

TOWARD AN ALTERNATIVE NORMATIVE FRAMEWORK FOR
COPYRIGHT:

FROM PRIVATE PROPERTY TO HUMAN RIGHTS♦

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INTRODUCTION

What does it mean to say that “intellectual property is a form of intangible property”?¹ We generally accept that the legal rights associated with intellectual property (“IP”) are those that flow from the fact that it is property and can be owned, thereby importing fundamental concepts of property law, such as excludability and alienability, into IP law.² In the late twentieth century, the language of property law has also been used to describe a “ratcheting up” of IP protection.³ Conferring property rights in information is said to constrain free expression,⁴ since property ownership emphasizes the right to exclude. Considering the extent to which modern copyright law takes into account the public policy interest of ensuring freedom of expression to facilitate development needs and access to knowledge (“A2K”), there is a surprising dearth of scholarship on the basic question of whether the accommodation of such concerns is hampered by the long-held assumption that copyright is a form of private property (with consequent rights and restrictions). Existing scholarship on the “proportization” of copyright also revealed a certain amount of

¹ As “property,” IP belongs in the category known to the common law as “choses in action,” a sub-species of personal property. See MICHAEL BRIDGE, *PERSONAL PROPERTY LAW* (3d ed. 2002) (describing copyright as a “pure intangible” and noting that the question whether information can constitute property has not been “satisfactorily resolved”). See also Christopher Jensen, *The More Things Change the More They Stay the Same: Copyright, Digital Technology and Social Norms*, 56 STAN. L. REV. 536 (2003) (observing that the exclusive rights in copyright law have “in rem” characteristics as well as an “almost absolute” right against infringement, and positing that copyright, as a form of positive law based on a primarily utilitarian rationale can be contrasted with the more “natural rights” bias of real property law); but see CATO HANDBOOK FOR CONGRESS, ch. 40 (Cato Institute 2003) (noting that the idea of IP as property is unsettled and troubling even from a natural rights perspective).

John Locke is often cited both for an instrumentalist, as well as a normative basis, for granting IP rights in the form of property. For a detailed analysis, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (arguing that a labor theory of IP based on Lockean property notions is incomplete, and some aspects of Hegelian personality theory should also be relied on in support thereof). See also PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996) (arguing in favor of an instrumentalist over a proprietarian approach to IP).

² Indeed, the World Intellectual Property Organization (“WIPO”) describes “intellectual property” as “legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.” WIPO *INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW & USE*, ch. 1 (WIPO Publication No. 489) (emphasis added). See also N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1 (2001) (analyzing the utilitarian and natural rights rationales for IP protection in the libertarian context) and Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007) (describing the evolution of IP rights from roots in unfair competition to a more property-like exclusion regime).

E.g., Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, <http://www.wired.com/wired/archive/4.01/white.paper.html>; James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 94 (1997).

⁴ See Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (World Intellectual Property Organization 1999) (highlighting difficulties with the notion of property ownership as a fundamental human right).

confusion, even disagreement, over the use of terms such as the “public domain” and the “commons.” In light of the recent, successful attempt to craft an international Development Agenda for the World Intellectual Property Organization (“WIPO”), and the recent exploration by scholars into the link between IP rights (“IPRs”) and human rights,⁵ it seems not only timely, but necessary, to re-examine the implications of a continuing assumption that copyright law is a form of private property.

This article seeks to analyze that question and consider what it means for the rights and relationships between and among different interest groups. I will attempt to show that how we resolve this question in copyright law affects the broader problem of how modern copyright law should accommodate A2K and development policy. My hypothesis is that traditional forms of property classification do not facilitate the kind of flexible thinking that will accomplish this, although certain concepts associated with property remain helpful. I argue that modern copyright law must adopt a framework that more easily assimilates social and cultural norms, and that considers needs and interests that have hitherto not been made explicit in international copyright law. In this respect, I examine recent scholarly work on the intersection between IPRs and human rights as a foundation for such a broader normative framework. Ultimately, I propose that the international copyright system should place greater emphasis on human rights objectives and norms than it has to date, such that the latter may be conscripted to create a flexible yet workable framework for future copyright policy. I conclude by suggesting that the recently-adopted WIPO Development Agenda can serve as the basis for broader thinking about the future of international copyright law.

This paper is accordingly divided into three Parts. Part I reviews the rhetoric, assumptions, and consequences of viewing “copyright as property,” including two concepts directly relevant to A2K and development, *viz.*, the “public domain” and the “commons” as these terms have been used in copyright circles. The prevailing scholarly view is that a robust public domain is essential for A2K; it is therefore troubling that the term is neither universally nor uniformly defined. A similar lack of precision and clarity accompanies much discussion of the concept of the “commons.”

⁵ See, e.g., Audrey R. Chapman, *Approaching Intellectual Property as a Human Right*, UNESCO COPYRIGHT BULL., Vol. XXXV No. 3 (July/Sept. 2001); Jakob Cornides, *Human Rights and Intellectual Property: Conflict or Convergence?*, 7 J. WORLD INTELL. PROP. 135 (2004); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 43 (2003) and Laurence R. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Vandana Shiva, *TRIPS, Human Rights and the Public Domain*, 7 J. WORLD INTELL. PROP. 665 (2004); David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (2003).

Part II examines the emerging link between human rights and IP. Though there are key differences between human rights and IPRs, international human rights law covers ground similar to IP, while emphasizing social values such as free expression and self-actualization. Indeed, these treaties also cover property ownership; a potential conflict which I examine in this Part. Part III considers how copyright policy might work within a human rights framework. I examine current academic commentary on the intersection between human rights and IP, and suggest that the WIPO Development Agenda provides a promising vehicle for integrating human rights and IP policy.

I. "PROPERTY," THE "PUBLIC DOMAIN," AND THE "COMMONS"

In this Part, I examine the traditional explanations for and contours of copyright, IP and property, with the aim of providing a starting point for determining the appropriate framework for incorporating important non-economic, social, and cultural norms and objectives (such as greater A2K) into copyright policymaking. I argue that a strategically useful way to achieve this may be to consider the public domain as related to, and perhaps even a subset of, the concept of the commons. Assuming that a vibrant, diverse and expansive public domain is desirable, possibly even necessary, for A2K to flourish⁶ so as to facilitate development, the modern concept of the commons will need to develop deeper insights into its various possible structures, and to acknowledge inequalities within the world trade and wealth distribution orders.

A. *Copyright as "Property"*

In the United States ("US"), the traditional view is that the constitutional basis for copyright reflects an instrumentalist theory of copyright protection. That is to say, Article 1, Section 8, Clause 8, which empowers Congress to grant the "exclusive Right" for "limited Times" to "Authors" in their "Writings" so as to achieve "Progress in Science and useful Arts," embodies the rationale that conferring limited property rights is the best means of achieving the broader public interest goal of knowledge advancement and

⁶ Professor Diane Zimmerman sketches the evolution of changing views of the public domain, and summarizes more skeptical views of the public domain, in the context of changes to US copyright law relating to copyright restoration. See Diane L. Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297 (2004). She argues that "the preservation of a rich public domain is normatively correct even if commodification of speech goods were actually to turn out to be the most efficient way to promote their creation and dissemination. . . . [T]he personal and social values of autonomy and participation in self governance that are supported by access to a large commons generally ought to trump efficiency where a choice cannot be avoided." *Id.* at 310. She argues further that there is "a refrain running through both First Amendment and copyright case law that suggests a protected commons does exist, and that it is rooted heavily, although not necessarily exclusively, in the First Amendment." *Id.* at 329.

societal development.⁷ It accomplishes this by mediating between the interests of creators (copyright owners) in protecting their creations, and those of the public (users) in having access to a growing body of innovation.⁸

It has been noted,⁹ however, that the notion that copyright law represents a *quid pro quo*, a bargain of sorts between owners and users, has in the latter part of the twentieth century ceded its primacy to a more economics-oriented, though no less instrumentalist, analysis. This economics-based analysis views copyright as a system of incentives, the scope and duration of which are to be determined not as a policy-balancing exercise that has the primary goal of achieving fairness between owners and users, but purely as a means to incentivize innovation. The “incentive theory” posits that creators will be motivated to create new works through the grant of exclusive rights, from which they may reap benefits (i.e., profit) through engaging in market transactions. Further, since this “transactional framework allows for the efficient distribution of expressive works, thereby maximizing the public’s welfare in accessing expression,”¹⁰ it fulfills copyright’s Constitutional objective by aligning private interests with the public interest to optimize social welfare.

“Incentive theory” and a wholly economic analysis of copyright law do not fully explain all the principles that form part and parcel of modern copyright law, and do not easily accommodate the influence of other theories, such as the natural rights theory;¹¹ however, they fit particularly well with the con-

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW & PRACTICE* (1989). See also Trotter Hardy, *Contracts, Copyright & Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2 (1995) (cited for this proposition in Part I).

⁹ See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* (2001).

¹⁰ Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and its Application to Software*, 15 BERKELEY TECH. L.J. 865, 908 (2000) (also pointing out that incentive theory minimizes the free-riding problem inherent in public goods (e.g., information), due to their non-rivalrous and non-excludable nature. Copyright law deals with the non-excludable aspect of works by creating a mechanism for exclusive legal rights, thereby eliminating the “public goods problem” of, or market failure from, under-production.). But see Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 635 (2007). On copyright protection for public goods, see Wendy J. Gordon, *Touring the Certainties of Property & Restitution: A Journey to Copyright and Parody*, in *CERTITUDES DU DROIT/CERTAINTY AND THE LAW*, (E. Mackaay, ed. 2000); see also Michael Abramowitz, *Copyrighted Works as Public Goods*, *IPCENTRAL. REV.*, May 6, 2004, available at www.ipcentral.info/review/v1n2abramowicz.pdf (last visited Nov. 26, 2008).

¹¹ See J. H. Reichman, *Goldstein on Copyright Law: A Realist’s Approach to a Technological Age*, 43 STAN. L. REV. 943, 946-49 (1991).

For a recent critique of copyright theory as either rights-based or grounded in economic theory, see Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007). Of particular relevance to the present discussion is Professor Cohen’s discussion of the so-called “capabilities” approach, “which takes as its lodestar the fulfillment of human freedom, and defines freedom in terms of the development of affirmative capabilities for flourishing,” the utility of which in the context of human rights and IP I

cept of copyright as a form of property, which confers upon a property owner *control* over the manner, means, and extent of its exploitation.¹² Even as the perception of *how* copyright law functions may have changed over time, the idea that copyright is a form of property has remained a constant and underlying theme. As a leading scholar recently put it,

“Property” is a term that involves a complex mix of assumptions, metaphors, and analogies and that obscures as much as it reveals. “Intellectual property” only compounds this complexity and sometimes causes us to underestimate the full range of options we may employ to effectively pursue distributive or utilitarian policy goals.¹³

It is somewhat alarming to find that there is not universal agreement as to the full consequences of utilizing “property talk” in the copyright arena.

One of the earliest and best-known parallels drawn between tangible property and intangible copyright is that of Sir

discuss *infra* Part IIIA. *Id.* at 1159.

¹² LITMAN, *supra* note 9. For an overview of the main theories underpinning IPRs, see William W. Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* (S. Munzer ed., 2000) (critiquing the four dominant theoretical approaches: utilitarianism (concerned with the maximization of net social welfare, including the relevance of economic analysis); labor theory (concerned with the Lockean thesis regarding the natural right to one’s own labor); personality theory (concerning Kantian and Hegelian notions of certain entitlements as necessary for human fulfillment); and social planning (concerned with a broader notion of social welfare beyond utilitarianism)).

For influential and comprehensive accounts of the history of copyright law, the Anglo-American statutory origin of which is generally attributed to the Statute of Anne (1710), see MARK ROSE, *AUTHORS & OWNERS: THE INVENTION OF COPYRIGHT* (1993), and *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 75 (2003); see also BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 *EMORY L.J.* 909 (2003). In the eighteenth and nineteenth centuries in France, the notion of authors’ rights gained ground as a basis for copyright. See CARLA HESSE, *PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789-1810* (1991), and Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.* 991 (1990). A comprehensive survey of the evolution of patents and copyrights in major European countries, the US, and Japan, and their relationship with economic development in those countries, is that of B. Zorina Khan, *Innovations in Intellectual Property Systems and Economic Development*, <http://www.econ.yale.edu/seminars/echist/eh02/khan-020328.pdf>.

Some writers have also pointed out that fundamental copyright concepts, pertaining to general notions of private/public property and ownership in intangibles, may reach as far back as Roman law. See, e.g., Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 *SANTA CLARA L. REV.* 365 (2004) (citing Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 *MD. L. REV.* 522 (2000)). A brief critique of many of these accounts is provided by Kathy Bowrey, *Who’s Writing Copyright’s History*, 18(6) *EUR. INTELL. PROP. REV.* 332 (1996). In sum, these accounts reveal the underlying Western theoretical basis for much of modern copyright law, the general principles of which are reflected in international agreements such as the 1886 Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), and the 1994 Agreement on Trade-Related Intellectual Property Rights (“TRIPS”).

¹³ Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency and Development)*, 40 *U.C. DAVIS L. REV.* 717, 721 (2007).

William Blackstone as stated in his seminal *Commentaries on the Laws of England*. In this work, Blackstone defined property as “[t]he sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,” and considered private property rights to be “sacred and inviolable.”¹⁴ In relation to copyright, Blackstone saw no difference between land (real property) and books (literary property), arguing that both were things of value and personal by occupation.¹⁵ The Blackstonian view of copyright, therefore, was fairly absolutist and without restrictions now familiar to us, such as limited terms of protection, demonstrating that a perspective favoring the “propertization” of intangible creations already existed in early copyright history.

In the US, although Blackstone’s views were undoubtedly well-known and fairly influential, the Founding Fathers’ fear of creating monopolies contributed to the explicit “limited times” restriction found in the Constitutional clause, to ensure that the “public good fully coincides . . . with the claims of individuals.”¹⁶ In the early, leading case of *Wheaton v. Peters*,¹⁷ the Supreme Court expressly declared that “the copyright recognized in the act of congress, and which was intended to be protected by its provisions, was the *property* which an author has, by the common law, in his manuscript.”¹⁸ The Court further noted that, instead of creating a perpetual copyright, the US copyright law only secures such a property right to an author for a “limited time.”¹⁹ Yet, it is said that copyright law “wears the property label uneasily,”²⁰ especially when recalling its early history as a regulated trade monopoly (in England, leading up to and enshrined in the provisions of the 1710 Statute of Anne²¹) and, subsequently in the US, as a limited monopoly. Nonetheless, “property talk” continues to pervade copyright discourse.

There seems to be little analysis or consensus on what “copyright as property” means.²² From one perspective, the language of

¹⁴ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1779).

¹⁵ See generally *id.*

¹⁶ THE FEDERALIST No. 43 (James Madison). On the early development of copyright law in relation to property concepts in England and the US, see Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777 (2000).

¹⁷ 33 U.S. 591 (1834).

¹⁸ *Id.* at 592 (emphasis added).

¹⁹ *Id.*

²⁰ L. Ray Patterson, *Copyright and “The Exclusive Right” of Authors*, 1 J. INTELL. PROP. L. 1, 37 (1993).

²¹ See Copyright Act 1709 (Statute of Anne), 1710, 8 Ann., c. 19 (Eng.).

²² But see John Tehranian, *Whither Copyright? Transformative Use, Free Speech and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201 (2005) (summarizing leading US copyright cases and selected academic commentary within the context of free speech and the First Amendment).

property can serve merely as an analogy or metaphor, to assist in the understanding and comparison of different, somewhat difficult, even imprecise, concepts.²³ Even metaphors, however, can evolve to become persuasive norms, with a consequently, and perhaps unexpectedly, broad influence on legal doctrine. A second, alternative, perspective is to recognize that, whatever the origin of Anglo-American copyright law, substantive copyright law has become increasingly “properitized” over time. This view is particularly prominent amongst commentators engaged with the economic analysis model.²⁴ A third possibility similarly views “properitization” as inevitable, although analyzed from the viewpoint of natural rights theory, where ownership arises from the act of creation. Whether copyright is viewed as having been “properitized” through actual market-driven behavior and their legal responses, or through the inevitable absorption of what was once a metaphor, or as the inevitable recognition of “natural rights,” however, it is doubtful that copyright represents the ideal model for a clear, coherent property rights system.

Due to a combination of factors, such as its origins, tendency to accommodate so-called “externalities” (e.g., the development of rules that do not relate directly to the decision to create), and reliance on case-by-case and context-specific analysis, copyright is inherently “leaky” and “fuzzy” rather than “well-defined.”²⁵ Considering the various and differing theories all purporting to explain the basis for copyright protection, this lack of clarity is perhaps not surprising, but troubling for purposes of the present enquiry since it is therefore far from easy to discern the contours and boundaries of “copyright as property.” This in turn means that a property-based view of copyright law is likely to obfuscate, rather than clarify, the right balance to be struck in answer to the central question at the heart of copyright law: to what extent is the granting of a private (property) right justified when the inevitable result thereof is to create a form of monopoly (control) over a non-owner’s access to and use of the (copyrightable) property? What type of rules has copyright, as a form of property law, developed to deal with this issue?

Three types of rules can be identified as governing the trans-

²³ See, e.g., LITMAN, *supra* note 9; Tom W. Bell, *Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 233 n.18 (2003) (citing Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 15 (2002)).

²⁴ The most well-known, of course, being WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003); see also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (specifically relating this view to copyright law).

²⁵ LANDES & POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, *supra* note 24. See also Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

fer of entitlements (i.e., the interests protected by law): “property rules,” “liability rules,” and rules of “inalienability.”²⁶ A property rule is one where the parties engage in a voluntary transaction to remove the entitlement from the market, whereas a liability rule is premised not on a voluntary negotiation, but on the payment of an objectively-determined price (e.g., in the form of damages).²⁷ Whichever rule is adopted is generally determined by the level of transactional costs associated with a particular transaction; for IPRs, the prevalent view seems to be that a property rule is more appropriate because of, *inter alia*, lower transaction costs and the comparative difficulty of setting an appropriate objective price.²⁸ To the extent that a property rule²⁹ is believed to be most appropriate for IPRs, including copyright³⁰ – and this is likely to be the case where copyright is viewed through the lens of economic analysis – such a rule tends to emphasize the right to *exclude* (except possibly for a price, as compensation to the owner), as this is part of the control vested in the copyright owner.

On a broader level, these rules do not seem to leave much room for non-market-oriented considerations and wider, somewhat more diffuse, public policy concerns such as development needs and A2K. Although the “property paradigm” seems inextricably bound up with the evolution and current articulation of copyright law, it does not, to my mind, provide an adequate basis for determining if, and to what extent, copyright law ought to fold in these policy issues. Before we turn to considering alternative frameworks and means by which to achieve this, however, it is necessary to discuss other major difficulties with the “property paradigm”: the language and role of the “public domain” and the “commons,” two concepts that are inextricably bound to a property-based perspective, and which have recently exerted considerable influence over copyright discourse.

²⁶ The seminal analysis is probably that of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a recent re-examination of Calabresi and Melamed’s thesis, see Keith N. Hylton, *Property and Liability Rules, Once Again*, (Boston Univ. Coll. of Law Working Paper Series on Law & Economics, Working Paper. No. 05-17, 2005), available at <http://www.bu.edu/law/faculty/papers>.

²⁷ Inalienability, in contrast to the other two forms, reserves to the state the ability to determine transfers of entitlements. It is therefore less relevant to the question of determining the appropriate rule for IPRs.

²⁸ See, e.g., Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585 (1998); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994).

²⁹ Although it must be noted that the copyright system accommodates both types of rule; e.g. compulsory licensing would be an example of a liability rule.

³⁰ Professors Mark Lemley and Philip Weiser have recently suggested that a third rule could also be relevant: that of “no liability” (or “zero price” liability), particularly for a commons-based regime. See Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007).

B. Copyright and the “Public Domain”

Increasing “proptertization” through the expansion of private property rights necessarily impacts the availability of the property in question for public use. Yet “the presence of a robust public domain is an essential precondition for cultural, social and economic development and for a healthy democratic process.”³¹ The public domain and its continued existence are thus positioned as the polar opposite of private property and as critical prerequisites for the facilitation and growth of A2K. Nonetheless, as a wealth of (primarily US) legal scholarship has shown, there is little clarity as to what, exactly, constitutes the public domain.³² At present, there seems to be no single, precise, or universally-accepted meaning for the term,³³ nor is it a specifically-defined legal term of art. To further complicate matters, the term “public domain” has sometimes been used interchangeably with the phrase “the commons.”³⁴ In

³¹ P. Bernt Hugenholtz & Lucie Guibault, *The Future of the Public Domain: An Introduction*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW, 1 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006).

³² For a collection of particularly rich scholarship on this issue from the November 2001 Duke University School of Law Conference on the Public Domain, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463 (2003); Carol M. Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147 (2003). Earlier scholarly work in this area includes that of Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990), and David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981). Prior academic conferences at the University of Haifa in 1999 and New York University in 2000 had also explored similar themes. See, e.g., EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY (Rochelle Cooper Dreyfuss et al. eds., 2001); Niva Elkin-Koren, THE COMMERCIALIZATION OF INFORMATION (2002).

Since then, legal scholars have continued the discussion. See, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004); Michael D. Birnhack, *More or Better? Shaping the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW, 59 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006); Julie E. Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW, 121 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006); Margaret Ann Wilkinson, *National Treatment, National Interest and the Public Domain*, 1 U. OTTAWA L. & TECH. J. 23 (2003-2004). This paper does not purport to evaluate the wealth of scholarship on the issue. Instead, my focus is on how the continuing vagueness in the meaning of the term “public domain” does little to relieve the confusion created by continuing to employ “property talk” in this area.

³³ Professor James Boyle points out that as a concept, the public domain is “considerably more slippery” than many commentators realize. See generally Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *supra* note 32. He suggests, in an intriguing comparison with the environmentalist movement (which emerged as an umbrella concept that successfully united varying issues), that the public domain needs similarly to be invented to be saved. See Boyle, *supra* note 3.

³⁴ For example, see the fourth declaratory statement from the 1993 Bellagio Declaration, which states that “systems built around the author paradigm tend to obscure or undervalue the importance of ‘the public domain,’ the intellectual and cultural commons from which future works will be constructed.” Statement of the Bellagio Conference, 1993 Rockefeller Conference on “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era” (Mar. 11, 1993), available at

this and the following section, I suggest that the aims of A2K and public access/use can be achieved without resorting to using either of these two terms.

Article 18 of the Berne Convention³⁵ expressly mentions the “public domain” without defining it. Since the Berne Convention prescribes minimum standards for copyright protection and – as is the case with many international agreements, treaties and understandings – is the product of multilateral negotiations, this lack of definition and precision is perhaps not unexpected. It was also, in all likelihood, unnecessary at the time for member countries of the Union thereby established to define the nature and scope of such a concept, for at least two reasons. First, the Convention was an unprecedented instrument of international harmonization (of a sort) for the protection of “the rights of authors in their literary and artistic works,”³⁶ and was thus already a major achievement. Secondly, since a majority of the original member countries were European nations, the term “public domain” (being derived from the French concept of *domaine public*³⁷) was assumed to be familiar to those tasked with drafting the Convention. Academic interest in the public domain was fueled only by the trend of expansionist copyright (in scope and duration) that accelerated in the twentieth century. Although the flurry of international activity³⁸ and consequent national legislation³⁹ on this score seems to have subsided somewhat, the recent upsurge of bilateral trade treaties that emphasize the strengthening and increased enforcement of IPRs means two things: one, that issues relating to further expansion of IPRs will likely remain on the national and international policy agenda, and two, the negotiation and imposition of TRIPS-plus (and hence, for copyright, Berne-plus) obligations and standards will continue. As such, the much-feared consequent erosion of

<http://www.cwru.edu/affil/sce/BellagioDec.html>. The Bellagio Declaration was issued by participants of the 1993 Rockefeller Conference entitled “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era.” *Id.* See also Litman, *The Public Domain*, *supra* note 32, at 975 (describing the public domain in copyright as “a commons that includes those aspects of copyrighted works which copyright does not protect” and in the IP context as a “true commons comprising elements of intellectual property that are ineligible for private ownership”).

³⁵ See Article 18(1) and (2), the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (as amended).

³⁶ See Article 1, the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (as amended).

³⁷ Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *supra* note 32; Litman, *The Public Domain*, *supra* note 32.

³⁸ See, e.g., WIPO Copyright Treaty of Dec. 20, 1996; see also WIPO Performances and Phonograms Treaty of Dec. 20, 1996.

³⁹ E.g., Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) and the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). Previously, and as a result of the accession by the United States to the Berne Convention, the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988), amended the 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976), to reflect the standards and obligations of that Convention.

the public domain will also remain a significant issue.

Legal scholars have traced the term “public domain” (in US IP usage) to the late nineteenth century, and have attributed its adoption to particular legislative and judicial developments.⁴⁰ Since its first appearance, the term has gradually displaced other, older terms such as “public property” and *publici juris* as the preferred catch-all phrase for material generally unprotected by IPRs. The 1909 US Copyright Act referred expressly to the public domain, in prohibiting copyright (even where the requisite originality was present) in “any work which is in the public domain.”⁴¹ Interestingly, the current US Copyright Act no longer contains a mention of the public domain. For comparative Anglo-American purposes, this is the case also with the current United Kingdom (“UK”) position in the 1988 Copyright, Designs and Patents Act. It should be noted, however, that the 1995 Duration of Copyright and Rights in Performances Regulations, which implemented the European Union’s harmonizing Copyright Term Directive⁴² into UK law, expressly mentions the public domain with respect specifically (and only) to revived copyrights. The apparent nonchalance on the part of these major common law countries toward the use of the term “public domain” could indicate an assumption that its meaning is so clear as to require no definition, and its function so obvious as to need no mention. In either case, the result is unfortunate in that it contributes to continuing imprecision in the use of the term, and uncertainty as to whether, and, if so, how, modern copyright law adequately protects the public interest in preserving and facilitating A2K, which depends on material remaining publicly-accessible and available.

That the single term “public domain” came to be a replacement for several previous categorizations of property that, while related, did not mean exactly the same thing, is unfortunate. For one thing, it means that previous (albeit technical) distinctions between and among various forms of property were gradually lost, such that certain nuances relating to property ownership disappeared from copyright law. The lack of a clear understanding of

⁴⁰ See, e.g., Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, *supra* note 32; Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91 (2003); and Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002). Professor Cohen notes that the term “public property” appears seven times and the term “public domain” ten times in the Supreme Court’s decision in *Singer Mfg Co. v. June Mfg Co.*, 163 U.S. 169 (1896). It was apparently the *Singer* case that first judicially linked the two concepts, and the 1909 Act that launched the term into legislative use.

⁴¹ 1909 Copyright Act § 7 (Act of Mar. 4, 1909) (in effect July 1, 1909). See also *id.* at Section 6 (dealing with derivative works and using the term “public domain” expressly in granting copyright to “versions of works in the public domain”).

⁴² Directive 93/98/EEC, of 29 October 1993, harmonizing the term of protection for copyright and certain related rights (Official Journal L 290, 24/11/1993) 9-13.

the scope of the public domain, as well as interchangeability in usage between the “public domain” and “the commons,” has meant that the single concept of a public domain has come to be “defined in terms of what it is not,”⁴³ rather than what it is or should be; in other words, it is viewed as a residual category of what is left over after copyright, patent, and other IPRs have been conferred and/or claimed over certain inventions, creations, and other material protected by such laws.

Where early US IP cases had used the term “*public property*” to describe materials that were not protectable by copyright or patent law (for reasons including expiration of the legal rights, or because such materials constituted unregistered or unprotectable subject matter), the implication was that these materials then became the property of the public, such that any member of the public could make free use of it. Such public rights were irrevocable.⁴⁴ “Public property” was, however, sometimes used interchangeably with the phrase “*common property*.” as both forms of property had similar public rights of use. The only difference, for IP (and most practical) purposes, was that the term “common property” originated from an analogy to the way in which natural resources could be, and were, shared by all, while the term “public property” was associated with tangible items such as land and goods.

A third term was also sometimes used interchangeably with the phrases “public property” and “common property”: this was the Latin phrase “*publici juris*” (meaning “of public right”). Where public property and common property both described the nature of the thing in question (in terms of who had rights to it), the latter term relates to the nature of the right itself,⁴⁵ and means “that it is open or exercisable by all persons.”⁴⁶ Notwithstanding this technical distinction, however, the core concept shared by all three – which largely explains their interchangeable use by early US courts – is substantially similar, *viz.*, the idea that a thing can be freely used by the general public.

Although this “public use right” could flow from ownership (or more accurately, lack of private appropriation of the thing in question), it was not always clear that the right inevitably meant the non-existence of *private* appropriation and ownership of that

⁴³ Ochoa, *supra* note 40, at 217.

⁴⁴ *Id.*

⁴⁵ The term “*publici juris*” has been employed to describe a broader range of subject matter than “public property” and “common property.” See Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, *supra* note 32, at 9. However, even dictionary definitions of all three terms seem to use them synonymously. See Ochoa, *supra* note 40, at 236-37. Both Cohen and Ochoa also note that pre-*Singer* use of the term “public domain” in non-IP cases meant something narrower than “public property.”

⁴⁶ Ochoa, *supra* note 40, at 237 (citing BLACK’S LAW DICTIONARY 965 (1st ed. 1891)).

particular property. This distinction – between the existence of legal ownership by a person and the existence of legal rights of other persons with respect to the thing⁴⁷ – is probably less important as a practical matter than as a legal point, and is yet another explanation for the ease with which these terms were used interchangeably by early courts and lawyers. Nonetheless, it can be a matter of some significance to IP. For example, describing something as “property” generally implies that someone (whether an individual, an entity, a group, or the public) owns the thing in question (whether tangible or intangible). If so, the owner(s) would have corresponding legal rights to exclude others from the property. This is *not* the same as a situation where a “right” is being described, for a right is not identical, either legally or functionally, to ownership, though it can flow as a consequence thereof. While having ownership means that the owner has certain rights over the property in question, having rights (e.g., to use the property in a certain way) does not correspondingly mean that that person is also the owner.

Thus, describing something as being “in the public domain” may have one of three possible meanings: (1) lack of private ownership (with a corresponding right of public use, as in the case of public property or common property); (2) right of public use (which, not necessarily corresponding to a lack of ownership by anyone, resembles a strict interpretation of *publici juris*); or (3) both situations simultaneously. A “thing” is thus more helpfully described in terms of whether or not it is privately owned by someone (at least for purposes of determining whether or not another’s permission is required to use that particular thing), rather than to simply say that the thing is “property.” Alternatively, it could be described in terms of whether or not the public has rights to use it, regardless of whether they also own it (in the form either of public or common property). In both cases, the result is the same: the description by itself tells us whether or not the thing is available for public use. There is little need to employ the term “public domain” for this purpose. By banishing the use of the term “public domain,” the distinction between ownership and use is clarified, and the question of the meaning of the term avoided.

Anglo-American conceptions and principles of property, whether real or personal, tangible or intangible, developed in the

⁴⁷ See Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111 (2003) (highlighting the same distinction and pointing out that the concept of ownership, as classified by property into government, private and common, reveals more about the status and nature of the holder of the particular right than provides information about the nature and complexities of those rights).

realm of private – as opposed to public – property.⁴⁸ As such, even as the term “public domain” became the dominant phrase to describe what had previously been referred to variously as public or common property or *public juris*, Anglo-American property law became increasingly focused on the exclusive rights created by and associated with private ownership. It was real property that provided the model for the scheme of private property and exclusive rights that evolved to become Anglo-American copyright law.⁴⁹

Although the common law system developed rather more independently of Roman law than did the civil law tradition, certain Roman law ideas relating to real and other forms of property, as well as obligations (e.g., private law distinctions between classifications of persons (*personae*), things (*res*), and actions (*actiones*), the origins and forms of contracts and torts, and concepts relating to *dominium* (ownership)), had long been borrowed by English judges and jurists. Hence, these ideas and obligations were “received” into English law. Such ideas also permeated and influenced the evolution of copyright as a private property regime. Further, in relation to copyright, concepts such as *domaine public* and *droit d’auteur* (authors’ rights), both of which are enshrined in the Berne Convention, originated in the civil law system, the development of which relied substantially on Roman law concepts. These historical factors have led to some scholarly enquiry as to whether Roman law concepts of property might be helpful in discerning the nature and scope of the public domain for modern copyright law purposes.⁵⁰

These analyses began with the Roman law classification dividing non-private, non-exclusive property into the following five classes: *res nullius* (things that do not as yet belong to anyone, though they may be appropriated by someone at some point), *res communes* (things which by their very nature are open to everyone

⁴⁸ See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); see also Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, *supra* note 32.

⁴⁹ See LITMAN, *supra* note 9. See also Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006) (arguing that property law concepts and history can support, rather than destroy, a robust public domain). For a more skeptical view, see Lange, *Reimagining the Public Domain*, *supra* note 29, at 469 (doubting the utility of a property-based regime in defining so elastic a concept as the public domain).

⁵⁰ See, e.g., Harry Hillman Chartrand, *Ideological Evolution: The Competitiveness of Nations in a Global Knowledge-Based Economy* (July 2006), available at <http://www.culturaleconomics.atfreeweb.com/Dissertation%203/0.0%20ToC.htm>; Brewster Kneen, *Redefining ‘Property’: Private Property, the Commons, and the Public Domain*, SEEDLING, Jan. 2004, available at http://www.grain.org/seedling_files/seed-04-01-1.pdf; Rose, *The Comedy of the Commons*, *supra* note 48. See also John Cahir, *The Withering Away of Property: the Rise of the Internet Information Commons*, 24 OXFORD J.L. STUD. 619 (2004) (surveying the commons concept in legal, philosophical, political and economic literature, and noting that the Roman law concepts of *res nullius*, *res communes* and *res publicae* have particular significance for the commons, and provide a solid historical example of how a property regime can institutionalize the commons into private and public property).

and thus not appropriable),⁵¹ *res publicae* (things which are publicly-owned and open to everyone),⁵² *res universitatis* (things which are owned by a group – whether privately, publicly, or as a corporate entity),⁵³ and *res divini juris* (things which are of a divine nature and hence cannot be owned by anyone).⁵⁴ Based on these classifications, IP, being intangible, knowledge- and information-based, and a result of intellectual endeavor, can be viewed as existing initially as *res communes* (e.g., as ideas). Laws can thus transform IP into appropriable forms of *res nullius*; further, to the extent that a limited common property regime exists with respect to certain types of IP, these can be owned as a form of *res universitatis*. Finally, and of direct relevance to the public domain, it may be possible for such intangibles to eventually become *res publicae*.⁵⁵

In this analogy, *res communes* thus represents the starting point, and *res publicae* the endpoint of a spectrum of public (as opposed to private, rather than in any specific sense of public or common property) forms of property. These starting and ending points illustrate at least two aspects of the public domain, wherein its contents are available for widespread public access. Similarly, *res universitatis* – as a form of common property ownership – would resemble one form of the “commons.” These approximations throw into relief two issues already highlighted about the public domain: first, that the public domain is susceptible of various meanings, and, secondly, that it is not identical to the commons.

Can there then be a meaningful definition⁵⁶ of the public domain that would emphasize its role in the copyright sphere, as an essential instrument to foster creativity and innovation?⁵⁷ Some

⁵¹ The obvious examples are natural resources, such as air and the oceans.

⁵² The classic examples are roads, bridges and similar infrastructural things. From these examples, *res publicae* seems akin to “public property,” and *res communes* to “common property,” in the pre-Singer description of what corresponds to the public domain.

⁵³ Because this category constitutes a “bounded form of *res publicae*,” and operates as a limited common property regime (i.e., a “commons on the inside, property on the outside” to non-owners), it perhaps most closely approximates the meaning of a “commons” as used synonymously with the public domain. See, e.g., Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, *supra* note 32.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Legal scholars have strived to craft such a definition. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Lange, *Recognizing the Public Domain*, *supra* note 32, updated in Lange, *Reimagining the Public Domain*, *supra* note 32; Litman, *supra* note 32; Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, *supra* note 32, updated (with an exhaustive review of other possible definitions and meanings of the public domain) in Samuelson, *Enriching Discourse on Public Domains*, *supra* note 32.

⁵⁷ This should hold true whether or not a utilitarian or a more Lockean/natural rights view of the primary rationale for copyright protection is adopted. See the articles cited on the history of copyright, *supra* note 2. In relation specifically to the issue of “Progress” under Art. 1, Sec. 8, Cl. 8 of the U.S. Constitution, see Margaret Chon, *Postmodern “Progress”?: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993); see also Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article 1, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754

scholars have suggested not only that the public domain may not be susceptible to a single and true definition, but also that there may be many “public domains,” just as there are many forms of property.⁵⁸ The differing definitions and/or manifestations of the public domain reveal different conceptual bases, varying purposes for advancing particular definitions, and the divergent nature of the audience being addressed.⁵⁹ These possibilities range from passive explanations based on what is and/or is not protected by IP laws,⁶⁰ to more dynamic contexts such as those defined through cultural norms and socially interactive spaces,⁶¹ or through the need for self-realization and actualization.⁶² These latter, broader formulations have emerged relatively recently from a foundation of earlier scholarly work,⁶³ which recognized that the creative act does not occur in a vacuum, i.e., creating a work means borrowing from and building on existing works, and occurs within specific, yet differing, cultural and social networks, communities and norms. To the extent that these conceptions of the public domain represent a view that more openly and clearly recognizes the intimate connection between socio-cultural norms, the creative process and access to pre-existing materials for new works, they also imply that such access is vital for cultural development and further innovation. Further, where access requires a vibrant and diverse public domain (broadly defined), ensuring such access in copyright law could serve not only as a check on further expansionist trends, but also facilitate copyright policymaking that explicitly takes A2K concerns into account and more clearly acknowledges

(2001). On the nature of the differences between copyright law in the US and the European Union countries generally, see Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23(9) EUR. INTELL. PROP. REV. 409 (2001).

⁵⁸ Boyle, *supra* note 31, at 67-68. See also Samuelson, *Enriching Discourse on Public Domains*, *supra* note 31.

⁵⁹ Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, *supra* note 58.

⁶⁰ Which, in and of itself, could include what Professor Samuelson has described as “the ineligibles and the expireds” as well as material that is considered “free as the air to common use”: ideas, principles and knowledge that represent the “noblest of human productions.” *Id.* at 419 (quoting *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918)).

⁶¹ Lange, *Reimagining the Public Domain*, *supra* note 32; Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, *supra* note 32. Professor Cohen describes creativity as experiential and relational, with “borrowing, reworking and cross-fertilization” as fundamental traits; as such, she argues for a reformulation of the public domain to better reflect this dynamic “cultural landscape.” *Id.* at 154.

⁶² For example, as a form of “citizenship arising from the exercise of creative imagination” which will help “secure these elemental aspirations . . . innate in humankind: to think and to imagine, to remember and appropriate, to play and to create.” Lange, *Reimagining the Public Domain*, *supra* note 32, at 475, 483.

⁶³ See Samuelson, *Enriching Discourse on Public Domains*, *supra* note 32 for analysis of the various definitions and their evolution. Professor Samuelson also points out that, while there is some risk of confusion in having multiple public domains, there may be benefits that outweigh such risks, including moving away from further and unnecessary debates over what is the single true meaning, toward seeking out more nuanced, context-sensitive usages that could further illuminate the essential nature of the public domain for society.

the close relationship between copyright law, A2K, and development.

For these reasons, copyright law should emphasize the generation of new knowledge, a greater awareness of cultural heritage, and the facilitation of self-expression. A market-driven copyright system should not lose sight of important public policy goals such as education, community development, democratic discourse and political participation. To the extent that these newer conceptions of the public domain reflect such aspirations, they also mirror the recent push by some scholars to link IPRs to human rights, as discussed further below.

These recent developments show that the discourse over the public domain has advanced much since the previous centuries' use of public property, common property and *public juris* to describe its characteristics. The public domain can thus be viewed as broader than what would be implied by the use of real property terminology. Unfortunately, the public domain discourse is currently taking place largely within scholastic rather than policymaking circles. Perhaps more significantly, there remains the risk that a narrow property-based notion of the public domain will continue to dominate in the latter realm. It is therefore unlikely that focusing on further elucidating the public domain will result in a stronger policy link between copyright, A2K, and development. Further, as long as a private property-based conception of copyright holds sway, the ambiguity that continues to surround the concept of the public domain means that it is not likely to be an incisive or useful means to define the scope of public access/use.

C. Copyright and a "Commons"

In analyzing the impact of IPRs on the exploitation of protected material, particularly from the perspective of utilitarian and economics theory, scholars have highlighted the concept of the "*commons*." These studies have focused on probing the assumption that creating private property rights (e.g., copyright) over a resource (e.g., intellectual creations) will maximize the use of that resource and so prevent its overuse and consequent depletion (the so-called "tragedy of the commons," which can occur when too many people have the right to use that resource and no one has the right to exclude anyone else).⁶⁴

In recent years, scholars have also analyzed the reverse possibility, namely, the "tragedy of the anticommons," which can occur when there are too many people who have the right to exclude

⁶⁴ The phrase, and the description of the economic and practical effects of overuse of public resources implied thereby, is generally credited to Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243.

others from a resource. In this case, the resource may suffer from under-utilization.⁶⁵ These studies have aided greatly in our understanding of the economic factors that lie behind the push for further “proPERTIZATION” of resources (both tangible and intangible), as well as the potential legal and practical consequences thereof.⁶⁶ They have also added some measure of theoretical rigor and complexity to, while further prolonging the discussion of, the question of *what* constitutes the public domain, and what makes up a “commons.”

Just as the public domain can be viewed as encompassing different meanings, the notion of property itself can be conceived as a less absolute, more complex way of regulating social and relational *networks*, rather than a purely straightforward mechanism to describe a particular person’s relationship to or with a particular thing. Property, it is said, encompasses not merely tangibles and intangibles, movables and immovables; its basic division into real, personal and intellectual (intangible) property does not adequately capture the plurality of ideologies, institutions, relationships, and practices that it connotes.⁶⁷ According to this view, sim-

⁶⁵ This phrase, and its corresponding description, is generally credited to Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). Hardin’s (*supra* note 46) and Heller’s works have since been analyzed in relation specifically to IP issues. See, e.g., Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998); Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, *supra* note 48. The Internet, or “cyberspace,” as a problem of the commons was studied by Dan Hunter in *Cyberspace as Place, and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003). The commons and the anticommons, in relation to real property, natural resources, intellectual property and theoretical extensions thereof, was the theme at the June 2006 Conference on The Future of the Commons and the Anticommons at the University of Illinois College of Law; reading lists, conference papers, and audio files are available online at <http://home.law.uiuc.edu/iple/conferenceJune06.html#readings4> (last visited Mar. 5, 2008).

⁶⁶ The classic economic analysis of copyright law (i.e., that it can promote economic efficiency by balancing the cost of providing access to a work with incentives to create the work in the first place) in light of the public goods aspect of copyright is explored in William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, *supra* note 21. See also Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, in THE AMERICAN ECONOMIC REVIEW, Vol. 56, No. 1/2 (March 1966). For a more skeptical view, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). This influential article inspired a response by many scholars. An example is Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971), which in turn led to a further response by Breyer in Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972). For a critique of the call for greater economic analysis in copyright policy, see Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 1 (2003-2004).

⁶⁷ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Melanie G. Wiber, *The Voracious Appetites of Public versus Private Property: A View of Intellectual Property and Biodiversity from Legal Pluralism* (CAPRI, Working Paper No. 40, 2005), available at <http://www.capri.cgiar.org/pdf/capriwp40.pdf> (commenting that this plurality is manifested in a wide range of differences within and across societies and legal systems, including in “the *social units* that are thought capable of holding property rights and obligations; the construction of valuables as *property objects*; the different kinds of *relationships* established in terms of rights and obligations; and the *temporal dimension* of property relation-

ply recognizing the differences between the various forms of public property is not sufficient to capture the fluidity and complexity of the relationships created by and among various types of property, their owners and users. When the possibilities of common/public ownership (as opposed to individual/private ownership) and of accommodating cultural norms that govern the collective management and use of property are added to the picture, what emerges is a more complicated montage than simple and binary either/or categories such as private/public, or IPRs/the public domain (public access/use). It is thus worth examining whether, in contrast with these more traditional property classifications, the concept of the “commons” can provide an alternative means for either defining the type of ownership/rights that are implicated by copyright, or perhaps of crafting a less property-oriented public domain that takes into account the need to consider other norms, networks and relationships.

1. The Origin and Meaning of the Commons Concept

The concept of a commons is traceable to the development, in early English law, of certain customary or traditional rights of access to, and use of, land (e.g., for grazing by cattle, for use as pasture, to collect wood or to fish) by persons other than the landowner. These persons, usually neighboring landowners, would have rights to use the land “in common” with the landowner. The term “commons” has, however, come to be used more generally, usually to refer to resources that are open to use by members of a particular community, or that are collectively (or publicly) owned, or as a social regime for managing certain resources.⁶⁸

In the IP context, and particularly in relation to the ease with which information is created and shared over the Internet, the term “information commons”⁶⁹ has been used increasingly to refer to subject matter possibly subject to IPRs (i.e., exclusive rights via

ships”).

⁶⁸ The commons has also been described as “that vast range of resources that the American people collectively own, but which are rapidly being *enclosed*: privatized, traded in the market, and abused.” David Bollier, *Reclaiming the Commons*, BOSTON REV. (Summer 2002), available at <http://bostonreview.net/BR27.3/bollier.html>. Other significant works by Bollier on this topic are *SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH* (2003), and *PUBLIC ASSETS, PRIVATE PROFITS: RECLAIMING THE AMERICAN COMMONS IN AN AGE OF MARKET ENCLOSURE* (New America Foundation 2001), available at http://www.bollier.org/pdf/PA_Report.pdf. See also Hess & Ostrom, *supra* note 47, at 115 (pointing out that both the term “commons” and the term “public domain” have been used in a wide variety of ways and meanings, though for the “intellectual public domain, the commons appears to be an idea about democratic processes, freedom of speech, and the free exchange of information”).

⁶⁹ See, e.g., John Cahir, *The Information Commons* (July 23, 2003) (unpublished working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=428584, and *The Withering Away of Property: The Rise of the Internet Information Commons*, *supra* note 53.

private ownership) but which either is, has been, or ought to be, open to all.⁷⁰ Here again, as with prior historical usages of public property and common property, it is important – though this has not always been achieved – to distinguish between rights flowing from *ownership* and rights associated with *access*. The commons does not necessarily mean that the material subject to or forming part of it is not owned by anyone. In its original incarnation, it could and often was owned privately. More modern usage of the term also refers to property that is owned communally by an identifiable group, or publicly, which, possibly confusingly, could mean either the state or the “unorganized public.”⁷¹ In the latter case, this inevitably brings up the issue of overlap with the public domain as a form of public/common property. Leaving that thorny issue aside for the time being, however, describing a thing as subject to, or part of, a commons basically implies that members of a particular community, whether as a group or, more broadly, as the general public, have rights to access and to use the thing in question. This usage does not reveal much about the nature of actual, legal ownership of the commons in question, such that the question of rights permissions cannot always be conclusively answered merely through this description.

At this juncture, it must be noted that although the term “public property” has hitherto been used in this paper as if it constituted only a single doctrine, there may actually be two distinguishable types of public property: first, public property that is owned and managed by a government body, and secondly, public property that is collectively owned by society at large.⁷² In this regard, it follows that a person using the term “commons” could *also* be referring to it as a form of public property under a government-owner, provided at least that the government-owner either holds or manages the property for the public benefit, including certain access rights thereto. Such overlapping meanings and lack of clarity in usage indicate that the word “commons” may be no less confusing than the term “public domain” when used in an at-

⁷⁰ Studies of the commons span many sectors, subjects and regions, from agriculture and environmental resources to information and knowledge. An extremely comprehensive bibliography across this vast range of topics, the Digital Library of the Commons, has been compiled under Charlotte Hess at Indiana University, *available at* <http://dlc.dlib.indiana.edu> (last visited Mar. 5, 2008).

⁷¹ See, e.g., Rose, *The Comedy of the Commons*, *supra* note 48; see also Carol M. Rose, *Custom, Commerce and Inherently Public Property*, 53 CHI. L. REV. 711 (1986), *reprinted in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP (Westview Press, Inc., 1994).

⁷² Rose, *Custom, Commerce and Inherently Public Property*, *supra* note 71, at 111. Professor Rose points out that, within these conceptions of public property, the evolution of the public trust doctrine, particularly in the US, would seem to imply also that situations may exist where the government can be said to own certain property in trust for the larger public, based on reasons such as public need or the inalienability of certain types of property. The classic examples of such public property would be roadways and waterways.

tempt to define the scope of public access/use for copyright purposes.

Can such confusion be cleared up by moving away from nomenclature and focusing on legal effects, i.e., the nature of the rights conferred by some form of non-private ownership, whether public or common, rather than the nature of the ownership? Fundamentally, all property concepts are *exclusionary* in nature, in that property law largely concerns itself with rules and norms which operate to restrict the actions of non-owners in relation to the property in question. It has been suggested that, from this perspective, common property can be viewed as neither private nor public property, at least in the very narrow sense that no individual or specific entity has the legal right to exclude others from accessing and using the resource in question. By focusing on the question of access/use rights rather than the fact of ownership, this view of common property sits well with the general, modern understanding of a commons.⁷³ In addition, it seems an appropriate vehicle for linking copyright with A2K, the essential concern of which is the right and ability to access and use materials for self-improvement, learning and progress.

As with the public domain, however, any attempt to use such concepts to boost A2K will run headlong into a collision with the IP status quo: that the materials in question may be subject to another person's private property rights. Thus, while the language and potential breadth of the public domain and the commons serve to emphasize the need to change the direction of copyright policy so as to ensure A2K and socio-cultural development, they remain bound to a property framework and thus may be of limited use in re-aligning copyright to a broader paradigm.

Why then is it significant to maintain at least a doctrinal, or definitional, distinction between common, private, and public property? One major reason is that the distinction can be extremely significant within the special context of informational (or "ideational," as opposed to material/tangible) resources⁷⁴ – meaning information, knowledge, and material that could, if eligible, be protected by IPRs. The non-rivalrous nature of ideational resources means that it would be possible to create and recognize a form of property that is neither private nor public, whereas the ri-

⁷³ This view is espoused by Cahir in *The Withering Away of Property*, *supra* note 53. Although Professor Cahir equates common property in this sense with the commons, he notes that using the term "common property" appears "oxymoronic," as property concepts connote the "application of exclusionary norms." He therefore suggests that the term "commons" is preferable. *Id.* at 621.

⁷⁴ *Id.* This distinction is substantially similar to that made by Carol M. Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, *supra* note 32, in relation to "Tangible Space" and "Intellectual Space." Intellectual property rights obviously protect that which belongs to ideational and intellectual space.

valrous nature of material resources requires excludability, and hence necessitates some form of either private or public ownership.⁷⁵ As noted above, a significant advantage of employing this particular rights-focused notion of common property for the commons is that, since its premise is an *absence* of the legal right to exclude, an enquiry as to its nature and scope would logically and more usefully be focused on the extent of the right to access and use the property – that is, on the *rights* of non-owners rather than the entitlements wrought by *ownership*.

2. The Commons, the Public Domain, and the Nature of Common Property

Seen in this light, and returning for a moment to the issue of what constitutes the public domain in copyright law, the term “public domain” may actually be more useful if it is described as a subset, or a particular aspect, of the commons, since it shares with the commons this feature. The breadth of the commons concept enables the public domain to be more generally understood as referring to resources that are available to all to use because no one has the right to exclude another from it (and not necessarily because no one, or everyone, owns it). Further, linking the commons to the public domain, without regarding them as identical and interchangeable, has the added benefit of building on the political and philosophical perspectives that have built up around the commons concept. It is therefore tempting to conclude that the concept of the commons ought to be appropriate for describing the kinds of intangible “property” represented by copyrightable creations. This, however, may not necessarily follow.

First, although it maybe has been argued above that the commons can be treated as a form of common property, there is yet another usage of the term “common property” which needs to be noted: the association of common property with what has come to be known as “common pool resources” or “common property resources” (in either case, generally abbreviated as “CPRs”). As used by modern common property theorists,⁷⁶ CPRs mean resources that are subtractable (or “rivalrous,” in that use by one person may reduce another’s opportunity to use it) and whose na-

⁷⁵ Cahir, *The Withering Away of Property*, *supra* note 53. This view of material (tangible) resources echoes Hardin’s tragedy of the commons, *supra* note 46.

⁷⁶ See, e.g., THE COMMONS IN THE NEW MILLENNIUM: CHALLENGES AND ADAPTATIONS (Elinor Ostrom & Nives Dolsak eds., 2003); NAT’L RESEARCH COUNCIL, THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds., 2002); Elinor Ostrom, *Not Just One Best System: The Diversity of Institutions for Coping with the Commons*, in RESEARCHING THE CULTURE IN AGRICULTURE: SOCIAL RESEARCH FOR INTERNATIONAL DEVELOPMENT 329 (Michael M. Cernea & Amir H. Kassam eds., 2006); Elinor Ostrom, *Property-Rights Regimes and Common Goods: A Complex Link*, in COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE 29 (Adrienne Héritier ed., 2002); Elinor Ostrom, *How Types of Goods and Property Rights Jointly Affect Collective Action*, J. THEORETICAL POL., July 2003, at 239.

ture makes it difficult, though not impossible, to exclude others from using it. CPRs thus have attributes both of “public goods” and “private goods,”⁷⁷ and are potentially subject to overuse and depletion. They may be owned privately, communally, or by government entities, and they may also be characterized by open access. For this reason, some theorists prefer to use “common pool resources” rather than “common property resources,” so as to avoid confusion with most common property regimes, which they regard as a form of property ownership in which a definable group has the legal right to exclude nonmembers of the group from using the resource in question.⁷⁸

The CPR notion of common property is somewhat different from the previously-described, more specific usage that referred only to a lack of legal exclusionary norms, and thus contrasting with private and public property regimes. The CPR meaning of common property contemplates the existence of a group with the right to exclude others; as such, it seems to fit better with the broader, plainer (if not necessarily the legal) meaning, of what the term “common property” implies; that is, property that is held “in common” by or for a defined group (rather than a lack of a right to exclude). Within the CPR context, the phrase “common property” provides a clear and useful contrast with an open access regime, which has been described as a situation where no one has the right to exclude anyone from using a particular resource.⁷⁹

For general copyright purposes, adopting a more complex approach to the commons, modeled on CPR studies, would allow for developing the concept away from a simplistic, binary division of intangible creations into “one-size-fits-all” categories of private, public, and common property. Indeed, the current discussion demonstrates how unhelpful simply describing “copyright as property” is, and how the consequences of such “property talk” are to add confusion, rather than clarity, to the effort to understand what copyright is, and what its appropriate normative framework should be. Copyright in the form of exclusive legal rights has generally and traditionally been recognized as private property. Even though material not otherwise subject to copyright, but rather viewed as “in the public domain” or subject to the “commons,” can be described as public and/or common property, these categorizations are not the most appropriate method for separating what is in the public domain/commons from what is

⁷⁷ See Hess & Ostrom, *supra* note 47.

⁷⁸ *Id.*

⁷⁹ *Id.* at 121 (citing Siegfried V. Ciriacy-Wantrup & Richard C. Bishop, “Common Property” as a Concept in Natural Resource Policy, 15 NAT. RESOURCES J. 713 (1975)). Ciriacy-Wantrup & Bishop’s and Hess & Ostrom’s usage of “open access” thus equates this with what Cahir calls “common property.” Cahir, *The Withering Away of Property*, *supra* note 53.

not, not least because of a lack of clarity in what non-private, i.e., public and common, property means.

It is at least arguably, and relatively, preferable to use terms such as the commons, rather than public or private property, to describe the role that the public domain ought to play in copyright law. In so doing, it would be helpful to disassociate the commons from notions of common property. It is thus noteworthy that some leading CPR scholars have recently indicated that the early focus on common property has given, and should give, way to more “carefully-chiseled” language that more adequately captures the richness and complexity of rights relating to commons resources, including the distinction between the *resource* and the *regime* governing it.⁸⁰ Where “common property” refers to one type of property regime, the “commons” is “a general term that can apply to all types of shared resources,” and which has expanded to include a greater number and diversity of resources.⁸¹

Yet wholesale adoption of the term “commons” may not be entirely satisfactory or sufficiently clear. Just as there is no universal agreement as to what constitutes “common property,” it is not entirely clear that those who use the “commons” all mean the same thing either. Further, whatever terminology is adopted would require a further analytical step, as it will still be necessary to examine the differences between the types of information/resources, the various users, their motivations, and the rules and norms governing their behavior in order to more fully understand the nature of the access rights and the appropriate governing relationships between the various interest groups relating to the “property” at issue. Undertaking this further analytical step will be challenging, as a number of problems can arise. For example, the relevant interest groups are not always easily definable or classifiable, and they do not necessarily remain static over time. Also, each group’s interests, such as can be defined, will not only change over time, but may not necessarily be uniform across types of resources or uses either.

3. Using the Commons Instead of Traditional Property Categories

Nonetheless, there are undeniable strategic advantages to using the “commons” concept to not only replace the public domain as a convenient label, at least, for materials that ought to be pub-

⁸⁰ See Charlotte Hess & Ruth Meinzen-Dick, *The Name Change; or, What Happened to the “P”?*, THE COMMONS DIG., Dec. 2006, at 1, available at <http://www.iascp.org/E-CPR/cd02.pdf> (explaining the name change of the journal in question from *The Common Property Resource Digest* to *The Commons Digest*, and the name change of the society publishing it from the International Association for the Study of Common Property to the International Association for the Study of the Commons).

⁸¹ *Id.* at 3.

licly-accessible, but also as a substitute for traditional property classifications. The leverage to be gained from the burgeoning scholarship, advocacy, and evolution of the “information commons” – particularly in relation to the potential avenues of creativity, distribution, and communication made possible by the Internet⁸² – should not be under-estimated. Using the language of the commons may thus allow copyright law to overcome some of its built-in limitations on recognizing forms of creativity that do not fulfill traditional copyright requirements, such as originality,⁸³ which would be potentially beneficial to “new” works that are currently facilitated by information technology and the Internet.⁸⁴ Moreover, the concept of the commons also connotes some form of open access: “free access” as in freedom from exclusive rights imposed by anyone with a right to control such access (e.g., through ownership) or as in no-cost. in addition to freedom from the need to seek another’s permission. “Free” connotes not just zero cost, but in this context means, more significantly, freedom from control and the will of others. The addition of this perspective to the copyright debate imports socio-political influences and democratic ideas largely absent from the traditional, more binary “property-ownership vs. public domain-rights” divide.

The language of the modern commons, due largely to the influence of the norms and practices in the Internet information commons, represents a shift away from simple property ownership talk toward a more fluid view of the need for law to guarantee public access to information, particularly on the more open and communicative Internet. The argument is that, without such access, “network effects” on the Internet are likely to vest in an IP owner of informational products even greater degrees of control – and hence power – than before; preserving the commons is thus

⁸² See, e.g., KRANICH, *supra* note 45 (a survey of the growth and significance of the information commons movement); David Bollier, *Why We Must Talk About the Information Commons*, 96 LAW LIBR. J. 267 (2004). Bollier argues that the information commons is both a socio-political concept and a metaphor that enables a fuller understanding of the “open social spaces,” the new production economics and the “gift economy” made possible by the Internet, and in a way that leaves behind the historical baggage invoked by the term “public domain” as well as the rigid traditional confines of copyright law, e.g., in its conception of what authorship means. Leading legal scholars who have explored these possibilities include Professor Lawrence Lessig and Professor Yochai Benkler. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); Yochai Benkler, *The Commons as a Neglected Factor of Information Policy*, Oct. 1998, available at <http://www.benkler.org/commons.pdf>; Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); and LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

⁸³ See LITMAN, *supra* note 9.

⁸⁴ I refer here to the phenomenon increasingly known as “user-generated content,” which includes material “remixed” from existing (including copyrighted) content. On the need to recognize some forms of such content, see LESSIG, *FREE CULTURE*, *supra* note 85.

important in resisting another, further, movement toward enclosure of the public domain. Where the previous paradigm, represented by a focus on ownership, was between “the realm of property and the realm of the free . . . the new dividing line, drawn as a palimpsest on the old, is between the realm of individual control and the realm of distributed creation, management and enterprise.”⁸⁵

This view also fits well with the approach taken by CPR and environmental scholars,⁸⁶ in that the lack of a right to exclude is not necessarily total or absolute. For example, whether or not CPRs are owned as common property, they are usually managed through a combination and variety of rules that include community norms, customs, and practices. These rules often result in the reverse of the tragedy of the commons – a phenomenon of scale returns, or, in more informal lay terms, “the more the merrier,” which in turn contributes toward greater socialization of the community.⁸⁷ The social good that is achieved by the interaction and communality created by the norms of shared management is as important as the commercial and economic need to privatize certain other types of property,⁸⁸ such that the commons, thus managed, should remain un-privatized.

Finally, the dynamism and perspectives added to the copyright debate by leveraging on the commons also enables a less negative perspective of the public domain (e.g., as usually meaning what is left over after copyright is claimed, or what copyright does not cover), and a more positive view – as a realm where cultural life, sharing and communal creation can thrive – to emerge. Where the public domain is also perceived as related to (by being a subset of) the commons, this allows policy discourse to be framed such as to include notions of social utility (e.g., through knowledge sharing, creating through borrowing or through community interaction) and democratic values (e.g., enabling greater civic participation). This perspective of the public domain in turn dovetails nicely with the concept of development as the enhancement of individual freedom, including intellectual freedom and cultural expression,⁸⁹ which can also be expressed more directly as an argument in favor of the need for greater A2K, as a vital part of sound development policy.⁹⁰ Linking the public domain with the

⁸⁵ On the “jockey[ing]” between the public domain and the commons for primacy in instantiating the “outside” of property, particularly the work done in this area by Professors Lessig and Benkler and other theorists, see Boyle, *supra* note 32.

⁸⁶ A point noted also by Boyle at *id.*

⁸⁷ Rose, *The Comedy of the Commons*, *supra* note 47.

⁸⁸ E.g., to maximize efficiency and returns on investments.

⁸⁹ See, e.g., KRANICH, *supra* note 45.

⁹⁰ This argument is summarized and analyzed by Fiona Macmillan in *Copyright's Commodification of Creativity*, 2 ICFAI J. INTEL. PROP. RTS.53 (2003), and William van Caenegem, *The*

commons is not without difficulty, however. One conceptual difficulty lies in the fact that certain property concepts used in relation to the public domain (e.g., that it is or should be “un-owned”) do not fit totally with the notion of a commons,⁹¹ at least not with the type characterized by ownership residing in a particular group.⁹² Even if the commons were to be described in less property-like terms, as urged earlier (i.e., by focusing on attributes such as the lack of a legal right by anyone to exclude anyone else from its use), this could create a definitional and analytical difficulty in that this conception of a commons would be synonymous with an open access regime.⁹³ This may not be bad news for proponents of A2K, as it would provide a convenient and neat segue into the language and politics of the open access movement. Further, since it has been argued that A2K issues ought to focus less on ownership and more on rights of public access, the conceptual and strategic benefits to moving away from property language outweigh the potential confusion that could result from such a linkage. It would be more beneficial to co-opt usages that not only fit within an existing analytical framework (in this case, the evolution of the information and/or Internet commons), but that also allow for the adoption of broader notions of freedom – a term with a meaning that can range from “costless access, through political liberty, to free trade.”⁹⁴

As such, since the central “axis” in the commons is the con-

Public Domain: Scientia Nullius, 24 EUR. INTEL. PROP. REV. 324 (2002). The need to define and preserve a healthy public domain is often raised as a necessary balance to, or “bastion” against, the increased commodification of knowledge through “enclosure” or greater appropriation (e.g., by enhanced IPRs). See, e.g., Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, *supra* note 32; Lange, *Recognizing the Public Domain*, *supra* note 32. Professor Macmillan argues that copyright law has not only failed to facilitate cultural development, it has actually achieved the opposite by failing to secure the intellectual commons (e.g., through weak fair use/fair dealing laws and low standards for originality). She also notes that a large and robust public domain can have unintended negative consequences for certain forms of creativity and content, particularly indigenous knowledge and traditional cultural expressions, which would lead to the ironic result that a strong public domain movement, far from achieving development, self-expression and related human rights objectives, would actually *prevent* the attaining of such objectives in these areas.

⁹¹ See Aoki, *Neocolonialism, Anticommons Property, and Biopiracy*, *supra* note 47 (citing the works of Carol M. Rose, including *The Comedy of the Commons*, *supra* note 48).

⁹² In contrast, e.g., to a commons that does not depend on ownership and property notions to be characterized as such. See Cahir, *The Withering Away of Property*, *supra* note 53 (analyzing the Internet information commons by defining the commons as a situation/space with an absence of legal exclusionary norms, and thus unlike private or public property).

⁹³ As highlighted by Hess & Ostrom, *supra* note 47 (pointing out the need for and utility of distinguishing, *inter alia*, the nature of the good/thing from the property regime governing it, and open access regimes from common property regimes).

⁹⁴ Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *supra* note 32 (referring specifically to the public domain in terms of its being “unprotected by intellectual property rights” and noting that this lack of clarity (particularly when compared to the well-understood and rich traditions of property doctrine) points to a need for a corresponding “legal realism” for the public domain).

cept of individual versus collective control (or the right to exclude), rather than “the ‘owned’ versus the ‘free,’”⁹⁵ using the commons to prescribe a fundamental precondition for greater A2K would seem to be more appropriate. This does not amount to saying that the public domain is synonymous with the commons.⁹⁶ Rather, the idea is that any interest in increasing awareness of the need for a healthy public domain, particularly for A2K purposes, would benefit more from a conceptual and linguistic association with the commons movement than remaining mired in its hitherto-primary context of property talk.

There is yet another, possibly even more important, reason to look more generally beyond the question, “what is the public domain/commons and how should it be defined?” The question arises whether the assumption that facilitating greater A2K through preserving or enlarging the public domain or the commons will necessarily aid development efforts. The fact is that merely replacing the term “public domain” with the word “commons” will not necessarily or fully recognize the reality of the dynamics of global commerce, which largely reflects inequalities of production, income, and wealth distribution, particularly between the developed world and developing countries/indigenous communities. In this context, the focus on the public domain tends to be viewed as a primarily American concern,⁹⁷ and the notion that the public domain will inevitably facilitate free speech enables greater A2K, and fosters innovation, a libertarian ideal.⁹⁸ The danger of such assumptions about the public domain is that, by leaving valuable knowledge un-owned and free to and for the use of all, the effect could actually be detrimental to development efforts, and thus contrary to the aims of A2K. The free availability of resources for exploitation means that, realistically, any such ex-

⁹⁵ *Id.* at 31.

⁹⁶ *Id.* (expressing the hope that greater clarity about the scope of the public domain and the relationship between it and the commons will be useful in “helping us to reimagine creation, innovation and speech on a global network”). See also Wilkinson, *supra* note 32, at 31-33.

⁹⁷ See Wilkinson, *supra* note 32, at 31 (pointing out that the ambit of the public domain can differ from jurisdiction to jurisdiction, and questioning whether the preponderance of American legal scholarship on the public domain could bias the prevailing view of what the public domain is and should be, including whether it is “analogous to or inseparable from the historical notion of the commons”). Professor Wilkinson suggests that notions of the public domain may not be as helpful in assisting understanding and development of national information and intellectual property policy as notions of national interest, which have the advantage of fitting in well with traditional international intellectual property policymaking.

⁹⁸ See Chander & Sunder, *supra* note 32, at 1334 (noting the “increasingly binary tenor” of the public domain debate, which posits a choice only between property (i.e., IPRs) or the public domain (i.e., “free culture”), and questioning the assumption that simply having information and ideas in the public domain will lead to a kind of “semiotic democracy” where everyone has the opportunity and right to create and share equally in intellectual products).

plotation is more likely to be made by corporations and researchers in the developed world. Leaving useful and/or valuable information and knowledge in the public domain – even recast as a “global commons” – may result in asymmetry and inequality as between the developed and developing world.⁹⁹

Thus, while linking the public domain with the commons concept may free it from the traditional confines of property, it could also have the ironic effect of limiting development. Care should therefore be taken that any advocacy efforts to connect the two concepts is not just a linguistic switch; rather, it is crucial to maintain fundamental distinctions between them, such that further study of the commons is not limited by its being assumed to mean the same thing as the public domain. In this way, the language and expanding notions of the commons can not only usefully be deployed to move the public domain debate away from property talk, they can also continue to serve as important starting points to investigate the nature of copyright, in a more expansive and flexible way than the traditional common law property classifications would dictate.

There have also been critiques of the commons concept. For example, one posits that a vision of a world “inhabited by cultural creators whose ownership of what they create is strictly bounded, whose social relationships are characterized by collective sharing, and whose principal objective is to protect the individual’s freedom of expression,”¹⁰⁰ should be equally concerned that such a vision also celebrates individualism and individual rights (e.g., of free expression). In fact, this critique holds that individual rights should be lauded more than the communality of the indigenous cultures, native practices, and traditional knowledge of the societies and cultures, as the greater A2K and an enlightened development policy can protect, preserve and nurture the latter.¹⁰¹

The hope is, therefore, that the ethos of the commons will develop further and more deeply, to more fully articulate principles more appropriate to, and that recognize the realities of, an increasingly globalized and culturally pluralistic world. Such a development can have effects beyond just enlarging the concept of

⁹⁹ *Id.* Chander and Sunder also assert that IP scholars and policy advocates who champion the public domain movement (without further investigating the resulting inequality) “[leave] the common person to the mercy of an unregulated marketplace where she must struggle to realize her rights.” *Id.* at 1341. See also Helfer, *Toward a Human Rights Framework for Intellectual Property*, *supra* note 5.

¹⁰⁰ Rosemary J. Coombe & Andrew Herman, *Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web*, 77 ANTHROPOLOGICAL Q. 559, 568 (2004). This article contrasts this ideal as an “alternative ecumene” to the consequences of further spread of the “enclosure” movement, and notes that legal scholars and activists (the “priesthood”) who promote such a “commons of the mind” invoke a “rhetorical boundary” between the two extremes of enclosure (private (corporate) property) and the commons. *Id.*

¹⁰¹ *Id.*

the public domain and/or the commons; it will also broaden discourse over the proper scope, including potential extensions, of IPRs by facilitating a genuine debate over the role and scope of cultural rights (including the rights of indigenous communities, minorities, and other economically disadvantaged or disempowered groups to intangibles such as traditional knowledge and folklore, cultural heritage, and biological information).¹⁰²

II. THE INTERPLAY BETWEEN HUMAN RIGHTS AND INTELLECTUAL PROPERTY

A. *IPRs and Human Rights: Conflict, Coexistence, and Integration*

Broadly speaking, human rights include “the freedoms, immunities and benefits that, according to modern values, all human beings should be able to claim as a matter of right in the societies in which they live.”¹⁰³ Essentially, human rights speak to the fundamental freedoms inherent in and essential to human life, dignity, and achievement and are recognized as such in major international legal instruments. The provisions in international instruments most directly relevant to IP include Article 27 of the Universal Declaration of Human Rights (“UDHR”), which states that:

- (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.¹⁰⁴

Similarly, Article 15 of the International Covenant on Economic,

¹⁰² Although the definition and status of cultural rights, and the debates and negotiations over protection of material associated therewith (including the possibility of *sui generis* protection for traditional knowledge), are beyond the scope of this paper, the possibility that a robust public domain/commons could result in imbalance of exploitation of such resources needs to be noted. See Chander & Sunder, *supra* note 32. See also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 FLA. J. INT’L L. 115 (2005); Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171 (2003); Rosemary J. Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001); Rosemary J. Coombe, *Cultural Rights and Intellectual Property Debates*, Spring 2005, at 34.

¹⁰³ Hans Morten Haugen, *Intellectual Property – Rights or Privileges?*, 8(4) J. OF WORLD INTELL. PROP. 445 (2005).

¹⁰⁴ Universal Declaration of Human Rights art 27, G.A. Res. 217 A III (Dec. 10, 1948) (emphasis added). The UDHR is not a binding treaty and as such has no signatories or technical legal force. It is, however, influential due not only to its status as a UN document signifying general member countries’ agreement, but also because it has served as a framework document for subsequent human rights treaties as well as for national legislation in many states. See <http://www.un.org/Overview/rights.html>.

Social and Cultural Rights (“ICESCR”) states, in part, that:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) 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.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation,¹⁰⁵ the development and the diffusion of science and culture.

It is immediately obvious that these provisions simultaneously recognize creators’ rights as well as the interests of the wider public in knowledge acquisition, learning, and cultural development. In copyright terms, the former would constitute the copyright “bundle” of exclusive rights while the latter is captured in principles such as fair use and other limitations and exceptions to copyright. The inherent tension in copyright law – balancing the public interest in encouraging creativity and achieving progress (by incentivizing and rewarding authors/creators) and the public interest in accessing and sharing knowledge so as to enable social and cultural development – is clearly reflected in these provisions. It must be noted, however, that in the human rights context, an author’s protected interests (i.e., her “moral and material interests”) are not the only exclusive rights recognized as IPRs; even those who did not create the works in the copyright sense possess certain rights that are legally recognized as standing on an equal footing with those of an author.

The issue is, how do we best resolve the fundamental conflict between these two groups of right holders? For copyright, the added inflection of the international human rights framework would mean that policymakers, legislators, and judges must acknowledge that the conflict also involves two sets of human rights. In arriving at the appropriate outcome and resolving this issue, the decision-maker should then seek guidance from human rights jurisprudence and norms developed within that framework, as well

¹⁰⁵ International Covenant on Economic, Social and Cultural Rights art 15, adopted by the UN General Assembly in 1966 and in force since 1976. Unlike the UDHR, the ICESCR (like the International Covenant on Civil and Political Rights (ICCPR), which was adopted at the same time) is an international treaty and as such creates binding obligations on signatory states. To date, over 150 UN member countries have signed the ICESCR and ICCPR, including the U.S. See http://www.unhcr.ch/html/menu3/b/a_ceschr.htm.

as from relevant case law in the human rights field.

Because Articles 27(1) of the UDHR and 15(1)(a) and (b) of the ICESCR seem to equate the public interest in cultural participation with some form of user right, with a status at least equivalent to those of authors/creators, proponents of user rights¹⁰⁶ and those who advocate for a greater scope of defenses, exceptions and other limitations to copyright are likely to point to these provisions as support for their cause. Unfortunately, the lack of specific guidance within these general provisions, case law, and other authoritative normative pronouncements means that, for the moment, the existence and language of these Articles simply heighten the inherent conflict between authors and users. Relying solely on these statements to propel fair use and the like into the sphere of rights is not likely to achieve much more than raising the question of a possible relationship between human rights and IP. The Articles themselves do not provide a definitive solution to the “author/owner vs. user” conflict. Nonetheless, they can provide a useful reference point for determining how an attempt to resolve the fundamental public interest conflict in copyright might benefit from a broader perspective.

This is, however, no easy path. Not only is such a framework lacking in clarity, but how one views the perpetual tussle between utilitarian/economic rights and natural law theories for primacy as the main rationale for copyright protection is also likely to influence one’s view of whether or not IPRs ought generally to be considered a form of human rights and the extent of the relationship between human rights and IPRs.¹⁰⁷ Similarly, one’s views on specific issues (such as the scope of exclusive rights, duration of copyright, and the extent of limitations and exceptions) also depend, at least in part, on whether one views IPRs as instruments of the state, meant to further economic policy and development, or as the natural rights of an author/creator emanating from her own labor and creativity. Those who adopt the latter view would more likely perceive that IPRs are human rights, or at the very least that there is a close relationship between the two types of rights.¹⁰⁸ Yet conceiving of IPRs (or at least copyright) only in terms of property is troubling because of the limitations imposed by the legal consequences of property ownership; re-conceptualizing them as human rights is only likely to exacerbate this problem. Before ex-

¹⁰⁶ See, e.g., Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 464-79 (Michael Geist ed., 2005).

¹⁰⁷ See generally Cohen, *supra* note 11, at 1151 (discussing the difficulties with such a binary approach).

¹⁰⁸ At least one scholar has argued that natural law theories are not necessarily inconsistent with the instrumentalist role of IPRs, insofar as the natural law tradition permits recognition of the right of a state to regulate property by means of positive law. See Drahos, *A PHILOSOPHY OF INTELLECTUAL PROPERTY*, *supra* note 1, at 350-51.

ploring the possibility of framing copyright policy within a human rights framework, it is thus necessary to first examine the question whether IPRs are also human rights and, if not, what the relationship between the two forms of rights is, or should be.

1. Are IPRs Human Rights?¹⁰⁹

It is not entirely clear that IPRs are or should be considered human rights. Neither UDHR Article 27(2) nor ICESCR Article 15(1)(c),¹¹⁰ even while asserting a right of an “author” to benefit from the “moral and material interests” arising from her creation, mentions IP. While it would be tempting to equate IPRs with the “moral and material interests” referred to in these provisions, human rights are “fundamental, inalienable and universal,”¹¹¹ and as such are far more than mere legal mechanisms (whether used as incentives or rewards) to be conferred as a spur to innovation. The distinction between human rights and IPRs may be particularly acute in the case of US IP law, which derives from the constitutional grant encapsulated in Article 1, Section 8, Clause 8.¹¹² To the extent that this is viewed as predominantly a utilitarian justification for granting patent and copyright protection, there may be little room within US law to consider IPRs as human rights.

Additionally, Articles 27(2) and 15(1)(c) refer expressly to the author of a scientific, literary or artistic production. A strict construction of such a word would present particular definitional difficulties for certain types of IPRs such as trademarks and geographical indications, even if the “inventor” of a patent could be considered its “author.” Even under copyright law, it would be difficult to see how copyright protection for subject matter – such as works made for hire – can fit within this language, unless, as is the case under US law, the concept of authorship is extended to employers and other persons or entities legally considered to be copyright owners. Even TRIPS speaks of the “owner” of a trademark, patent or industrial design and an “interested person” in the case of geographical indications; in its copyright provisions, TRIPS mentions “author” only in relation to rental rights and uses

¹⁰⁹ The focus of this paper is largely on the economic rights conferred by copyright law. Because of their different nature, philosophical basis and characteristics (e.g., the propensity toward inalienability), and because of the lack of international obligations as well as varying national implementations, the status of moral rights – and the accompanying question of their role within a human rights framework – are beyond the scope of this paper.

¹¹⁰ See Articles 15(1)(c) and 27(2) the International Covenant for Economic, Social and Cultural Rights (ICESCR) (1948).

¹¹¹ See Statement by the Committee on Economic, Social and Cultural Rights (the interpretive authority for the ICESCR), UN Doc. E/C. 12/2001/15 (2001) (contrasting these attributes of human rights with intellectual property rights, which are “instrumental . . . generally of a temporary nature, and can be revoked, licensed or assigned.”).

¹¹² U.S. CONST. art. I, § 8, cl. 8.

“right holder” when providing for limitations and exceptions (where the Berne Convention had previously used the word “author” in the same context).¹¹³

Furthermore, to the extent that IP is viewed as property, particularly private property, it can be argued that it is already protected by other human rights treaty provisions, such that Articles 27(2) and 15(1)(c) should be interpreted as referring to non-property interests.¹¹⁴ While this view does not eliminate fully the conceptual possibility that IPRs are human rights, it represents a different process for treating them as such: insofar as property ownership is a fundamental human right, since IP is property and IPRs are property rights, it follows that IPRs are also human rights. It is noteworthy that this view was taken by the European Court of Human Rights in the 2007 case of *Anheuser-Busch Inc. v. Portugal*,¹¹⁵ in relation to Article 1 of Protocol 1 of the European Convention on Human Rights (“ECHR”). The Court concluded unequivocally that IP are possessions and property, and as such incontestably enjoy the protection of Article 1, Protocol 1.

While this view may be facially attractive for being straightforward, it may not represent a more flexible, or even appropriate, approach to copyright policy. For one thing, it plays directly into the “copyright (and IPRs) as property” paradigm; for another, and with respect particularly to the fact that this view emanates from European case law on ECHR Article 1, Protocol 1, the ECHR does not have an equivalent to Articles 27 (UDHR) or 15 (ICESCR). The ECHR therefore does not expressly recognize, much less attempt to balance, the fundamental and inherent copyright conflict.¹¹⁶ Furthermore, while the European Court of Human Rights’ rulings influence (though they do not bind) European courts and

¹¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 (negotiated in the Uruguay Round of 1986-1994 as Annex 1C of the Marrakesh Agreement establishing the World Trade Organization (“WTO”), signed in Marrakesh, Morocco), available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

¹¹⁴ E.g., Article 17(1) of the UDHR: “Everyone has the right to own property alone as well as in association with others.” Interestingly, and of relevance to the present discussion, this clearly includes not just private but also common property ownership.

¹¹⁵ App. No. 73049/01, 44 EUR. H.R. REP. 42 [846] (Chamber 2007). The case concerned the Portuguese government’s cancellation of a trademark registration, and denial of an application. For a detailed analysis of the decision, see Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT’L L.J. 1 (2008). Article 1, Protocol 1 states, *inter alia*, that

[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest . . . a State [has the right] to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .

Helfer notes that this is “one of the more controversial and obscure provisions in the European human rights system.” *Id.* at 7.

¹¹⁶ See *id.* at 35-39, 46-52 (discussing the IP implications of the *Anheuser-Busch* decision, particularly whether this indicates a narrow rule of law paradigm being adopted by the Court and the risk that future decisions will represent ad-hoc arbitrations of Europe-wide IP policy).

legal developments, the Court is not the sole authoritative body for international human rights rulemaking. From a broad international perspective, therefore, the *Anheuser-Busch* decision can be narrowly viewed as a problem particular to the ECHR and rationalized on the basis that the ECHR provides no other mechanism for recognizing IPRs within a human rights framework, such that Article 1, Protocol 1 was viewed as the only appropriate means by which to do so. It may yet be that future cases will more clearly describe the internal relationship within the ECHR of IP, property and other, equally recognized human rights. After all, neither the public interest in free expression (e.g., in Article 10 of the ECHR) nor the troubling, broader question of balancing property rights against access rights were at issue in *Anheuser-Busch*.

At this stage in the evolution of the IPRs/human rights dynamic, the relationship between the right of property, as recognized by major human rights treaties and instruments, and the type of rights recognized by Articles 27 (UDHR) and 15 (ICESCR) have yet to be fully explored.¹¹⁷ Cases like *Anheuser-Busch* perhaps should be viewed as limited to their facts, rather than as espousing a far broader recognition of IP as property and hence as human rights.

In contrast with the ECHR, the more universal UDHR and ICESCR, through the language in the express provisions regarding “moral and material” interests of author/creators, present a fuller recognition of the competing rights and policy calculations at stake in the IPR/human rights relationship. As such, if property rights are eventually and more broadly recognized as human rights,¹¹⁸ the coexistence of these property rights provisions with more nuanced existing provisions such as the above-mentioned Articles argue for at least explicit, further recognition of the need to strike a balance between recognizing IP as property and accommodating other acknowledged human rights, such as freedom of expression and cultural life. Neither “hard” law nor “soft” law norms have yet to do this.

An even greater obstacle to regarding IPRs as human rights may lie, at present, in the view of the United Nations Committee on Economic, Social and Cultural Rights. In November 2005, the Committee issued a General Comment on Article 15(1)(c)¹¹⁹

¹¹⁷ Helfer believes his paper is the first attempt to analyze the European courts’ adjudication of Article 1 (the right of property) in relation to IP. *Id.* at 6.

¹¹⁸ E.g., Article 17 (UDHR): “Everyone has the right to own property, alone or in association with others.”

¹¹⁹ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c))*, U.N. Doc. E/C.12/2005 (Nov. 21, 2005) [hereinafter Comment]. A General Comment is a nonbinding but influential guideline on interpreting treaty articles and issues arising

(“Comment”). While noting that the authors’ rights in Article 15(1)(c) do not necessarily or entirely coincide with those rights as enshrined in national or international copyright law, the Committee recognized the fundamental difference between human rights and IPRs. Where the former are “inherent to the human person as such,” the latter are “first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.”¹²⁰ According to the Committee, the right recognized by Article 15(1)(c) “derives from the inherent dignity and worth of all persons” and as such contrasts with the type of rights recognized by IP law.¹²¹

The Committee’s clear distinction between IPRs and human rights is a prime example of the view that IPRs and human rights are essentially in conflict. In the human rights context, this means that, in situations where there are conflicting treaty obligations, human rights considerations must prevail over economic policy, and primacy given to human rights norms and principles.¹²² This view of the distinction between IPRs and human rights raises the question: what then are the “moral and material interests” to be protected under Article 15(1)(c)? How squarely do they map to the type and scope of rights typically recognized by IP laws? Focusing on the copyright angle for purposes of the present discussion, can we assume that “material interests” are reflected in the economic (as opposed to moral) rights, which generally mean the rights to exclude others from accessing and using copyrighted “property”?¹²³

Through the Comment, the Committee acknowledged the close linkage between the need to protect an author’s material interests and the right to own property.¹²⁴ Other than describing the general nature of a state’s obligation with respect to this right,¹²⁵ however, the Comment does not offer much specific guidance as to the extent of such material interests or the ways in which they

thereunder.

¹²⁰ *Id.*

¹²¹ *Id.*, ¶ 1.1.

¹²² See, e.g., Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, *supra* note 5. See also Peter Drahos, *Intellectual Property and Human Rights*, I.P.Q. 349 (1999) (analyzing the conceptual difficulty with placing property rights within the category of fundamental human rights).

¹²³ For analysis of the moral rights issue in this regard, see Comment, *supra* note 119, ¶¶ 12-15; see also Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1081-83 (2007).

¹²⁴ See Comment, *supra* note 119, ¶ 15.

¹²⁵ See *id.* ¶¶ 25-34 (describing the state’s obligation to protect the right to respect, protect, and fulfill).

can be assured. Given the Committee's stance on the nature of IPRs, it seems logical that the Committee would lean toward the view that material interests would not just equate to the exclusive rights conferred by IPRs. For if IPRs are instruments of the state, and human rights are fundamental and inherent to a person, an author's material interests must be different in scope from the exclusive property rights conferred by instrumentalist IP regimes.

Further, as the explicit language and drafting history of Article 15(1)(c) and related provisions¹²⁶ show, its scope is not limited to private property rights. It has been argued that Article 15(1)(c) in fact covers economic rights that are narrower than the private property rights recognized by IPRs, but that because neither the treaty nor the Committee limit the modality of protection thereunder, states are free to choose any appropriate model that will ensure treaty compliance.¹²⁷ This argument is particularly persuasive in light of the Committee's opinion that Article 15(1)(c) relates directly to ensuring an adequate standard of living for authors,¹²⁸ and that while it is thus necessary that authors' rights are effective, they do not necessarily equate to the existing levels of protection found in current IPR laws.¹²⁹ By recognizing a narrower scope for authors' economic rights, a better balance can be achieved as between authors' rights and the public's interest in acquiring access to information, since (unlike the traditional economic rights in a copyright system) the material interests to which the human rights framework refers are not tied to objectives of market efficiency and utilitarianism. This line of reasoning also enables reliance on human rights as a broader theoretical justification for a more flexible modern conception of copyright, and provides a more solid basis to resolve the IP-as-human rights dilemma highlighted by the *Anheuser-Busch* case within the context of the ECHR.

Another issue that arises in relation to the question whether IPRs are also human rights is whether, and to what extent, states (i.e., governments) ought to be able to regulate the enjoyment and exercise of such rights. Viewing IPRs as human rights would argue for a very limited role for such state regulation. It is also possible to argue that, even if IPRs are not human rights, state regulation should still be limited.

The Committee had previously proposed a very narrow test for determining the conditions for state regulation,¹³⁰ in relation

¹²⁶ See Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, *supra* note 123, at 1047-70, 1083-89.

¹²⁷ *Id.* at 1085-92.

¹²⁸ See Comment, *supra* note 119, ¶ 2.

¹²⁹ *Id.* ¶ 10.

¹³⁰ Comment, *supra* note 119.

to the right enunciated in Article 12 – the right to attain the highest standard of health – and largely repeated the same test in the Comment. While acknowledging the need to balance authors’ rights with the other rights provided for by the Covenant, the Committee thought that limitations “must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society”¹³¹ At first blush, this test seems narrower even than the Berne Convention’s “three-step” test for copyright exceptions,¹³² although the Comment goes on to state that limitations should be *proportionate*, meaning that “the least restrictive measures must be adopted when several types of limitations may be imposed,” and also *compatible* with the nature of the rights protected, which concern “the protection of the personal link between the author and his/her creation and of the means . . . necessary to enable authors to enjoy an adequate standard of living.”¹³³ These statements suggest that restrictions on an author’s exclusive rights are permissible so long as they do not encroach on the personal link between the author, her creation and the necessary exploitation of such creations which assure that author’s ability to lead an autonomous life; in other words, meaning an author’s moral rights and those economic rights to the extent that they affect the author’s basic survival. Any additional legal protections that go beyond guaranteeing this “core zone of autonomy” will need to be balanced against the other Covenant and human rights, including considerations of the appropriate balance to be struck between the various public interests acknowledged in Article 15.¹³⁴ The “moral and material interests” protected by Article 15(1)(c) are thus not absolute, requiring instead a balancing exercise that ought already to be familiar with IP legislators, policymakers, judges and scholars, even those who have not yet considered the influence of human rights in their work.

2. A Closer Relationship Between IPRs and Human Rights?

There has traditionally been a jurisprudential separation¹³⁵ between human rights and IP. This may partly explain why, in re-

¹³¹ *Id.* ¶ 22.

¹³² See Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, *supra* note 5.

¹³³ Comment, *supra* note 119, ¶ I.23.

¹³⁴ *Id.*

¹³⁵ Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, *supra* note 5. Professor Helfer points out that neither TRIPS nor the major IP conventions (Paris and Berne) specifically mention human rights, and that, despite the recognition of authors’ “moral and material interests” in the Universal Declaration of Human Rights, intellectual property has, until recently, been somewhat of a “normative backwater” in human rights jurisprudence, although the two fields are increasingly becoming more “intimate bedfellows.” *Id.*

lation to copyright policy, ensuring a certain level of A2K (a necessary precondition to the enjoyment of certain fundamental human rights) has not as yet been an explicit primary aim. This situation differs from the lively and active debate over the existence of legal protection (e.g., through patent rights) for areas such as traditional knowledge and biodiversity. This jurisprudential separation may be dissipating, in large part due to recent UN efforts recognizing the urgent need to address technology transfer and other issues of importance to developing countries.¹³⁶ However, the potential policy implications of a link between human rights and IP outside the realms of traditional knowledge, indigenous folklore and environmental materials have not, as yet, been fully addressed on the multilateral policymaking stage, although academic commentary has begun to emerge.¹³⁷ Although A2K itself is not a human right under the UDHR, the ICESCR or other major human rights treaties and documents, it is a theme that necessarily underlies various human rights. These rights, such as the right to education¹³⁸ and freedom of expression,¹³⁹ are key conditions for development; as Article 1 of the 1986 UN Declaration of the Right to Development states: it is an “inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁴⁰ Taken together with the statements regarding cultural participation and the benefits of progress in Article 27 (UDHR) and Article 15 (ICESCR), this indicates that, outside the IP policy sphere, there is high-level consensus that the extent to which the rights and interests of authors are to be protected must be determined within a broader policy context. Difficult though its resolution may be, it involves

¹³⁶ See Francis Gurry, *Globalization, Development, and Intellectual Property: New Challenges and New Opportunities*, 99 AM. SOC'Y INT'L L. PROC. 291 (2005). Mr. Gurry (who is the incoming Director General of WIPO) observes that these proposals “were born of the desire to see more appropriate recognition of the contribution of traditional knowledge systems to humanity, to prevent the unfair acquisition of intellectual property rights over this knowledge by third parties outside traditional communities and peoples, and to *make property rights in the knowledge economy more inclusive by extending them to all forms of knowledge, and not just those forms that correspond to the largely Western system of individual, as opposed to communal, creation.*” (emphasis added).

¹³⁷ E.g., Helfer, *Toward a Human Rights Framework for Intellectual Property*, *supra* note 5. See also Abbe Brown, *Socially Responsible Intellectual Property: A Solution?* (2005) 2:4 SCRIPT-ed, available at <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-4/csr.pdf> (last visited May 30, 2006), and Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, *supra* note 5.

¹³⁸ Article 26, UDHR and Article 13, ICESCR.

¹³⁹ Article 19, UDHR and Article 19, ICCPR (which latter also states that this includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”).

¹⁴⁰ G.A. Res. 41/128 (Dec. 4, 1986).

balancing social and cultural needs beyond the narrow instrumentalist vision for copyright protection.

Resolution 2000/7, adopted by the United Nations (“UN”) Sub-commission on the Promotion and Protection of Human Rights (“Resolution 2000/7”) is currently the most significant for being the first, explicit, international recognition of the conjunction of the human rights and IP agendas.¹⁴¹ Further international consensus as to the proper role of each agenda area in relation to the other, and the appropriate corresponding legal framework and recommendations to adopt, has yet to emerge. Resolution 2000/7 refers expressly to Article 27 (UDHR) and Article 15 (ICESCR) in affirming that the author’s right to protection of her moral and material interests is a “human right, *subject to limitations in the public interest.*”¹⁴² The Resolution also notes that there are “apparent conflicts” between the international IP regime (as delineated in TRIPS) and international human rights law, since TRIPS “does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications.”¹⁴³ The Resolution calls for the participation not just of governments, but also intergovernmental organizations and civil society groups, to better integrate human rights considerations into international IP policymaking.¹⁴⁴

In its concerns, language and objectives, the Resolution is yet another indication that international policymakers are beginning to acknowledge a link between IPRs and human rights, and a need to address gaps, inadequacies, and inconsistencies in future norm-setting activities and treaty negotiations. With the General Comment on Article 15(1)(c) following on the heels of the Resolution, it clearly behooves IP policymakers to heed these high-level signals, and work towards more clearly and explicitly weaving in public interest considerations – such as those described in the UDHR, ICESCR, the Resolution and the Comment – into their work.

Despite the Committee’s unequivocal distinction between

¹⁴¹ For a thorough analysis of the process behind the Resolution, see David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Subcommission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (2003).

¹⁴² Sub-commission on the Promotion and Protection of Human Rights, Sub-comm. Res. 2000/7, Aug. 17, 2000, ¶ 2, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> (last visited Nov. 21, 2008) (emphasis added).

¹⁴³ *Id.*

¹⁴⁴ In November 2001, the Sub-commission adopted a further Resolution, which reiterated its concerns over the human rights dimension to international IP, and emphasizing the need to integrate on integrating human rights with IP, particularly in relation to the ongoing WTO review of TRIPS. See Sub-commission on the Promotion and Protection of Human Rights, Sub-comm. Res. 2001/21, available at [http://193.194.138.190/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.RES.2001.21.E.n?Opendocument](http://193.194.138.190/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.RES.2001.21.E.n?Opendocument) (last visited Mar. 5, 2008).

IPRs and human rights, however, neither the Resolution nor the Comment answers perhaps the obvious question: what, exactly, does “integrating” human rights and IP mean? As described previously, one perspective, which is taken by the Committee, is that the two are in fundamental conflict, and human rights considerations must be given primacy where there is a conflict with non-human rights policies and rules. An alternative view is that there is actually no real fundamental conflict, at least if the common objectives of both human rights and IP regimes are analyzed.¹⁴⁵ From this perspective, both types of rights are viewed as having essentially the same purpose: to achieve the appropriate policy balance, as reflected in the relevant laws, between incentivizing and rewarding authors for their creations, while allowing the public to benefit from such creativity.¹⁴⁶ Thus, rather than being mutually exclusive objectives, they can be viewed as essentially intersecting, compatible and mutually supportive. The main attractiveness to this view, besides the appeal of aligning the two regimes, is that it would allow for a substantial amount of flexibility in interpreting the apparent tensions within Article 27 (UDHR) and Article 15 (ICESCR), and emphasizing commonalities rather than divergences would facilitate a more purposive approach.

A third perspective is that it basically does not matter whether the two regimes are in conflict or coexist. According to this view, what matters is to identify the human rights attributes of IPRs, and separate these from the non-human rights attributes of these IPRs. This exercise would allow a state to focus on whether its IP regime complies with its human rights obligations, without having to resolve the entirety of the tensions between human rights and IPRs.¹⁴⁷

A major benefit of this approach is that it emphasizes the link between human rights and IPRs without equating the two, and without conflating all aspects of IP protection with, and inflating them to, the status of human rights. As future analysis of each regime, and of the nature of their relationship, emerges from the work both of human rights and IP scholars, and assuming that international organizations and norm-setting bodies such as the UN Committee on Economic, Social and Cultural Rights continue

¹⁴⁵ See Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, *supra* note 5.

¹⁴⁶ See *id.* for a further analysis of the two different perspectives. Professor Helfer notes that the conflict could lead to at least four consequences: the development of more “soft law” norms, the recognition of users as rights-holders, the articulation of maximum rather than minimum standards of protection in international intellectual property treaties and policy, and (on a related note) the reception of human rights norms by WIPO, the WTO and other multilateral fora for intellectual property policy. Of these four potential consequences, the recognition of users’ rights and the attitude of WIPO toward integration of human rights would be the most significant for A2K issues going forward.

¹⁴⁷ See Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, *supra* note 123, at 1092-93.

their work on this issue, it may be that the conflict/coexistence question can and will be settled. For the moment, however, and if we allow for hope that a broader framework for copyright discourse, accommodating a variety of economic, social and cultural concerns, can be formulated, a good starting point would be acknowledging (as Resolution 2000/7 already has done) the close link between human rights and IP, and exploring ways in which that link can enrich international copyright policymaking. Some illustrations and indications of how this can be accomplished may be found in various examples, ranging from the European experience with Article 10 of the ECHR, to the proposals contained in the current iteration of the WIPO Development Agenda, explored further below.

3. The Relationship Between Human Rights, IP, and Development

In addition to the UDHR and ICESCR, other international human rights documents may also be relevant when assessing the relationship between human rights and IPRs, particularly in relation to accommodating development policy within this matrix. These documents include the previously-mentioned 1986 UN Declaration on the Right to Development and the 1993 Vienna Declaration adopted by the World Conference on Human Rights.¹⁴⁸ The former states in its preamble that development is a “comprehensive economic, social, cultural and political process, which aims to [improve individuals’ wellbeing] on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”¹⁴⁹ It declares the right to development to be an “inalienable human right”¹⁵⁰ through which “all human rights and fundamental freedoms can be fully realized,”¹⁵¹ that “[a]ll human rights and fundamental freedoms are indivisible and interdependent; [and that] equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”¹⁵² It further directs States to shoulder the “primary responsibility for the creation of national and international favorable to the realization of the right to development,” which includes the duty to cooperate and ensure a “new international economic order [that] . . . encourage[s] the observance and

¹⁴⁸ As recorded by the UN Secretariat in Conference Document No. A/CONF/157/23 (July 12, 1993).

¹⁴⁹ G.A. Res. 41/128, *General Assembly on the Adoption of the UN Declaration on the Right to Development* (Dec. 4, 1986).

¹⁵⁰ *Id.* at art. 1.

¹⁵¹ *Id.*

¹⁵² *See id.* at art. 6.

realization of human rights.”¹⁵³

The Vienna Declaration echoes on a broader scale much of the objectives and provisions of the 1986 Declaration, including the “universal, indivisible and interdependent and interrelated” nature of human rights.¹⁵⁴ In addition, it reaffirms the right to development as integral to human rights. It confirms that States have a duty to promote and protect human rights and fundamental freedoms, that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” and calls on the international community to support these goals.¹⁵⁵ In relation specifically to the UN system, it calls on all UN organizations and agencies “whose activities deal with human rights to cooperate in order to strengthen, rationalize and streamline their activities” and avoid duplication.¹⁵⁶ It also recognizes the ability of NGOs and grassroots organizations engaged in development and human rights work to contribute to national and international discourse and work relating to the right to development.¹⁵⁷

Although not having the same binding effect as treaties, these statements and documents provide a useful window for IP policymakers into what may hitherto have been a somewhat obscure world, illustrating the amount of international policy activity relating to human rights that extends beyond the UDHR and ICESCR. When read together, they may allow IP policymakers to conceive of their roles and actions as having a broader impact beyond the debates and activities undertaken by and within WIPO. They would also allow policymakers to take into account considerations which give prominence – possibly even priority – to the means by which IPRs can contribute positively to development and the achievement of human rights goals. After all, the overarching theme behind the Declaration on the Right to Development and the Vienna Declaration is the link between development and human rights. To the extent that IPRs are viewed as at least linked to human rights, they therefore mandate the promotion of development, such that IP policymaking and norm-setting within a human rights framework ought also to include development issues. To this end, the affirmation of the Vienna Declaration by the UN-endorsed World Summit on the Information Society (“WSIS”), in its Declaration of Principles (Geneva, 2003)¹⁵⁸ and the Tunis

¹⁵³ See *id.* at art. 3.

¹⁵⁴ See *id.* at Part I, ¶ 10.

¹⁵⁵ See *id.* at Part II, ¶ 8.

¹⁵⁶ See *id.* at Part II, ¶ 1.

¹⁵⁷ See *id.* at Part II, ¶ 73.

¹⁵⁸ World Summit on the Information Society, 2003, *Vienna Declaration and Declaration of Principles*, WSIS-03/GENEVA/DOC/0004.

Commitment (Tunis, 2005),¹⁵⁹ indicates welcome continued interest at international, inter-governmental and multilateral levels in development-oriented policymaking.

A further positive indication that development concerns will continue to figure prominently in international policy circles is the adoption in October 2007 by the WIPO General Assembly of a Development Agenda.¹⁶⁰ This initiative, following on the heels of WSIS and specifically requiring further integration of the development dimension into the work of WIPO, is likely to be of particular significance to efforts to link IP policy, human rights and development. Although the WIPO Development Agenda is of such recent provenance that its potential successes cannot yet be outlined, much less measured, in any detail, its substantive goals can provide the motivation and the means for IP policymakers to discuss the IP/human rights interface openly, and incorporate more directly the public interest values espoused by human rights into future treaties, norms and activities. How this process may be started is explored further, below.

B. *Initial Lessons from Human Rights Jurisprudence*

Article 10(2) of the ECHR may to some extent be instructive to copyright policymakers seeking to strike the appropriate policy balance between competing public policy interests. This Article provides, in relation to permitted restrictions on freedom of expression, that since exercise of such a right

carries with it duties and responsibilities, [it] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary* in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁶¹

Although broadly similar to the Comment in its emphasis on limiting restrictions only to what is “necessary” in a democratic society,¹⁶² Article 10(2) goes on to specify the various public interests

¹⁵⁹ World Summit on the Information Society, 2005, *Vienna Declaration and Tunis Commitment*, WSIS-05/TUNIS/DOC/7.

¹⁶⁰ The Development Agenda was formally adopted by the WIPO General Assembly on November 12, 2007 (Report of the 2007 General Assembly, WO/GA/34/16) [hereinafter WIPO].

¹⁶¹ The European Convention on Human Rights, as adopted by the Council of Europe at Rome on 4 November 1950 [hereinafter ECHR].

¹⁶² There are echoes also of Article 29 of the UDHR:

In the exercise of his rights and freedoms, everyone shall be subject only to such

that would, presumably, qualify as such (and thereby approximate, in somewhat more specific fashion, the “legitimate aim” prescribed by the Comment).¹⁶³ Specifically, Article 10(2) mentions the public interest in protecting the “rights of others”; this can be read as a reference not just to the other fundamental Convention rights, but also including the exclusive rights conferred by copyright law on authors/owners.¹⁶⁴ This mirrors the conflicting public interests involved in determining whether and to what extent it would be appropriate to create or expand a limitation or exception to copyright (as does the statement that the right of free expression also embodies “duties and responsibilities”).¹⁶⁵ In this regard, UK case law provides an instructive example as to whether a particular legislative measure satisfies the “necessity” test under Article 10(2). UK case law requires asking “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than necessary to accomplish the objective.”¹⁶⁶

In relation to copyright law, the question would thus be whether a particular limitation or exception to any one or more of the exclusive rights fulfills this three-pronged test. Since Article 10(2) goes on to state that necessity may also require protecting the rights of others, it is possible to argue (as with the UDHR and the ICESCR) that this means a very limited ability on the part of states to restrict a copyright owner’s exclusive rights. On the other hand, since freedom of expression under Article 10 of the ECHR is a broad and neutral right (i.e., it does not apply only to authors/owners), it may be possible to counter-argue that the ability to access, quote from, copy, adapt and use another’s copyrighted work is *also* a form of free expression, and, as such, any restriction thereof is similarly permitted under Article 10(2).¹⁶⁷ In other words, if freedom of expression is viewed from the reverse perspective – that of the user of a copyrighted work (as opposed to the author/copyright owner) – a human rights-oriented approach

limitations as are determined by law *solely for the purpose of securing due recognition and respect for the rights and freedoms of others* and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Id. (emphasis added).

¹⁶³ The mechanism of listing each such interest could also potentially limit the scope of restrictions and exceptions, as compared with the possibility of adopting a more general prescription that any limitations should be for the general welfare of the public.

¹⁶⁴ See ECHR, *supra* note 161.

¹⁶⁵ *Id.*

¹⁶⁶ See Lord Clyde’s opinion in the Court of Appeal, in *de Freitas v. Permanent Secretary of Ministry of Agriculture Fisheries Lands and Housing* [1999] 1 A.C. 6 (P.C.).

¹⁶⁷ See, e.g., Robert Danay, *Copyright vs. Free Expression: The Case of Peer-to-Peer Filesharing of Music in the United Kingdom*, 8 YALE J.L. & TECH. 2 (2005-2006.)

could actually support stronger and broader fair use principles and other limitations and exceptions to copyright.

While this argument highlights the tension that is also found in Article 27 (UDHR) and Article 15 (ICESCR), it also provides an additional frame of reference for applying the Berne/TRIPS “three-step test” in copyright law.¹⁶⁸ Aside from providing a framework for raising specific questions and questioning the considerations relevant to each of the three steps, it would also allow judges and policymakers to make decisions based not on vague notions either of an author’s (or right holder’s) “legitimate interests” or what might constitute a “normal exploitation” of the copyrighted work, but on specific public policy concerns such as those specified in Article 10(2) of the ECHR. Admittedly, some of these are less likely to be relevant to a typical copyright law enquiry, while others (especially the need to protect the rights of others) are no more specific than the language of the “three-step test.” Nevertheless, the emphasis on certain other considerations (such as the need for a democratic society and the protection of morals) serves at least as both a reminder and a guideline for a flexible and fair application of the policy-balancing exercise at the heart of copyright law.

The free expression/copyright interface may, however, present particular problems for the US. The Constitutional underpinning of US copyright law means that the issue whether and how US copyright law affects freedom of expression necessarily requires consideration of the relationship between copyright and other foundational Constitutional principles,¹⁶⁹ an issue that does

¹⁶⁸ *E.g.*, that a copyright limitation and exception be allowed only in “certain special cases” that neither conflicts with a “normal exploitation” of the work nor “unreasonably prejudice the legitimate interests” of the author (Berne) or right-holder (TRIPS).

¹⁶⁹ *See, e.g.*, *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968); *Rosemont Enter. v. Random House Inc.*, 366 F.2d 303 (2d Cir. 1966); *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D.Ga. 2001) *rev'd* 252 F.3d 1165 (11th Cir. 2001); *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985); and *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). The general judicial attitude toward any potential conflict between the First Amendment and copyright law principles, however, seems to be that the latter doctrines already have built into them considerations that pertain to free speech, such as the “idea/expression” dichotomy and the principle of fair use. There is a wealth of academic commentary on this issue; *see, e.g.*, Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Lyman Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1 (1987); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983; Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Michael Birnhack, *The Copyright Law and Free Speech Affair: Making Up and Breaking Up*, 43 IDEA: J.L. & TECH. 2 (2003) and Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred, 44 Liquormart, and Bartnicki*, 40 HOUSTON L. REV. 697 (2003).

On the resulting “enclosure” of the public domain as well as the First Amendment challenges posed by the continuing expansion of copyright, i.e., by concentrating “information production” in the hands of fewer and less diverse sources, see Yochai Benkler,

not arise in European copyright.¹⁷⁰ As such, if US copyright law “as is” already incorporates free speech concerns, legal issues such as those faced by the UK courts in aligning the existing public interest exceptions under its copyright law with the human rights framework of the ECHR (specifically, Article 10)¹⁷¹ are unlikely to be prominent issues in the US. This could, however, mean less room to maneuver, under US copyright law, toward importing a stronger human rights framework to assist in determining specific issues that raise free speech concerns. Moreover, the lack of equivalent, express constitutional recognition of IPRs in much of European copyright means that natural law theories, premised on personality and property rights, tend to exercise a greater influence on copyright discourse in those jurisdictions.¹⁷² This view of copyright accounts in part for another difference between US and much of Continental copyright law: the relatively late recognition in European copyright policy discussions of the copyright/free speech interface, which was precipitated eventually by national implementations of the ECHR and more recent developments such as the harmonization efforts of various European Union Directives.¹⁷³

To the extent that US copyright law is viewed as already accommodating to and inclusive of free speech principles (through, e.g., the doctrines of idea/expression and fair use), arguments based on free expression are unlikely to be useful against any fur-

Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354 (1999). For an examination of the role of copyright law in furthering a “speech hierarchy” corresponding to market wealth, see Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000). For an economic perspective on the interaction between intellectual property and free speech concerns, see Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2001).

¹⁷⁰ See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001).

¹⁷¹ *Ashdown v. Telegraph Group* [2001] E.M.L.R. 1003, on appeal from [2001] E.M.L.R. 554. In this case, the Court was asked to consider the relationship between the right of free expression under Article 10 of the ECHR and the rights protected by copyright law, including whether or not the UK’s fair dealing provisions should be read in light of Article 10. Although the Court found that there was no fair dealing on the facts, it opined that there may well be circumstances where freedom of expression might trump copyright interests, including cases where the use in question would not fall within an existing statutory exception under the copyright statute, although these circumstances may well be rare. Whether a particular case is one where copyright is overridden in this way could not be defined with any specificity, but instead requires factual analysis on a case-by-case basis. For further commentary, see Timothy Pinto, *The Influence of the European Convention on Human Rights on Intellectual Property Rights*, E.I.P.R. 2002, 24(4) 209; see also Chris Ryan, *Human Rights and Intellectual Property*, 23 E.I.P.R. 521 (2001).

¹⁷² See P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in INNOVATION POLICY IN AN INFORMATION AGE (Rochelle Cooper Dreyfuss, Harry First and Diane Leenheer Zimmerman eds., 2000).

¹⁷³ *Id.*

ther expansion of copyright. To the extent, however, that tensions between copyright and free speech continue to be highlighted by scholars and perhaps case law from other jurisdictions, it may yet be possible to employ free speech principles to support the preservation of the public domain and other copyright doctrines that would militate against further “propertization” and expansion of copyright.¹⁷⁴ Admittedly,, there may be more flexibility for grafting human rights norms and standards into issues that would otherwise be considered strictly copyright matters in Europe than in the US. Furthermore, this would likely take place within the ambit of a more general discussion of the “public interest,” for example, as prescribed by the ECHR and certain national copyright laws. In addition, the continuing influence of natural law theory and a greater recognition of moral rights in the European framework also fit well with a more human rights-oriented approach to copyright, albeit with some continuing tension as to how property rights conferred within such a paradigm should coexist with user rights and public access.

It will be unfortunate if human rights jurisprudence and considerations turn out to be less applicable in judicial interpretations and policy discussions in US copyright law than in Europe and elsewhere. Propertization, the public domain and the scope of copyright are not issues that are limited territorially. Rather, the generality of fundamental copyright law principles, bolstered by the Berne Convention and TRIPS and the increasing link between national trade policies, multilateral/bilateral trade negotiations, and IPRs, means that these are global concerns, and increasingly less tied to national legal history or purely domestic concerns. Considerations of global trade also necessarily bring in development issues. Just as the ethos of the commons should evolve to take on a broader base of factors and considerations, similarly, the overlapping relationships among free speech, A2K, development, and copyright/IP mean that alternative, or at least broader and more flexible, frameworks ought to be utilized in framing and guiding policy discussions going forward. Explicit recognition that the major human rights instruments refer to rights and interests that relate to IP would point to a human rights-oriented approach as the obvious candidate for such a broader methodology. Beyond the free speech arena, additional reasons for integrating human rights into international copyright policy include the increasing political, policy and legal discussions over the recognition

¹⁷⁴ Where a robust public domain would not only facilitate the dissemination of and access to information, but also allow for active participation in democratic processes and community life, copyright law can thereby harness the jurisprudence of free speech as further support for a strong public domain. This argument is made very convincingly and forcefully by Michael D. Birnhack. See Birnhack, *supra* note 32.

of cultural rights and the protection of indigenous knowledge.¹⁷⁵

III. PLACING COPYRIGHT WITHIN A HUMAN RIGHTS FRAMEWORK

A. *Proposals for Integrating Human Rights, IP, and Development Policy*

Throughout this paper, I have made the assumption that A2K and development are closely linked, and that social and cultural norms and differences must factor into copyright policymaking, nationally and internationally. Questions such as the extent to which “development” – of the political, social, economic and cultural kinds – is affected by stronger or weaker IPRs, the basis for and role of social and cultural theory, and the cultural and creative significance of community life and diverse cultures are all complex areas of study which, though relevant, are beyond the scope of this article. These questions are also relevant – in some cases, very much so – to other areas of IP policy which intersect with human rights concerns, such as health and access to medicines, and the protection of indigenous knowledge, environments, and communities. Important as all these sectors are to human life, and to the question of the appropriate levels of IP protection that will cater adequately to all the myriad commercial, societal, community and other interests impacted thereby, much of the scholarship and analysis of these issues have been “sector-specific” rather than ambitious attempts to provide more comprehensive solutions.¹⁷⁶

Where development policy was concerned, traditional welfare economics and liberal economic theory have largely measured development in terms of economic well-being and utility, e.g., through emphasis on a country’s Gross National or Domestic Product or its income levels and wealth distribution, rather than by focusing on human functioning (meaning achievement) and capabilities (meaning ability).¹⁷⁷ Such sector-specific and economically-focused approaches are necessarily somewhat narrow in scope. Without purporting to be a complete theory or solution to

¹⁷⁵ See, e.g., Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, *supra* note 4.

¹⁷⁶ See Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2826-31 (2006).

¹⁷⁷ *Id.* See also David A. Clark, *The Capabilities Approach: Its Development, Critiques and Recent Advances*, GPRG-WPS-032 (a paper prepared for the Global Poverty Research Group, published in 2006 under the title *Capability Approach*), in *THE ELGAR COMPANION TO DEVELOPMENT STUDIES* (David A. Clark ed., 2006) (describing, *inter alia*, the work of Amartya Sen and Martha Nussbaum on the “human capabilities approach” that has since become a substantial cornerstone of development policy, particularly as an alternative to traditional utilitarian economics). For further analysis of the intersection between development and human capability, see the work of the Human Development Capability Association (HDCA), [available at http://www.capabilityapproach.com/Home.php?sid=3d24f7cea9e449aefc72b7a8e5359b1f](http://www.capabilityapproach.com/Home.php?sid=3d24f7cea9e449aefc72b7a8e5359b1f) (last visited Mar. 5, 2008).

development issues, an alternative approach known as the “capability approach”¹⁷⁸ is broader and more flexible; as such, it is likely to be more inclusive of the kinds of non-legal, non-economic considerations that the A2K and copyright question requires. The capability approach takes into account not only principles of economic efficiency but also of personal liberty. As such, it refocuses development policy on people and their achievements as objectives in and of themselves, rather than as mere economic units of production. This more expansive view of development emphasizes human choice and freedoms and allows for differences across cultures, countries and societies in terms of their needs and the measures and levels of their development.¹⁷⁹

Adopting a broader approach to development policy has clear parallel implications for copyright policymaking that aims to facilitate consideration of more varied public interest factors. For example, such factors may include values and norms centered on access rather than ownership, cultural and social norms rather than market efficiencies, and achieving human rights objectives rather than purely utilitarian goals. To these ends, the work of several leading IP scholars is both significant and timely. In line with the capability approach, Professor Margaret Chon suggests that international IP policymakers consider adopting a “substantive equality norm” (analogous to the strict scrutiny doctrine in US constitutional law) that would require the decision-maker to strike down a rule that interferes with the achievement of a basic human need (in the development context, these would be those identified in the UN Millennium Development Goals).¹⁸⁰ Such a principle is

arguably the very core of a human development-driven concept of “development,” whether expressed as heightened attention to distributional concerns, or to the social consequences of economic growth, or as a commitment to poverty reduction. Certain foundational capacities, whether viewed as the sum of individual capabilities or as national capacities, should guide application of the rules of intellectual property globalization.¹⁸¹

¹⁷⁸ See Clark, *supra* note 177.

¹⁷⁹ The capability (or human capabilities) approach is but one theory that supports a broader view of global economic policy. For an alternative approach, and an analysis of the theories of John Rawls and T. M. Scanlon in relation to a distributional framework encapsulating principles of fairness and justice, see John Linarelli, *What Do We Owe Each Other in the International Economic Order? Constructivist and Contractualist Accounts*, 15 J. TRANSNAT'L L. & POL'Y 181 (2006).

¹⁸⁰ See further discussion, *infra* note 181.

¹⁸¹ Chon, *supra* note 176, at 2835-36. Professor Chon relies on the capabilities approach and another theory drawn from recent development economics (global public goods theory) in support of her proposal. She notes also that much of developed country IP scholarship has focused on narrower issues, such as those relating to domestic utilitarian objectives or on doctrines which, even though they may impact broader development goals (such as fair use on education) have not been examined from this angle.

Professor Chon also addresses the relationship between public international law (of which, of course, human rights is a part) and development issues in international IP lawmaking and norm-setting. She notes that in addition to rules of treaty interpretation and existing practices by, *inter alia*, international dispute settlement bodies, the major human rights treaties, by dealing with IP, already incorporate a substantive equality norm;¹⁸² furthermore, that a good way to achieve policy integration between the human rights and IP fields is to incorporate the former, via the language of development, as just such a norm into the latter. Professor Chon's proposal argues for basic human needs (from poverty eradication to education), heightened A2K and development considerations to figure more prominently in IP decision-making.¹⁸³ Where she suggests concrete means, both general (normative) and specific (applicative),¹⁸⁴ of changing the face of IP decision-making, I have attempted to provide a complementary, consistent and coherent basis for the incorporation methods she proposes. I also argue that a human rights-oriented framework is preferable to a strict property paradigm for dealing with copyright policy, particularly where such policy sets out to take into account broad development needs and global issues.

Examining IP in the context of human rights, traditional knowledge and community norms and values, Professor Rosemary Coombe has noted that there is some ambiguity in the use of the word "culture" in relation to international human rights, with the different usages largely determining the extent of the particular state's perceived obligations with respect to IPRs. These different meanings of "culture" range from the perception that culture is the "accumulated material heritage of humankind" such that an individual ought then to have the right to access this material, to culture as "the material and spiritual activities, products, meanings and values of a given social group that distinguishes it from other groups" such that cultural rights include notions of cultural identity and community as well as ownership and access.¹⁸⁵ In writing about indigenous knowledge and the possibility that IPRs can function in a number of roles, e.g., as useful political rhetoric, as achievable (even desirable) outcomes or as antagonist, she notes that even the term "IPRs" can be perceived as Western epistemology that reveals a particular (Western) thinking as to how knowl-

¹⁸² *Id.* at 2905-06.

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 2907-08. Professor Chon expands on some of these methods, in relation specifically to textbooks, access to education and the existing international copyright framework governing the applicable rights and limitations in this area, in *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

¹⁸⁵ Rosemary J. Coombe, *Intellectual Property, Human Rights and Sovereignty*, 6 IND. J. GLOBAL LEG. STUD. 59 (1998).

edge is (individually) generated; yet in many indigenous communities, knowledge is not only a cultural product, but also contextual and community-based.¹⁸⁶ Not only does Professor Coombe provide thoughtful contributions towards a better understanding of the differences between developed and developing countries writ large, and between different types of communities and cultural knowledge, she also cautions against the temptation of adopting patronizing or uniform approaches when considering broader factors and alternative policy frameworks.¹⁸⁷

The link between human rights and IPRs through the multilateral negotiation system and the evolution of international bodies such as the World Trade Organization (“WTO”) and WIPO has been traced by Professor Laurence Helfer. He notes that the “skeletal and under-theorized intellectual property provisions of human rights laws” do not provide clear guidelines as to how to develop appropriate norms and rules while avoiding the trap of rhetoric and the risk of the labeling of every putative claim as a human right.¹⁸⁸ In analyzing the General Comment on Article 15(1)(c), he highlights the Committee’s failure to define the “moral and material interests” protected under Article 15(1)(c).¹⁸⁹ He further notes that the Comment itself illustrated the clear difficulty in developing coherent, comprehensive rules for interpreting IP provisions of human rights treaties, which tend toward sparse language and which, for the economic, social and cultural rights (as distinct from political and civil rights) tend also to be undeveloped and far less prescriptive.¹⁹⁰

In light of these challenges, Professor Helfer nonetheless detects a hint of how the Committee might in future work on other provisions of Article 15 articulate such a framework. For example, the Committee acknowledges (at least implicitly) certain potential tensions between various human rights and their achievement.¹⁹¹ This necessarily calls for a broad “margin of appreciation” of rights in order to reconcile different, even competing policy objectives, and potentially to reconcile varied calibrations of those reconcilia-

¹⁸⁶ However, Professor Coombe warns against assuming that all indigenous interest in IP “assumes a collective cultural form.” *Id.* at 108.

¹⁸⁷ These themes are explored more recently in Rosemary J. Coombe, Steven Schnoor & Mohsen Ahmed, *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891 (2007) (discussing the growing link between IPRs and social reform, and how IPRs can be an expression of the cultural rights protected by, *inter alia*, the UDHR and ICESCR).

¹⁸⁸ Helfer, *Towards a Human Rights Framework for Intellectual Property*, *supra* note 5, at 976.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Comment, *supra* note 119 ¶ 35, which exhorts states to make sure that their “legal and other regimes” for IPRs constitute no impediment to their ability to comply with their core obligations in relation to the right to food, health, education culture, as well as the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications or any other right set out in the [ICESCR].

tions across countries. The Committee's reference to "core obligations" under the ICESCR could indicate also that the Committee may eventually come to differentiate between various Covenant obligations on the basis of what it considers core and non-core. Such a step would then become a yardstick for measuring state compliance with their international treaty obligations.¹⁹²

Although it is still early for detailed jurisprudence to emerge from the Committee's work on Article 15, the Comment, though limited, is a promising start.¹⁹³ It remains to be seen which of Professor Helfer's three possible versions of a human rights framework for IP will be the one that eventually develops: (1) using human rights to justify expanding IPRs; (2) using human rights to justify strengthening limitations and exceptions to IPRs (from permissive to mandatory); or (3) focusing on defining minimum outcomes defined by human rights-based needs and then either adopting, revising or rejecting IPRs (as appropriate) to achieve those outcomes. It is also possible that a fourth as-yet-unidentified possibility will form the basis for integrating human rights and IP policy. Although each is different in approach and potential outcome, any policy movement in that direction will be a positive signal that the international IP community is starting to integrate human rights considerations into its work.

Professor Peter Yu has examined various aspects of international IP policy, including the role and influence of human rights and the drafting history of several IP-related provisions in human rights treaties.¹⁹⁴ He differentiates between what he terms "external conflicts" (i.e., the apparent conflict between human rights and IPRs) and "internal conflicts" (i.e., conflicts between different rights within the human rights regime).¹⁹⁵ This differentiation reminds us that IPRs contain both human rights and non-human rights characteristics, lending a more detailed nuance to the conflict/coexistence issue. Professor Yu argues that recognizing this

¹⁹² The Committee could also provide further blueprints and additional principles for the future shaping of IPRs, in that those exclusive rights that comport with (or that can be justified as) core obligations might be more politically and widely acceptable than those which do not.

¹⁹³ In agreeing with Professor Helfer, Professor Karl Raustiala points out that the expansion and increasing propertization of IPRs is even more "profound" at the international level, largely because of the rigidity of TRIPS and compounded by the growing density of international organizations, treaties, rules, norms and practices, with the inevitable overlaps, confusion and multiple "regime complexes." See Kai Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021 (2007) (warning of the risk that adopting a human rights framework for IPRs could lead to a further propertization of IP). Professor Helfer also notes this possibility. See Helfer, *Towards a Human Rights Framework for Intellectual Property*, *supra* note 5, at 1015-17.

¹⁹⁴ See, e.g., Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, *supra* note 123, see also Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1 (2005).

¹⁹⁵ Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, *supra* note 123, at 1078.

differentiation allows a state to examine and calibrate its IP system toward fulfilling its human rights obligations, and also permits it to explore the conflict/coexistence issue more specifically in relation to whether the non-human rights aspects of its IP regime conflict or coexist with its human rights aspects.¹⁹⁶ The answer to this question – which may vary from state to state – will then largely depend on how much protection for human rights has already been built into the existing state system.

In relation to internal conflicts, Professor Yu recognizes that the primacy principle may not be helpful. Instead, he proposes that the “progressive realization” approach, which has also been advocated by scholars such as Professor Helfer, is preferable.¹⁹⁷ This is because such an approach aims to facilitate the progressive realization by individuals of their economic, social and cultural rights, by means of a balancing exercise that requires a state to balance the various intra- and inter-provision conflicts in human rights treaties. The result is a prioritization of rights and a determination, and if necessary an adjustment, of the level of protection afforded to IP within its national laws. While Professor Yu’s approach would result in greater fragmentation rather than international harmonization, it reconciles state sovereignty with the need to relate IPRs and human rights. It also supports the view that a “one size fits all” approach to IP policy is inappropriate and insufficiently flexible to accommodate development-oriented policy goals.

Many of these scholars share the belief that the current international IP regime does not adequately accommodate concerns of distributive social justice, and the relatively simplistic utilitarian balancing act it currently espouses tends to favor IP producers (who are located primarily in developed, mostly Western, countries).¹⁹⁸ It does not easily allow for non-economic developmental considerations that are emphasized by human rights jurisprudence and norms, and that are socially beneficial objectives that IP regimes ought to incorporate. Alongside specific proposals for addressing these inadequacies, the scholars whose work I have highlighted support (either explicitly or implicitly) a broader approach that incorporates social and cultural theory, and that more clearly maps to less utilitarian objectives such as self-actualization, freedom of choice, and human development. Such a perspective

¹⁹⁶ *Id.* at 1093.

¹⁹⁷ *Id.* at 1094-1123 (discussing also the “just remuneration” and “core minimum” approaches).

¹⁹⁸ See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency and Development)*, 40 U.C. DAVIS L. REV. 717 (2007) (reviewing various scholarly proposals for redressing the distributive gap by reducing the emphasis on efficiency doctrines and utilitarian considerations).

fits well with more recent trends in development economics, such as the evolution of the “human capabilities” approach.¹⁹⁹ This approach, by emphasizing freedom (which depends on access to resources and the availability of real options) and equality (which demands more than merely tweaking an existing system based on predetermined entitlements by other criteria), provides a “toolkit” for exploring and integrating social and cultural studies into what, traditionally in the copyright world, was a more simplistic ownership/access duality.²⁰⁰

B. *The Integration Question and the WIPO Development Agenda*

In August 2004, several countries, led by Argentina and Brazil, joined together to press for a formal Development Agenda to be adopted by WIPO.²⁰¹ The proposal that was submitted by the so-called “Friends of Development” (“FOD”) called for WIPO to integrate the development dimension more explicitly and broadly into its work, in areas ranging from norm-setting and research and impact assessments to the provision of technical assistance and technology transfer.²⁰² Because one of WIPO’s primary objectives is to “promote the protection of intellectual property throughout the world,”²⁰³ certain developing countries, civil society groups and the FOD considered that this language encouraged WIPO to undertake activities that are in line with the economic interests of developed nations so as to further an expanding, “maximalist” IP regime.²⁰⁴ The push for a WIPO Development Agenda can be

¹⁹⁹ See Chon, *supra* note 176. See also Cohen, *Creativity and Culture in Copyright Theory*, *supra* note 11.

²⁰⁰ See Cohen, *supra* note 11 (critiquing the rights/economics debate, rooted in Anglo-American liberal political philosophy, and which has thereby marginalized developments in social and cultural theory that explore cultural changes, processes and the evolution of knowledge creation).

²⁰¹ See WIPO, *supra* note 160.

²⁰² The proposal and the specific measures that the FOD suggest be adopted by WIPO are contained in WIPO Document WO/GA/31/11; *available at* http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf (last visited Aug. 1, 2006). Although the FOD proposal deals generally with overarching issues of IP policy, its themes and proposals implicate copyright law in various respects. Based on the premise that IPRs and international harmonization towards uniform, higher levels of protection should not be ends in and of themselves, but rather tools for development and innovation, the proposal highlighted A2K as a key method for fostering innovation and creativity.

²⁰³ Convention Establishing the World Intellectual Property Organization art. 3 (2007).

²⁰⁴ See, e.g., James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9 (2004). For a discussion on the 1994 adoption and implementation of the TRIPS as part of the establishment of the WTO, mandating minimum standards for IP protection in all WTO member states, and how this has solidified the link between trade policy and IP by providing a set of internationally-sanctioned standards for compliance as a step toward participation in the global trading order, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004). For a discussion on the general role of IPRs in trade and development policy, see *Intellectual Property Rights in the Global Economy* (Keith Maskus ed., Institute for International Economics, 2000). For a discussion on the dominant economic interests and major corporate agendas behind TRIPS, see Peter Dra-

seen, at least in part, as a recent maneuver by less-developed member states to push for a more inclusive policy to enunciate WIPO's broader role as part of the UN organizational network and to more truly be a member-driven (meaning considering the interests both of developing as well as developed countries) organization.

The September 2005 WIPO General Assembly ("GA") agreed to set up a Provisional Committee ("PCDA") to consider the proposal in greater detail.²⁰⁵ At the first PCDA meeting in February 2006, the FOD highlighted the "growing importance of access to knowledge, of protecting and promoting access to the cultural heritage of peoples, countries and humanity, and the need to maintain a robust public domain through norm-setting activities and enforcement of exceptions and limitations to intellectual property rights" as one of the five core issues that WIPO should address as part of a broader Development Agenda.²⁰⁶ By the conclusion of the second PCDA meeting, the number of member state proposals had grown to 111, and although the aim had been to report recommendations to the 2006 GA, this was not achieved due to a lack of consensus.²⁰⁷ The PCDA's mandate was extended by the GA for a further two meetings, with explicit admonitions to streamline the proposals. They were divided accordingly into five main "Clusters":²⁰⁸ Cluster A (Technical Assistance and Capacity Building), Cluster B (Norm-setting, Flexibilities, Public Policy and the Public Domain), Cluster C (Technology Transfer, Information and Communication Technology (ICT) and A2K), Cluster D (Assessments, Evaluation and Impact Studies), and Cluster E (Institutional Matters Including Mandate and Governance). There was also Cluster F, dealing with other issues related to enforcement of

hos & John Braithwaite, *INFORMATION FEUDALISM* (Earthscan Publications Ltd., 2002). On the other hand, it may be possible for developing countries to implement the minimum standards of TRIPS while also developing defensive yet pro-competitive national policies. See, e.g., J. H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997).

²⁰⁵ The General Assembly had also agreed to three Intersessional Intergovernment Meetings ("IIMs") to discuss the proposal. The three IIMs were held between April and July 2005, during which various country and regional proposals were discussed. The proceedings of the IIMs may have helped streamline discussions within the PCDA, which had been set up expressly to facilitate a more efficient and faster way of working out the FOD proposal. It would otherwise likely have floundered at the larger and busier general Session meetings.

²⁰⁶ The other four core issues were ensuring that its norm-setting activities accurately reflected the priorities of as well as differences among member states, developing member-driven mechanisms and processes for performing and evaluating independent and objective research and studies, strengthening technical assistance programs, and facilitating technology transfer. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO DOCUMENT PCDA 1/5 5 (2006), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=56613.

²⁰⁷ See Report from the Second Session of the Provisional Committee on Proposals related to a WIPO Development Agenda, PCDA2/4 (Sept. 18, 2006).

²⁰⁸ See the Decision of the 2006 WIPO General Assembly, WO/GA/33/10 (Oct. 3, 2006).

IPRs. Of the six Clusters, development concerns figured most prominently in Cluster A (which included calls for WIPO technical assistance to be “development-oriented, demand-driven and transparent”), Cluster B (assertions that norm-setting should be participatory, supportive of the UN Millennium Development Goals and facilitate different levels of development), and Cluster C (calling on WIPO to expand activities for bridging the digital divide). In addition, Cluster F specifically referenced “broader societal interests” as part of an overall approach to IP enforcement, in line with TRIPS Article 7.²⁰⁹

By the conclusion of the third PCDA meeting in February 2007, negotiators had successfully agreed on 24 proposals for submission to the September 2007 GA.²¹⁰ These included Cluster B recommendations to “[c]onsider the preservation of the public domain within WIPO’s normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain”;²¹¹ and under Cluster C for “assisting Member States to identify practical IP-related strategies to use ICT for economic, social and cultural development.”²¹² Other proposals called for the enhancement of civil society participation in WIPO processes, and greater cooperation between WIPO and other UN organizations.²¹³

Although development policy and its link with IP is not a new subject area for WIPO,²¹⁴ the original FOD proposal sparked heated debates, particularly at the second PCDA meeting.²¹⁵ The success of the PCDA process in bringing agreed proposals to the GA means that the challenge of development as a major international IP policy goal for the 21st century was ultimately recognized.

²⁰⁹ TRIPS Article 7 provides that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

²¹⁰ See Report from the Third Session of the Provisional Committee on Proposals related to a WIPO Development Agenda, PCDA/3/3 (June 11, 2007).

²¹¹ *Id.*, Annex 1, 11.

²¹² *Id.*, Annex 1, 15.

²¹³ *Id.*, Annex 1, 21, 23.

²¹⁴ Besides its programs spanning training, technical assistance and practical workshops, WIPO has had, since 1998, a Permanent Committee on Cooperation for Development Related to Intellectual Property (“PCIPD”). The PCIPD was created by merging the prior Permanent Committees for Development Related to Industrial Property and for Copyright and Neighboring Rights. Since its inception, however, the PCIPD has had only four meetings (the last in August 2005) and has not figured prominently in the overall decision-making process at WIPO (for example, it has not – on the face of the publicly-available documents from WIPO – made specific recommendations relating to development policy to the General Assembly). The low profile of and lack of activity within the PCIPD led many WIPO observers (including civil society groups) to describe it as a moribund committee lacking any real power within the organization. With the GA’s adoption of the June 2007 PCDA recommendation to establish a Committee on Development and IP, the PCIPD will cease to exist.

²¹⁵ See Report from the Second Session of the Provisional Committee on Proposals related to a WIPO Development Agenda, PCDA/2/4 (Sept. 18, 2006).

This may have been facilitated by the FOD's reference to the UN Millennium Development Goals, to be achieved by all UN Member countries by 2015. These Goals were based on the Millennium Declaration adopted at the Fifty-fifth Session of the UN General Assembly; it pledged to make "the right to development a reality for everyone" and "create an environment conducive to development," in part through "good governance at the international level."²¹⁶ Of the eight Millennium Development Goals, those most relevant to development and IP include the goal of universal primary education and the establishment of a "global partnership for development."²¹⁷

The final PCDA meeting in June 2007, at which member states agreed on a further set of twenty-one proposals to be presented to the GA, was hailed by the WIPO Director-General as a significant breakthrough, particularly given the hostile stalemate of 2006.²¹⁸ In addition to those development and A2K-related proposals approved at the February meeting, the final list of forty-five proposals, read together, highlight the need for WIPO and its activities to be "development-oriented," "demand-driven," and transparent.²¹⁹ The list includes proposals relating to technical assistance and capacity building projects that "promote fair balance between IP protection and the public interest," and norm-setting activities that facilitate a "robust," "rich and accessible" public domain and that support the UN Millennium Development Goals.²²⁰ In addition to yearly review and evaluation mechanisms for its development activities, WIPO is also to undertake, at Member States' request, studies "to assess the economic, social and cultural impact of the use of intellectual property systems" and "on the protection of intellectual property, to identify the possible links and impacts between IP and development."²²¹

At this stage, the WIPO Development Agenda (as encapsulated in these forty-five proposals) is, perhaps necessarily, still largely aspirational in nature and high-level in tone. It is certainly too early to predict, much less judge, how successful this plan will be in practice. There is no doubt, however, that the successful outcome of the PCDA process and formal adoption of the WIPO Development Agenda (in particular, the establishment of a Com-

²¹⁶ UNITED NATIONS, UNITED NATIONS MILLENNIUM DECLARATION DOCUMENT A/RES/55/2 § III (11)-(13) (2000), <http://www.un.org/millennium/declaration/ares552e.pdf>.

²¹⁷ The Goals, background, and various Progress Reports can be accessed online at <http://www.un.org/millenniumgoals/> (last visited Mar. 5, 2008).

²¹⁸ WIPO Press Release PR/2007/497.

²¹⁹ See Annex A of the PCDA Report, prepared for the 43rd WIPO GA in September/October 2007, Document Number A/43/13 (Aug. 17, 2007).

²²⁰ See *supra* note 217.

²²¹ See Annex I of the Report from the Fourth Session of the Provisional Committee on Proposals related to a WIPO Development Agenda, PCDA/4/3 (Sept. 4, 2007).

mittee for Development and Intellectual Property) are incredibly rich opportunities and timely platforms for discussions over the intersection of IP, human rights and development. Although the WIPO Development Agenda does not expressly mention human rights, by emphasizing development it necessarily and inevitably opens the door for human rights considerations to enter the discourse. This is so particularly considering a number of significant policy developments in the broader, non-IP specific area, such as the endorsement of the 1993 Vienna Declaration (referencing the 1986 Declaration on the Right to Development) by WSIS in 2003 and 2005, the adoption of UN Resolution 2000/7 and the release of the General Comment on ICESCR Article 15(1)(c).

C. *The Way Forward*

Having progressed beyond political posturing, procedural obstacles, and policy stalemates, it is time for governments, regional and international organizations, and civil society to get down to the undoubtedly mammoth task of translating the objectives and proposals of the WIPO Development Agenda into practice. To this end, I hope that the newly-formed Committee for Development and IP (“CDIP”) will take the lead and commit itself to explicit consideration of human rights and public interest values in its work and recommendations to WIPO member states. At least two levels of commitment are possible: (1) the CDIP may seek to more expressly align the goals of the Development Agenda to mirror, generally, those of the UN Millennium Development Goals and, more specifically, the values enshrined in Article 27 (UDHR) and Article 15 (ICESCR); and (2) it can prioritize “action items” from the forty-five approved proposals. Although nineteen of the forty-five proposals had been identified by the GA as appropriate for immediate implementation, the initial Working Document that was circulated at the first meeting of the CDIP (in March 2008) recognized that these had been identified partly because they did not require additional financial or human resources, and WIPO had already held or planned programs that fell within the broad scope of these nineteen proposals.²²²

While this step is understandable from an efficiency and resource viewpoint, the fact that nothing in the Preliminary Implementation Report relating to the nineteen proposals mentioned other UN agencies, treaties, or activities, or seemed to contemplate a broader context for WIPO’s activities, is disappointing. It was encouraging, however, to find limited references to partnerships with other UN organizations and international governmental

²²² CDIP/1/3 (Mar. 3, 2008).

organizations in the draft Working Document for the remaining twenty-six proposals.²²³

At its initial meeting in March 2008, the CDIP discussed five of the forty-five GA-approved proposals, which constituted just under twenty percent of the twenty-six proposals for which it was to develop a work program. By the end of its Second Session in July 2008, about a dozen proposals in total had been discussed, some from the list of nineteen initially identified and others from the remaining twenty-six.²²⁴ Perhaps not surprisingly, the focus was on existing WIPO programs and outreach to lesser and the least developed countries, and discussions centered on finance questions, human resources and technical assistance.²²⁵ One interesting discussion that arose during the Second Session related, however, to whether and how WIPO and the CDIP should work with other WIPO Committees; an issue that saw disagreement between some developed (e.g., the United States and Japan) and developing countries (e.g., Argentina, speaking on behalf of the Friends of Development, and Brazil). The Chair's Summary report noted ultimately that "there was a need to discuss the necessary mechanisms for its coordination with other relevant WIPO bodies in implementing the adopted recommendations, and also the modalities for monitoring, assessing and reporting on the implementation of recommendations."²²⁶ These issues – and continuing discussions over the forty-five proposals – will be on the agenda at the Third Session of CDIP in 2010.

The generality and breadth of the GA-approved list of forty-five proposals are such that the CDIP faces a challenging task not only in working out implementation details, but also in determining effective and measurable assessments of any programs or initiatives that are to be launched or reworked. Given the history of the Development Agenda process and the disagreements that are already surfacing amongst CDIP members, it is highly unlikely that all delegations will reach swift and comprehensive agreement on all of the proposals. The final section of this paper therefore includes suggestions that the CDIP can consider as it continues to refine and develop implementation activities for the Development Agenda.²²⁷

It is imperative for the CDIP to bear in mind that development is a cross-cutting issue not merely confined (or confinable)

²²³ CDIP/1/3 Annex V (e.g., at pp. 16 & 27).

²²⁴ See the Chair's Summary of the Second Session of the Committee on Development and IP (CDIP/2/SUMMARY, July 14, 2008).

²²⁵ *Id.* at Annex I.

²²⁶ *Id.* ¶ 10.

²²⁷ The CDIP is slated to meet twice yearly, with its first meeting in March 2008 and its second expected to be July 2008.

to IP, and encompasses political, economic, social, civil and cultural matters. By framing development-oriented IP policy by restating it within a human rights context, the CDIP can attract interest and participation from individuals, groups and governments who traditionally would not have been involved in substantial IP law or policymaking. These might include human rights organizations and government actors/departments usually geared to focus on regulatory and policy sectors other than IP (such as labor/employment, educational policy or even telecommunications and infrastructure). Whether or not adding new actors is a desirable outcome is, of course, a different matter, as is whether or not such participation would fall within the CDIP's mandate. At the very least, however, the attention of these groups and entities would be drawn to the CDIP's work, with potential spillover effects into other policymaking realms and arenas.

Another step the CDIP can take is to expressly reference the Vienna Declaration in its work so as to underscore the link between development and human rights. This would provide the beginnings of a sound framework within which to develop and evaluate more specific action items for the Development Agenda. Additionally, it is critical that the CDIP, in recommending ways of implementing the forty-five proposals, prioritizes considering how best to engage national governments, regional groupings, and international organizations in this effort. One way to do this might be that, instead of generalizing about "human rights," it could (relying on, *inter alia*, the UN Millennium Development Goals, the ICESCR and the Vienna Declaration) point out specific associations between human rights goals and development. For example, proposals relating to A2K could be linked directly to poverty eradication and education, and A2K-linked "performance measures" could be mandated for the periodic review, evaluation, and assessment of WIPO's development-oriented activities.²²⁸ In developing these mechanisms, the CDIP could also recommend utilizing and building on techniques, research and methodologies already being studied in traditional human rights work. Further, where the Development Agenda expressly mandates WIPO to "intensify its cooperation on IP related matters with UN agencies,"²²⁹ the CDIP could reach out to other UN organizations for greater information-sharing and cooperation, and recommend to the GA that specific proposals be matched with particular agencies for further research and implementation. Finally, it could also work with

²²⁸ For a discussion on Cluster D of the accepted proposals, see Decision of the 2006 WIPO General Assembly, *supra* note 208.

²²⁹ For a discussion on Cluster E of the accepted proposals, see Decision of the 2006 WIPO General Assembly, *supra* note 208.

other, non-UN, less informal and/or ad-hoc organizations and groupings. Of these, the various stakeholders and community representatives that participated in WSIS are possibly the most logical partners.

WSIS came about when, in December 2001, the UN General Assembly adopted a resolution²³⁰ endorsing the convening of a World Summit on the Information Society. Organized by the International Telecommunication Union (“ITU”), WSIS was held in two phases: in Geneva in 2003 and Tunis in 2005.²³¹ The Geneva Phase saw the issuance of a Declaration of Principles and a Plan of Action, which, *inter alia*, affirmed the international community’s commitment to build a “people-centered, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential . . . respecting fully and upholding the Universal Declaration of Human Rights.”²³² In the Geneva Declaration and Plan of Action, as well as in their affirmation and further development by the Tunis Commitment and Agenda for the Information Society, the dual themes of development and A2K are repeated and resonate throughout the numerous recommendations, from bridging the digital divide to financing and the provision of Internet infrastructure.²³³

For purposes of the present discussion, the WSIS process is notable for at least two reasons. First, it represented a concerted effort by the UN and national governments to take a multi-stakeholder, participatory approach. Second, it endorsed implementation plans and follow-ups that are to be monitored by the Economic and Social Council of the UN (“ECOSOC”), supported by its Commission on Science and Technology for Development, which after WSIS now includes NGOs and civil society representatives.²³⁴ This illustrates the growing role that NGOs, civil society, industry associations, and individuals play in formulating devel-

²³⁰ Resolution 56/183 (Dec. 21, 2001).

²³¹ Further background information about the process, motivations and outcomes of WSIS can be found on its website: <http://www.itu.int/wsis/index.html> (last visited Mar. 5, 2008).

²³² See Geneva Declaration of Principles, ¶ A(1), at <http://www.itu.int/wsis/outcome/booklet.pdf> (last visited Mar. 5, 2008).

²³³ See the WSIS Outcome Documents, endorsed by the UN General Assembly in Resolution 60/252. These, as well as the Geneva Declaration and the Tunis Commitment, are available online at <http://www.itu.int/wsis/index.html> (last visited Nov. 15, 2008).

²³⁴ UN Resolution 2006/46 (July 28, 2006). On April 26, 2007, ECOSOC announced that NGOs and civil society groups that did not have consultative status with ECOSOC but who had been accredited to WSIS could participate in the next two meetings of the Commission for Science and Technology in Development (“CSTD”), on the understanding that they will apply for consultative status. ECOSOC also concurrently announced that business entities accredited to WSIS could participate in CSTD meetings, although their participation would be reviewed in 2010.

opment-related policy on the international stage. Given that the IP arena contains an increasing number of NGOs and civil society groups, recognition through the WSIS process of the legitimacy of such groups' participation in norm-setting and other policy activities is timely and welcome, particularly as WIPO has also recently begun admitting more such groups as ad-hoc observers at various meetings. Because the multi-stakeholder approach "has permeated the WSIS process to a greater extent than in any previous UN Summit and is the cornerstone of WSIS implementation,"²³⁵ it seems logical, even natural, to expect that, if and as WIPO, through the Development Agenda and the CDIP, begins to more fully integrate development policy (including issues relating to social and cultural values) into its norm-setting and other activities, there will be a greater role for those stakeholders and communities that have not traditionally been well-represented on the international IP policy stage.

According to a recent study on the role of NGOs in IP policymaking within multilateral fora,²³⁶ on a number of IP-related matters, "international NGOs have established close links with developing country delegates in a way that has not been seen in the context of other issues, such as environmental issues or human rights, where [they] have historically been perceived as critical of developing countries."²³⁷ They have also been fairly successful in capacity-building, awareness-raising and facilitating coordination across organizations. At the same time, because different government departments and individual delegates may have responsibilities for various IP issues falling within their specific charge, and because these delegates also change over time, there is room for international NGOs to also focus on providing advice and technical expertise to governments at the capital level. Concurrently, multilateral institutions (such as WIPO and the WTO) could facilitate further positive contributions by NGOs, and greater meaningful participation by developing countries, by making better use of regional outreach programs and ensuring transparency of operations. Such studies suggest that there are benefits and efficiencies to be achieved at the international negotiation/norm-setting level by further engaging NGOs in their facilitation and capacity-building roles; the Development Agenda and the CDIP can, correspondingly, be appropriate fora where such engagement can be

²³⁵ See ITU-UNCTAD *World Information Society 2007 Report: Beyond WSIS* (May 2007), available at <http://www.itu.int/wisr> (last visited Mar. 5, 2008). The Report notes that, of around 3,300 WSIS-related projects worldwide, over 55% were being conducted through partnerships amongst different bodies and groups.

²³⁶ Duncan Matthews, NGOs, *Intellectual Property Rights and Multilateral Institutions*, a report of the IP-NGOs Research Project at the Queen Mary Intellectual Property Research Institute (Dec. 2006).

²³⁷ *Id.* at 14.

pro-actively developed.

CONCLUSION

As the question of whether and how to integrate human rights and IP in future international standards-setting and policy-making remains unresolved, it is not clear whether and how propounding greater integration will influence the implementation of the WIPO Development Agenda, including the mandate, work, and priorities of the CIPD. Nor is it clear that an express commitment to more fully integrate a “development dimension” into WIPO’s work will necessarily mean the adoption of human rights norms and values. Nonetheless, and at the very least, it seems obvious that the international IP world needs to pay greater attention to human rights norms and values.

This paper has suggested that, without having to equate IPRs with human rights, it is possible to adopt a policy approach within the IP sphere that is at least oriented toward human rights concerns. Adopting a human rights-oriented approach to IP policy-making means that recognized human rights norms, such as transparency, civic participation, and the development of needs-based guidelines, should be considered by WIPO member states as they discuss and evaluate how to best implement the Development Agenda.²³⁸ Taking a more human rights-oriented approach could also minimize potential distractions and conflicts created by differing national and regional jurisprudential approaches toward IPRs, in that it will facilitate more flexible implementations of international standards, while still retaining a basic harmonized framework and recognized minimum standards. This of course entails recognition and acceptance that, in IP, there is no “one size fits all” approach; rather, the scope of IPRs in individual nation states depends on a number of particular factors, from development needs to the presence and strength of copyright-dependent industries.

While proponents of uniform and universal expanded IP protection may balk at this perceived fragmentation, it should be remembered that many states (and certainly if they are WTO member states) maintain at least minimum standards of IP protection that conform to TRIPS. These uniform minimum standards were openly negotiated by sovereign states. Beyond that, international IP norms and standards have to be developed according to needs and values that go beyond economic dictates or the balance of international power. To this end, the ability of the interna-

²³⁸ See, e.g., *Human Rights and the Establishment of a WIPO Development Agenda*, Information Note 5 (June 2006), issued by the policy group 3D – Trade – Human Rights – Equitable Economy, at http://www.3dthree.org/pdf_3D/3Dnote5_WIPO_June06.pdf.

tional IP framework to be sufficiently flexible so as to accommodate social and cultural diversity and other human rights concerns is to be viewed as a positive rather than a negative trait. To the extent that countries and governments wish to press for higher (e.g., TRIPS-plus) protection standards, the international endorsement of a human rights-oriented framework at the very highest levels (i.e., the UN, its various institutions and international fora) will allow each sovereign nation to determine its negotiating position with a clearer understanding of the types and range of interests to be considered. In this regard, the contributions of international NGOs to capacity-building and awareness-raising should not be disregarded.

Until the conflict/coexistence issue between IPRs and human rights is settled, adopting a very broad normative approach may be the best course for the international copyright community to take in implementing the WIPO Development Agenda. From this broad perspective, human rights are purely a general framework that allows for a wider diversity of public interest values and factors to be considered and weighed in the development and enunciation of legal standards, norms and rules. Such a human rights-oriented approach need not definitively address the conflict/coexistence question. Instead, it could simply allow human rights norms and values to be called upon when the age-old policy-balancing question in copyright – weighing the needs of users and authors against each other – falls to be determined. This relatively basic approach will necessarily attract criticism because of its very vagueness. Its beauty and appeal, however, may lie in its very simplicity. By functioning as a recognized, legitimate and primary framework in the minds of policymakers, legislators, and judges when making decisions ranging from norm-setting to dispute settlement, rules and outcomes that enhance development and other human rights concerns can be adopted. More immediately, it should form the basis upon which WIPO Member States endorse specific activities as part of the Development Agenda.

Further, at this early stage, some prudence in crafting a fuller human rights framework may be advisable given that the evolution of human rights has become somewhat inflationary, and additional rights have gradually been added to the human rights pantheon (consequently attaining the fundamental and inalienable status of existing human rights).²³⁹ This adds an element of uncer-

²³⁹ Cornides, *supra* note 5 (pointing out that the December 2000 Charter of Fundamental Rights of the European Union includes rights such as, *inter alia*, a right to cultural diversity, access to preventive healthcare, and a high level of consumer protection). See also Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, *supra* note 4 (outlining three “generations” of human rights: classical rights (first generation), welfare rights (second generation) and peoples’ rights or solidarity rights (third generation), and

tainty to the adoption of a human rights framework and/or its substantive content in IP discourse. Although expanded rights would *prima facie* seem to be advantageous both to those advancing IPRs as human rights, as well as to embedding A2K concerns further into IP policy, the lack of international agreement over the status of new human rights, even as the status of IPRs within the human rights world remains somewhat unsettled, would argue for caution in the matter.

This paper thus does not advocate that copyright and IP rush to embrace human rights as a substitute framework. It also does not recommend completely discarding the property paradigm. What I propose is more limited, but will hopefully prove to be effective as well as workable and politically acceptable. This involves, first and foremost, a change of perspective. By moving away from a view of copyright premised on the ownership of private property to one that focuses on access rights (regardless of who owns the work, if at all) within a human rights context, we shift our collective policy mindset away from the restraints of private property consequences (i.e., the right to exclude) toward one that is more open to considerations relating directly to A2K and development. This will facilitate a larger role for social and cultural norms and values in determining the scope of copyright, not simply as an instrumental means of achieving market efficiencies and providing related economic incentives, but more broadly as a society's manifestation of how it balances different and potentially conflicting individual/societal and economic/socio-cultural demands, needs and interests, in the name of overall development.

While the "copyright as property" paradigm undoubtedly provides a more certain and better-established framework, and even though newer and more flexible views of the public domain and, more particularly the commons, are evolving that can accommodate some A2K and development issues, looking purely to the property framework for future copyright direction may ironically create even greater uncertainty. The familiar robustness of the property model is premised on the existence of ownership and excludability, neither of which principles lend themselves easily to flexibility and non-economic interests. A broader public domain and commons concept will still have to develop within that rigid framework. In contrast, the human rights framework not only accommodates property ownership and interests, which it recognizes as fundamental human rights, it elevates non-economic values (such as free expression and social and cultural progress) to a similar status. As such, it seems better able to provide both a co-

noting that "cultural rights" and the right to development (amongst others) form part of the third generation that remain the subject of much debate and controversy).

herent theoretical basis as well as a suitably flexible framework for developing copyright rules and norms that will more clearly facilitate A2K and development.