence the importance of always demonstrating the interconnectedness between these reports.

The two thematic reports, on the right to science on the one hand, and on artistic freedom on the other, were received by the Human Rights Council and more largely the international community with great differences, showing a profound divide on these issues between members of the "Western European and Others Group," more inclined to support the work undertaken on artistic freedom, and other states, in particular developing countries, many of which welcomed the work on the right to science.

Significantly, Cuba reacted to the report on the right to science by launching an initiative to request the Office of the High Commissioner for Human Rights to convene a two-day seminar with international experts on the right to enjoy the benefits of scientific progress and its applications, in order to further clarify the content and scope of that right and its relationship with other human rights and fundamental freedoms.<sup>14</sup> The seminar took place in Geneva on 3 and 4 October 2013, with one of its six panels focusing on intellectual property rights.<sup>15</sup> The conclusion of the report of the seminar, consisting of only one paragraph, clearly identified the impact of intellectual property

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11 A/HRC/23/34, para. 51.

12 Nadia Plesner v. Louis Vuitton, Case number 389526/KG ZA 11-294, Court of The Hague, 4 May 2011, see <http://www.nadiaplesner.com/simple-living--darfurnica1>.

13 A/HRC/23/34, para. 89(d).

14 See Resolution 20/11 of the Human Rights Council.

15 For the report of the seminar, see A/HRC/26/19.

rights on the right to science as a main issue, stating:

The participants in the seminar expressed particular interest in the relationship between the right to enjoy the benefits of scientific progress and intellectual property rights. Much of the discussion concerned the compatibility of the international intellectual property system with human rights norms and standards, and the need for significant adjustments to ensure a balanced system which accords fully with human rights norms and standards.<sup>16</sup>

In the case of artistic freedom, developed countries launched several initiatives with varying degrees of success, with the aim of giving more visibility to the issue of artistic freedom and making it an integral part of the work of the Council. For example, on 18 September 2015, a statement was made by a group of more than 50 states in support of the right to artistic expression.<sup>17</sup> While states from various regional groups joined the statement, including from Africa and Latin America, most of them were developed countries, many of them from the "Western European and Others Group." The statement did not touch upon issues related to intellectual property policies.<sup>18</sup>

### 3. *The 2015 Reports on Intellectual Property Policies*

#### 3.1 The Process

In 2013, the Special Rapporteur decided to embark on thematic research entirely focused on intellectual property and the right to science and culture, conscious of her crucial position in this regard: mandated to promote the respect for, at the same time, the right to take part in cultural life, the right to benefit from scientific progress and its applications, and the right to the protection of the moral and material interests of authors, the Special Rapporteur is to enhance the full implementation of all these rights, but also to enquire about their interconnectedness and to address the tensions between them.

The process lasted about two years, and Farida Shaheed rapidly decided that two consecutive reports were needed, because of the sum of documentation to review, the complexities of the issues raised, and the consultations needed. This was also the best way to address two sets of issues that were analogous but not entirely similar. It was then decided to submit a first report to the Human Rights Council on copyright policy (A/HRC/28/57), and a second report to the General Assembly on patent policy (A/70/279).

The work involved the organisation of three experts' meetings which took place in 2014 in Geneva as well as at New York University and Yale University. As with most of the reports published by the Special Rapporteur, many experts from all regions of the world were consulted. An open consultation, which was organised in Geneva in June 2014, also allowed states and other stakeholders to share

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<sup>16</sup> A/HRC/26/19, para. 53.

<sup>17</sup> Albania, Armenia, Australia, Austria, Belgium, Benin, Brazil, Bulgaria, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Saint Kitts and Nevis, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America, Uruguay.

<sup>18</sup> All statements are available on the extranet of the Human Rights Council, accessible to all at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCRegistration.aspx>. See Human Rights Council / 30th regular session / oral statements / 18 September 2015 / Latvia (in the name of a group of states).

their views. Of note, spontaneous written contributions were also received from several states but also tens of organisations of publishers, distributors and artists, most of them based in Australia, Europe and the United States of America. Most of these contributions stressed the importance of protecting copyrights.<sup>19</sup>

### 3.2 Presentation of the Reports and Reception by the International Community

#### 3.2.1 *The copyright report*

The report on copyright policy and the right to science and culture was presented on 11 March 2015 to the Human Rights Council. In her presentation, Farida Shaheed recalled key principles and recommendations from her report, in particular that intellectual property rights were not human rights, that authors had to be distinguished from copyright holders, that the protection of authorship as a human right required in some ways more and in other ways less than what was currently found in the copyright laws of most countries, and that exceptions and limitations of copyright had to be developed to ensure the conditions for everyone to enjoy their right to take part in cultural life by permitting legitimate educational usages, expanding spaces for non-commercial culture and making works accessible for persons with disabilities or speakers of non-dominant languages. She also stressed one of her recommendation to explore the possibility of establishing a core list of minimum required exceptions and limitations incorporating those currently recognised by most states, and/or an international fair use provision.<sup>20</sup>

As expected, the Human Rights Council was divided over the report, which raised a lot of attention. Countries such as Algeria, Bangladesh or Egypt welcomed the report. Egypt underlined for example that the report addressed a "missing balance" between the right to participate in cultural life, to enjoy the arts and to share in scientific advancement and its benefits on the one hand, and the rights of authors on the other hand.<sup>21</sup>

Others, like the European Union, expressed their surprise that the report had not taken into account many comments made by member states and relevant stakeholders, implicitly referring to the many submissions received from organisations of publishers, distributors and artists. The European Union further considered that "complementarity should be the guiding principle" for the discussions, and that the "different stakeholders" should be involved. It also stressed that at the international level, the European Union called for the protection of the right of authors to make innovation and creation sustainable, to strengthen cultural and creative industries, and to support economic growth and development. It also stated its unwillingness to consider a legally binding instrument on copyright limitations and exceptions for libraries and archives.

Other states dissociated themselves further. Japan, for example, expressed its disappointment to find that some arguments did not seem to be the result of careful examination of the copyright regime with its actual characteristics, noting that the World Intellectual Property Organization (WIPO) and

19 All contributions are available at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/impactofintellectualproperty.aspx>.

20 The statement is available at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/AnnualReports.aspx>.

21 See also the statement from Pakistan, in the name of the Organization of Islamic Conference. Extranet of the Human Rights Council, at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCRegistration.aspx>. See Human Rights Council / 28th regular session / oral statements / 11 and 12 March 2015.

the World Trade Organization (WTO) had the expertise to do so. The United States of America, for its part, was of the view that the report did not adequately acknowledge that copyright could serve as a means to promote human rights, including those included in Article 27 of the UDHR. It also believed that the report could "have more fully addressed the pressing challenges posed to creators by lack of respect for intellectual property rights and for all individuals' human right to freedom of expression." Finally, the United States disagreed with many parts of the report, in particular those "suggesting that individual creators and corporations or businesses should merit different protections."<sup>22</sup> On this latter point, the Special Rapporteur responded that only human beings were entitled to human rights.

### 3.2.2 *The patent report*

Farida Shaheed presented her report on patent policies and the right to science and culture to the General Assembly on 26 October 2015.<sup>23</sup> Her statement reiterated some of the principles laid out in her March presentation, in particular that there was no human right to patent protection.

She added very clearly that the human rights perspective demanded that patents do not extend so far as to interfere with the dignity and well-being of individuals. Hence, where patent rights and human rights are in conflict, human rights must prevail, and states have a positive obligation to provide for a robust and flexible system of patent exclusions, exceptions and flexibilities based on domestic circumstances, including through the establishment of compulsory and government use licences when needed. To make it shorter, from the perspective of human rights, exclusions, exceptions and flexibilities are often to be considered as obligations.

Farida Shaheed also stressed forcefully that the effects of intellectual property rights were strongly context-dependent, and insisted how crucial it was that international legal regimes on patents should continue to leave room for countries to adopt and implement policies to abide by their human rights obligations. Concerned that international trade treaties were being used to drive and delimit domestic patent policies, short-cutting democratic processes and discussions and in contradiction to Article 25 of the ICCPR,<sup>24</sup> she recommended that international intellectual property instruments, including trade agreements, be negotiated in a transparent way, permitting public engagement and commentary. She also recommended that national patent laws and policies be adopted and reviewed in forums that promoted broad engagement, with input from innovators and the public at large.

Several states only made statements during the interactive dialogue with Farida Shaheed.<sup>25</sup> One reason for this seems to be that states' representatives in New York express less interest

22 Those interested can view the debates online, as they were webcasted, at <http://webtv.un.org/meetings-events/>.

23 This statement is also available at <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/AnnualReports.aspx>.

24 Article 25 of the ICCPR protects the right of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives.

25 The dialogue can be viewed at <http://webtv.un.org/meetings-events/general-assembly/main-committees/3rd-committee/watch/third-committee-28th-meeting-70th-general-assembly/4582209165001>. See also the press release "Special Rapporteurs Tell Third Committee Checks, Balances Sorely Needed to Ensure Counter-Terrorism Laws, Sanctions Comply with Human Rights Norms," at <http://www.un.org/press/en/2015/gashc4143.doc.htm>.

in human rights issues than in Geneva, at least in their interaction with special rapporteurs and other independent experts. However, once again, the divide between developed and developing countries was obvious.

Brazil, Cuba and Pakistan commended the report. Pakistan, for example, found that the conclusions of the report usefully contributed to ongoing debates regarding the implementation of economic, social and cultural rights, and concurred with many of the recommendations made. Brazil believed that the protection of intellectual property was not a goal in itself, and agreed that where human rights and intellectual property rights were in conflict, human rights had to prevail.

The European Union, for its part, welcomed the report while restating its position on the importance of protecting intellectual property, which it considers indispensable for human development. The Russian Federation, while agreeing on the possible contradiction between intellectual property rights and the right to science and culture, considered many of the recommendations of the Special Rapporteur to be "problematic," as they could not easily be put into practice.

### 3.3 Follow-Up

The reports are not an end in themselves, but tools to open critical discussions on contemporary issues, from a human rights based approach. Unfortunately, the Office of the High Commissioner for Human Rights usually does not have the capacity to follow up on reports of special procedures through the elaboration of programmes. Special rapporteurs do their best to contribute to the dissemination of their findings as well as their implementation, through participation in conferences, press releases, country visits and, where relevant, through responding to allegations of violations drawn to their attention.

Farida Shaheed, for example, was invited by the Legal Affairs Committee of the European Parliament to present her report on copyright in May 2015, at a time when the European Commission and the European Parliament were looking into the European legislation regarding copyright.<sup>26</sup> Interestingly, the mere fact that she had been invited to make such a presentation created much debate among the members of the Legal Affairs Committee, some of whom tried to prevent her taking the floor.

In June 2015, the Special Rapporteur joined 10 other United Nations experts in a press release to express concern about the secret nature of the drawing up and negotiation of some free trade and investment agreements, such as the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, and about the potential adverse impact of these agreements on human rights. It was noted that, according to observers, these treaties and agreements were likely to have a number of retrogressive effects on the protection and promotion of human rights, including by extending intellectual property protection.<sup>27</sup>

More steps need to be adopted beyond those limited actions, however, if things are to change. The Special Rapporteur contributed to the ongoing debate on intellectual property and human rights through the lens of cultural rights, and we hope that all concerned stakeholders will consider her reports in this area as useful and supportive of their work in other arenas. We all know that the

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26 See <http://www.ohchr.org/Documents/Issues/CulturalRights/StatementEuropeanParliament.pdf>.

27 "UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights," 2 June 2015, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>.

United Nations human rights system is a weak system in comparison to the apparatus put in place to protect free trade and intellectual property rights, at the international as well as national levels. However, the imbalance in the machinery put in place should not let people forget that human rights are inserted in international treaties and national laws that are also binding, and that states have obligations they must abide by in this area.

# Intellectual Property and the Right to Science and Culture: The Reports of the Special Rapporteur in the Field of Cultural Rights

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Lea Shaver

## 1. *Introduction*

In recent years, the right to science and culture has emerged as a leading conceptual framework for reconciling intellectual property law with human rights. The textual foundation of the right to science and culture dates back to the 1948 Universal Declaration of Human Rights. Article 27 of the UDHR states: "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Despite clear grounding in the international human rights documents, this particular provision has long suffered from obscurity and confusion about its meaning. Fortunately, a new wave of scholarship provides a more solid conceptual foundation for the right to science and culture. This new literature understands the right to science and culture as having two complementary aspects. The "protection" aspect of the right calls for attention to the moral and material interests of authors and scientists. The "participation" aspect emphasises inclusion in the processes of creative expression and scientific discovery, as well as access to the fruits of cultural and technological creativity.

This dual nature allows the right to science and culture to play a unique role in intellectual property debates. The encounter between the international human rights and IP regimes had previously been framed strongly in terms of conflict between IP protection and human rights demands. In contrast, the right to science and culture frames both protection and access in human rights terms. It thus points towards solutions in the nature of integrating and reconciling intellectual property and human rights principles, rather than asserting the primacy of one set of interests over the other.

These ideas have now found acceptance within the United Nations system. The UN Special Rapporteur in the field of cultural rights, Farida Shaheed, first offered a detailed and authoritative interpretation of the right to science in a May 2012 report adopted by the UN Human Rights Council (A/HRC/20/26). Among many themes, this report considered the role of intellectual property in shaping enjoyment of the right to science. Between 2013 and 2015, the Special Rapporteur decided to focus even further on understanding and explaining the relationship between intellectual property and the right to science and culture. This subsequent work ultimately resulted in two major reports by the Special Rapporteur, one focused on copyright (A/HRC/28/57) and the other on patents (A/70/279).

This short article examines the origins, development, and conclusions of these two reports. I had the privilege to serve as a consultant to the Special Rapporteur in this process, producing drafts, participating in all meetings organised to solicit expert feedback on the drafts, and collaborating on their finalisation. My aim here is to provide an accessible overview of the substance of these reports, as well as to take the reader "behind the scenes" to appreciate some of the challenges and difficulties encountered during the process to provide insight on the choices ultimately made.



## 2. *Origins of the Special Rapporteur's Reports*

The Special Rapporteur's 2012 report had focused on elaborating an understanding of the right to enjoy the benefits of scientific progress and its applications. Among many themes, this report included a discussion of the interaction between the right to science and intellectual property law and policy. The Special Rapporteur felt that this topic merited even further discussion, however, and she began planning to produce a report that would squarely focus on the interaction of intellectual property and the right to science and culture, to be completed towards the end of her second and final term.

My scholarship on the intersection of intellectual property and the right to science and culture<sup>1</sup> had informed the preparation of the 2012 report. Because of this, I was invited to participate in a 2013 OHCHR seminar on the right to science, and ultimately to serve as consultant to the Special Rapporteur.

When I began this work, the terms of reference called for enquiry into all forms of intellectual property as they related to the right to science and culture. As the process of drafting and discussion continued, however, it became clear that this was not ideal. There was simply too much to be said. Yet it was not initially obvious how best to subdivide it.

Within Article 27 of the UDHR, paragraph 1 highlights cultural, artistic, and scientific participation, while paragraph 2 highlights protection of authorship. Article 15 of the ICESCR similarly places protection and participation in separate paragraphs. Yet dealing separately with these two aspects of the right to science and culture was unsatisfactory. This was very clearly articulated to me by both Farida Shaheed and Mylène Bidault, the OHCHR staff member overseeing drafting. The entire purpose of bringing the lens of the right to science and culture to bear on intellectual property is to be able to focus simultaneously on these dual aspects, in order to consider how best to integrate, balance, and reconcile them. Splitting participation and protection into separate reports would undermine this goal.

The second possibility was to focus one report on science and a second on culture. Both the UDHR and the ICESCR place *cultural* participation and *scientific* participation in distinct clauses. Scholars in this field also sometimes speak separately of "the right to science" or "the right to culture." Yet this approach was ultimately unsatisfying as well, because there is no clear dividing line between "culture" and "science." Consider, for example, the issue of ensuring widespread access to scientific publications and scholarship. Would this belong in the "culture" report, because it deals with text and publication? Or is it an issue of science, because the subject matter of the publication pertains to engineering and medicine? If the latter, must we treat scholarship about physics differently from scholarship about poetry? Indeed, scientific inquiry, theory, and literature, as well as technological innovation and products, are themselves properly recognised as cultural manifestations.

In the context of a comprehensive report, it made little sense to rely on a strict dichotomy between science and culture. It was also plainly essential to consider both the participation and protection dimensions within a single report. Indeed, an integrated approach was considered as uniquely complementing and adding value to the CESCR's existing general comments (Nos 17 and 21), which

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1 Lea Shaver, "The Right to Science and Culture," *Wisconsin Law Review* 1 (2010): 121–84.

had followed the treaty structure. It was ultimately decided to elaborate two separate reports for each of the main categories of IP rights: one on copyright, and one on patents.

This seed was first planted by a comment at an early special forum, where the Special Rapporteur publicly shared her intent to produce a report on intellectual property and the right to science and culture and invited feedback. The delegate from Germany emphasised her concern that despite the common usage of the umbrella term "intellectual property," different forms of intellectual property in fact hold very different implications for human rights, urging us not to lose sight of these important distinctions when preparing the report.

Although the earliest draft of the report had contained some material about trademark law and other forms of intellectual property, it quickly became clear that by far the strongest implications for the right to science and culture lay in the copyright and patent areas, and that although the dynamics across these two fields of law share significant commonalities, they also present unique challenges and opportunities.

The boundary between copyright and patent law also has the virtue of being quite clear, in contrast to the very slippery distinction between science and culture. This made it very natural to separate discussion of the two legal fields into two reports. The main drawback is that this approach may give greater primacy to intellectual property than is due. The right to science and culture is broad, with many implications beyond intellectual property. In the end, however, this seemed the only practical way to meaningfully subdivide our work.

Future scholarship and international norm development can take an important lesson from this experience. Although the human rights treaty structure seems to encourage conceptual divisions between science and culture and between protection and participation, these divisions may obscure more than they reveal. In my opinion, it is more informative to approach the right to science and culture in a holistic, integrated way. The field of study can best be narrowed by approaching the right to science and culture through the lens of some other well-defined topic; such as internet freedom, the role of libraries, access to learning materials, or affordability of communications technology.

### *3. Copyright and the Right to Science and Culture*

Within each report, the text does separately discuss the two distinct aspects of protection and participation, while taking care to relate the two aspects. The human rights documents consistently place "participation" ahead of "protection" structurally. The copyright report however, presents the two topics in reverse order. This reversal was important in order to clarify, as early as possible, common misconceptions about the protection aspect. It was also important to avoid giving any impression that the Special Rapporteur considered participation to be more important than protection.

#### **3.1 Protection of Authorship**

A major objective of the copyright report was to firmly put to rest the misunderstanding that copyrights are human rights, or that copyright protection is of equal status with fundamental human rights. The report states unambiguously that "this equation is false and misleading" (para. 26). Yet this much was nothing new. Human rights authorities have repeatedly denied the equation of the

right to science and culture with copyright (e.g. CESCR General Comment No. 17, paras 1–3). Yet the myth has persisted and it was essential for this report to clarify this important point.

### *3.1.1 Distinguishing copyright from protection of authorship*

To move things forward, we sought to offer improved terminology for speaking about the related but distinct concepts of copyright protection and the human rights of authors. The report coins the term “protection of authorship” (paras 26–9) as shorthand for “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” (ICESCR Art. 15(1)(C)). It goes on to emphasise that “protection of authorship” is not a synonym or euphemism for copyright, but rather a human rights standard against which copyright law must be judged (paras 29, 100).

### *3.1.2 What the right to protection of authorship requires*

We felt it was also crucial to offer a more detailed and satisfying explanation of the precise relationship between protection of authorship and copyright protection. The report accordingly emphasises that some aspects of copyright protection are required, or at least strongly encouraged, in order to realise the duty of protection of authorship (para. 26). Yet in other ways, copyright law often goes too far, overly protecting works against adaptation and non-commercial sharing in ways that advance the interests of corporations, but undermine the interests of authors (para. 26).

Protection of authorship as a human rights concept requires a focus on the interests of human creators; where an individual creator has sold their copyright to a secondary rights-holder, protection of copyright may diverge from protection of authorship.

For example, national copyright laws may be designed in ways that promote or undermine the bargaining power of creators when they negotiate with publishers or other corporations that help to commercialise their works. This may be accomplished through reversion rights (para. 44), *droit de suite* (para. 45), and statutory licensing provisions that guarantee authors a certain share of the resulting income (para. 46). The report emphasises:

Given the inequality of legal expertise and bargaining power between artists and their publishers and distributors, States should protect artists from exploitation in the context of copyright licensing and royalty collection. In many contexts, it will be most appropriate to do so through legal protections that may not be waived by contract. (para. 101)

The report also notes that the moral and material interests of authors can and must be advanced through mechanisms in addition to copyright protection. “Copyright law is but one element of protection of authorship. States are encouraged to consider policies on labour practices, social benefits, funding for education and the arts, and cultural tourism from the perspective of that right” (para. 103).

The report thus pushes forward the discussion about authors’ rights as human rights. “Protection of authorship requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries” (para. 29). The report draws attention to potential conflicts between the interests of human authors and corporate copyright holders. The human rights perspective requires that the interests of authors, as vulnerable parties negotiating with more

economically powerful and legally sophisticated entities, be legally protected. This can occur only when lawmakers are cognisant of these conflicts of interest and empower authors to speak for themselves, rather than allowing rights holders speak for authors (para. 99).

### *3.1.3 Copyright and the human right to property*

Whether advanced by individual or corporate copyright owners, the claim to copyright protection itself as a human right better fits within the paradigm of the right to property.

The Special Rapporteur was careful to acknowledge that there is no international consensus recognising property as a human right. Yet we felt it was important to address the European approach to recognising a human right to protection of (intellectual) property (paras 52–4). This discussion reveals that human rights law requires much less than copyright owners frequently claim. Specifically, the European human right to property requires states to respect the copyright laws that they have adopted, but does not mandate any particular level of copyright protection (para. 53). Time limits on copyright's term, compulsory licensing, and copyright exceptions and limitations are entirely consistent with the well-recognised appropriateness of state regulation to fulfil the "social function" of property (para. 53).

The very brief discussion of this topic within the copyright report highlights the need for future research evaluating copyright law through the lens of the human right to property. At the time the copyright report was drafted, there was not an adequate basis in the literature to further develop this important discussion of copyright as a property right.

## **3.2 Cultural Participation**

My prior scholarship has suggested that intellectual property protection is inherently in tension with human rights demands for participation, because it erects legal barriers to public access.<sup>2</sup> This does not, however, lead to the absurd conclusion that intellectual property law as a whole must be condemned or abandoned. Instead, recognition of this tension calls for special efforts to address it, reconciling the goals of human rights with the goals of IP protection through careful legal tailoring of intellectual property rules.

The Special Rapporteur's report proceeds in this vein. Rather than discussing the problem itself at length, the report more productively focuses on solutions. As the draft and discussion evolved, it became clear that two major solution spaces deserved emphasis in the final report: copyright exceptions and limitations, and open licensing.

### *3.2.1 Copyright exceptions and limitations*

Copyright exceptions and limitations to promote cultural participation emerged as the most important solution space for reconciling copyright law with the right to science and culture. Particular credit for this emphasis goes to Professor Ruth Okediji, whose cogent feedback on an early draft of the report emphasised exceptions and limitations as the most important and promising tool within copyright law to strike an appropriate balance between protection and participation.

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<sup>2</sup> Shaver, "The Right to Science and Culture."

As explained in the report, copyright law not only prohibits commercially exploitative exact copying (piracy), but a wide range of uses, including translation, performance, and modification, even when the user invests significant new creativity of their own.

Because of the broad application of copyright protection, countries have long found it necessary to affirmatively permit certain types of socially desirable uses. Thus, nearly every country has a provision allowing for small quotation within the context of new work. Many countries also allow extensive copying for the purposes of parody or pastiche, and full copying for classroom, research, or personal use. A few countries also have open-ended flexible exceptions, such as "fair use" in the United States (paras 20–5).

The report calls for even greater use of copyright exceptions and limitations to realise human rights goals (paras 61–73). "States have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honour their human rights obligations" (para. 104). Copyright exceptions and limitations may facilitate broader access to learning materials (para. 64), provide greater room for non-commercial culture (para. 65), and address the special needs of disadvantaged groups such as persons with disabilities (para. 67) and linguistic minorities (paras 68–70).

The report expressed significant concern that copyright exceptions and limitations are currently underutilised due to international legal impediments (paras 74–6). Copyright treaties set high standards in areas vital to the interests of rights holders, such as length of term. Yet these treaties have largely treated exceptions and limitations as an optional matter for national practice (para. 74). Indeed, copyright treaties currently impose significant restrictions on national use of exceptions and limitations, subjecting them to a "three-step test." Problematically, this standard remains very unclear, thereby discouraging national experimentation and innovation (para. 75). The report lends its weight to existing calls that "The 'three-step test' of international copyright law should be interpreted to encourage the establishment of [a robust and flexible] system of exceptions and limitations" (para. 73).

The report also considered arguments that more countries should adopt open-ended, flexible exceptions such as the US system of "fair use" (para. 73), but does not specifically endorse any particular solution, recognising this as an issue requiring further study. Instead, the report calls for further exploration of an international fair use provision and international lists of minimally required exceptions and limitations (para. 109).

In contrast, the report does adopt a clear stance on the often controversial issue of uncompensated exceptions and limitations, insisting that uncompensated exceptions are compatible with the human right to protection of authorship, and will be essential in many contexts (paras 71–2, 105–6). "States should enable allowance for uncompensated use of copyrighted works, in particular in contexts of income disparity, non-profit efforts, or undercapitalised artists, where a requirement of compensation might stifle efforts to create new works or reach new audiences" (para. 106).

The report also notes the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled as a promising example of international cooperation to promote exceptions and limitations (paras 74, 76, 109) and calls for further efforts in this vein, including current efforts to mandate exceptions and limitations to promote education and the functions of libraries (para. 116).

Recognising the disappointing failure of the Stockholm Protocol to reduce copyright barriers to translation (paras 69–70), the report also recommends that “Further studies should be undertaken to examine what reforms are needed to better enable access to copyrighted materials in all languages, at affordable prices” (para. 118).

### *3.2.2 Open licensing*

In addition to the primary emphasis on realising the human rights potential of copyright exceptions and limitations, the copyright report also highlights the value of open licensing for promoting cultural participation—specifically mentioning Creative Commons, Free Art, and the GNU General Public License as leading examples. The report notes that open licensing not only promotes cultural and scientific participation, but also promotes the moral interests of scientific or academic authors in having their works travel as widely as possible, ensuring them the greatest credit for their ideas and contributions (para. 81).

The report therefore commends the growing practice of Open Access scholarship and Open Educational Resources as efforts to be encouraged in the name of human rights (paras 82–4). Within the report’s section on “Examples of Good Practices,” it highlights Mexico’s recent initiative to transition to open access scholarly publishing (para. 87), South Africa’s support for openly licensed textbooks (para. 88), and the work of Indian non-profit Pratham Books in producing openly licensed children’s books that address the need for affordable, multilingual materials for supporting literacy development (para. 89). The report recommends that “Public and private universities and research agencies should promote open access ... especially through Creative Commons licenses” (para. 113), and calls upon states to “redirect financial support from proprietary publishing models to open publishing models” (para. 112).

## **4. Patent Policy and the Right to Science and Culture**

Dividing the Special Rapporteur’s work on intellectual property into separate reports on copyright and patents allowed for more detailed and careful analysis of the human rights implications of each regime. The Special Rapporteur also took the strategic decision to finalise the copyright report first, while saving the patent report for later. This prioritisation was motivated in significant part because of a particular conceptual challenge facing the patent report, namely whether to understand “inventors” as falling within the category of “authors.”

### **4.1 Inventors as Authors**

In both the UDHR and the ICESCR, the protection aspect of the right to science and culture is specifically framed with regard to works of authorship. To intellectual property experts, the term “author” clearly invokes copyright law. It is less clear whether the human right to protection of moral and material interests similarly applies to inventors and patents.

Several experts consulted during the drafting strongly urged that the report should clarify that the human right to protection of authorship relates specifically to copyright law, and that there is no corresponding connection to patent protection. In their view, there was nothing to be gained and much to be lost from recognising a human rights foundation for claims to legal protection of inventions and discoveries. The patent report acknowledges this debate, explains some of the

reasons offered in defence of the narrow view, and notes the ambiguity of the drafting history and the primary documents (para 28–31).

Ultimately, however, the Special Rapporteur felt compelled to leave the door open to a broader interpretation of authorship, concluding that “the term ‘authors’ within the right to science and culture can be interpreted to include inventors and scientific discoverers” (para. 34). The CESCR had previously declared that the term “author” includes a “creator” of “‘scientific productions,’ such as scientific publications and innovations, including knowledge, innovations, and practices of indigenous communities.”<sup>3</sup> Although far from conclusive, this precedent pointed towards a more expansive interpretation of authorship than the traditional notion imported from copyright law. The Special Rapporteur was also concerned not to undermine a human rights basis for protection of traditional knowledge (paras 35–45), as well as to honour the deep-rooted principle of human rights interpretation which prefers expansive interpretations over narrowing ones.

While therefore declining to conclusively distinguish “authorship” from “inventorship,” the report emphasises that protection of the moral and material interests of scientific creators should not be understood as a synonym or euphemism for patent protection. The introductory Summary of the report highlights in deliberately plain language: “There is no human right to patent protection” (see also para. 90). The report reiterates long-standing reasons given for distinguishing patent rights from human rights (para. 32). It further emphasises that even the right to property provides a slender human rights basis for intellectual property protection, and that compulsory licences and denials of patent applications are not to be considered as limitations on human rights, unless done on an arbitrary or capricious basis (para. 33).

In my opinion, this result represented the best possible compromise on a particularly difficult issue. Yet I remain uneasy about what this ambiguous guidance on the human rights of scientific innovators portends for future norm elaboration. The report emphasises that the human right to protection of authorship “does not provide patent holders grounds to challenge patent rules as providing inadequate protection of their financial or commercial interests. Nor can the right ... be used by States to defend patent laws that inadequately respect the right to science and culture.” Nevertheless, I suspect that the right to science and culture will continue to be invoked towards precisely these ends, and that even the unequivocal statement that “there is no human right to patent protection” may hold little power to discourage this. As long as states retain the ability to defend protectionist patent rules as “within the margin of appreciation” for national balancing of conflicting human rights demands, the right to science and culture may do too little to constrain patent expansionism.

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3 General Comment No. 17, para. 9. The term “innovations” appears exactly twice in General Comment No. 17, and is never defined. It is thus a matter for speculation what the Committee intended by the term. Obviously neither scientific publications nor scientific knowledge can be patented. Therefore, nothing decisively indicates that “innovations” was intended as a synonym or euphemism for “inventions.” Despite the availability of “inventions” as a legally defined term, the General Comment refers to “inventions” only once, urging that states “should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights” (para. 35). While I did not take part in these debates, my suspicion is that the Committee was similarly conflicted about whether protection of authorship ought to extend analogously to protection of inventorship and intended to avoid answering it one way or the other in the General Comment.

## 4.2 Access to Science and Technology

In contrast to the challenges encountered in interpreting the "protection" aspect of the right to science and culture, the "participation" portion of the patent report came more easily.

This section of the report begins by clarifying that the human right "to enjoy the benefits of scientific progress and its applications" includes technologies that may be protected by patents (para. 46). The report emphasises that the tension between patent exclusivity and the need for broad access to new technologies extends beyond the most famous context of access to medicines, and that a broad set of technologies must be considered as essential for realisation of the human rights to an adequate standard of living and cultural and scientific participation (paras 47–55).

The report also expresses concern that over-reliance on patents may negatively impact scientific research and technological development. An overemphasis on patents may divert university researchers away from topics of public concern towards more profitable ventures (para. 58), impede third parties from further improving upon patented technologies (para. 59), and negatively impact agricultural innovation, especially among small farmers (para. 60). The report thus emphasises that "States must ensure that their patent laws are well-designed to promote the right of the public to participate in scientific progress, both through universal access to essential technologies and by eliminating or overcoming barriers to scientific research and technological development" (para. 62). In terms of specific solutions, the patent report focuses on several themes.

First, the report broadly emphasises the need to ensure that patent laws and policies adequately respect relevant human rights (paras. 95–101). "Human rights law operates as a limit to prevent the overreaching of economic claims by patent-holders in contexts where the rights to health, food, access to technology, or other human rights would be compromised" (para. 90). International patent instruments should contain safeguards for human rights (para. 95), WTO bodies should take human rights into account when interpreting TRIPS provisions (para. 96), states should conduct human rights assessments of their domestic patent rules (para. 97), and national courts should review these rules for compliance with human rights (paras 98–9). "Implementing unreasonably strong patent protection may constitute a violation of human rights" (para. 89).

Second, the report emphasises that although exclusions, exceptions and flexibilities are optional from the perspective of trade law, they are obligatory from the perspective of human rights (para. 72). "States have a positive obligation to provide for a robust and flexible system of patent exclusions, exceptions and flexibilities based on domestic circumstances, including through the establishment of compulsory and government use licences when needed" (para. 103).

States have a human rights obligation not to support, adopt, or accept intellectual property rules, such as TRIPS-Plus provisions, that would impede them from using exclusions, exceptions and flexibilities and thus from reconciling patent protection with human rights. International agreements that do not provide sufficient flexibility should be renounced or modified. (para. 104)



The report highlighted good practices, including India's exclusion of many medical technologies from patentability (para. 77), the rejection of patents on human genes (para. 78), Brazil's patent re-examination procedures (para. 79), and compulsory licensing in Brazil, Ecuador, India, Indonesia, Malaysia, and Thailand (para. 80).

Third, the report calls for increased efforts to promote scientific research and technological development through non-patent mechanisms (paras 108–13). Patents are unlikely to stimulate research and development on topics of specific concern to vulnerable groups (para. 56). Alternative incentive systems such as tax incentives, public grants, procurement commitments, and prize competitions have an important role to play, but are not a substitute for a well-functioning patent system (paras 57, 91). "Universities should ensure that their licensing approaches are compatible with their primary mission to explore and develop technological innovations for the benefit of society" (para. 111). "Plant variety rules should not impede the right of small farmers to use, save, exchange, and sell farm-saved seeds and to continue to engage in experimentation" (para. 110).

## 5. *Conclusions*

Several particularly important contributions of the Special Rapporteur's work in the area of intellectual property should be highlighted. Both reports advance the understanding of the relationship between intellectual property and human rights in significant ways.

The copyright report distinguishes between copyright protection and the protection of authorship. From a human rights perspective, protection of authorship is the goal, and the standard by which appropriate copyright laws must be judged. This requires ensuring that copyright law is well designed to serve the interests of human authors, particularly where these diverge from or conflict with the interests of corporate rights holders. This requires protections for human authors that cannot be waived by contract, in order to prevent exploitation. In order to ensure that the right to cultural participation is adequately protected, states have a human rights obligation to make extensive use of copyright exceptions and limitations, including uncompensated exceptions in appropriate contexts. The report is also the first UN human rights document to identify open licensing as a human rights necessity beyond the context of scientific literature, to include also educational and cultural materials.

The patent report soundly rejects the notion of a human right to patent protection, while leaving open the door to human rights claims by individual and community creators to share in the benefits of their own innovations. Importantly, it extends the recognition of the right to science beyond well-recognised contexts like medicines and food to more broadly insist upon equitable access to technologies. To achieve this goal, the patent report calls for human rights safeguards and the ability to challenge unreasonably protective patent policies. Similarly to the copyright report's emphasis on exceptions and limitations as a human rights obligation, the patent report also emphasises that although exceptions and compulsory licensing are treated as optional within the trade regime, they are obligatory under human rights law where necessary to promote public access to technology, particularly those technologies essential for a life with dignity. The Special Rapporteur expressed particular concern that international IP treaties must leave states room to implement their human rights obligations. States must also recognise the limits to what patent incentives can achieve, and design alternative institutions for encouraging research and innovation to benefit all of society.

Apart from substantive guidance for copyright and patent laws compatible with the right to science and culture, both reports also emphasised the importance of a participatory process in shaping those rules. Because copyright and patent protections offer immense financial benefits to certain companies, they will inevitably be the subject of intense corporate lobbying. Individual creators, vulnerable groups, and the general public typically have less influence, particularly in international negotiations that are characterised by secrecy and a democratic deficit.<sup>4</sup> Both reports accordingly call for international IP instruments to be negotiated more transparently, with greater input from authors and the public at large.<sup>5</sup> The patent report highlights the secrecy surrounding negotiation of the Trans-Pacific Partnership and the imposition of investor–state dispute settlement requirements as particularly problematic (paras 73–5). Exclusion of the general public from the policymaking process around intellectual property is itself identified as contrary to human rights obligations, independent from the substance of the resulting policies.

The Special Rapporteur's reports on intellectual property and the right to science and culture also point to areas in which additional scholarly research is still needed. The intersection of these two legal regimes begs for additional analysis through the paradigm of the human right to property. Difficult questions also remain of exactly what scientific creators' human right to protection of their moral and material interests means for intellectual property law.<sup>6</sup> Further work must also be done to further clarify the human right to protection of authorship, build upon the copyright report's framework for distinguishing between this right and copyright protection as such.

The Special Rapporteur's copyright report happened to come out as the European Parliament was considering comprehensive harmonisation of copyright laws. A draft report prepared by Julia Reda gave significant prominence to the recommendations of the Special Rapporteur, advocating both for stronger protection of artists vis-à-vis their contractual partners and greater use of exceptions and limitations. Reda's recommendations were significantly watered down in the final report adopted by the European Parliament, which insisted upon "freedom of contract" and while encouraging updating of existing exceptions and limitations to reflect technological changes and meet the needs of libraries, reflected continuing controversy over whether these could ever be uncompensated.

Despite the achievements of the Special Rapporteur's reports, not everyone was satisfied with them. In particular, lobbyists from the copyright industries found the Special Rapporteur's activities and conclusions highly problematic. These groups took an intense interest in the Special Rapporteur's work even before the reports were concluded, submitting dozens of contributions for her consideration. The general themes of these letters were that the industry groups represent the interests of creators, who benefit from greater copyright protection. Many of the contributions also identified digital piracy as the single greatest threat to authors' human rights. The Special Rapporteur's reports could not adopt these views.

This prompted some countries highly influenced by these groups to condemn the Special Rapporteur's reports as "unbalanced." Of course, within intellectual property debates, "balance" has always been in the eye of the beholder. Everyone agrees in the abstract on the need for balance, yet they hope for

4 A/HRC/28/57, paras 19, 92–3; A/70/279, paras 73–5.

5 A/HRC/28/57 paras 92–3; A/70/279, paras 73–6, 92–4.

6 See Peter K. Yu, "The Anatomy of the Human Rights Framework for Intellectual Property," *Southern Methodist University Law Review* 69 (2016): 37–96.

the balance to be struck in their favour. The copyright industries have long been accustomed to having their opinions reflected in the trade and parliamentary spheres. To have a legal institution take a less agreeable view appears to have come as a bit of a shock. This suggests that public interest groups in the IP space should fully explore how they can continue to leverage human rights institutions as a favourable ground for advancing demands of access, inclusion, development, and equity.



## **Part Two:**

### **Assessing the Relationship between Intellectual Property and the Right to Science and Culture**



# Intellectual Property and Access to Science

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Carlos M. Correa

## 1. Introduction

Free access to and use of scientific knowledge are fundamental for the advancement of the scientific enterprise. Researchers need that access to test and build on prior findings. Any barrier erected in this regard may retard or impede progress to the detriment of all humankind. For this reason, the transparency and accessibility of scientific data are key concerns of scientists in all disciplines.<sup>1</sup>

Access to science is not only of practical importance; it is one of the universally recognised human rights. As noted by the United Nations Special Rapporteur in the field of cultural rights:

The conjoined human right to science and culture should be understood as including a right to have access to, use and further develop technologies in self-determined and empowering ways. New scientific knowledge and innovations increase available options, thereby strengthening people's capacity to envisage a better future for which access to specific technologies may sometimes be pivotal ... Access to the benefits of scientific progress not only allows improving one's socio-economic situation, but also gives the opportunity for meaningful participation in the life of local, national or international communities.<sup>2</sup>

In some areas the boundaries between science and technology have become blurred. For instance, a person conducting scientific research in molecular biology at a university laboratory possesses the knowledge required to produce a biological medicine in a company working in biotechnology. The development of new drugs is increasingly dependent on deep scientific knowledge, such as in the case of immunobiologicals. As noted by Dasgupta and David,

What makes a knowledge-worker a 'technologist' rather than a 'scientist,' in this usage, is not the particular cognitive skills or the content of his or her expertise. The same individual, we suppose, can be either, or both, within the course of a day. What matters is the socio-economic rule structures under which the research takes place, and, most importantly, what the researchers do with their findings: research undertaken with the intention of selling the fruits into secrecy belongs unambiguously to the realm of Technology.<sup>3</sup>

The universities' policies aiming at creating spin-off companies and the possibility for scientists to move from research jobs in universities to undertake profit-oriented research in the private sector also exemplifies the close link between science and technology.<sup>4</sup>

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1 See e.g. the Declaration of Helsinki on Ethical Principles for Research Involving Human Subjects, the World Medical Association (as revised in 2008), stating that authors, editors, and publishers share ethical obligations related to the disclosure of research results. See also Trudo Lemmens and Candice Telfer, "Access to Information and the Right to Health: The Human Rights Case for Clinical Trials Transparency," *American Journal of Law and Medicine* 38 (2012): 63–112, at 71.

2 *Report of the Special Rapporteur in the Field of Cultural Rights, Patent Policy and the Right to Science and Culture*, A/70/279, 4 August 2015, para. 55.

3 See e.g. Partha Dasgupta and Paul A. David, "Toward a New Economics of Science," *Policy Research* 23 (1994): 487–521, at 495.

4 See e.g. Scott A. Shane, *Academic Entrepreneurship: University Spinoffs and Wealth Creation* (Cheltenham, UK: Edward Elgar, 2004); W. Daring, R. Oakey, and S. Kauser (eds), *New Technology-Based Firms in the New Millennium*, vol. 3 (Oxford: Pergamon, 2001).

The existence of such a close link in some areas, however, does not mean that science and technology cannot be differentiated. While the former provides evidence and explanations on natural phenomena, the latter creates tools to address technical problems. Keeping this differentiation in view is crucial to defining the boundaries of what may be subject to appropriation under intellectual property rights.

Some developments in intellectual property, notably in the field of patent law, have led to the appropriation of scientific knowledge that by its very nature should remain in the public domain, thereby jeopardising its dissemination and further use. As noted by Ghidini, "if basic research were attracted to the appropriability rationale of applied research, not only the potential to innovate but even the room for freedom would be reduced."<sup>5</sup>

This paper briefly discusses the expansion of patents into the scientific realm, taking as an example knowledge relating to biological sciences. There are other examples of such expansion (e.g. in the area of computer science<sup>6</sup> and nanotechnology<sup>7</sup>) whose study would involve considerations similar to those raised here. The policies adopted in some countries to encourage patenting by universities are also mentioned in this context, as well as a number of measures that may be adopted to limit the appropriation of scientific knowledge or its restrictive impact.

There are important issues regarding access to scientific knowledge under copyright law, particularly in countries where narrow exceptions are provided for under the applicable law.<sup>8</sup> Text and data mining, in particular, may be regarded as prohibited under many copyright regimes. These issues, however, are not addressed in this paper.

## 2. Nature as Invention

Traditionally, patent laws have distinguished between patentable technical inventions and discoveries or laws of nature. Thus, in the United States, courts have denied patent protection to "laws of nature" and "natural phenomena." In 1853, in *O'Reilly v. Morse* (56 U.S. 62, 112-21) the patentability of the principles of electromagnetism, even if confined to telecommunication, was rejected. In *Funk Bros. Seed Co. v. Kalo Inoculant Co.* (333 U.S. 127, 130, 1948) a combination of naturally occurring nitrogen-fixing bacteria was deemed not patentable subject matter, although the particular combination was not found in nature.<sup>9</sup> The US Supreme Court in *Re Chakrabarty* (1980) did affirm the patentability of

5 See Gustavo Ghidini, *Aspectos Actuales del Derecho Industrial. Propiedad Intelectual y Competencia* (Granada: Comares, 2002), at 23.

6 See e.g. John Swinson, "Copyright or Patent or Both: An Algorithmic Approach to Computer Software Protection," *Harvard Journal of Law and Technology* 5 (1991): 145-214, at [jolt.law.harvard.edu/articles/pdf/v05/05HarvJLTech145.pdf](http://jolt.law.harvard.edu/articles/pdf/v05/05HarvJLTech145.pdf).

7 ETC Group, *The Big Downturn? Nanogeopolitics*, 35, at [http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/pdf\\_file/nano\\_big4web.pdf](http://www.etcgroup.org/sites/www.etcgroup.org/files/publication/pdf_file/nano_big4web.pdf).

8 See Jerome H. Reichman and Ruth L. Okediji, "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale," *Minnesota Law Review* 96 (2012): 1362-480.

9 See also *Diamond v. Diehr*, 450 U.S. 175, 185 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (dictum); *Parker v. Flook*, 437 U.S. 584, 598 (1978) (Stewart, J., dissenting) ("It is a commonplace that laws of nature, physical phenomena, and abstract ideas are not patentable subject matter"); *Flook*, 437 U.S. at 59495 (mathematical formula is not patentable, even as limited to use in cracking hydrocarbons); *Gottschalk v. Benson*, 409 U.S. 63, 67, 71-72 (1972) (algorithm for converting binary-coded decimal numbers to binary numbers in digital computers is not patentable) (quotes from Jay Dratler, Jr., "Fixing Our Broken Patent System," *Marquette Intellectual Property Law Review* (1 January 2010), at <http://www.thefreelibrary.com/Fixing+our+broken+patent+system.-a0222408982>).



"anything under the sun that is made by man," opening the way for the patentability of genetically modified organisms. The US Patent and Trademark Office (USPTO), however, understood its mandate to grant patents in a broader manner. It did not hesitate to grant patents on cells<sup>10</sup> and genes, including those of human origin.

In fact, thousands of patents were granted by the USPTO over "isolated" natural genes with an identified "utility." The non-patentability of natural materials was deemed to be overcome by claiming genes as "isolated," a format that a court depicted as a "lawyers' trick" in *Association for Molecular Pathology v. Myriad Genetics*.<sup>11</sup> This case related to a set of patents on BRCA genes, the presence of which is associated with an increased risk of hereditary breast and ovarian cancer. Interestingly, in an *amicus curiae* submitted to the court by the US Department of Justice in this case it was argued: "The chemical structure of native human genes is a product of nature, and it is no less a product of nature when that structure is 'isolated' from its natural environment than are cotton fibers that have been separated from cotton seeds or coal that has been extracted from the earth."<sup>12</sup>

In reversing the appellate court decision, the US Supreme Court ruled (569 U.S. 12-398, 2013) that naturally occurring isolated DNA is *not* a valid patentable subject matter.<sup>13</sup> However, the court made an improper distinction between DNA and cDNA, that is, a form of synthesised DNA used in genetic engineering to produce gene clones. cDNA contains the same information found in a natural DNA but omits portions within the DNA segment that do not code for proteins (introns). Hence, a cDNA molecule containing the DNA of a naturally occurring protein is not substantially different' from what may be found in nature. Neither DNA nor cDNA are inventions." As a result of this reasoning, the US Supreme Court decision may not drastically affect the possibility of appropriating basic genetic information.<sup>14</sup>

The Australian High Court similarly ruled, in October 2015, in the case *D'Arcy v. Myriad Genetics Inc. & Anor* that an isolated gene sequence cannot be patented. It held that "an isolated nucleic acid, coding for the BRCA1 protein, with specified variations, is not a manner of manufacture." It added: "While the invention claimed might be, in a formal sense, a product of human action, it was the existence of the information stored in the relevant sequences that was an essential element of the invention as claimed."<sup>15</sup>

10 See e.g. "Bioethics and Patent Law: The Cases of Moore and the Hagahai People," *WIPO Magazine* (September 2006), at [http://www.wipo.int/wipo\\_magazine/en/2006/05/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2006/05/article_0008.html).

11 *Ass'n for Molecular Pathology v. U.S. Patent and Trademark Office*, 702 F.Supp.2d 181 (S.D.N.Y. 2010). The court considered that all DNA sequences whether isolated or synthetic were products of nature, indistinguishable from naturally occurring DNA sequences.

12 US Department of Justice-*Amicus curiae* in *Association for Molecular Pathology v. Myriad Genetics* (569 U.S. 12-398, 2013).

13 See e.g. L. O. Gostin, "Who Owns Human Genes? Is DNA Patentable?" *JAMA* 310 (2013): 791–2.

14 *Myriad Genetics*, for instance, holds other BRCA-related patents including claims to cDNA that have not been invalidated.

15 *D'Arcy v Myriad Genetics Inc. & Anor* [2015] HCA 35, at <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2015/hca-35-2015-10-07.pdf>.

In contrast, although the European Patent Convention stipulates that "discoveries" are not inventions, substances found in nature may be the subject matter of a valid patent.<sup>16</sup> In particular, according to the jurisprudence of the European Patent Office (EPO), patents on genes are admissible.<sup>17</sup> Moreover, according to EPO's practice, gene patents may be granted with a broad scope, including aspects that the applicant was unaware of.<sup>18</sup> The patent owner, hence, is presumed to have "invented" what was actually unknown to him.

In summary, the court decisions in the United States<sup>19</sup> and Australia referred to show some positive steps towards a limitation to the appropriation of purely scientific biological information through patents. In fact, patent laws may contain specific rules on the matter. The 1996 Brazilian Industrial Property Code (No. 9.279, 14 May 1996), which excludes from patentability living beings or "biological materials found in nature," even if isolated, including the "genome or germplasm" of any living being (Article 10.IX), provides a useful model in this respect.

### 3. Universities' Patenting Policies

Many developed and developing countries (including China, Brazil, and South Africa) have introduced policies to encourage (or mandate) patenting by universities and other institutions that are beneficiaries of public funding for research. In adopting this policy, many countries have been largely influenced by the Bayh-Dole Act (Patent and Trademark Law Amendments Act, Pub. L. 96-517) enacted in the US in December 1980, which permitted universities, small business and non-profit institutions to acquire patents on research results obtained with federal funding. The adoption of such a policy has been stimulated by the expectation of generating net benefits from the protection and exploitation of research results.<sup>20</sup> However, this objective has not been achieved in most cases, including in the US, where a report found that 84 percent of universities operating technology transfer offices "did not generate enough licensing income to cover the wages of their technology transfer staff and the legal costs for the patents they file."<sup>21</sup> Moreover, concerns have been raised that

the law, intended to spur research, has created a culture whereby the profit motive often trumps more purely scientific based inquiries. Colleagues have become competitors. Critics say

16 In accordance with Article 3 of the European Directive on Biotechnological Inventions "1. ... inventions ... shall be patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. 2. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature."

17 See e.g. Technical Expert Working Group on Genetic Sequence Data, *Final Report to the PIP Advisory Group* (Geneva: World Health Organization, 2014), at [http://www.who.int/influenza/pip/advisory\\_group/PIP\\_AG\\_TEWG\\_Final\\_Report\\_15May2014.pdf](http://www.who.int/influenza/pip/advisory_group/PIP_AG_TEWG_Final_Report_15May2014.pdf).

18 See e.g. decisions T 301/87 and T 923/92.

19 In the area of plant varieties, however, discovered varieties may be protected under the US Plant Patent Act of 1930. See e.g. Carlos Correa (with contributions from Sangeeta Shashikant and Francois Meienberg), *Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991* (Association for Plant Breeding for the Benefit of Society (APBREBES), 2015).

20 Bhaven N. Sampat, "The Bayh-Dole Model in Developing Countries: Reflections on the Indian Bill on Publicly Funded Intellectual Property," Policy Brief No. 5, October 2009, UNCTAD-ICTSD Project on IPRs and Sustainable Development, at [http://unctad.org/en/docs/iprs\\_pb20095\\_en.pdf](http://unctad.org/en/docs/iprs_pb20095_en.pdf); see also S. Basheer, "The Indian Bayh Dole Bill: A Critique and Some Suggestions", 2010, at <http://spicyipindia.blogspot.com/2010/01/indian-bayh-dole-bill-critique-and-some.html>.

21 Walter D. Valdivia, "University Start-Ups: Critical for Improving Technology Transfer," Brookings, 20 November 2013, at <http://www.brookings.edu/research/papers/2013/11/university-start-ups-technology-transfer-valdivia>.

that instead of freely trading information for purely scientific goals, the effect of the law has been to distort the motivations of researchers who once only had science on their minds. Even if individual researchers are still keeping their motivations clean, that may not be true with the institutions for whom they work, which are eager to keep control of their research for potential future sale, and so are motivated to fiercely protect their findings.<sup>22</sup>

While the incentive (or requirement) to seek patents over universities' research has not attained the desired economic outcomes, they promote in some instances the appropriation of scientific knowledge. In view of the spread of this type of policies, the United Nations Special Rapporteur in the field of cultural rights has echoed the concerns noted above. She noted in the report quoted above that

[a] worrisome trend is the expanding roles of patent-seeking in scientific research at universities and public research institutions. The result is that the fruits of publicly funded scientific research are often transferred to exclusive private ownership. Of equal concern is the change in the culture surrounding university research, away from an activity conducted for the public good and human advancement towards an activity valued only for its potential commercial application.<sup>23</sup>

In fact, an overstatement of the role of intellectual property in promoting transfer of technology from universities may distort the research agenda and lead universities "to be so aggressive in their pursuit and defence of patents that these activities hinder the progress of research and serve as obstacles rather than aids to university–industry technology transfer and collaborative research."<sup>24</sup>

Despite the questionable benefits of a pro-patenting policy by universities, the World Intellectual Property Organization established in 2002 the "WIPO University Initiative Program," which reportedly encompasses some 250 universities worldwide, to assist universities in the establishment of IP and technology management infrastructure, develop human capital skilled in IP and technology management and promote an "effective use of IP, in particular, patents ... with a view to promoting scientific innovation and IP rights so that universities can enjoy the full benefit of IP systems."<sup>25</sup> In light of the concerns referred to, it would seem appropriate to review the premises and impact of this programme on the dissemination and use of universities' research outcomes in developing countries.

#### 4. Keeping Science Accessible

A number of policies and legislative measures have been adopted in some countries to counter the appropriation of science under intellectual property rights, including limitations to the scope of patent rights and legislation mandating public access to the outcomes of government-funded research, as discussed below.

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22 Samuel Loewenberg, "The Bayh–Dole Act: A Model for Promoting Research Translation?" *Molecular Oncology* 3 (2009): 91–3, at [http://www.elsevierscitech.com/pdfs/molonc0910/9\\_TheBayhDoleAct.pdf](http://www.elsevierscitech.com/pdfs/molonc0910/9_TheBayhDoleAct.pdf).

23 *Report of the Special Rapporteur*, A/70/279.

24 Sampat, "The Bayh–Dole Model in Developing Countries," 4–5 (references omitted).

25 See <http://www.wipo.int/uipc/en/>.

#### 4.1 Research Exception

Most national laws incorporate exceptions allowing third parties to conduct research and/or experimentation on a patented invention, albeit with differences regarding their scope.<sup>26</sup> The adoption of this type of exception, if properly formulated, may facilitate follow-on innovation and “inventing around” a patented technology. The exception may also be useful to allow for the evaluation of an invention in order to request a voluntary or compulsory licence, or for other legitimate purposes, such as to test whether the invention works, or whether it has been disclosed in a manner that complies with the disclosure requirements of the applicable law. A research exception may also be of particular importance in the area of plant breeding.<sup>27</sup>

In European and other countries, experimentation on an invention (as opposed to with an invention) is allowed even for commercial purposes.<sup>28</sup> Courts in European countries, for instance, have deemed legitimate research done to find out more information about a product—provided that it is not made just to convince licensing authorities or customers about the virtues of an alternative product—and to obtain further information about the uses of a product and its possible side effects and other consequences of its use.<sup>29</sup> In the United States, however, research without the authorisation of the patent owner has only been narrowly admitted for scientific purposes.<sup>30</sup>

Although there has been no case in the WTO clarifying whether a research exception is compatible with the TRIPS Agreement, it may be deemed to be fully covered by Article 30 of that Agreement, interpreted in the light of accepted principles of treaty interpretation as codified in the Vienna Convention on the Law of the Treaties.<sup>31</sup>

#### 4.2 Claims' Scope in Gene Patents

When patents covering genes are granted, an important issue is whether the exclusive rights extend to any possible utilisation of the gene. If this were the case, nobody could use the patented gene even for functions not discovered or disclosed by the patent owner. An absolute protection of this kind is likely to discourage further research on and prevent other possible uses of a patented gene until the patent expires. Even if research is allowed under a “research

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26 See Carlos Correa, “The International Dimension of the Research Exception,” Science and Intellectual Property in the Public Interest (SIPI) Project, American Association for the Advancement of Science, Washington, DC, 2005, at <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=6267EF2C019CBA7513EB651864A6C345?doi=10.1.1.207.4033&rep=rep1&type=pdf>.

27 See e.g. Viola Prifti, *The Breeder's Exception to Patent Rights: Analysis of Compliance with Article 30 of the TRIPS Agreement* (Cham, Switzerland: Springer International, 2014).

28 The Community Patent Convention, for instance, provides that there is no infringement in case of “acts done for experimental purposes relating to the subset matter of the patented invention” (Article 27.b).

29 W. Cornish, “Experimental Use of Patented Inventions in European Community States,” IIC 29.7 (1998): 735–53, at 736. See also Correa, “International Dimension of the Research Exception.”

30 The Federal Circuit Court of Appeals held in *Madey v. Duke* (307 F.3d 1351, Fed. Cir. 2002) that “regardless of whether a particular institution or entity is engaged in an endeavor for commercial gain, so long as the act is in furtherance of the alleged infringer’s legitimate business and is not solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry, the act does not qualify for the very narrow and strictly limited experimental use defense. Moreover, the profit or non-profit status of the user is not determinative.”

31 See e.g. Carlos Correa, *Trade Related Aspects of Intellectual Property Rights*, vol. 6 of *Commentaries on the GATT/WTO Agreements* (Oxford: Oxford University Press, 2007).

exception," a product that contains the patented gene could not be commercialised without the patent owner's authorisation until the expiry of the patent.

This problem may be addressed in different ways. One option would be to grant compulsory licences based on patent dependency, as permitted by Article 31(l) of the TRIPS Agreement. However, the conditions set out by this provision are quite onerous, as it may be necessary to demonstrate that the invention claimed in the second patent involves an important technical advance of considerable economic significance in relation to the invention claimed in the first patent. Another option is to limit the scope of the patent claim to the functions of the gene that were actually discovered by the applicant<sup>32</sup> so as not to interfere with third parties' research and use of the gene for other functions.

This second alternative has been suggested by the European Parliament,<sup>33</sup> and implemented in Germany with regard to human DNA.<sup>34</sup> French patent law more broadly stipulates that the scope of a claim is limited to that part of the sequence directly linked to the function specifically disclosed in the specifications, and that such a claim cannot be enforced against a subsequent claim on the same sequence that discloses another specific application thereof.<sup>35</sup> In a case relating to a plant gene construct that provides resistance to glyphosate, the European Court of Justice interpreted that the European Directive on Biotechnological Inventions "makes the patentability of a DNA sequence subject to indication of the function it performs" (para. 45).<sup>36</sup>

The scope of patents covering genes, where accepted, remains a largely undefined issue in most developing countries. Limitations of the type applicable under European laws should be considered to address this gap.

### 4.3 Open Access to Research Results

Some initiatives have been taken in a number of countries by governments or particular institutions that may partially counter the trends referred to towards the appropriation of scientific results. Thus, an omnibus spending bill passed by the US Congress in 2007 contained a provision requiring the National Institutes of Health (NIH) to mandate open access for NIH-funded research, in a manner consistent with copyright law.<sup>37</sup> In 2013 the US Office of Science and Technology Policy instructed each federal agency with annual research and development expenditures of over US\$ 100 million "to develop a plan to support increased public access to the results of research funded by the Federal Government. This includes any results published in peer-reviewed scholarly publications that are

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32 These claims are generally known as "use-bound" claims.

33 "European Parliament Resolution on Patents for Biotechnological Inventions," at [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2005-0407&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2005-0407&language=EN).

34 Patent Act of 16 December 1980, as last amended by the Law of 28 February 2005.

35 Article L613-2-1 of the French Industrial Property Code.

36 Case C-428/08, *Monsanto Technology LLC v. Cefetra BV et al.* More specifically, the European Court of Justice General Advocate held that "Directive 98/44 permits and, in fact, requires an interpretation to the effect that, in EU territory, the protection conferred on DNA sequences is a 'purpose-bound' protection" (para. 29). See <http://curia.europa.eu/juris/cgi-bin/gettext.pl?where=&lang=es&num=79899690C19080428&doc=T&ouvert=T&seance=CONCL#Footnote7>.

37 In accordance with such provision, the "Director of the National Institutes of Health shall require that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law."

based on research that directly arises from Federal funds."<sup>38</sup> This policy was codified through the FY 2014 Omnibus Appropriations Bill which required federal agencies under the Department of Labor, Department of Education, and Department of Health and Human Services<sup>39</sup> to implement such an open access policy.

The European Commission has issued guidelines to ensure open access to scientific information and to boost the benefits of public investment in the research funded under the European Union (EU) Framework Programme for Research and Innovation, Horizon 2020 (2014–20). The Guidelines note that

the European Commission's vision is that information already paid for by the public purse should not be paid for again each time it is accessed or used, and that it should benefit European companies and citizens to the full. This means making publicly-funded scientific information available online, at no extra cost, to European researchers, innovative industries and citizens, while ensuring long-term preservation.<sup>40</sup>

Some developing countries have adopted similar initiatives. In Argentina, for instance, law No. 26.899 (2014) mandated the setting up of institutional "open access digital repositories" and required researchers, including professors as well as postdoctoral fellows, graduate and PhD students whose research is financed by public funds, to deposit or expressly authorise the uploading of a copy of the final version of their scientific and technological production, published or accepted for publication, to the open access institutional digital repository within a period of six months. Primary research data must be deposited in the institutional digital repository within a period of five years from the date of collection. Mexico adopted in 2014 a policy on the subject through an amendment to its laws relating to science, technology and education. Open access is to be given through a digital platform without any subscription requirement, but without prejudice to the protection of the information by patents, copyrights and other modalities of intellectual property, including trade secrets.

These regulations may contribute to ensuring free access to scientific research outputs, although with some questionable limitations (such as the US\$ 100 million threshold of the US law and the possibility of preserving research results as trade secrets under the Mexican law discussed). They will not prevent the practice of patenting upstream research where this is possible under the applicable law. This may only be achieved through the right design of policies of universities and other research institutions and, more importantly, through changes in legislation and in patent offices' practices regarding what constitutes an "invention."

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38 Executive Office of the President, Office of Science and Technology Policy, "Memorandum for the Heads of Executive Departments and Agencies," 22 February 2013, at [https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp\\_public\\_access\\_memo\\_2013.pdf](https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf); A Fair Access to Science and Technology Research Act.

39 It includes research agencies such as the National Institutes of Health, Food and Drug Administration, and the Centers for Disease Control and Prevention.

40 European Commission, Directorate-General for Research and Innovation, "Guidelines on Open Access to Scientific Publications and Research Data in Horizon 2020," 30 October 2015, at 4.

## 5. *Conclusions*

The boundaries between scientific and technological knowledge are nebulous in some technical fields, such as the biological sciences and their applications. This has led to the appropriation under patents of knowledge (such as on specific genes) of a scientific nature, which may not only have negative effects for the further development of science and new technological contributions, but also encroach on the fundamental right of access to science. The patenting policies adopted by some universities and other research institutions may aggravate this problem.

Court decisions in the US and Australia and some national laws (e.g. in Brazil) have limited the possibility of that appropriation, which is still feasible, however, in many jurisdictions. Other measures—such as a well-formulated research exception, the limitation of the patent claims' scope, and legislation mandating open access to research results achieved with public funding—may mitigate the effects of the exclusivity granted by patent rights, but more fundamental policy changes may be necessary in order to preserve scientific outcomes in the public domain for free use and follow-on research.

# Patents and Human Rights: The Paradox Re-examined

Rochelle Cooper Dreyfuss

## 1. Introduction

The Special Rapporteur in the field of cultural rights has recently released two reports tackling the difficult task of reconciling the provision in the Universal Declaration of Human Rights recognising that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" with the right "to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." The Copyright Report,<sup>1</sup> which was issued first, maintains that the harder question is reconciling moral rights with public access interests because material interests can be satisfied in ways that do not require copyright protection. In contrast, moral rights pose a difficult question because authorial interests in the integrity of the work clash with society's interest in commenting, parodying, and transforming the work to other needs.

In the second report, the Rapporteur sees the patent problem as much simpler: the Patent Report flat out denies there is a human right to patent protection.<sup>2</sup> In this paper, I suggest that the Rapporteur is right to see minimal moral rights in the scientific realm. Because there is less of the inventor in the work, the public's interest in interacting with existing works is easily accommodated. In this context, however, material interests are more problematic than the Rapporteur acknowledges. Society is crucially concerned with the development of future technologies: inventions that can tackle such issues as terrifying diseases, drastic climate changes, and threats of terrorism. Patent rights are not the only way—or even a sufficient way—to promote these developments. But science is expensive. Because the material interests protected by patents furnish significant support to innovations that improve social welfare, an argument can be made that patents do have human rights dimensions. In that case, thought must be given to ways to promote the right to share in scientific advancement within a globally coordinated patent system.

Farida Shaheed, the Special Rapporteur in the field of cultural rights, and her advisers deserve abundant praise for tackling the complex relationship between human rights and intellectual property rights. The Universal Declaration of Human Rights presents a conundrum. On the one hand, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."<sup>3</sup> On the other hand, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Moreover, there is a specific right to health, which presumably includes a right to the medications that are the target of considerable scientific research, as well as rights to employment, education, and freedom of expression, which likewise imply rights to

1 Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights, Copyright Policy and the Right to Science and Culture*, A/HRC/28/57, 24 December 2014 (referred to as Copyright Report).

2 Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights, Patent Policy and the Right to Science and Culture*, A/70/279, 4 August 2015 (referred to as Patent Report).

3 Universal Declaration of Human Rights (UDHR), 8 December 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71, Art. 27(2). See also International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966, Arts 15(1)(c), S. Exec. Doc. D, 95-2, at 13, (1997), 993 U.N.T.S. 3, 5 (entered into force 3 January 1976).



enjoy the fruits of creative production.<sup>4</sup> At some level, all of these commitments cannot be fulfilled at once, for the more protection given the creators of knowledge products, the harder it is for others to access their works and benefit from them. Accordingly, the question of how best to balance these divergent interests is exceedingly difficult.

In her Copyright Report, which was issued in 2014, the Rapporteur set up a useful framework, differentiating between creators' material interests in capturing a financial return on their efforts and their moral interests in preserving the integrity of their output.<sup>5</sup> Examining how the right of the public to access creative works can be reconciled with each of these authorial rights, the report suggests that on the copyright side, material rights present the less formidable challenge. According to the report, "Artistic livelihoods may be supported by, for example, minimum wage protections, collective bargaining power, social security guarantees, budgetary support for the arts, artistic education, library purchasing, immigration and visa policies and measures to promote cultural tourism."<sup>6</sup> In any event, the report points out, the material gains that flow directly from copyright rarely go to the creators themselves because they generally transfer their interests to the corporations that commercialise their works.<sup>7</sup>

Moral rights are, according to the Rapporteur, a very different matter.<sup>8</sup> Because authors' personalities are intertwined with what they produce, they need a creative environment that is attentive to their relationship with their works, one that enables them to ensure their works are properly attributed and to oversee how they are used, viewed, and maintained. Some of these interests, however, clash directly with those of the public, for to fully participate in cultural life, others must be able to interact with the works that already exist. That can require translation. It also means that others must be free to comment on and criticise existing works, recast them in a different light from that intended by the author, or utilise bits and pieces to construct their own works.<sup>9</sup> Much of this effort can affect the integrity of earlier works and the way they are publicly perceived. The Copyright Report goes a long way to delineating how to reconcile artistic freedom and autonomy in ways that make room for parody, commentary, and creative transformations.<sup>10</sup>

The Patent Report, which was issued in August 2015, uses the same framework adopted in the Copyright Report, but comes to a startlingly different conclusion: it flatly states: "There is no human right to patent protection."<sup>11</sup> The report acknowledges that, as with authors, inventors deserve the "enjoyment of an adequate standard of living."<sup>12</sup> Further, it notes that patents, like copyrights, are not the sole means for protecting that interest.<sup>13</sup> But as to moral rights, the report sees a

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4 UDHR, Arts 27(1) and 25 and Arts 1 (right to dignity); 18 (freedom of thought); 19 (freedom of expression); 23 (work); 26 (education). See also ICESCR, Arts 15(1)(a) and (b), and Arts 5 (work); 13 (education).

5 Copyright Report, para. 4.

6 Copyright Report, para. 49.

7 Copyright Report, paras 41–3.

8 Copyright Report, paras 34–6.

9 See generally Amy M. Adler, "Against Moral Rights," *California Law Review* 97 (2009): 263–301.

10 See e.g. Copyright Report, paras 34–9.

11 Patent Report, para. 90.

12 Patent Report, para. 34.

13 See Patent Report, para. 57 (noting alternatives, including tax incentives, public funding, government purchase, prize competitions, and advance market commitments).

big difference—there are none: “intellectual property regimes primarily protect business and corporate interests and investments,”<sup>14</sup> the entitlements are not inalienable,<sup>15</sup> and (perhaps) the traditional “personal link” between the creator and the work is absent.<sup>16</sup> As a result, there is no need for accommodation. Quite the opposite: the report’s conclusion is that states cannot defend their patent laws on human rights grounds;<sup>17</sup> indeed, it claims that nations have a duty to resist obligations that would raise the standard of patent protection above the level mandated by (a very liberal reading of) the TRIPS Agreement.<sup>18</sup>

The question thus arises whether implementation of the Patent Report’s conclusion might lead to insufficient incentives to invest in future works or to expend efforts to meet new challenges, such as those posed by pandemics, terrorism, or climate change. If patents do furnish the basis for making science an attractive profession, if they are essential to protecting the livelihood of those who do it, or if they are instrumentally necessary to promote advances that improve the human condition, can the human rights dimension be so easily rejected? If not, then how can public and private interests be reconciled? This essay discusses these questions.

## 2. *The Moral Interests of Inventors*

It would be difficult to quarrel with the Patent Report’s assessment of the moral rights of inventors or the conclusion that there is no difficult accommodation to be made, for it is hard to perceive a moral component in the utilitarian objects that are the subject of patent law. The light bulb works or it doesn’t—Thomas Edison’s personality has nothing to do with it. To the extent that inventors have reputational interests in being associated with their works, they can publish copyrightable papers in which they will enjoy the same moral rights as other authors. And if their works are patented, in most jurisdictions, they will also enjoy the benefits of attribution.<sup>19</sup> Thus, in a paper I published in 2009, I suggested that copyright was the only intellectual property right that can be derived from a conception of human rights.<sup>20</sup> After examining the US Constitution, the TRIPS Agreement, and both American and European law, I noted that “a moral commitment to inventors, one that recognizes a right to control intellectual production and capture all its benefits is ... virtually undetectable in the ways that the world’s patent rights are structured.”<sup>21</sup>

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14 Patent Report, para. 32.

15 Patent Report, para. 32.

16 At para. 34, the Patent Report states: “individuals and communities are entitled to protection of the moral and material interests related to the inventions with which they have a strong personal link, similar to the link between an author in the traditional sense and their creative work of authorship.” The import here is not entirely clear, but it appears to suggest that the link is missing in the case of technological works, except when they are associated with indigenous people and local communities, as outlined in paras 35–45.

17 Patent Report, para. 34.

18 Patent Report, para. 104. See the TRIPS Agreement, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round vol. 3, 33 I.L.M. 1125 (1994).

19 See e.g. 35 U.S.C. §116; European Patent Convention, Art. 62.

20 Rochelle C. Dreyfuss, “Patents and Human Rights: Where Is the Paradox?” in Willem Groscheide (ed.), *Intellectual Property and Human Rights: A Paradox* (Cheltenham, UK: Edward Elgar, 2009), 72–96.

21 Dreyfuss, “Patents and Human Rights,” 85.

The notion that the main rights-based impediment to public access—moral rights—is not a problem in the patent realm has had important implications for balancing the claims of inventors and the right of the public to benefit from scientific advancement. As my co-author, César Rodríguez-Garavito, and I showed in our study of the impact of escalating international intellectual property obligations on access to medicines in Latin America, the availability of pharmaceuticals is generally more favourable in countries able to marshal human rights arguments on behalf of patients than in countries where human rights arguments—particularly the right to health—have not been pressed effectively.<sup>22</sup> The correlation is not perfect, as some nations consider the right to health to be limited to the right to care by doctors and in hospitals; in some of the countries, other human rights concerns (such as locating those who were “disappeared” during earlier regimes) dominated the discussion. Most important, some nations have lacked the expertise necessary to fully understand the implications of adopting strong intellectual property laws or to convert a commitment to human rights into operational negotiation positions and practical legislation.

Still, a framework that pits fundamental human rights on one side of the equation and only statutory rights and ambiguous international requirements on the other can lead to laws that strongly promote access. Thus, countries with high regard for access interests have taken approaches similar to those advocated in the Patent Report. They have adopted patentability requirements that make it harder to acquire protection: they define patentable subject matter narrowly, require a heightened inventive step, and deny patents to second uses of known materials. Some use compulsory licences to ensure local access or—less drastically—to induce right holders to lower prices and work the patent locally. They also use exceptions and limitations as well as competition law to cabin the reach of patent rights. And they take account of the public interest in awarding remedies.<sup>23</sup> Furthermore, they effectively resist the very considerable pressure, exerted through the negotiation of TRIPS-Plus free trade agreements and backed by threats to withdraw investment and trade preferences, to eliminate these public-regarding provisions in favour of stronger protection for patent owners.<sup>24</sup>

### 3. *The Material Interests of Inventors*

This approach, successful as it seems, does require according diminished regard for the right of inventors to rely on patents to appropriate returns and thus to benefit materially from the fruits of their efforts. In my earlier work, I argued that inventors' material interests are not an obstacle to accommodating access rights for many of the same reasons mentioned by the Special Rapporteur: there are other ways to compensate innovators. As with copyrights, patents may not even be the best way, for there is nothing in patent law that assures a return—patent protection is a right to exclude; it does not give creators a right to practise, license, or sell the products of their inventiveness.<sup>25</sup> But as countries have begun to use the mechanisms set out above to promote the right to benefit from

22 “Conclusion: Balancing Wealth and Health in a Transnational Regulatory Framework,” in Rochelle C. Dreyfuss and César Rodríguez-Garavito (eds), *Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America* (Oxford: Oxford University Press, 2014), 323–45.

23 See Patent Report, paras 63–70. For examples of these ideas and more, see Max Planck Institute for Innovation and Competition, “Declaration on Patent Protection: Regulatory Sovereignty under TRIPS” (2015), at [http://www.ip.mpg.de/en/news/declaration\\_on\\_patent\\_protection.html](http://www.ip.mpg.de/en/news/declaration_on_patent_protection.html).

24 See e.g. Amir H. Khoury, “Differential Patent Terms and the Commercial Capacity to Innovate,” *Texas Intellectual Property Law Journal* 18 (2010): 373–418. For examples of the sort of demands made, see note 60 below.

25 Dreyfuss, “Patents and Human Rights,” 81.

scientific advances, it has become increasingly apparent that there is cause to question such an easy rejection of the claim to the material rewards available under the patent system.<sup>26</sup>

While the Copyright Report's dismissal of the need to worry about material interests in copyright seems exactly right, experience shows that the rationale does not easily extend to patents. First, the financial requirements of authors and inventors are different. Aside from a few areas such as blockbuster motion pictures and investigative journalism, the up-front cost associated with producing works in the copyright industries is not very high. Nor is the cost of investing in the human capital necessary to contribute creatively. Thus, there is plenty of leeway to ensure access to others while still giving firms sufficient incentive to organise creative production and providing authors with an adequate return on their efforts. But the same is not as generally true for technology industries. The costs of inventing are often extremely high (equipment, laboratories, supplies, and so on are expensive) and the cost of bringing knowledge workers to the technological frontier (university education, graduate school, postgraduate training) is substantial. To compound the problem, the risks inherent in inventing are formidable (not every good idea translates into a commercialisable invention for which there is public demand) and the time between investment and recoupment can be quite long. Truly challenging problems often demand collaborative, multidisciplinary efforts and thus can necessitate considerable high-level coordination. Economists have shown that attracting investors to these enterprises can require near-windfall profits.<sup>27</sup>

Second, the alternative financing mechanisms that work in the authorial context function less well for inventors. To be sure, recent scholarship has devoted considerable attention to the alternatives to the patent system discussed in the Patent Report,<sup>28</sup> including government funding, tax preferences, advance market commitments, and prizes.<sup>29</sup> This literature points out the advantages of eliminating the deadweight loss, holdout problems, and transaction costs that are caused by exclusive rights and supracompetitive profits. At the same time, however, it is also evident that these mechanisms have serious flaws. Because invention is so expensive, government funding—though common—does not currently support all important innovation efforts. Nor is it likely ever to do so. Relying on the government is not even normatively desirable, for it forces all taxpayers to subsidise those with a taste for the "cutting-edge." Furthermore, rich countries are not likely to finance research that satisfies needs that arise only in poor countries, yet poor countries are unlikely to have the resources to fund these projects themselves. In addition, granting mechanisms require government to choose winners and losers—that is, to predict whose research is more valuable and more likely to come to fruition. There is little reason to think those in power will do these things well.

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26 See generally E. Richard Gold, "Patents and Human Rights: A Heterodox Analysis," *Journal of Law, Medicine and Ethics* 41 (2013): 185–95.

27 See e.g. F. M. Scherer, "The Innovation Lottery: The Empirical Case for Copyright and Patents," in Rochelle C. Dreyfuss, D. L. Zimmerman, and H. First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001), 3–21.

28 See Patent Report, para. 91.

29 See Daniel J. Hemel and Lisa Larrimore Ouellette, "Beyond the Patents–Prizes Debate," *Texas Law Review* 92 (2013): 303–82 (reviewing the literature); Thomas W. Pogge, "Human Rights and Global Health: A Research Program," *Metaphilosophy* 36 (2005): 182–209; Steven Shavell and Tanguy Van Ypersele, "Rewards versus Intellectual Property Rights," *Journal of Law and Economics* 44 (2001): 525–47. There are also other mechanisms to induce innovation, see e.g. Katherine J. Strandburg, "User Innovator Community Norms at the Boundary between Academic and Industry Research," *Fordham Law Review* 77 (2009): 2237–74; Anne M. Readell, "Finding a Cure: Incentivizing Partnerships between Disease Advocacy Groups and Academic and Commercial Researchers," *Journal of Law and Health* 26 (2013): 285–312.

The other alternatives also have deficiencies. Tax preferences for research and development lower tax revenues—and thus cost the government money—even when the research and development activity does not yield beneficial innovations. Furthermore, tax preferences require government to monitor those taking the deductions to make sure they are engaging in the activities that are meant to receive the preferential treatment. Advance market commitments demand an evaluation of what people want and how much they ought to pay. Prizes require someone to set an objective and determine whether the inventor has attained it—and to change the goalposts as the underlying science is clarified and it becomes more evident whether the initial objectives were realistic.<sup>30</sup>

As the Patent Report acknowledges, patents avoid many of these problems.<sup>31</sup> Would-be innovators (and their investors) self-select to engage in (and support) particular research projects and decide for themselves how to structure the work and organise the way it is pursued. They also determine when the project is finished and can use the rewards available under the patent system to educate consumers about the benefits of the resulting products, instruct buyers on how to use the products correctly, and arrange for marketing and servicing.<sup>32</sup> Only those who wish to purchase the products need pay the supracompetitive price required to obtain them. While a patent system cannot attract capital to invest in researching things only the poor need, it can incentivise researchers in countries that are not operating at the technological frontier to fulfil niche demands (for example, to develop drug storage and delivery methods compatible with local needs). This can be a very important function, for locals may well be best able to identify domestic needs accurately and may be the only ones with a desire to respond to them.<sup>33</sup>

Third, authorship differs from inventorship in that authors cannot usually achieve either their material or moral objectives without publishing their work. In contrast, many inventions can be used in secret. While the public may have an abstract right to share in these scientific advances, as a practical matter the public cannot enjoy inventions that have not been adequately disclosed. Patents require disclosure: it is one of the *quid pro quos* for obtaining protection.<sup>34</sup> Besides, there is no way to claim exclusive rights without delineating the scope of the entitlement. Once the information is divulged, others can build on the underlying ideas. Furthermore, the government can regulate use of the inventions to protect workers, purchasers, and the public. When the patent eventually expires, members of the public can utilise the information in the disclosure to exploit the invention themselves. Importantly, patents also *facilitate* disclosure: without patents to protect exclusivity, inventors would be less willing to publish their work and more likely to channel their inventive efforts into advances that can be kept secret.

This is not to say that the patent system alone would be sufficient to satisfy society's technological needs; supplementary methods are clearly necessary, for example to support the production of

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30 See Michael J. Burstein and Fiona E. Murray, "Governing Innovation Prizes," guest blog Balkan.com, 16 March 2014, at <http://balkin.blogspot.com/2014/03/governing-innovation-prizes.html>.

31 Patent Report, para. 57.

32 Ted Sichelman has even suggested awarding another type of patent to encourage post-invention activities, see Ted Sichelman, "Commercializing Patents," *Stanford Law Review* 62 (2010): 341–410.

33 See David W. Opderbeck, "Patents, Essential Medicines, and the Innovation Game," *Vanderbilt Law Review* 58 (2005): 501–54.

34 W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th ed. (London: Sweet & Maxwell, 2007), 139–40; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), at 150–1.

advances uniquely required by non-market economies and to fulfil special needs, such as curing rare diseases. But there is reason to be concerned about systematically valuing access interests over proprietary concerns, as will occur if the material interests of inventors are ignored in the human rights calculus. Least developed countries that lack all technological capacity may be best off with a minimalist patent system (the least protection allowable under international law). However, the Patent Report is on dubious ground when it suggests that a commitment to human rights must be read as barring more developed nations, including emerging economies such as the BRICs (Brazil, Russia, India, and China), from enacting stronger protection.<sup>35</sup> New fields may present unique challenges that require new law. In emerging economies, more robust protection might better attract foreign investment, create jobs and opportunities for training technological workers, and improve the ability of these countries to invent for themselves—and ultimately, for the global marketplace.<sup>36</sup> In this context, compulsory licensing can be particularly questionable.<sup>37</sup> While the Rapporteur is clearly right that these licences can be essential to protecting health and welfare, overuse could lead potential inventors to be wary of investing in precisely those technologies that are the most necessary for improving social welfare.

To put this another way, doing science requires significant financial outlays and personal effort. While it is true (as the Patent Report observes) that corporations rather than individual creators often wind up owning the patent rights to new scientific advances,<sup>38</sup> the complexity of technological research, development, production and distribution can require high levels of coordination. The fact of corporate ownership ought not to obscure the critical role that patents play in enabling researchers to appropriate returns from the substantial investments they must make to become scientists and the labour they necessarily expend on innovating. If nothing else, patents are instrumental in ensuring the enjoyment of *other* human rights because they foster the production of inventions crucial to human development and enable scientists to find solutions to problems that threaten social welfare.

#### 4. *Alternative Approaches to the Human Rights Conundrum*

If there is a human rights dimension to patents, then it is necessary to consider how to accommodate competing interests with the patent system. To be sure, fine-tuning patent law requires difficult decisions—is it more advantageous to adopt a high inventive step that permits locals to experiment with foreign advances or a low inventive step that gives locals more incentives to respond to domestic needs?<sup>39</sup> Is it better to deny protection for second uses of known products in order to prevent evergreening or to award patents on incremental advances so as to encourage adaptations that fit the taste and pocketbooks of local consumers? How do rules that deny injunctive relief to non-practising entities affect the incentives of those inventors who are not well positioned to manufacture? Does the routine use of compulsory licences discourage research in areas of vital

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35 Patent Report, para. 104.

36 Keith E. Maskus, "Intellectual Property Challenges for Developing Countries: An Economic Perspective," *University of Illinois Law Review* (January 2001): 457–73. See also Rochelle C. Dreyfuss, "Intellectual Property Lawmaking, Global Governance, and Emerging Economies," in Margo Bagley and Ruth Okediji (eds), *Patent Law in Global Perspective* (Oxford: Oxford University Press, 2014), 53–84.

37 See Patent Report, paras 47, 51, 68, 80, 103.

38 Patent Report, para. 10.

39 See e.g. Bhaven N. Sampat and Kenneth C. Shadlen, "TRIPS Implementation and Secondary Pharmaceutical Patenting in Brazil and India," *Studies in Comparative International Development* 50 (2015): 228–57.

concern or does it improve access and keep down costs?<sup>40</sup> Experimentation with the legal regime is a useful way to answer these questions. Human rights principles can be used to ensure that international law preserves the capacity of countries to test different approaches to reconciling competing interests.<sup>41</sup>

Despite rejecting human rights in patents, the Special Rapporteur in fact makes several extremely welcome interventions in this regard. Most important, the Patent Report endorses the view that there is a human right to engage in scientific inquiry.<sup>42</sup> This right has not been free of doubt. In the United States, for example, the Federal Circuit (the court that hears all US patent appeals) has taken a very sceptical view of the right to engage in research involving patented inventions.<sup>43</sup> Congress legislatively reversed this approach with respect to uses of patented inventions that are reasonably related to obtaining marketing approval for drugs and the United States Supreme Court interpreted that measure generously.<sup>44</sup> Nevertheless, more leeway is necessary because the statute applies only to pharmaceutical research, not to the broad array of other experiments scientists may wish to perform. Admittedly, most other countries do recognise an experimental use exception to patent rights. However, it is not unheard of for the United States to pressure other nations to adopt its pro-patent views. Furthermore, the WTO's parsimonious interpretation of the exceptions provision of the TRIPS Agreement might even support the argument that an open-ended research exception violates international law.<sup>45</sup> The Rapporteur's clarification of the right of the public to research, to know, and to actively participate in the advancement of science is thus extremely helpful.<sup>46</sup>

To make the point more generally, once it is recognised that there is a real tension among the human rights that relate to innovation, it becomes critical to focus attention on the powers nations retain under international law to strike the appropriate balance in light of their social, intellectual, and economic needs. The Max Planck Institute,<sup>47</sup> a project spearheaded by Bernt Hugenholtz and Ruth Okediji,<sup>48</sup> the Washington Declaration, which was issued by a conference

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40 See Joerg Baten, Nicola Bianchi, and Petra Moser, "Compulsory Licensing and Invention: Historical Evidence from German Patents after WWI" (23 September 2016), at <http://ssrn.com/abstract=2417532>.

41 Jerome H. Reichman and Rochelle C. Dreyfuss, "Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty," *Duke Law Journal* 57 (2007): 85–130.

42 Patent Report, paras 12, 13, 47, 55, 110.

43 See e.g. *Madey v. Duke Univ.*, 307 F.3d 1351 (Fed. Cir. 2002); *Roche Products, Inc. v. Bolar Pharm. Co.*, 733 F.2d 858 (Fed. Cir. 1984).

44 See 35 U.S.C. §271(e); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990).

45 See TRIPS Agreement, Art. 30; Panel Decision, Canada – Patent Protection of Pharmaceutical Products, WT/DS114/R (17 March 2000).

46 Cf. Diane Leenheer Zimmerman, "Scientific Speech in the 1990s," *New York University Environmental Law Journal* 2 (1993): 254–78 (positing a right to scientific speech under the First Amendment to the US Constitution). See also Malla Pollack, "The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment," *Cardozo Arts and Entertainment Law Journal* 17 (1999): 47–145.

47 See Max Planck Institute, "Declaration on Patent Protection"; "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" (2006), at [http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf); Annette Kur with Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Cheltenham, UK: Edward Elgar, 2011).

48 P. Bernt Hugenholtz and Ruth L. Okediji, "Conceiving an International Instrument on Limitations and Exceptions to Copyright" (2008), at [https://www.opensocietyfoundations.org/sites/default/files/copyright\\_20080506.pdf](https://www.opensocietyfoundations.org/sites/default/files/copyright_20080506.pdf).

of scholars,<sup>49</sup> and an *acquis* that I proposed with Graeme Dinwoodie<sup>50</sup> all seek to clarify the flexibilities available under international intellectual property law. The Patent Report adds important heft to this effort with its equation of flexibilities with human rights, as well as through its emphasis on the objectives and purposes of the TRIPS Agreement and the sovereign authority that states enjoy to promote public access.<sup>51</sup>

Moreover, and in light of the difficulties Rodríguez-Garavito and I observed in the Latin American countries, the Patent Report's focus on public participation and transparency in the processes of negotiation and dispute settlement is critically important.<sup>52</sup> It has long been understood that human rights law protects procedural interests in the context of formal adjudications,<sup>53</sup> but increasingly, public interests are strongly affected by agreements negotiated in more arcane venues and settled in esoteric tribunals.<sup>54</sup> Procedural guarantees, including opportunities to be heard, and the effective assistance of "counsel" (that is, input from individuals with technical expertise) in negotiating intellectual property agreements and resolving disputes under these instruments would help less powerful countries fight for the authority to strike the locally appropriate balance among competing interests.<sup>55</sup>

It is, however, a pity that the Rapporteur did not weigh in on the question of international exhaustion. The TRIPS Agreement is largely agnostic on the position that WTO members take,<sup>56</sup> but it is increasingly clear that the leeway thus furnished can hamper national freedom to try different approaches to tailoring law to local needs. From a purely domestic perspective—one that is focused on maximising public access—countries are well advised to adopt a rule of international exhaustion because it allows parallel importation of knowledge products from wherever they are cheapest (that is, from the place where the patent holder "exhausted" its right at the lowest price). From a global perspective, however, parallel importation can have perverse effects on negotiations over international intellectual property agreements, for it creates a highly interdependent global marketplace in which each country's intellectual property policy is at the mercy of what other countries do. The latitude to permit parallel imports therefore tends to induce inventors and countries that are heavy innovators to pursue strategies that maintain high prices worldwide, including through the negotiation of agreements that raise the level

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49 The Washington Declaration on Intellectual Property and the Public Interest (August 2011), at <http://infojustice.org/washington-declaration>.

50 Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford: Oxford University Press, 2012), 173–203.

51 Patent Report, paras 61–72.

52 Patent Report, paras 73–6.

53 See e.g. UDHR, Art. 10.

54 Cf. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 15–61 (proposing the adoption of global administrative law norms).

55 See generally Rochelle C. Dreyfuss and Susy Frankel, "From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property," *Michigan Journal of International Law* 36 (2015): 557–602.

56 TRIPS Agreement, Art. 6 (the freedom to choose is, however, cabined by national treatment and most favoured nation obligations).



of protection as well as with instruments that mandate the elimination of practices that control pricing.<sup>57</sup>

*Kirtsaeng v. John Wiley & Sons, Inc.*<sup>58</sup> furnishes a good example of how this dynamic can take hold. The case involved a claim that the importation of cheap textbooks from Thailand into the United States infringed the publisher's copyrights. The United States Supreme Court rejected the claim, recognising instead a doctrine of international exhaustion which allowed the defendant to import the texts without authorisation. This made the books available at lower prices in the United States. However, soon after the decision was handed down, Wiley announced it would increase the price of the international editions of its books.<sup>59</sup> The benefit international exhaustion provided to overprivileged Americans therefore came at the cost of making access for Thai students more expensive. For Thailand, it would be better if the United States rejected international exhaustion, but under the prevailing international regime, it has no power to force the United States to change its law.

An analogous problem exists in the pharmaceutical sector. Countries with strong proprietary drug industries (the United States) routinely pressure countries that protect the right to health with price controls or the threat of compulsory licensing to drop those regimes.<sup>60</sup> Were there international rules barring parallel importation, pharmaceutical markets could be segmented. While inventors would still suffer lower profits in the countries that use price controls and threats of compulsory licences, they would not have to worry about price erosion in countries where they can charge more. The result would be more economically efficient, for the ability to price discriminate would allow right holders to squeeze out deadweight loss.<sup>61</sup>

With market segmentation, other approaches to accommodating interests would also be more feasible. For example, many economists have expressed dissatisfaction with patent availability and patent breadth as the only variables for balancing interests.<sup>62</sup> They recommend augmenting techniques like raising the standard of inventiveness, awarding compulsory licensing, and focusing on equity in remedy determinations with adjustments in the length of the patent term. Typically, they suggest differentiating by field of technology according to factors such as the cost of research,

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57 An example of these sorts of concerns emerged in the WTO's Trade Policy Review of India in June 2015, when several countries asked pointed questions about India's definition of invention, standard of inventiveness, compulsory licensing practices, actions to deter export of cheap products to other countries, and price controls, see WTO WT/TRP/M/313/Add.1, at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_rep\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm); "June 2015 – WTO Trade Policy Review of India: Section 3(d) and Compulsory Licensing under the Spotlight." Knowledge Ecology International, posted 3 August 2015, at <http://keionline.org/node/2305>.

58 568 U.S. 133 S. Ct. 1351 (2013).

59 <http://www.librarian.net/stax/4174/unintended-consequences-wiley-price-hike-post-kirtsaeng/>.

60 See e.g. United States-Korea Free Trade Agreement, U.S.-S. Kor., 30 June 2007, Arts 5.3(1) and (2). In a Confirmation Letter, Korea also agreed to ensure that the body setting prices be independent of the health authorities. The United States also uses trade preferences to pressure countries over their methods of controlling price, see Office of the United States Trade Representative, "2015 Special 301 Report 25" (commenting on New Zealand's Pharmaceutical Management Agency), at <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>. See also Australia-United States Free Trade Agreement, U.S.-Australia, 18 May 2004, 43 I.L.M. 1248, Art. 17.9(7) (limiting grounds for issuing compulsory licences).

61 See e.g. Alan O. Sykes, "TRIPs, Pharmaceuticals, Developing Countries, and the Doha 'Solution,'" *Chicago Journal of International Law* 3 (2002): 47–68.

62 For a literature review, see Khoury, "Differential Patent Terms," at 393–7.

the social value of the invention, and characteristics of the demand function.<sup>63</sup> However, these proposals have never been adopted, largely because it is administratively difficult to calculate the optimum term for each field and hard to deter skilled patent prosecutors from drafting around the categories to obtain longer terms for their clients. But as Esteban Donoso has argued, the length variable could be used on a geographic basis to permit countries that are less wealthy to protect inventions for a shorter term than countries that are richer.<sup>64</sup> Nations that adopted a shorter term could then be required to forego measures that constrain patent breadth. By abandoning other mechanisms for ensuring access, such as compulsory licensing, price controls, and the like, these countries would no longer give the appearance of taking a free ride on efforts expended elsewhere. Instead, it would be clear that they are shouldering a proportionate share of the global burden of advancing science. The assurance of a reward during the (shorter) patent period might also spur more local invention than a longer term in which inventors are in constant danger that compulsory licences will be issued and their ability to fully appropriate returns from their investments will be curtailed.

Donoso's proposal would be easy to administer: the country of registration is immutable and the WTO could use objective criteria, such as gross domestic product, to calculate the minimum permissible term each country could adopt. This approach would, however, violate the TRIPS Agreement, which currently imposes a uniform 20-year minimum term.<sup>65</sup> WTO members can presumably waive their rights to enjoy longer terms in other WTO countries,<sup>66</sup> but no country is likely to do so if it cannot prevent its trading partners from permitting parallel importation after these short terms expire. Thus, a rule barring international exhaustion is important to enabling this approach.<sup>67</sup> To put this another way, while international exhaustion rules do not, at first blush, appear related to human rights, they do affect every country's tolerance for how other countries balance the divergent interests in innovators' material interests and everyone's right to health and the enjoyment of the benefits of scientific advancement. Thus, the rules would have been a worthy focus of the Rapporteur's attention.

In addition, the Patent Report vacillates between recognising a right of access to *all* scientific advances and the right to access "essential" inventions. Thus, on the one hand, the report characterises the International Covenant on Economic, Social and Cultural Rights as defining a right of "access to the benefits of science by everyone without discrimination."<sup>68</sup> It also calls for a human rights assessment of all domestic patent laws and policy and a ban on agreements that exceed the level of protection imposed by the TRIPS Agreement.<sup>69</sup> On the other hand, the report repeatedly refers

63 See e.g. William D. Nordhaus, *Invention, Growth and Welfare: A Theoretical Treatment of Technological Change* (Cambridge, MA: MIT Press, 1969); Khoury, "Differential Patent Terms."

64 Esteban Donoso, *A Global Solution for the Protection of Inventions* (Bloomington, IN: Archway, 2013).

65 TRIPS Agreement, Art. 33.

66 See Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, WTO Agreement, Annex 2, 33 I.L.M. 112 (1994), Art. 3.6 (envisioning "mutually agreed solutions" to violations); J. H. Reichman and David Lange, "Bargaining around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions," *Duke Journal of Comparative and International Law* 9 (1998): 11–68, at 43–4.

67 To be sure, patent holders could simply withdraw from markets after their patents expire and then use Art. 28 of the TRIPS Agreement to require countries to bar unauthorised imports by third parties. Patentees are, however, unlikely to enter a market they will quickly need to leave. Accordingly, a mechanism that permits market segmentation would best promote use of this approach.

68 Patent Report, para. 12.

69 Patent Report, paras 97, 104.

specifically to health, food security, and information technologies.<sup>70</sup> It would be desirable to have a clearer statement that a human rights analysis extends only to basic technologies, such as medicines, transportation, telephones, and computers—as opposed to Ferraris, smartphones, high-definition televisions, Roombas or Fitbits. In many industries, the luxury market cross-subsidises (or could be used to cross-subsidise) the development, manufacture, and distribution of basic goods; profits from these ventures can also support research on problems that might otherwise be neglected.<sup>71</sup> To the extent inventors and investors can retain the power to charge supracompetitive returns in the high-end sector, countries may be more amenable to recognising human rights that require them to adopt laws that promote access to goods that satisfy fundamental needs. Implicitly, the Patent Report's references to pharmaceuticals, seeds, and communication technologies recognise a differentiation among scientific advances; better would be guidance on how to decide which advances are "essential" and therefore trigger a human rights analysis, and which are merely "bells and whistles," and allow patent holders to exert greater control over the market.

## 5. Conclusion

With the appearance of new and ever more terrifying diseases, drastic climate changes, increasing pollution, growing populations, and threats of terrorism, there is a strong social interest not only in interacting with *existing* works (which is the main focus of the accommodation discussed in the Copyright Report), but also in ensuring the production of *future* technological innovations. In the Patent Report, the Special Rapporteur therefore confronted a challenge that was perhaps more daunting than the one she conquered on the copyright side. The human right to "share in scientific advancement and its benefits" must not be interpreted in a manner that hinders the motivation or capacity to invent discoveries that society will eventually desperately need, or interfere with the establishment of industries that will, in the long run, promote social welfare. Striking the right balance is difficult. To the extent that the Patent Report endorses rules that enhance regulatory sovereignty within a globally coordinated patent regime, it makes a very important contribution.

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<sup>70</sup> Patent Report, paras 11, 50–5.

<sup>71</sup> Cf. Lesley Hamming, "The Promise of Priority Review Vouchers as a Legislative Tool to Encourage Drugs for Neglected Diseases," *Duke Law and Technology Review* 11 (2013): 390–412 (suggesting the use of vouchers to gain priority patent review as a way to encourage research in neglected diseases); Amy Kapczynski, Samantha Chaifetz, Yochai Benkler, and Zachary Katz, "Addressing Global Health Inequities: An Open Licensing Approach for University Innovations," *Berkeley Technology Law Journal* 20 (2005): 1031–114 (proposing an equitable licensing approach); Jean O. Lanjouw, "A New Global Patent Regime for Diseases: U.S. and International Legal Issues," *Harvard Journal of Law and Technology* 16 (2002): 85–124 (requiring patent holders to choose between protecting in developed or developing countries).

# Making Sense of “the Public Interest” in Copyright

Rebecca Giblin and Kimberlee Weatherall\*

## 1. Introduction

Copyright is an overly contentious area of policy debate in need of better tools for finding, and conceptualising, a middle ground. Debate around copyright often takes place between entrenched interests: not for naught have commentators referred to the copyright “wars” occurring both within copyright scholarship and in policy and law reform circles.<sup>1</sup> In both contexts, commentators often themselves identify, or are identified by others, as being associated with either “user interests” (focusing on the way that copyright promotes, or hinders, access to knowledge and culture), or “creator/producer interests” (placing greater emphasis on protecting the financial, personal and moral interests of creators). In seeking a middle ground between these opposing perspectives, proposals to reform copyright law and policy often reference the idea of “balancing” competing interests—itsself unsatisfactory for the way it seems to suggest that there is some perfect equilibrium, or that makers of copyright policy should keep a tally of wins and losses for each entrenched “side”—that every apparent “win” for copyright owners must be accompanied by a user win (or vice versa).

The difficulty is formulating an alternative framework or guiding principle for the design of a more satisfactory copyright. One guiding principle sometimes employed in policy debates generally, and in copyright debates in particular, is that law should be designed *in the public interest*. At first glance at least, such a concept would seem to hold some potential to offer an alternative to user-centric or author-centric views. But the concept of the “public interest” has itself been criticised as largely meaningless. In this paper we look at the concept of the public interest in some depth, exploring the methods developed in political philosophy which try to give it substance. We argue that, for all its faults, there is a place for “the public interest” in copyright in helping direct attention to the full range of interests affected by copyright rules and the full scope of trade-offs required. It is, however, not an easy route out of the difficulties in formulating good copyright policy.

## 2. “The Public Interest”

“Vacuous, deceptive and generally useless”:<sup>2</sup> with these kinds of critiques (here by Held) one could be forgiven for abandoning any attempt to rely on the public interest to provide a framework for policy thinking. The view that the concept lacks substance is widespread. Although the notion has

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\* This paper has been developed from work which will be published as the open access book “What If We Could Reimagine Copyright?” (forthcoming, ANU Press). Thanks to the participants of that international collaboration (R. Anthony Reese, Christophe Geiger, Martin Senftleben, Jeremy de Beer, Dev Gangjee and Caroline Ncube) and to those who gave further feedback on this paper at CEIPI’s workshop on “IP and Access to Science and Culture” (Strasbourg, May 2015), particularly Rochelle Dreyfuss, Lea Shaver and (again) Christophe Geiger. The authors are both members of the board of the Australian Digital Alliance, a non-government body which advocates for balanced copyright law and represents a range of stakeholders including schools, universities, libraries, galleries, and technology companies. The views expressed herein are those of the authors and may not represent the views of the Alliance. Neither author has any financial interest or benefit arising from the direct applications of this research.

1 See e.g. Jessica Litman, “The Politics of Intellectual Property,” *Cardozo Arts and Entertainment Law Journal* 27.2 (2009): 313–20.

2 Virginia Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970), 1.

been around for thousands of years, generations of philosophers, economists, political scientists, lawyers and regulators have made little progress in determining precisely what they mean by it. This has resulted in considerable dissatisfaction. Schubert has argued that the concept "makes no operational sense, notwithstanding the efforts of a generation of capable scholars."<sup>3</sup> Sorauf nominated it to head a list of ambiguous phrases which would "never be missed,"<sup>4</sup> complaining that not only was there no current or emerging consensus about its meaning, but scholars don't even agree "about what they are trying to define: a goal, a process, or a myth."<sup>5</sup> Though in constant use, the term "is usually left totally undefined."<sup>6</sup> As a result, "anything more than the most superficial examination of the term 'the public interest' reveals enormous difficulties in defining this deceptively familiar concept."<sup>7</sup> That lack of substantive content means that:

any detailed inquiry about its exact meaning plunges the inquiry into a welter of platitudes, generalities, and philosophic arguments. It soon becomes apparent that no general agreement exists about whether the term has any meaning at all, or, if it has, what the meaning is, which specific actions are in the public interest and which are not, and how to distinguish between them.<sup>8</sup>

Given these issues, it is surprising how often the use of this term passes without enquiry or challenge.<sup>9</sup> When it is explored, however, "the immediately apparent lack of agreement as to the concept's content, and resulting doubt as to whether its use can add anything meaningful to debate, has led to some commentators quite reasonably viewing 'public interest theory' as so ill as to be beyond resuscitation."<sup>10</sup>

The term's amorphousness also renders it susceptible to being hijacked to promote some particular interest. Feintuck observes that "the absence of any identifiable normative content renders the concept ... hopelessly vulnerable to annexation or colonization by those who exercise power in society."<sup>11</sup> Box similarly finds that its uncertain meaning "allows it to be used to justify individual or group preferences or undemocratic use of public power."<sup>12</sup> As Flathman laments, "the misuse of the concept (and its ancestors) is as old as politics."<sup>13</sup> The phrase's lack of consistent substantive content also makes it impossible to know when and whether those invoking it are referring to the same thing. "[T]he public interest will often appear to be an empty vessel, to be filled at different times with different content. Given that different people will seek to fill it with differing values, if we 'drink' from

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3 Glendon Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (New York: Free Press of Glencoe, 1960), 224.

4 Frank Sorauf, "The Conceptual Muddle," in Carl J. Friedrich (ed.), *Nomos V: The Public Interest* (Atherton Press, 1962), 190.

5 Sorauf, "The Conceptual Muddle," 186.

6 Robert A. Dahl and Charles E. Lindblom, *Politics, Economics, and Welfare: Planning and Politico-Economic Systems Resolved into Basic Social Processes* (New York: Harper & Row, 1963), 501.

7 Mike Feintuck, *"The Public Interest" in Regulation* (Oxford: Oxford University Press, 2004), 3.

8 Anthony Downs, "The Public Interest: Its Meaning in a Democracy," *Social Research* 29 (Spring 1962): 1–2.

9 Feintuck, *"The Public Interest" in Regulation*, 3.

10 Feintuck, *"The Public Interest" in Regulation*, 3–4 (internal note omitted).

11 Feintuck, *"The Public Interest" in Regulation*, 33.

12 Richard C. Box, "Redescribing the Public Interest," *Social Science Journal* 44.4 (2007): 585–98, at 585–6.

13 Richard E Flathman, *The Public Interest* (New York: John Wiley & Sons, 1966), 9.

the vessel, we cannot be sure about the extent to which it might meet our particular expectations of its content."<sup>14</sup> Alexander further captures the slipperiness of the concept: "The notion of 'public interest' is not a single or unified concept—its content will vary depending upon who is considered to make up 'the public' and who is articulating its interests. At times different interests may come into conflict, and at other times they may be complementary."<sup>15</sup>

If these weren't problems enough, upon closer examination, it often becomes apparent that "the public interest" is actually being used simply to refer to "the speaker's own view as to a desirable public policy."<sup>16</sup>

### 3. The "Public Interest" in Copyright

The shortcomings described above are certainly illustrated in the term's usage in the copyright context. That there is a public interest in copyright is treated as being so obvious that it is not open to debate. Why else would there be such a complex set of limitations on owners' rights? However, working out where the public interest in copyright actually lies is immensely tricky. Copyright's various constituencies have a habit of giving the concept a meaning consistent with their own vision of copyright or, taking advantage of its simple rhetorical appeal, using it to promote a particular result in a dispute, or specific policy or law reform goals.

At times, the public interest in copyright is treated as synonymous with the current law as enacted—perhaps on the assumption that whatever the legislature has decided to do is, by definition, "in the public interest." Courts in the United States have tended to do this, for example, when considering whether to grant injunctive relief, for which analysis "the public interest" is one of the factors to be balanced;<sup>17</sup> trade negotiators similarly justify treaty and negotiating positions which require no changes to existing domestic law.

At other times, the public interest in copyright is treated (perhaps rhetorically) as synonymous with the interests of some specific constituency. The Berne Convention seems to conflate the "public interest" or "public good" with the protection of authors' proprietary interests. The assumption here may be that the public interest *in copyright* is necessarily the interest of those protected by copyright—namely, authors and owners—with other interests being perhaps legitimate but falling outside the envelope of copyright itself.

More often in recent times, the "public interest" has been used as a proxy for "user" (or perhaps "consumer" interests). Thus the notion of the public interest has been invoked "in favour of free and unfettered access by the public to copyright works combined with the means of copying them for

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14 Feintuck, "The Public Interest" in *Regulation*, 3.

15 Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford: Hart, 2010), 16. Carys Craig similarly reminds us that 'the idea of "balancing" competing interests is no more than a metaphor itself, albeit one that is a pervasive and persuasive presence in modern legal discourse: Carys J Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" *University of Ottawa Law & Technology Journal* 2.2 (2005): 425-445, 441.

16 Dahl and Lindblom, *Politics, Economics, and Welfare*, 501.

17 Sherman Siy, "Two Halves of the Copyright Bargain: Defining the Public Interest in Copyright," *Cardozo Arts and Entertainment Law Journal* 31 (2013): 683–7, at 684, citing *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

personal use.”<sup>18</sup> Along similar lines, the public interest is sometimes used as the counterweight to author interests or, in other words, the interests of everyone but authors and owners. For example, the preamble to the WIPO Copyright Treaty emphasises “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”<sup>19</sup> Davies has suggested that “from the inception of the copyright system, there has been a built-in tension between the interests of the author on the one hand and those of the public on the other.”<sup>20</sup> The US Copyright Principles Project expresses a richer conception of the public interest but still places it in opposition to the interests of copyright owners:

A well-functioning copyright law carefully balances the interests of the public in access to expressive works and the sound advancement of knowledge and technology, on the one hand, with the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other.<sup>21</sup>

There are obvious problems with conflating “the public interest” with one specific interest group or another. Such conceptions will rarely convince others in the context of the perennial copyright debate. As Alexander and Craig both argue, it is simply unrealistic to treat the public interest as synonymous with stronger and stronger intellectual property rights, or to treat every other interest (including access to works for both the broader public and second generation authors) as being somehow outside the copyright system: especially given the present form of copyright in both treaties and domestic law that includes many exceptions and limitations. Equally, however, conceptions that leave out authors entirely are unsatisfactory: they fail to recognise the public’s interest in access to a range of quality cultural material, and in any event, taking authors out of the equation entirely takes the heart out of copyright law.<sup>22</sup>

We can partly avoid these problems by recognising that the public interest must encompass a range of goals. Thus Barbara Ringer, a former Register of the US Copyright Office, once defined the public interest as “the *aggregate* of the fundamental goals that the society seeks to achieve for *all* of its members—not for a majority of its members or for any large and powerful group, but for all of the people within the society.”<sup>23</sup> The fundamental societal goals which have been commonly described

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18 Gillian Davies, *Copyright and the Public Interest*, 2nd rev. ed. (London: Sweet & Maxwell, 2002), 7.

19 World Intellectual Property Organization Copyright Treaty, opened for signature 20 December 1996, 36 ILM 65, entered into force 6 March 2002.

20 Davies, *Copyright and the Public Interest*, 35.

21 See Pamela Samuelson et al, “The Copyright Principles Project: Directions for Reform,” *Berkeley Technology Law Journal* 25 (2010): 1175, 1176. See also G. Dworkin, “Copyright, the Public Interest and Freedom of Speech: A UK Copyright Lawyer’s Perspective,” in J. Griffiths and U. Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analysis* (Oxford: Oxford University Press, 2005), 154, stating that “Copyright and the public interest are inextricably linked. All copyright systems seek to strike a balance between the rights of the owner and the public interest.”

22 In 2013, current Register of the US Copyright Office, Maria Pallante, directly challenged the conception of the public interest being independent of authors’ interests, arguing: “The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, they are not a counterweight to the public interest but instead are at the very center of the equation.” Maria A. Pallante Statement by the Register of Copyrights before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, United States House of Representatives 113th Congress, 1st Session, “The Register’s Call for Updates to U.S. Copyright Law,” at <http://www.copyright.gov/regstat/2013/regstat03202013.html>.

23 Barbara Ringer, “Authors’ Rights in the Electronic Age: Beyond the Copyright Act of 1976,” *Loyola Entertainment Law Journal* 1.1 (1981): 1–6, at 2 (first emphasis added).

as constituting the public interest in copyright include the promotion of learning and progress,<sup>24</sup> the widest possible creation, dissemination and access to works<sup>25</sup> (including space to "produce new works by building on the ideas and information contained in the works of others"<sup>26</sup>), creativity,<sup>27</sup> freedom of expression,<sup>28</sup> the preservation of culture<sup>29</sup> and a robust public domain.<sup>30</sup> Alternatively, descending below grand social goals to focus on something more personal and specific, we might argue, with Ginsburg among many others,<sup>31</sup> that "[t]he public interest comprises the goals *and* aspirations of authors and users, of publishers *and* educators, and so forth."<sup>32</sup>

This, however, takes us back to our starting point: with no guidance as to how to decide where the public interest in copyright might lie.

#### 4. Why Not Simply Abandon the Concept?

Leading thinkers have little idea what the public interest means, either generally or in the copyright context, and the term is vulnerable to being hijacked by a range of competing interests. If this is the case, why not simply abandon the concept? Flathman persuasively argues that to do so would be futile:

The problems associated with "public interest" are among the crucial problems of politics. Determining justifiable governmental policy in the face of conflict and diversity is central to the political order; it is a problem which is never solved in any final sense but which we are constantly trying to solve. The much-discussed difficulties with the concept are difficulties with morals and politics. We are free to abandon the *concept*, but if we do so we will simply have to wrestle with the *problems* under some other heading.<sup>33</sup>

Colm similarly argues that "it is difficult to imagine that politicians, statesmen, judges, and officials concerned with the formulation of government policies could do without this concept." In his view,

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- 24 See e.g. Davies, *Copyright and the Public Interest*, 12; Preamble to WIPO Copyright Treaty emphasising "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information"; Sam Ricketson, "The Copyright Term," *IIC* 23.6 (1992): 753–84, at 755.
- 25 See e.g. Davies, *Copyright and the Public Interest*, 16; *Intellectual Property and Innovation*, Cmnd 9712 (London: Stationery Office, 1986) (UK government white paper), 35, para 4.
- 26 *CCH Canadian v. Law Society of Upper Canada* [2004] 1 SCR 339 [23].
- 27 Neil Netanel, "Why Has Copyright Expanded? Analysis and Critique," in F. Macmillan (ed.), *New Directions in Copyright Law*, vol. 6 (Cheltenham, UK: Edward Elgar, 2008), 4; "The Washington Declaration on Intellectual Property and the Public Interest," *American University International Law Review* 28.1 (2012): 19–29, at 21.
- 28 *Ashdown v. Telegraph Group* [2001] EWCA Civ 1142 (in which the UK Court of Appeal suggested that the UK's fair dealing exceptions "will normally afford the Court all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press" (at [66]), and explaining how essential it is to remember that "considerations of public interest are paramount" and thus not to apply tests inflexibly (at [71])). See also "The Washington Declaration," 21; Ricketson, "The Copyright Term," 755.
- 29 See e.g. Australian Law Reform Commission, *Copyright and the Digital Economy Final Report*, Report No 122 (Sydney: ALRC, 2013), 278; Laura N. Gasaway, "America's Cultural Record: A Thing of the Past?" *Houston Law Review* 40.3 (2003): 643–71.
- 30 "The Washington Declaration," 21.
- 31 Caron also describes the rights of authors and the public as being "indissociable in nature." See Christophe Caron, "Abuse of Rights and Author's Rights," *Revue Internationale du Droit d'Auteur*, no. 176 (1998): 2–80, at 54.
- 32 Jane C. Ginsburg, "Authors and Users in Copyright," *Journal of the Copyright Society of the USA* 45.1 (1997): 1–20, at 4.
- 33 Flathman, *The Public Interest*, 13.



"Even a person who is wholly agnostic with respect to the public interest as a meta-sociological idea may find that the concept is needed at least as a working hypothesis, regardless of whether it corresponds to a 'reality'."<sup>34</sup> Held agrees, suggesting that such concepts are "indispensable" in enabling evaluations of government decisions.<sup>35</sup>

Thus, while we don't exactly know what the public interest means, and will probably forever debate its content, we have a keen intuition that it is important—hence former US Supreme Court Justice Felix Frankfurter's description of it as a "vague, impalpable but all-controlling consideration."<sup>36</sup> We need the *concept* of the public interest (or what it stands for) because its absence would leave lacunae in policy development and evaluation. "The public interest" transcends self-interest.<sup>37</sup> It stands for something central to our democratic system: the idea that "we" are not just a welter of self-interested individuals out to further our own very specific interests regardless of the impact on others in society, but rather, that we make up a society, in which guise we can have an overall shared set of interests. It also suggests that, on occasion, furtherance of those shared interests can and should take precedence over individual or group self-interest.

Thus, although "its fuzziness makes it awkward as a practical guide to daily affairs,"<sup>38</sup> the concept invokes considerations that cannot be ignored. All of this explains why, despite the numerous criticisms, the public interest continues to play a leading role in the design of public policy and regulation.<sup>39</sup>

## 5. *Is It Possible to Give Some Meaning to "the Public Interest in Copyright"? How the Tools of Social and Political Philosophy Might Help*

So the concept is essential, but its usage has been such as to leave it virtually incapable of (specific) meaning. How then can we work out where the public interest in copyright might lie? Social and political philosophers have been wrestling with similar problems for millennia; in this section, we explore how the conceptual tools they have produced might assist.

Over time, a number of alternative typologies of the public interest have been created.<sup>40</sup> Our starting point is to adopt Held's classification scheme, which divides public interest conceptions in general legal and political philosophy into three main categories: "preponderance theories," "common

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34 Gerhard Colm, "The Public Interest: Essential Key to Public Policy," in Friedrich, *Nomos* V, 127.

35 Held, *The Public Interest and Individual Interests*, 9–10.

36 Quoted in Colm, "The Public Interest," 115.

37 Charles J. Fox and Hugh Theodore Miller, *Postmodern Public Administration: Toward Discourse* (London: Sage, 1995), 123–4.

38 Box, "Redescribing the Public Interest," 586.

39 See e.g. Feintuck, "*The Public Interest*" in *Regulation*, 25; Held, *The Public Interest and Individual Interests*, vii; Downs, "The Public Interest," 1–2.

40 See e.g. E. C. Banfield, "Note on Conceptual Scheme," in M. Meyerson and E. C. Banfield (eds), *Politics, Planning and the Public Interest* (New York: Free Press, 1955); Schubert, *The Public Interest*; C. E. Cochran, "Political Science and 'the Public Interest'," *Journal of Politics* 36.2 (1974): 327–55; Wayne A. R. Leys and Charner Marquis Perry, "Philosophy and the Public Interest: A Document," paper presented at the Symposium of the Western Division of the American Philosophical Association, University of Wisconsin, 1 May 1959.

interest theories," and "unitary theories."<sup>41</sup> "Interest" can have different meanings,<sup>42</sup> but we also assume Held's approach of limiting ourselves to interests "in something being *done*, or enacted, or brought about, or maintained."<sup>43</sup>

### 5.1 Common Interest Theories: In the Interests of All Individuals

Common interest theories will recognise a policy as being in the public interest where there is unanimity: that is, they suggest that something will only be in the public interest where it is in the interests of *all* members of a polity.<sup>44</sup> Things that may be seen to be in the public interest in this sense of the "common interest" include operational monetary systems, sustainable access to breathable air and drinkable water, community firefighting facilities and so on. Rousseau, a leading proponent of this view, rejected preponderance theories on the grounds that simply following the preponderance of opinion might mean yielding to force, acting out of necessity rather than inclination.<sup>45</sup> Common interest theories suggest that where a policy triggers conflict between individual interests it cannot be in the public interest. As Barry observes, interests common to all members of society are rare.<sup>46</sup> Given the near impossibility of persuading all voters to favour a given policy, common interest theories are unlikely to provide a mechanism for effective decision-making involving large groups. If every member of the public had a veto right over policymaking, it is hard to imagine any decision ever getting made. The contentiousness of copyright policymaking suggests that a common interest approach is likely to be of limited use.

### 5.2 Preponderance Theories: In the Interests of Sufficient Individuals

Preponderance theories avoid some of the problems with common interest theories by suggesting that the public interest "cannot be in conflict with a *preponderance* or *sum* of individual interests."<sup>47</sup> Epitomised by the work of Hobbes, Hume and Bentham, these aggregationist theories suggest that "something might be in the public interest where it's not in an individual's interest, as long as it's in the interests of *sufficient* individuals."<sup>48</sup> This raises an important question: how do we judge this preponderance? Is a simple majority sufficient? Is it "to be judged in empirical or behavioral terms, as a higher degree of force, or a greater weight of actual opinion, or a superior group strength"?<sup>49</sup> And of course there is the obvious problem: how to factor in minority interests.<sup>50</sup>

Davies seems to have implicitly adopted a preponderance conception in *Copyright and the Public Interest*, defining that by majority of numbers:

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41 Held, *The Public Interest and Individual Interests*, 42–6.

42 See e.g. Flathman, *The Public Interest*, 14–31.

43 Held, *The Public Interest and Individual Interests*, 19.

44 Held, *The Public Interest and Individual Interests*, 44.

45 Held, *The Public Interest and Individual Interests*, 100, citing Jean-Jacques Rousseau, *The Social Contract: Book 1* (New York: Charles Frankel, 1947), ch. 3, 8–9.

46 Brian M. Barry, "The Use and Abuse of 'the Public Interest'," in Friedrich, *Nomos V*, 199.

47 Held, *The Public Interest and Individual Interests*, 43.

48 Held, *The Public Interest and Individual Interests*, 43 (emphasis added).

49 Held, *The Public Interest and Individual Interests*, 83.

50 Feintuck suggests a "counter majoritarian" response would be needed: Feintuck, "The Public Interest" in *Regulation*, 12.

Whether a particular act is “in the public interest” is probably not subject to any objective tests. Inherent in the noble motive of the public good is the notion that, in certain circumstances, the needs of the majority override those of the individual, and that the citizen should relinquish any thoughts of self-interest in favour of the common good of society as a whole.<sup>51</sup>

Preponderance and common interest theories are sometimes described as process theories, because they provide a *process* for determining where the public interest lies without actually purporting to give it any normative content. This has led to another criticism for lack of utility. For example, in the context of preponderance theories, Held has noted that:

to assert that “x is in the interests of a preponderance of individuals” implies only that “x is in the interests of a preponderance of individuals.” ... [I]f we want to know whether a given x is in the public interest, we want to know something else than the empirical fact that it is in the interests of a preponderance of individuals, although being in the interests of a preponderance of individuals may well be among the possible good reasons for believing that such an x is in the public interest.<sup>52</sup>

In practice, we argue that process theories *must* involve some normative content—aims or goals—being given to the concept of the public interest: we need to know what outcomes are considered desirable. Whenever it is argued that a given policy is in the public interest because it is in everybody's interest, a normative judgement is being made—that it is good for the majority for there to be a robust national defence force or independent judiciary or stable currency. Thus, before process conceptions of the public interest can be applied there must at least be some implicit normative basis for deciding that certain endpoints are desirable while others are not.

Sometimes this is clear-cut: for example, a policy to criminalise murder is clearly in all or most individuals' interests. When it comes to copyright policy, however, it can be much more difficult to determine where all or a preponderance of individuals' interests lie. Are they better served by policies that facilitate access but risk certain kinds of new content being underproduced, or those that incentivise the creation of that content but result in less use overall? The answer depends on normative judgements about where those individual interests lie: a point to which we return below.

### 5.3 Unitary Theories: In the Interest of Individuals as a Matter of “Valid” Judgement

The third category in Held's typology can be described as “unitary” theories. Under these theories, which can be traced to the work of Plato and Aristotle, and later Hegel and Marx, if something is in the public interest as a matter of “valid” judgement, it must also be in each individual's interest. Equally, if something is not in the interest of an individual as a matter of such judgement, then it cannot be in the public interest either.<sup>53</sup> Unlike the process conceptions, unitary theories explicitly seek to give normative content to the concept of the public interest. Validity or justifiability are conferred by the universal moral order, and whether something is in the public interest is determined on that basis.<sup>54</sup>

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51 Davies, *Copyright and the Public Interest*, 4.

52 Held, *The Public Interest and Individual Interests*, 84.

53 Held, *The Public Interest and Individual Interests*, 45.

54 Held, *The Public Interest and Individual Interests*, 136.

The obvious difficulty with such a formulation is in reaching agreement on where this objective good lies. Plato and Aristotle couldn't agree on a conception of the good,<sup>55</sup> and over the subsequent two thousand years little has changed. There is widespread disagreement about whether the moral content of the public interest aligns with the interests of the state (as posits the Hegelian view), the Church, broader society or some other benchmark.<sup>56</sup>

Also problematic is that unitary theories (a bit like common interest theories) don't allow for dissent: there can be no justifiable conflict between the public interest and individual interests.<sup>57</sup> Any individual's disagreement with the morally valid "public interest" would, by definition, be invalid. While moral validity may sometimes be clear, in the case of copyright policy the wide range of contradictory views as to what it is seeking to achieve seem to make it difficult to identify any moral "right" without dismissing core philosophical and cultural concerns. For example, for Tang, writing on the public interest in copyright in China, a key consideration is whether the act "stimulates a socialist spirit and values."<sup>58</sup> That this is not a consideration that would necessarily animate the concept elsewhere demonstrates in some small way the difficulty of defining a morally valid "public interest" in copyright. The fundamental debates over the rationales for copyright, touched on in more detail below, make it more difficult still.

#### 5.4 The Ex Ante Theory: The Interest of "the Representative Individual"

More recently Ho has put forward an intriguing hybrid tool for determining where the public interest lies, persuasively arguing that it must be defined using an ex ante perspective:

The public interest is the interest of "the representative individual"—an imaginary person who forgot his identity and who imagined that he had equal chance of being anyone in society. By pondering policy options using this *ex ante* perspective impartially, the most preferred option is the one that is deemed to maximize the public interest. With the public interest defined this way, policy decisions should be made on the basis of comparing benefits in terms of enhancement of the public interest on the one hand, and costs on the other hand.<sup>59</sup>

As well as having roots in work by John Stuart Mill and John Harsanyi, this kind of ex ante framework evokes the Rawlsian "invisible veil," which suggests that the principles of justice must be determined by individuals in a "hypothetical situation of equal liberty":

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a *veil of ignorance*. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles

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<sup>55</sup> Held, *The Public Interest and Individual Interests*, 142–3.

<sup>56</sup> Held, *The Public Interest and Individual Interests*, 154–6.

<sup>57</sup> Held, *The Public Interest and Individual Interests*, 156–8.

<sup>58</sup> Guan H. Tang, *Copyright and the Public Interest in China* (Cheltenham, UK: Edward Elgar, 2011), 122.

<sup>59</sup> Lok Sang Ho, *Public Policy and the Public Interest* (Abingdon, UK: Routledge, 2012), 8.

to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.<sup>60</sup>

Of course, analyses carried out via Ho's framework or under cover of the Rawlsian veil are unlikely to be truly representative: they will always be shaped to some extent by the attitudes of the wielders. If these devices are predominantly employed by white, liberal, middle-class individuals, the results will disproportionately reflect white, liberal, middle-class world views.

What the representative individual framework is very effective in stripping away, however, in common with its predecessors in the work of Mill, Harsanyi and Rawls, is *privilege*. This attribute is essential given the need to reflect the full range of voices and interests impacted by copyright policies. The Representative Individual might not be truly representative, but, by stripping away privilege and its associated benefits (such as political strength), the framework at least enables fuller consideration to be given to the breadth of individual and group interests at play. Imagining copyright as designed by the Representative Individual also requires a commentator seriously to set to one side their *role* in the copyright ecosystem. However much one might be inclined to see copyright from an author perspective, it is salutary to consider, for example, matters from a student's perspective (and vice versa).

Ho's "representative individual" approach resembles the process-based conceptions outlined above. However, even more starkly than those, it requires some normative judgements to be made before the tool can be of any use. The representative individual would clearly be unable to determine the best policy unless she knows broadly what she wants it to achieve. Before she designs a copyright policy, our representative individual needs to know whether she is trying to design a content creation and cultural/knowledge advancement copyright policy, a copyright policy for the protection and promotion of artist's inherent and inalienable interests in their creations, or something else altogether.

But once that has been determined—assuming that it can be—Ho's approach is intriguing, not least because it helps to free the mind from self-interest and traditional ways of doing things. Vested interests tend to dominate and distort policy thinking in copyright: as Litman has observed, "Any given copyright law will be more hospitable to some sorts of technological change than to others. Interests who find themselves, usually more by reason of accident than design, in a favorable legal position will naturally resist proposals to tinker with it."<sup>61</sup> In thinking about what the law *should* or *could* be, it is vital to divorce ourselves from such positions. Ho's model is a useful framework or tool for encouraging thinking in terms of policy goals rather than the tools or institutional or market structures we currently use to achieve those goals.

Although Ho is an economist, we do not read his formulation as limiting the representative individual's considerations to the purely economic. This would be a shortcoming indeed; conceptions of the public interest dominated by a focus on allocative efficiencies have been justly criticised for being too narrow.<sup>62</sup> Instead, the "representative individual" could take into account any relevant

60 John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 2005) 11–12 (emphasis added).

61 Jessica Litman, *Digital Copyright*, 2nd ed. (New York: Prometheus, 2006), 36.

62 See e.g. Feintuck, "The Public Interest" in *Regulation*, 13–21. M. Blitz, "Public Interest," in N. J. Smelser, James Wright and P. B. Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (Oxford: Pergamon, 2001) ("There are, however, limits to this perspective. They are evident in the narrowness of the economic view of the public when it is compared to other notions of what is potentially common in common goods.")

moral, ethical or philosophical beliefs and considerations in determining whether any given policy is in the public interest. This is an essential feature when considering copyright policy, which is nowhere a creature of pure instrumentalism. The representative individual ought also be sufficiently generous and wise to include the interests of future generations in forming her view, something which existing process-based conceptions of the public interest do not necessarily take into account,<sup>63</sup> but which is vital given that a dynamic, rather than a static approach to the benefits of copyright is needed, and given the impact of copyright policies on future generations.

## 6. *Lessons: How Can This Theory Inform Copyright Policymaking?*

The above analysis identifies a number of different conceptions of the public interest. In sum, depending on which approach is adopted, a policy may be argued to be "in the public interest" where:

1. It is consistent with the *preponderance* of individual interests within a polity (which requires identifying where those interests lie, as well as how that preponderance is to be determined—e.g. by weight of numbers, political strength or something else);
2. It is consistent with everyone's individual interests or, at least, as unanimously agreed by members of the polity (which also requires identification of where those interests lie);
3. Where it is "valid," that is, morally justified (which assumes that moral validity is capable of determination; the required determination of what is "right" must also depend on what is intended to be achieved);
4. Where it is the preferred option of the Representative Individual (which also requires determination of what the policy is intended to achieve).

When put this way, two clear explanations emerge for why assertions that a given copyright policy is "in the public interest" tend to be unhelpful.

First, commentators invoking the "public interest" are rarely explicit about the approach on which they are relying, even though "the public interest" is capable of being determined in a number of different ways. It is hard to assess exactly what is being argued unless we know the underlying approach taken: whether the proponent believes that the policy is in the interests of a preponderance of members of society or is arguing for some unitary conception of the good, such as, perhaps, one based on a human rights conception of copyright. It is probably fair to suspect that many copyright commentators, if pressed, might cite a kind of "preponderance of interests" approach: acknowledging that the advocated policy may disadvantage some nevertheless is justifiable to promote the greater good.

Second, and more importantly, regardless of which conception or approach to the public interest is adopted, it is impossible to argue sensibly that any given copyright policy is in the public interest without explicitly identifying what is the endpoint or goal sought to be achieved. If you sit down to try to imagine what copyright in the public interest would look like, *regardless* of the philosophical approach adopted, the first thing you need to do is work out what endpoint you are aiming for. Consensus cannot be assumed on this point. Most commentators would agree on copyright's policy

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63 See e.g. Feintuck, "The Public Interest" in *Regulation*, 13.

aims and rationales at the highest level of generality: most today accept that copyright is justified by reference to some combination of "naturalist" and "instrumentalist" theories. But their weighting within any final "copyright utopia" is the subject of fierce disagreement.

Instrumentalist approaches justify the grant of copyright as a way of achieving certain social and economic aims, such as the creation and dissemination of knowledge and culture. In this view, public interest considerations lie at the heart of the matter, and copyright laws are justified only to the extent they further those aims. By contrast, naturalist approaches assume that authors have expansive rights over their creative outputs as of right. Those rights are most commonly explained as springing from the output being brought about by the author's labour (the Lockean approach) or because it is a materialisation of her personality (per Kant and Hegel). In these conceptions, "the author acquires a property right in his work by virtue of the mere act of creation. This has the corollary that nothing is left to the law apart from formally recognising what is already inherent in the 'very nature of things': a view that seems to chime most with unitary approaches to the public interest.<sup>64</sup> In naturalist conceptions, the public's role is secondary.<sup>65</sup>

Other rationales have also been put forward to explain why we grant copyright, including the ideas that it is intended to enhance democratic civil society,<sup>66</sup> and that it operates as protection against unfair competition.<sup>67</sup> As perhaps a more accurate reflection of copyright debates as they occur today, Drahos has also advanced a theory of "financier's copyright," which "rests on the view that copyright must serve the financier of copyright works by guaranteeing rights of exploitation in whichever markets the financier chooses to operate." Thus:

If new technologies like the Internet come along to threaten existing investments or make new forms of exploitation possible then the financier is entitled to new rights that allow him or her to manage the contingencies of the technology. Copyright becomes the servant of the financier rather than the author of the public welfare.<sup>68</sup>

Instrumentalist rationales help explain why it is important to grant sufficient protection to incentivise creation and investment in works. Naturalist rationales explain why those rights should vest in their creators, and justifies their being set at levels above those necessary to incentivise creation. Financier's copyright explains policies that cannot be justified on either of these grounds, such as retroactive term extensions which benefit right holders rather than creators, and opposition to performers' rights.<sup>69</sup>

The point is that no single rationale is capable of providing a coherent justification for existing copyright policy. As Sherman and Bently explain, "the emergence of modern intellectual property law was neither natural nor inevitable, nor was it an example of the law coming to occupy its proper

64 Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Boston: Kluwer, 2004), 6.

65 Alexander, *Copyright Law*, 3; also Davies, *Copyright and the Public Interest*, 171; Ricketson, "The Copyright Term," 755. This perhaps explains why the copyright discourse so often conceptualises the "public interest" in opposition to authors' interests.

66 See generally Neil Netanel, "Copyright and a Democratic Civil Society," *Yale Law Journal* 106.2 (1996): 283–7.

67 Mark J. Davison, Ann L. Monotti, and Leanne Wiseman, *Australian Intellectual Property Law*, 2nd ed. (Cambridge: Cambridge University Press, 2012), 4–5.

68 Peter Drahos with John Braithwaite, *Information Feudalism* (New York: Earthscan, 2002), 176.

69 Drahos with Braithwaite, *Information Feudalism*, 175–6.

philosophical position."<sup>70</sup> The result is an uneasy hodge-podge of contradictory aims, and no consensus about the order in which they ought to be subordinated to one another in order to best achieve them.

That backdrop helps to explain why references to the public interest often seem less than compelling in the context of copyright. Given the rich range of competing options, of course it is difficult to form a principled view as to whether a given policy option *in fact* furthers the public interest without understanding what that policy is intended to achieve and what the proponent's ideal endpoint looks like: author-centric copyright law; bare minimum incentives with broad subsequent distribution; a market-based winner-takes-all allocation of rewards—or something else. That is, unless the wielder identifies her understanding of what the results of copyright ought to look like, it is impossible to make any determination of how close we are or whether it is a vision of copyright that others can buy into.

## 7. Conclusions

It is no wonder that copyright experts tend to be jaded about (or even maddened by) claims that one policy or another is "in the public interest." As the above analysis has demonstrated, such claims are meaningless unless the claimant explicitly identifies her assumptions about what the overall goal of copyright is, and what conception is being used to determine where the balance of interests lies (whether it be common interest, preponderance, unitary, *ex ante*, or something else altogether). Since we are not going to reach any consensus on copyright's aims any time soon, views will inevitably continue to differ over what copyright in the public interest would look like.

This does not mean, however, that we have to give up on the concept or its role in copyright. As we pointed out earlier, two thousand years of disagreement as to the substance of the public interest have not led to its abandonment in political philosophy, because of what it stands for. There is value in the idea that "we" are not just a jumble of self-interested individuals pursuing our own purposes regardless of the impact on others; that we make up a society and in that capacity have some shared interests; and that, on occasion, furtherance of those shared interests can and should take precedence over individual or group self-interest.

The trick, as they say, is how to *use* this concept in a meaningful way. For ourselves, at least when attempting a "big picture" rethink of copyright policy, we think that there is value in adopting the tools of political philosophy: for example, trying explicitly to put self-interest to one side by considering the perspective of the representative individual. Not everyone will agree that this is a useful approach: Rawls is not without his critics. At the minimum, however, we would argue for transparency in argumentation. Scholars, lobbyists, commentators, and interest groups can all readily enable more meaningful evaluation of whether policies do in fact further the public interest by putting their claims in context: identifying their understanding of what each policy is intended to achieve, and the conception of the public interest around which their argument is built. By making these assumptions explicit, it is possible to make some sense of the nonsense: to equip policy proponents to engage with one another and to evaluate the relative merits of their proposals. Without this, however, the concept is meaningless indeed.

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70 Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999), 141.



# The Perspective of the European Court of Human Rights on Intellectual Property and Access to Science and Culture

Peggy Ducoulombier

## 1. Introduction

The European Convention on Human Rights does not protect in an express manner the right to culture, nor does it protect intellectual property *per se*.<sup>1</sup> However, the European Court of Human Rights considers these rights as subrights included in the protection offered respectively by Article 10 (freedom of expression) of the European Convention and by Article 1 of the first additional protocol to the European Convention (right to property, hereafter Article 1P1). The protection of intellectual property was included by the Court in the protection offered by Article 1P1, in the case *Anheuser-Busch v. Portugal*.<sup>2</sup> As far as the right to culture is concerned, Article 10 offers a vehicle for the guarantee of the various aspects of this multifaceted right, as is illustrated by several cases. For instance, in the early case of *Müller v. Switzerland*,<sup>3</sup> the Court extended the protection offered by Article 10 to artistic expression. *Akdas v. Turkey*<sup>4</sup> illustrates how access to culture may be included in Article 10. In *Sorguç v. Turkey*,<sup>5</sup> the Court protected academic freedom under Article 10. This diversity reflects the vague definition of the word "culture" and the ensuing broadness of the right to culture and science,<sup>6</sup> which may in turn have an impact on the manner in which the Court addresses the question of conflicts between the right to culture and the protection of intellectual property rights.

In the case law of the European Court of Human Rights instances of conflicts between these two rights are rare. Therefore, any general guideline that can be drawn from this jurisprudence, so as to solve these conflicts, is limited.

However, there are several cases in which intellectual property rights conflict with what can be considered as aspects of the right to culture and science. Two rulings are particularly relevant for this study. First, the case of *Ashby Donald and others v. France*,<sup>7</sup> which concerns the conviction of photographers for copyright infringement through the publication on a website of pictures of fashion shows without the consent of the fashion houses. Then, the decision related to "the Pirate Bay,"<sup>8</sup> which is about sanctions taken against the operators of a file-sharing website.<sup>9</sup> In addition,

1 Compare with Article 17.2 of the Charter of Fundamental Rights of the European Union.

2 European Court of Human Rights (ECtHR), *Anheuser-Busch Inc v. Portugal*, 11 January 2007, §72. See also *Balan v. Moldova*, 29 January 2008, §34.

3 ECtHR, *Müller and Others v. Switzerland*, 24 May 1988, §27.

4 ECtHR, *Akdas v. Turkey*, 16 February 2010.

5 ECtHR, *Sorguç v. Turkey*, 23 June 2009.

6 On the protection of cultural rights in the case law of the ECtHR, see *Cultural Rights in the Case-Law of the European Court of Human Rights* (Council of Europe/European Court of Human Rights, 2011), report prepared by the research division of the ECtHR.

7 ECtHR, *Ashby Donald and Others v. France*, 10 January 2013.

8 ECtHR, dec., *Neij and Sunde Kolmisoppi v. Sweden*, 19 February 2013.

9 For a detailed analysis of these rulings, see C. Geiger and E. Izyumenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression," *IIC* 45.3 (2014): 316–42.

a more recent decision, *Akdeniz v. Turkey*,<sup>10</sup> on the subject of a file-sharing website but analysed from the perspective of a frequent user of the website complaining of the measures blocking access to internet, will complement the analysis of the leading rulings of the European Court of Human Rights on this subject.

## 2. *The Conflict between Intellectual Property Rights and the Right to Culture from the Perspective of the Runners of Websites*

The first element that we need to mention is that the Court does not resort to the idea of hierarchy to solve these conflicts but balances the various rights in conflict and expects domestic courts to apply the same method.<sup>11</sup>

While intellectual property rights could have been considered as inferior to human rights, the inclusion of intellectual property rights in the right to property eradicates any possibility of using the hierarchical tool in a meaningful manner. This seems perfectly justified and, as the Special Rapporteur stressed, "both cultural participation and protection of authorship are human rights principles designed to work in tandem."<sup>12</sup> However, the Special Rapporteur also stressed that certain aspects of IP laws "may even be incompatible with the right to science and culture."<sup>13</sup> Nevertheless, in cases involving intellectual property rights and the right to culture and science, the European Court of Human Rights insists on the fact that it is presented with a conflict between two convention rights, and this has an influence on the balancing exercise.<sup>14</sup>

The presence of a conflict between two convention rights has an impact on the scope of the margin of appreciation allocated to states when balancing the competing rights. This means that the Court's review of the interference with Article 10 is not as strict as it would be if the margin of appreciation allocated were narrow. It should be clarified that this is in no way a new principle,<sup>15</sup> nor a principle specific to cases where intellectual property rights conflict with access to culture.

However, it must be stressed that, despite what the Court asserts in the aforementioned cases, the balancing exercise was non-existent or almost non-existent at the domestic level.<sup>16</sup> This is particularly flagrant in "the Pirate Bay" case in which the domestic courts paid no attention to the argument based on the protection of Article 10 and focused only on the breach of copyright law. Despite this lack of consideration for the opposite right involved in the conflict, the Court did not increase its control of the interference with Article 10.

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10 ECtHR, dec., *Akdeniz v. Turkey*, 11 March 2014.

11 On the subject, see P. Ducoulombier, "Interaction between Human Rights: Are All Human Rights Equal?" in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK: Edward Elgar, 2015), 52–69.

12 See F. Shahid, *Report of the Special Rapporteur in the Field of Cultural Rights, Copyright Policy and the Right to Science and Culture*, A/HRC/28/57, 24 December 2014, §4.

13 Shahid, *Report of the Special Rapporteur*, A/HRC/28/57, §26.

14 See ECtHR, *Ashby Donald and Others v. France*, §40.

15 This principle was laid down in ECtHR, GC, *Chassagnou and Others v. France*, 29 April 1999, §113.

16 It must be noted that, in theory, the manner in which the Court controls the proportionality of an interference is in line with the Special Rapporteur's recommendations: "Copyright laws should place no limitations upon the right to science and culture, unless the State can demonstrate that the limitation pursues a legitimate aim, is compatible with the nature of this right and is strictly necessary for the promotion of general welfare in a democratic society." See *Report of the Special Rapporteur*, A/HRC/28/57, §98.

This relaxation in the Court's control may be explained by the presence of another element increasing the scope of the margin of appreciation in the cases under examination.

In principle, Article 10 is highly protected by the European Court of Human Rights. This high level of protection usually leads to a narrow margin of appreciation allocated to states, mitigating the principle we have just mentioned related to the conflict between two convention rights. This is one of the principal problems with the doctrine of the margin of appreciation: different factors influence the scope of the margin, some factors widening its scope,<sup>17</sup> others narrowing it.<sup>18</sup> However, the case law of the European Court on Article 10 is complex and nuanced. If political speech, or expression contributing to a debate of general interest, is afforded a high level of protection, artistic expression is also protected but at a lower level and commercial speech finds itself at the bottom of the scale.<sup>19</sup> Therefore interferences with artistic expression and even more with commercial expression are easier to justify, in particular in the name of the protection of the rights of others, such as intellectual property rights.

In cases involving a facet of the right to culture which can be located at the periphery of the right rather than at its core, the European Court asserts that the scope of the margin of appreciation should be wide. And this reason added to the other leads the Court to conclude that in these cases the margin of appreciation allocated to states must be particularly wide.<sup>20</sup> Then it comes as no surprise that the Court finds no violation of Article 10 and supports the protection offered by domestic courts to intellectual property rights.

In the *Ashby and Neij and Sunde Kolmisoppi* cases, the applicants were directly involved in the running of websites which breached copyright law. It could have been thought that users of the website would be in a better position to advocate in favour of the right to culture. However, it appears that it is even more difficult for third parties to have their right to culture protected.

### 3. *The Conflict between Intellectual Property Rights and the Right to Culture from the Perspective of the Users of Websites*

In the decision *Akdeniz v. Turkey*, the applicant was a frequent user of a website which had been blocked for breaching copyright law. It is interesting to note that the Special Rapporteur stressed that "website blocking, content filtering and other limits on access to content subject to copyright, as well as the liability imposed on intermediaries for infringing content disseminated by users ..." <sup>21</sup> could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture. However, in this instance, the Court dismissed the application. The Court considered that the mere fact that the applicant was a user was not per se enough to be considered a victim under Article 34 of the European Convention on Human Rights. However, the Court admitted that he suffered collateral damage from the blocking of the site. Yet, the European Court of Human

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17 Such as the lack of a European consensus on a particular subject.

18 Such as the fact that the right interfered with is considered as a core right or the problem involved touches upon the applicant's intimacy.

19 For a reminder of these principles, see ECtHR, *Ashby Donald and Others v. France*, §39; ECtHR, dec., *Akdeniz v. Turkey*, §28.

20 See ECtHR, dec., *Neij and Sunde Kolmisoppi v. Sweden*, The Law, part D; ECtHR, *Ashby Donald and Others v. France*, §41.

21 *Report of the Special Rapporteur*, A/HRC/28/57, §51.

Rights considered that, despite the importance of the internet in the sharing of information, the applicant could not claim that his right to freedom of expression had been breached.<sup>22</sup> Relying on principles developed in its precedents,<sup>23</sup> the European Court stressed that the substance of his right was not impaired as he could still access music and works of art through other websites complying with intellectual property rights. In addition, and contrary to the case of *Khurshid Mustafa v. Sweden*,<sup>24</sup> which protected the right for immigrants to maintain links with the culture of their country of origin, the applicant did not argue that the information contained on the website presented a particular interest for him or that the blocking of the website deprived him of an important source of communication.<sup>25</sup> This argument can be linked again to the idea of the core and the periphery of the right to culture. Although the notion of victim under Article 34 of the European Convention on Human Rights can be another hurdle in the protection of the right to access to culture, the decision of the Court also means that if access to culture were to be completely denied to individuals, the Court might find differently. In addition, one may note that the decision, in comparison with "the Pirate Bay" decision, was not rendered unanimously but only by a majority. Unfortunately, dissenting opinions are not made public in relation to inadmissibility decisions.

In both *Ashby* and "the Pirate Bay" cases, the Court insisted on the commercial aspects of the expression. In *Ashby*, the European Court considered that the publication of photos of a fashion show on a website could not be considered as contributing to a debate of general interest.<sup>26</sup> In "the Pirate Bay" decision, the Court insisted that the file-sharing platform pursued a commercial aim.<sup>27</sup> Even if the European Court recalls that Article 10 protects commercial expression, it is clear that the Court considers that the forms of expression involved in these cases, despite the fact that one can consider that access to fashion pictures or to movies and music files represents an aspect of the right to culture, are less worthy of protection than other forms of expression.

This also may come as an element of hope, because in other circumstances the solution of the conflict could be different. In the event that a core element of access to culture was involved, it might be possible for Article 10 to prevail over Article 1P1. This may be deduced from *Gillberg v. Sweden*,<sup>28</sup> although in this case no intellectual property rights were involved as the disputed information was in the public domain. However, it is still interesting to stress that, in that case, facilitating access to science was certainly one of the reasons why the Court considered that no negative right under Article 10 could be afforded to the applicant which would have justified that he could have retained scientific data in secrecy, thus hindering research.

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22 See ECtHR, dec., *Akdeniz v. Turkey*, §§24–9.

23 See, for instance, ECtHR, *Appleby and Others v. United Kingdom*, 6 May 2003, even if the case is not mentioned in *Akdeniz*.

24 ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008.

25 ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, §26.

26 ECtHR, *Ashby Donald and Others v. France*, §39.

27 ECtHR, dec., *Neij and Sunde Kolmisoppi v. Sweden*, The Law, part D.

28 ECtHR, GC, *Gillberg v. Sweden*, 3 April 2012.

#### *4. Conclusion*

So far, the case law of the European Court of Human Rights, despite using the language of the balancing exercise, has been particularly protective of intellectual property rights. In addition to the particular circumstances of the case, especially the facts that the European Court considered that the forms of expression involved did not enjoy the higher level of protection enjoyed by political expression, this preference for intellectual property rights may also be explained by the liberal inspiration of the European Convention on Human Rights, while the right to culture is still considered as a socio-economic right despite its transversal nature.

# Taking the Right to Culture Seriously: Time to Rethink Copyright Law

Christophe Geiger\*

## 1. Introduction

The human right to culture is recognised at global level in Article 27 of the Universal Declaration of Human Rights<sup>1</sup> and Article 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>2</sup> At the same time, both these provisions incorporate "the right to the protection of the moral and material interests" of creators, causing a potential and inherent tension between these rights and access to science and culture. However, the exact implications of these provisions still remain unclear and are debated at scholarly<sup>3</sup> and policy levels.<sup>4</sup> In the framework of this article, it will be argued that if Article 27 of the UDHR and Article 15 of the ICESCR are to be taken seriously, then access to culture should be recognised as one of the main, if not the ultimate, goal of copyright protection.<sup>5</sup> Such an assumption implies that the moral and material interests of creators are protected in order to enable cultural development, which should lead to a "rethinking," reconsidering and reshaping of copyright as an "access right," meaning as a right to grant access (and not to hinder it), as a right to say "yes" rather than a right to say "no," as an inclusive rather than an exclusive right.

One clarification needs to be made upfront: such an understanding has nothing to do with an "anti-copyright" position. In fact, anyone nowadays questioning the functioning of the current system and bringing forward "access" arguments tends to be immediately described as sympathising with greedy "pirates" who claim broad access on the internet and want to consume all cultural products for free, stealing the bread out of the mouth of poor creators. This shows how polarising the debates have

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\* This article presents a very brief summary of the author's ideas developed in other writings, in particular "Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests," Max Planck Institute for Innovation and Competition Research Paper No. 15-07 2015, forthcoming in R. Giblin and K. G. Weatherall (eds), *What If We Could Reimagine Copyright?* (Canberra: Australian National University Press, 2016).

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- 1 See United Nations General Assembly, Universal Declaration of Human Rights, Resolution 217 A (III), 10 December 1948.
  - 2 See United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, Vol. 993, 3.
  - 3 See C. Sganga, "Right to Culture and Copyright: Participation and Access," in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK: Edward Elgar, 2015), 560; L. Shaver and C. Sganga, "The Right to Take Part in Cultural Life: On Copyright and Human Rights," *Wisconsin International Law Journal* 27.4 (2010): 637–62; L. Shaver, "The Right to Science and Culture," *Wisconsin Law Review* 1 (2010): 121–84; L. Shaver, "Intellectual Property and the Right to Science and Culture: The Reports of the Special Rapporteur in the Field of Cultural Rights," in this issue; C. Geiger, "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles," in Geiger, *Research Handbook*, 661; A. Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science," *Human Rights Quarterly* 35.1 (2013): 143–75.
  - 4 Two notable reports in this sense are the UN Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Copyright Policy and the Right to Science and Culture*, A/HRC/28/57, 24 December 2014 (hereinafter "Copyright Report"), and the UN General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights, Patent Policy and the Right to Science and Culture*, A/70/279, 4 August 2015.
  - 5 See in this sense also F. Gurry, "Developments in the International Intellectual Property System," in C. Geiger (ed.), *The Intellectual Property System in a Time of Change: European and International Perspectives* (Paris: LexisNexis, 2016), 61, underlining that the role of copyright is "finding a balance between all the competing interests that surround the act of cultural creation. On the one hand, there are the interests of the creators, who derive their economic existence through the restriction on access that copyright entails. On the other hand, there are the interests of society and the general public. Access is the reason for which we are interested in cultural production" (emphasis added).

been. As Jessica Litman has convincingly described, “the middle ground seems to have disappeared entirely. One is either ‘one of us’ or ‘one of them’.”<sup>6</sup> Claiming access, however, does not mean that the access should be for free, but it should be possible under fair conditions, and that copyright should not block future creativity.<sup>7</sup> Nothing else has been said by the Court of Justice of the European Union in the famous *Magill* decision of 1995,<sup>8</sup> when it considered that the refusal to grant a licence with the objective of blocking a competitor from proposing a new product on the market, without any reason other than to hinder him from entering that market, is an abuse of dominant position. One problem is that it took many years of litigation for courts to come to this result, showing that internal mechanisms are needed within the copyright system as such, in order to avoid these cases occurring in the future as well.

## 2. The Urgency of Rethinking Copyright as an Access Right

Copyright, originally conceived as a tool to protect the author and to provide incentives for him or her to create for the benefit of society, is nowadays more and more perceived as an instrument to the advantage of “large, impersonal and unlovable corporations.”<sup>9</sup> A major study on Europeans’ perception of intellectual property, conducted by the European Observatory on Infringements of Intellectual Property Rights, found that more than 40 percent of European Union citizens, when asked who benefits the most from intellectual property protection, mentioned large companies and famous artists,<sup>10</sup> and not creators or society at large. Copyright is increasingly perceived as a right to sanction and punish<sup>11</sup> that prevents the free flow of information and access to knowledge or cultural participation, not as a right that has positive effects for the development of society. In the same report by the European Observatory, it was equally disclosed that almost 50 percent of European Union citizens between 15 and 24 years old consider illegal access to copyright-protected content to be “an act of protest.”<sup>12</sup> Nowadays, young Europeans often perceive protesters against the copyright system as the “cool” guys, the “bad” guys being the copyright owners, the majors of the music industry or the big studios in

6 See J. Litman, “War and Peace: The 34th Annual Donald C. Brace Lecture,” *Journal of the Copyright Society of the USA* 53.1–2 (2006): 101–21, at 104.

7 See also C. Geiger, “Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalized World,” *European Intellectual Property Review* 28.7 (2006): 366–73.

8 See European Court of Justice, Judgment in *RTE and ITP v. Commission*, joined cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98. For a comment, see T. Doherty Reagan, “The Ascendancy of European Community Law—The Implications of the Court of Justice Decision in *Magill* on the Balance between National and EC Intellectual Property Law,” *Georgia Journal of International and Comparative Law* 25.3 (1996): 681–705.

9 See J. C. Ginsburg, “How Copyright Got a Bad Name for Itself,” *Columbia Journal of Law and the Arts* 26.1 (2002): 61–73.

10 See Office for Harmonization in the Internal Market (Trade Marks and Designs), *European Citizens and Intellectual Property: Perception, Awareness and Behaviour*, November 2013 (hereinafter “OHIM Report”), 66.

11 A good reason contributing to this perception might also be the tendency to increase criminal sanctions for copyright infringement in intellectual property legislation, at international, regional or national level. See C. Geiger, “The Rise of Criminal Enforcement of Intellectual Property Rights ... and Its Failure in the Context of Copyright Infringements on the Internet,” in S. Frankel and D. Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge: Cambridge University Press, 2014), 113. This subject has been widely debated in different communities, from academia to international organisations. See, for instance, for an overview in the literature, C. Geiger (ed.), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Cheltenham, UK: Edward Elgar, 2012).

12 See OHIM Report, 12.

the film industries.<sup>13</sup> The large street protests against the Anti-Counterfeiting Trade Agreement (ACTA) clearly demonstrated this.<sup>14</sup> Even among creators, copyright is increasingly perceived as a hurdle in the creative process, as the success of so-called "open content" models clearly evidences. The existing empirical studies start to show that the earnings of creators generated under the current copyright system are too low, meaning that too little of this money ends up in their pockets.<sup>15</sup>

Rethinking copyright as an access right is therefore imperative in order to guarantee that copyright is again supported by the general public, and thus to solve the legitimacy crisis that it is facing today.<sup>16</sup> As has been argued elsewhere, such an approach would correspond to human rights<sup>17</sup> foundations as enacted at European and international level, but also to the historical<sup>18</sup> and philosophical<sup>19</sup> foundations of copyright law as it emerged in the eighteenth century.

### 3. *The Practical Consequences of Considering Copyright as an Access Right*

Considering copyright as an access right is not merely a theoretical exercise, but can effectively establish or contribute to good practices in the field. In fact, there are several practical consequences that need to be briefly mentioned: first, those related to evidence-based copyright legislation (section 3.1), then to the fact that the rights of intellectual property owners also imply duties (section 3.2), and lastly that both aspects lead to the need to "rethink" copyright law (section 3.3).

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- 13 See European Union Intellectual Property Office, *Intellectual Property and Youth—Scoreboard 2016*, April 2016, revealing that 25 percent of young Europeans "admitted to having intentionally used illegal sources to access digital content in the past year", at 116.
- 14 In this sense, see for example K. Gracz, "On the Role of Copyright Protection in the Information Society: Anti-ACTA Protests in Poland as a Lesson in Participatory Democracy," *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law* 4 (2013): 21–35; C. Geiger, "Multilateralism vs. Plurilateralism in International IP Law: Lessons to Be Learned from the Failure of the Anti-Counterfeiting Trade Agreement," in *Rethinking International Intellectual Property Law: What Institutional Environment for the Development and Enforcement of IP Law?* (CEIPI-ICTSD Publication Series on Global Perspectives and Challenges for the Intellectual Property System, Issue 1, Geneva/Strasbourg, November 2015), 43; and C. Geiger, "Assessing the Implications of ACTA for the European Union: Legitimate Aim but Wrong Means," in P. Roffe and X. Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge: Cambridge University Press, 2014), 313.
- 15 See M. Kretschmer and P. Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25.000 British and German Writers* (Bournemouth, UK: University of Bournemouth, Center for Intellectual Property Policy and Management, 2007); P. C. DiCola, "Money from Music: Survey Evidence on Musicians' Revenue and Lessons about Copyright Incentives," *Arizona Law Review* 55 (2013): 2–70.
- 16 See, in this regard, Vice-President of the European Commission responsible for the Digital Agenda, N. Kroes, "Our Single Market Is Crying Out for Copyright Reform," Speech/14/528, Information Influx International Conference, Amsterdam, 2 July 2014: "Every day citizens ... across the EU break the law just to do something commonplace. And who can blame them when those laws are so ill-adapted. ... Technology moves faster than the law can, particularly in the EU. Today, the EU copyright framework is fragmented, inflexible, and often irrelevant. It should be a stimulant to openness, innovation and creativity, not a tool for obstruction, limitation and control." See also, in the context of the European Union, C. Geiger, "The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information," *Intellectual Property Quarterly* 14.1 (2010): 1–14.
- 17 See C. Geiger, "Reconceptualizing the Constitutional Dimension of Intellectual Property," in P. Torremans (ed.), *Intellectual Property and Human Rights*, 3rd ed. (Boston: Kluwer Law International, 2015), 115.
- 18 See C. Geiger, "The Influence (Past and Present) of the Statute of Anne in France," in L. Bently, U. Suthersanen, and P. Torremans (eds), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Cheltenham, UK: Edward Elgar, 2010), 122.
- 19 See C. Geiger, "The Social Function of Intellectual Property Rights, Or How Ethics Can Influence the Shape and Use of IP law," in G. B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property* (Cheltenham, UK: Edward Elgar, 2013), 153.



### 3.1 Evidence-Based Copyright Legislation

Copyright should be conceived as contributing equally to the development of intellectual, cultural and economic progress. This would require the legislator to convincingly justify the granting of intellectual property rights in the first place. In this sense, one of the responsibilities of policymakers would be to demonstrate the reasons for passing the legislation and the expected results, by means of reliable data and impact-assessment studies that make it possible to measure the probable outcomes of the legislative activity.<sup>20</sup> The main consequence of this would be that the legislator would have *an obligation to justify any extension of intellectual property law*, which would shift the burden of proof. In fact, this is exactly the opposite of what has happened so far with intellectual property law-making, where any extension has been considered progress and any limitation of the right has had to be very carefully justified.<sup>21</sup>

### 3.2 Rights Imply Duties

In the past, legislators designed new intellectual property regulations in order to enhance the protection for copyright owners by developing or broadening their rights. However, these regulations should have some counterparts, meaning that they should, in parallel, also establish a set of *legal duties for right holders*. As one scholar appropriately stated, "the grant of a right in the intellectual property may itself be derivative of a duty to others; that is, when the intellectual property owner acquires a legal intellectual property right, a duty to the public is simultaneously imposed on the intellectual property owner."<sup>22</sup> Such duties result from the social contract and the functions of intellectual property that derive from it:<sup>23</sup> receiving rights should also come with responsibilities.

Such obligations imposed on right holders could, for example, consist in a duty to disseminate as widely as possible protected creations and to exploit them. Creating this obligation might be inspired, for instance, by the European Union trademark law,<sup>24</sup> where the non-exploitation of a

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20 See, in this sense, in the context of the European Union, C. Geiger, "The Construction of Intellectual Property in the European Union: Searching for Coherence," in C. Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives* (Cheltenham, UK: Edward Elgar, 2013), 5. See also the report of Professor I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, An Independent Report (May 2011), 1. More generally on the importance of evidence-based policies in copyright law, see J. Poort, *Empirical Evidence for Policy in Telecommunication, Copyright and Broadcasting* (Amsterdam: Amsterdam University Press, 2015), 9: "Increasingly, politicians, judges and stake holders require economic analysis and economic evidence to make informed decisions about new policy measures, to make optimal decisions within the legal boundaries and to fathom the proposed consequences of proposed legal interventions. Without empirical evidence *they may simply assume the effects of a policy measure as an article of faith*" (emphasis added).

21 See on this issue more generally C. Geiger, "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law," *Vanderbilt Journal of Entertainment and Technology Law* 12.3 (2010): 515–48.

22 See E. F. Judge, "Intellectual Property Law as an Internal Limit on Intellectual Property Rights and Autonomous Source of Liability for Intellectual Property Owners," *Bulletin of Science, Technology and Society* 27.4 (2007): 301–13, at 311. See also, on the idea of duties of authors in the field of copyright law, C. Colin, "The Author's Duty," *Revue Internationale du Droit d'Auteur* 224 (2010): 160.

23 See Geiger, "The Social Function of Intellectual Property Rights."

24 See Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJEU L 336/1 of 23 December 2015 (hereinafter "EU TM Directive 2015/2436"); Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No. 2868/95 implementing Council Regulation (EC) No. 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No. 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJEU L 341/21 of 24 December 2015.

trademark might result in its loss.<sup>25</sup> In the copyright context, if losing the right appears quite radical, it could result at least in an obligation to license it, after a determined period of time, in case of non-exploitation. Further, duties could also reside in a prohibition on preventing the dissemination of any protected creation, for example, by securing access to orphan or out-of-print works, forbidding the use of contracts or Technical Protection Measures that are blocking access through exceptions and limitations, and other analogous obligations.<sup>26</sup> In this respect, one of the duties of right holders could be, for instance, to guarantee that access is granted under fair conditions (pricing issue) and that business models are adapted to the needs of consumers (easy to use, diversity of content, usable on a variety of devices, etc.). In fact, granting access under unfair conditions or at a price that is too high often results in hindering access for a majority of people.<sup>27</sup> Libraries and archives could have a particular role to play in this context, as they are often the vehicle for accessing copyrighted works for many citizens. Among other obligations, right holders should also allow public discourse about the protected work through parody, quotations, creative reuse and the like. Some of these obligations clearly result from fundamental rights such as freedom of expression and freedom of information,<sup>28</sup> freedom to create,<sup>29</sup> or freedom to conduct a business,<sup>30</sup> and the positive obligation of the state to protect those rights<sup>31</sup> could involve developing internal mechanisms within intellectual property law in order to secure them.

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25 The absence of genuine use is a ground for revocation of trademark rights in Article 19(1) of the EU TM Directive 2015/2436.

26 See more detailed C. Geiger, "The Future of Copyright in Europe."

27 To this effect, an independent regulation authority such as an "Observatory on access to copyrighted work" could be created. It could be built on the model of some European competition authorities, since statutory organised mediation is a regulatory option that has been underexploited so far, and it should gain more importance in the future in the debate on how to secure balanced solutions in copyright by taking into account all interests. See more detailed on this proposal, C. Geiger, "Statutory Licenses as an Enabler of Creative Uses," *Max Planck Institute for Innovation and Competition Research Paper No. 15-14 2015*, forthcoming in R. M. Hilty and K.-C. Liu (eds), *Exploring Sensible Ways for Paying Copyright Owners* (Berlin: Springer, 2017).

28 The rights to freedom of expression and freedom of information are established in Article 19 of the International Covenant on Civil and Political Rights echoing Article 19 of the UDHR; Article 10 of the European Convention on Human Rights; Article 11 of the European Union Charter of Fundamental Rights; Article 13 of the American Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights. Further, see C. Geiger and E. Izyumenko, "Copyright on the Human Rights Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression," IIC 45 (2014): 316–42; D. Voorhoof, "Freedom of Expression and the Right to Information: Implications for Copyright," in Geiger, *Research Handbook*, 331.

29 The fundamental right to artistic freedom has been recognised under national laws, such as in Article 5, paragraph 3, sentence 1 of the Basic Law for the Federal Republic of Germany. See also the judgment of the First Senate of the Federal Constitutional Court, 1 BvR 1585/13, 31 May 2016, where the Court decided in favour of the artist's freedom of creative expression. For a summary of the decision in English, see "The Use of Samples for Artistic Purposes May Justify an Interference with Copyrights and Related Rights," Press Release No. 29/2016, 31 May 2016, at <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-029.html>. More generally, see Geiger, "Statutory Licenses as an Enabler of Creative Uses."

30 The right to freedom to conduct a business is protected under Article 16 of the European Union Charter of Fundamental Rights. See further G. Ghidini and A. Stazi, "Freedom to Conduct a Business, Competition and Intellectual Property," in Geiger, *Research Handbook*, 410, and in the context of enforcement of intellectual property: C. Geiger and E. Izyumenko, "The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking," *American University International Law Review* (forthcoming 2016).

31 For the concept of positive obligations of states within the European system of human rights, for example, see J. F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks No. 7 (Strasbourg: Council of Europe, 2007), 7ff.

One such legal tool could be to grant *users' rights*, which could be enforced in the courts.<sup>32</sup> Limitations and exceptions would not only result in mere defences, but also in subjective rights of equal value to exclusive rights. This would be important in the case of online contracts when, for example, clauses restrict uses that are permitted by statutory limitations, or when technical barriers in practice hinder access and the benefit from an exempted use.<sup>33</sup> In its latest decisions, the Court of Justice of the European Union has clearly recognised and endorsed such users' rights.<sup>34</sup> Beyond the field of limitations and exceptions, procedural safeguards in the case of intellectual property enforcement measures are another area where rights of defendants can be framed as users' rights.<sup>35</sup>

### 3.3 "Rethinking" Copyright Law

There are several approaches to "rethinking" copyright law, three of which in particular will be briefly addressed here: the need to establish a more selective test to access copyright protection, the need to "flexibilise" limitations to copyright, and the desirability of better remunerating creators.

To start with, if copyright is considered as an access right, this should also entail some changes in positive law. In other words, this would mean that exclusive rights would have to be envisaged restrictively in order to secure that they only protect works that bring a true creative added-value.<sup>36</sup> This would diminish the blocking effect of creations with low creative input on future creativity. In parallel, limitations would have to be designed in a flexible manner, so as to adapt to new circumstances.

Introducing a sort of "three-step test" to access copyright protection might be one solution in achieving this objective. The current rule of the "three-step test" sets up admissibility criteria for copyright limitations.<sup>37</sup> If one considers that copyright should enhance access, it is difficult to understand then why criteria are set forth only for limitations and exceptions. In fact, a "three-step test" could also be created for the grant of copyright protection. Put differently, any creative

32 See also in this sense, R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), 279; T. Riis and J. Schovsbo, "Users' Rights: Reconstructing Copyright Policy on Utilitarian Grounds," *European Intellectual Property Review* 29.1 (2007): 1–6; C. Geiger, *Droit d'auteur et droit du public à l'information. Approche de droit comparé* (Paris: Litec, 2004), 185. In the context of technical measures, see A. Ottolia, "Preserving Users' Rights in DRM: Dealing with 'Judicial Particularism' in the Information Society," *IIC* 35 (2004): 491–521.

33 See C. Geiger, "The Answer to the Machine Should Not Be the Machine: Safeguarding the Private Copy Exception in the Digital Environment," *European Intellectual Property Review* 4 (2008): 121–9.

34 See in this sense, Court of Justice of the European Union (CJEU), Judgment in *UPC Telekabel Wien*, C-314/12, ECLI:EU:C:2014:192; CJEU, Judgment in *Eugen Ulmer*, C-117/13, ECLI:EU:C:2014:2196.

35 See CJEU, *UPC Telekabel Wien*, "in order to prevent the fundamental rights recognized by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules *must provide a possibility for internet users to assert their rights before the court* once the implementing measures taken by the internet service provider are known," para. 57 (emphasis added). See detailed on users' rights in the context of the enforcement debate, Geiger and Izyumenko, "The Role of Human Rights in Copyright Enforcement Online"; K. Weatherall, "Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties," Legal Studies Research Paper No. 16/52, Sydney Law School (forthcoming in *American University International Law Review* 2016).

36 In patent law, for example, this is called "the search for quality."

37 For an in-depth analysis of the "three-step test," see R. M. Hilty, J. Griffiths, and C. Geiger, "Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law," *IIC* 39 (2008): 707–13; D. Gervais, C. Geiger, and M. R. F. Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law," *American University International Law Review* 29.3 (2014): 581–626.

work would first have to fulfil a set of conditions<sup>38</sup> in order to qualify for copyright protection. This would guarantee that only those works that are really creative and represent an added value are protected by intellectual property. In order to maintain an inclusive copyright system, works that fail to pass the copyright access-test could have other suitable protection regimes applied, such as existing design law or unfair competition rules, or, when mechanisms are unavailable, they could still be designed.

"Flexibilising" limitations is another approach to rethinking copyright law. Starting from the assumption that copyright serves the interest of society by encouraging the creation of new works, it is necessary to expand space for creativity. Even in economic terms, the value of limitations can be measured.<sup>39</sup> There are, in fact, numerous businesses that use "free" material — meaning material use which is allowed under a copyright limitation (so-called "added value services") — to generate income and economic growth.<sup>40</sup> Even if the copyright limitation permits remuneration, the absence of costs related to finding the right holder and to negotiating a licence (not to mention the costs related to litigation, in that event) also has a measurable value, which eventually facilitates the creative reuse of existing works.<sup>41</sup>

Lastly, rethinking copyright law implies renewed attention to the remuneration system for creators. This aspect is often neglected in the access debate within the copyright regime.<sup>42</sup> It is crucial that the copyright system benefits the creators in a better way, meaning that they must participate more effectively in the exploitation of their works.<sup>43</sup> For this to be achieved, one could, for instance, imagine a better contract law<sup>44</sup> (with some mandatory rules, like the copyright contract rules of some European countries), but also an increase in statutory licences if these offer more favourable financial solutions for creators, compared to the exclusive right system.<sup>45</sup> It is finally crucial to move

38 For elaboration on these criteria, see C. Geiger, "Copyright as an Access Right: Securing Cultural Participation through the Protection of Creators' Interests," *Max Planck Institute for Innovation and Competition Research Paper No. 15-07*, 2015, 24ff.

39 See, for example, T. Rogers and A. Szamoszegi, *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use* (Washington, DC: Computer and Communications Industry Association, 2011), according to which fair use-intensive industries were responsible for 23 percent of US economic growth; B. Gibert, *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity* (Brussels: Lisbon Council for Economic Competitiveness and Social Renewal, 2015), stating that countries that employ a broadly "flexible" regime of exceptions in copyright saw higher rates of growth in value-added output throughout their economies.

40 See L. Gibbons and X. L. Wang, "Striking the Rights Balance among Private Incentives and Public Fair Uses in the United States and China," *John Marshall Review of Intellectual Property Law* 7 (2008): 488–528, at 494.

41 See further Geiger, "Statutory Licenses as an Enabler of Creative Uses."

42 As has been underlined, "Designing copyright law to promote the material interests of authors requires nuance. 'Stronger' copyright protection does not necessarily advance the material interests of creators", see Copyright Report, A/HRC/28/57, para. 48.

43 See Geiger, "Promoting Creativity through Copyright Limitations"; R. M. Hilty, "Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der Tripolaren Interessenlage im Urheberrecht," in A. Ohly, M. Lehmann, T. Bodewig, and T. Dreier (eds), *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts, Festschrift für Gerhard Schricker zum 70. Geburtstag* (Munich: Beck, 2005), 325.

44 See R. M. Hilty, "Five Lessons about Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn," *Journal of the Copyright Society of the USA* 53 (2006): 103–38, at 137.

45 See also Copyright Report, A/HRC/28/57, para. 46; J. C. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?" *Berkeley Technology Law Journal* 29 (2014): 1384–446, at 1446. These statutory licences already exist in a wide variety of legislations, see C. Geiger and O. Bulayenko, "Statutory Remuneration Rights: International Legal Framework and National Approaches," General Report for the ALAI Congress 2015, in S. von Lewinski (ed.), *Remuneration for the Use of Works: Exclusivity vs. Other Approaches* (Berlin: de Gruyter, forthcoming 2016).

from a mere rhetoric of protecting creators to a more practical and measurable reality. Authors do not care about, or have great need of beautiful theoretical statements. They need—like anyone else—to pay their bills at the end of the month. If it is merely an illusion to count on copyright law alone for these purposes (a cultural policy needs other incentive mechanisms in order to support creators), the system should at least contribute to remunerating creators in a more efficient way than it does today.

#### 4. *Conclusions*

As the United Nations Special Rapporteur in the field of cultural rights has rightly noted, “The moral and material interests of authors are deeply affected by copyright policy, which in some ways falls short of adequately protecting authorship. In other ways, copyright laws often go too far, unnecessarily limiting cultural freedom and participation.”<sup>46</sup> In this context, establishing copyright as a “right to access” is imperative. Of course, both the protection and access aspects of copyright are closely linked. Nevertheless, some of the current “overprotective” tendencies call for an emphasis on cultural participation and on the inclusive function of copyright law in order to re-establish a fair balance of interests within the system. It is very important that copyright is understood as a cultural right rather than a right to forbid or sanction, and the poor image that intellectual property sometimes has in public opinion is a clear indicator of this. Therefore, (re)conceiving copyright as an access right<sup>47</sup> will ensure that cultural and scientific creations are still available for future innovations, while at the same time better remunerating creators for their important contributions to the progress of society.

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46 See Copyright Report, A/HRC/28/57, para. 28.

47 In this spirit more generally, see Copyright Report, A/HRC/28/57. The Special Rapporteur has also recommended that “States should further develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and subsidy of openly licensed works”, para. 102. For the recommendations of the UN Special Rapporteur in respect to the “three-step test,” see paras 104ff.





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