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J. Janewa OseiTutu

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# CORPORATE “HUMAN RIGHTS” TO INTELLECTUAL PROPERTY PROTECTION?

**J. Janewa OseiTutu\***

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## INTRODUCTION

When the owners of the controversial bit-torrent website, *The Pirate Bay*, were charged with criminal offenses for violating copyright law,<sup>1</sup> they asserted their right to freedom of expression as a constitutional right, as well as under the European Convention on Human Rights.<sup>2</sup> Noting that copyright is protected not only by statute, but also under the applicable human rights law, the court sought to balance the human right to freedom of expression against the human right to property.<sup>3</sup> The court noted that the right to property includes intellectual property.<sup>4</sup> Thus, the European court balanced the *human right* to free speech against the *human right* to copyright as a form of property. Interpreted as a limited statutory right, copyright should be accorded less weight than the human right to free speech.<sup>5</sup> However, as human rights, neither the right to copyright nor the right to

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1. *Neij v. Sweden*, App. No. 40397/12 (Eur. Ct. H.R. 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117513>.

2. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

3. *Neij*, App. No. 40397/12.

4. *Id.*

5. In the United States, copyright law recognizes the First Amendment right to free speech as part of the balancing that is implicit in the law. *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“The Second Circuit noted, correctly, that copyright’s idea/expression dichotomy ‘[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”). The current argument assumes that countries respect human rights as inalienable rights that should not be violated. However, this is not the practice in all countries. *See, e.g.*, Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) (some of China’s censorship laws and their impact on copyright were at issue in this dispute). Nor is it consistently the practice in countries that do recognize human rights.

free speech would necessarily take precedence over the other.<sup>6</sup>

A human rights approach to intellectual property has been suggested as one way to achieve greater balance in what many commentators perceive to be a global intellectual property system that has led to excessive protection.<sup>7</sup> Intellectual property rights play an important role in society. The challenge, however, is to construct intellectual property rules that stimulate innovation in a manner that is conducive to social and economic welfare.<sup>8</sup>

The “human rights framework” uses human rights norms to interpret and develop intellectual property laws. There are two ways in which human rights norms can interact with intellectual property law. First, human rights law can be used to limit intellectual property rights. For instance, if one considers the human right to health when interpreting patent rights, the government obligation to protect patents could be limited so that it does not interfere with access to medicines.<sup>9</sup> This use of human rights to temper intellectual property can be characterized as a response to the global harmonization of intellectual property laws. A second aspect of the human

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6. James W. Nickel, *Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights*, 30 HUM. RTS. Q. 984, 984–85 (2008). While in principle there is no hierarchy of rights, this does not always reflect the reality of human rights law insofar as civil and political rights are often given greater recognition than economic, social and cultural rights.

7. See Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, Panel Discussion on Intellectual Property and Human Rights (Nov. 9, 1998); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47 (2003); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121; Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975 (2007).

8. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement] (Article 7, Objectives, states: “[t]he 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.”).

9. For example, under Articles 27 and 28 of the TRIPS Agreement, all WTO members have an obligation to provide patent protection to inventions from other WTO member countries.

rights approach is the characterization of intellectual property protection *as a human right*. The right to patent, trademark, or copyright protection is not typically considered a human right. However, provisions in the Universal Declaration of Human Rights<sup>10</sup> (UDHR) and other human rights instruments support the proposition that some aspects of what we understand to be copyright or patent protection are human rights.<sup>11</sup> Initially, this may seem appealing to social justice advocates. As this Article will argue, however, a human right to intellectual property protection is more likely to expand intellectual property rights than to counter the negative effects of excessive intellectual property protection. In particular, it is often assumed that corporations are naturally excluded from asserting human rights to their intellectual property.<sup>12</sup> However, corporations have used human rights law as a basis for their intellectual property claims.<sup>13</sup>

The characterization of these rights is important because framing patents and copyrights as property rights, natural rights, or human rights can impact their legal treatment. The state may place limitations on some rights more easily than others depending on the theoretical underpinnings of the right. For instance, we may treat the rights differently depending on whether we conceive of them as natural rights—like human rights<sup>14</sup>—or as privileges. We might

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10. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

11. *Id.* at 71. See also Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47 (2003). There appears to be some overlap with patent and copyright protection but not with trademark, except to the extent that a trademark right is considered a property right.

12. Audrey R. Chapman, *Core Obligations Related to ICESCR Article 15(1)(C)*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 305, 316–317 (Audrey Chapman & Sage Russell eds., 2002).

13. See *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

14. Jack Donnelly, *Human Rights as Natural Rights*, 4(3) HUM. RTS. Q. 391, 391 (1982). Human rights are “fundamental and inalienable” rights that are enjoyed by all human beings by virtue of being human. They are generally understood to be natural rights as understood by Locke. *Id.* While human rights are widely understood to be natural rights, some theorists have argued that human rights are not natural rights but rather that they are based on a social justice model. *Id.* at 392.

inquire whether the rights at issue are fundamental<sup>15</sup> rights or limited state-granted rights. These characterizations also affect our understanding of the nature of the persons or groups who are entitled to the rights, as well as the way the rights are balanced.

Since intangible rights are tremendously valuable in the current information economy, the treatment and characterization of rights is a salient question for domestic and international intellectual property law. A fundamental constitutional right,<sup>16</sup> like freedom of speech or the right to own property,<sup>17</sup> may also be an international human right.<sup>18</sup> This is because the human rights framework is based on international principles, but these rights are typically embodied in domestic constitutions and enforced by national governments.<sup>19</sup>

This Article contemplates the potential impact of human

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15. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5 (1986) (“[T]he terms ‘human rights,’ ‘freedoms,’ ‘fundamental human rights,’ ‘fundamental freedoms,’ ‘rights and freedoms’ and, most commonly, ‘human rights and fundamental freedoms’ appear, in general, to be used interchangeably. This practice suggests that there is no substantive or definable legal difference between these terms. In these instruments at least, ‘human rights’ are not inferior to ‘fundamental’ rights and freedoms. They are the same.”).

16. BLACK’S LAW DICTIONARY 674 (6th ed. 1990) (defining “fundamental rights” as “[t]hose rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution . . . and state constitutions.”).

17. See U.S. CONST. amend. V. The Bill of Rights, comprised of Amendments I–X of the Constitution, provides for the protection of property. Amendment V states, in part, that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” *Id.* UDHR Article 17 states, “(1) Everyone has the right to own property alone as well as in association with others, 2) No one shall be arbitrarily deprived of his property.” UDHR, *supra* note 10, art. 17.

18. Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 806 (2009).

19. Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 283 (2007) (“The global human rights regime relies on national implementation of internationally recognized human rights. Norm creation has been internationalized. Enforcement of authoritative international human rights norm, however, is left almost entirely to sovereign states.”); HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 987–88 (2d ed. 2000) (“This section looks at one of the important phenomena of the past 50 years or so: the spread among many states of constitutions expressing political (and sometimes economic) liberalism, and often recognizing human rights.”).

rights principles on intellectual property law, particularly if corporations seek to protect their intellectual property interests based on human rights laws. For instance, the American corporation that owns the *Budweiser* trademark made a property-based human rights claim to its trademarks under the European Convention on Human Rights.<sup>20</sup> Yet, the question of corporate-owned intellectual property within a human rights framework for intellectual property remains relatively unexplored and unsettled.<sup>21</sup> If the goal is to treat the entitlement to intellectual property rights *as a human right*, the human rights framework is likely to strengthen, rather than temper intellectual property rights. However, where human rights objectives are used to *limit* intellectual property rights, the framework is likely to achieve its stated objective: bringing more balance to the intellectual property system.

The argument here is not that corporations enjoy human rights *per se* or that they should be entitled to such rights. Rather, as the human rights framework evolves, it is important to anticipate that corporations will continue to seek to protect their intellectual property interests. In light of the upward trend in intellectual property protection, corporations may attempt to frame intellectual property rights using a human rights lens, even if they do not explicitly make human rights claims. This Article recognizes that intellectual property law can benefit from human rights concepts. However, engaging with some of the theoretical challenges presented by a human rights framework for intellectual property may be useful as the framework is developed and tailored to meet its balancing objectives.

Part I of the Article discusses the global trend towards increased intellectual property protection and the resulting human rights concerns. It then goes on to explain the relevance of corporations to the human rights framework. In Part II, the Article explains the human rights basis for claiming intellectual property protection. Part III analyzes

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20. *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36, ¶ 78 (Grand Chamber 2007).

21. LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (Cambridge Univ. Press 2011).

the human rights framework for intellectual property and its potential impact on intellectual property law. Finally, the Article elaborates on the relationship between corporations and human rights and offers some preliminary suggestions for limiting corporate human-rights-based intellectual property claims.

## I. GLOBAL INTELLECTUAL PROPERTY TENSIONS

### A. *Critiques of the Existing Framework*

Most commentators agree that there has been an increasing amount of tension in the international intellectual property system in recent years.<sup>22</sup> Enforceable global minimum standards for intellectual property were established for the first time in 1994 when the World Trade Organization (WTO) was created.<sup>23</sup> These standards include minimum terms of protection for copyright, patents, and trademarks and a requirement to provide patent protection for all fields of technology.<sup>24</sup> Prior to this time, nations maintained a fair amount of discretion regarding their domestic intellectual property laws. Increased global intellectual property standards were driven largely by private industry in the United States and Europe.<sup>25</sup> The WTO’s minimum intellectual property standards came into effect in 1995 through the Agreement on Trade-Related Intellectual Property Rights (“TRIPS”),<sup>26</sup> an agreement to which all

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22. Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 973 (2007) (“The international intellectual property system is on the brink of a deepening crisis. Government officials, civil society groups, and private parties are staking out opposing positions on a variety of issues in an increasingly wide range of venues.”).

23. WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *reprinted in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]; TRIPS Agreement, *supra* note 8, at 320.

24. TRIPS Agreement, *supra* note 8, arts. 9–21, 27–34.

25. JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 116 (Norton & Company, 2007) (“[T]he corporate interests that care intensely about intellectual property have succeeded in getting more and more of what they want . . . This was exemplified by the influence of these corporate interests in the adoption of the TRIPS agreement within the WTO.”).

26. TRIPS Agreement, *supra* note 8, art. 65.1 (“Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the

members of the WTO member countries had to adhere.<sup>27</sup> Once TRIPS came into force, all WTO members had to meet the minimum standards contained therein, regardless of whether the standards were suitable for their domestic conditions.<sup>28</sup>

The TRIPS standards were designed primarily for the benefit of industrialized countries with intellectual property intensive industries, whose interests were sometimes at odds with those of the developing and least developed economies.<sup>29</sup> While the least developed countries were given an extended deadline to implement their TRIPS obligations, developing countries had to comply with TRIPS once the five-year grace period ended in 2000.<sup>30</sup> Although some countries were pleased with the standards, many others were dissatisfied.<sup>31</sup> Some nations consider the standards inadequate and have continued to press for increased intellectual property protections through other bilateral or multilateral agreements.<sup>32</sup>

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date of entry into force of the WTO Agreement.”).

27. Article II.2 of the WTO Agreement states, “[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all Members.” WTO Agreement, *supra* note 23, art. II.2. The TRIPS Agreement is Annex 1C. TRIPS Agreement, *supra* note 8.

28. There was, however, a delayed period of entry for developing country members. TRIPS Agreement, *supra* note 8, arts. 65–66. For a fuller discussion on the suitability of TRIPS for all countries, see J. Osei-Tutu, *Value Divergence in Global Intellectual Property Law*, 87 *IND. L.J.* 1639 (2012).

29. Marie Byström & Peter Einarsson, *TRIPS: Consequences for Developing Countries Implications for Swedish Development Cooperation* 48–49 (2001) (consultancy report to the Swedish International Development Cooperation Agency (SIDA)), available at <http://www.grain.org/system/old/docs/sida-trips-2001-en.PDF>.

30. TRIPS Agreement, *supra* note 8, arts. 65–66. The least developed countries were given an extension of time until July 1, 2013, and then again until July 1, 2021. See *Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members: Decision of the Council for TRIPS of 29 November 2005*, IP/C/40 (Nov. 30, 2005); *Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members: Decision of the Council for TRIPS of 11 June 2013*, IP/C/64 (June 12, 2013).

31. CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES* (2000).

32. Peter K. Yu, *Shaping Chinese Criminal Enforcement Norms Through the TRIPS Agreement*, in *CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 286, 286–87 (Christophe Geiger ed. 2012).

Thus, since the adoption of TRIPS, there have been a number of agreements described as “TRIPS plus” intellectual property agreements that build on the minimum standards that TRIPS introduced.<sup>33</sup> Industry associations continue to press for strong intellectual property standards in these “TRIPS plus” agreements, such as the Trans-Pacific Partnership negotiations.<sup>34</sup> Negotiations on a Trans-Atlantic Trade and Investment Partnership (TTIP) began in 2013.<sup>35</sup> The stated goals for the TTIP negotiations include the development of “rules, principles[,] and new modes of cooperation” relating to intellectual property.<sup>36</sup> It is expected that this agreement will further strengthen intellectual property protections.<sup>37</sup>

Simultaneously, there have been numerous critiques of these globalized intellectual property standards and the deleterious effects intellectual property rights can have on human health and access to knowledge. Many academics and commentators view the current intellectual property laws as overprotective.<sup>38</sup> In particular, commentators have expressed concern about the way patent and copyright laws affect developing countries that have yet to reach the level of

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33. Cynthia M. Ho, *An Overview of “TRIPS-Plus” Standards*, in ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS (C. Ho ed. 2011).

34. Letter from Pharmaceutical Research and Manufacturers of America (PhMRA) to Gloria Blue, Exec. Sec’y of the Trade Policy Staff Comm., Exec. Office of the President 4, USTR-2009-0041 (Jan. 25, 2010), available at <http://www.wcl.american.edu/pijip/go/tpp>.

35. Office of the United States Trade Representative, Transatlantic Trade and Investment Partnership (T-TIP), <http://www.ustr.gov/ttip>.

36. Office of the United States Trade Representative, White House Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip>.

37. Alex Newman, *TTIP of the iceberg – what the Transatlantic Trade and Investment Partnership means for lawyers on both sides of the Pond*, LEGALWEEK (Feb. 12, 2014), <http://www.legalweek.com/legal-week/analysis/2327975/ttip-of-the-iceberg-what-the-transatlantic-trade-and-investment-partnership-trade-deal-means-for-lawyers-on-both-sides-of-the-atlantic>.

38. See, e.g., Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1030 (2007); see also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37–41 (2003) (describing the expansion of intellectual property rights); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (Random House 2001).

development where these laws are useful for domestic industry.<sup>39</sup> Scholars and activists have critiqued the effect of patents on access to medicines, and the effect of copyright laws on access to knowledge.<sup>40</sup> Arguably, the “access to medicines” movement and the “access to knowledge” movement formed in response to increased global intellectual property standards.<sup>41</sup> For instance, there was an attempt to create an international agreement on access to knowledge.<sup>42</sup> In addition, the WTO member states issued a Declaration on TRIPS and Public Health that stated that intellectual property rights should not interfere with access to medicines.<sup>43</sup>

The human rights framework appears to be a further critical response to these strengthened intellectual property rights, and one that is pertinent to the access to medicines movement, the access to knowledge movement,<sup>44</sup> and the proposal for a new traditional knowledge right.<sup>45</sup> The human rights framework is a potentially powerful model for reforming global intellectual property law. It could help to counter excessive intellectual property rights, but it could

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39. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

40. See Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165, 171 (2000) (noting the patent related health concerns of developing country members); Helfer, *supra* note 22, at 984–86; Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547, 548–51 (2003) (discussing the North-South division and the negative reaction of farmers in India to the TRIPS Agreement).

41. See, e.g., Geneva Declaration on the Future of the World Intellectual Property Organization, *available at* <http://www.futureofwipo.org/futureofwipodeclaration.pdf>. In this document, a number of members of civil society expressed their concern about the future of the WIPO (“WIPO must also express a more balanced view of the relative benefits of harmonization and diversity, and seek to impose global conformity only when it truly benefits all of humanity. A ‘one size fits all’ approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.”).

42. Treaty on Access to Knowledge (Draft), May 9, 2005, *available at* [http://www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf).

43. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

44. Treaty on Access to Knowledge (Draft), *supra* note 42.

45. See World Intellectual Property Organization [hereinafter WIPO], *Traditional Knowledge*, <http://www.wipo.int/tk/en/>.

also enhance protections for intellectual property producers.

The assertion that a human rights framework for intellectual property does not extend to corporations renders the human rights approach more consistent with the objective of tempering the excesses of intellectual property because it largely excludes those who sought higher intellectual property standards at the WTO. However, developments in intellectual property law over the past several years indicate that businesses—including corporations that own intellectual property—will seek to protect their rights to the maximum extent possible.<sup>46</sup> If the purpose of incorporating human rights principles into intellectual property law is to create a more balanced system, the potential for large corporations to utilize the framework is pertinent to the discussion. Yet, the relationship between corporations and the human rights framework for intellectual property has received minimal attention in the literature.

### *B. Corporate Human Rights Claims to Intellectual Property*

There are three reasons for giving corporations further consideration. First, the proposed human rights framework must be considered in context. The relevant context is that globalized intellectual property standards were driven largely by the interests of major companies.<sup>47</sup> Furthermore, the purpose of the merger between trade and intellectual property was to ensure that the intellectual property held by American and European companies would be adequately protected overseas.<sup>48</sup> The trend described as the “ratcheting up” of intellectual property rights is largely about protecting business interests. Intellectual property producing companies—whether corporations or other business entities—

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46. See Mike Palmedo, *Notes on Third Hearing of U.S. International Trade Commission Investigation of Trade, Investment, and Industrial Policies in India*, INFOJUSTICE (Feb. 17, 2004), available at <http://infojustice.org/archives/32228>.

47. Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 858–59 (2003); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 97–99 (Cambridge Univ. Press 2003); Chapman, *supra* note 12 at 308.

48. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 274 (1991).

will continue to press for higher intellectual property standards.<sup>49</sup> It is within this context that one must evaluate the benefit of a human rights approach to intellectual property law and policy.

Second, states extend human rights protections<sup>50</sup> to legal persons when they believe there is some basis for doing so.<sup>51</sup> Thus, both legal and natural persons may enjoy the right to property and the right to free speech, for example, but not a right to be free from torture.<sup>52</sup> Since a legal person cannot be tortured, there is no rational basis for extending such rights to corporations. However, corporations, like natural persons, own property and can participate in speech, which is why nations may choose to extend speech, property, or other human rights to corporations.

Finally, and perhaps most importantly, framing intellectual property rights through a human rights lens can alter the way we perceive intellectual property rights for both legal and natural persons. Moreover, the human rights framing, which is based on a natural rights approach rather than the current utilitarian approach to intellectual property, could strengthen, rather than weaken, intellectual property rights. Contemplating the human rights framework *from an intellectual property perspective*, this Article posits that the same business interests that continue to pursue increased global intellectual property standards are likely to attempt to frame human rights claims to their intellectual property.

One may not be inclined to think of large business corporations enjoying human rights protection to their copyrights and patents. Yet, there have been instances of corporations relying on human rights law to protect their

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49. See, e.g., Office of the United States Trade Representative, Trans-Pacific Partnership (TPP) [hereinafter TPP], <http://www.ustr.gov/tpp>; Office of the United States Trade Representative, Anti-Counterfeiting Trade Agreement (ACTA) [hereinafter ACTA], <http://www.ustr.gov/acta>.

50. Such rights have been more accurately described as rights “akin to human rights” or “human rights-like” since the rights do not pertain to human beings. However, for the purposes of this article, I will use the term “human rights” even when referring to legal persons rather than natural persons.

51. See HELFER & AUSTIN, *supra* note 21.

52. See *Soc’y for Propagation of Gospel in Foreign Parts v. Town of Pawlet*, 29 U.S. 480 (1830); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

intellectual property rights in Europe.<sup>53</sup> Despite the ambiguity in the literature about the relationship between corporations and the human rights framework, there is legal precedent for recognizing human rights-based intellectual property claims by legal persons.<sup>54</sup> While these cases are of limited application as legal precedents, they illustrate the potential for industry to co-opt a human rights framework in order to protect corporate-owned intellectual property.<sup>55</sup>

In *Anheuser-Busch Inc. v. Portugal*,<sup>56</sup> (“*Budweiser*”) the European Court of Human Rights concluded that corporate-owned intellectual property rights are property interests subject to protection under the human rights framework in Europe.<sup>57</sup> Although this case has been criticized by some human rights advocates and interpreted by others as being of limited application,<sup>58</sup> other commentators view the analysis as consistent with the objectives of human rights law.<sup>59</sup>

In a dispute over the registration of the trademark “*Budweiser*,” an American corporation, Anheuser-Busch, Inc.,<sup>60</sup> unsuccessfully sought to protect its trademark rights under the relevant intellectual property laws.<sup>61</sup> After finally

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53. See *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

54. *Id.* at ¶ 78.

55. Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 728–30 (2007); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant)* U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), at 2–3 [hereinafter *General Comment No. 17*].

56. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36.

57. *Id.*

58. Wong, *supra* note 18, at 811.

59. HELFER & AUSTIN, *supra* note 21, at 62.

60. *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36, ¶ 12 (Grand Chamber 2007) (“The applicant is an American public company whose registered office is in Saint Louis, Missouri [United States of America]. It produces and sells beer under the brand name “*Budweiser*” in a number of countries around the world.”).

61. *Id.* ¶ 21 (“In a judgment of 18 July 1998, the Lisbon Court of First Instance dismissed the appeal. It found that the only intellectual property eligible for protection under Portuguese law and the Bilateral Agreement was the “*Českobudějovický Budvar*” appellation of origin, not the “*Budweiser*” trade mark.”). The case, which involved the registration of a trademark in Portugal, was subsequently appealed to the Lisbon Court of Appeal and the Lisbon Supreme Court. *Id.* ¶¶ 22–26.

losing before the Portuguese Supreme Court,<sup>62</sup> the company took its case to the European Court of Human Rights to claim interference with the peaceful enjoyment of its possessions contrary to Article 1 of Protocol 1 of the European Convention on Human Rights. The company argued that the Supreme Court's decision amounted to an expropriation,<sup>63</sup> contrary to European human rights law.<sup>64</sup>

When Anheuser sought to register its "Budweiser" trademark in Europe, its registration was opposed by Budwar, who had registered "Budweiser" as an appellation of origin.<sup>65</sup> The name "Budweiser" comes from the name "Budweis"—a German name for the Czech town from which the beer originates.<sup>66</sup> The Czech company, Budejovicky Budwar, asserted that a handful of brewers were given the authority to use the appellation "Budweiser" as early as 1295, and that Budwar had been selling its "Budweiser" beer since 1895.<sup>67</sup> The term referred not only to the German name of the town, but also to the special technique used to produce beers that carried the name "Budweiser."<sup>68</sup> Anheuser litigated unsuccessfully in the Portuguese courts.<sup>69</sup>

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62. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36.

63. The U.S. equivalent of an "expropriation" is a "taking."

64. *Anheuser-Busch*, 45 Eur. H.R. Rep. 36, ¶ 46 ("Article 1 of Protocol No. 1 reads as follows: 'Every 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 and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'").

65. *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36, ¶ 16 (Grand Chamber 2007). The appellation of origin was registered pursuant to Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958, 923 U.N.T.S. 205, as am. An appellation of origin protects a name that is the name of a country or a geographic region or locality and where there is some quality or characteristic of the product that is attributable to its geographic origin.

66. *Id.* ¶ 14.

67. *Id.*

68. *Id.* In 1911 and 1939, Anheuser and Budejovicky Budwar concluded agreements regarding the sale and distribution of "Budweiser" beer in the United States, but the agreement did not cover the sale of the beer in Europe. *Id.* ¶ 15.

69. Anheuser successfully had the Budwar appellation of origin cancelled on the basis that it was not an indication of source. Following the cancellation of Budwar's appellation of origin, Anheuser's Budweiser's trademark was registered in 1995. The Lisbon Court of Appeal ordered the registration

Annheuser then lodged a complaint against Portugal under the ECHR for a violation of its right to the peaceful enjoyment of its possessions because it had been deprived of the right to use its trademark.<sup>70</sup>

Ultimately, Anheuser was not successful in its claim.<sup>71</sup> For the majority, the question turned on whether Anheuser had a right of priority with respect to the “Budweiser” mark at the relevant time.<sup>72</sup> Most importantly, from the intellectual property perspective, the court explicitly recognized intellectual property rights as being protected under the property right provision of the European Convention on Human Rights.<sup>73</sup>

Some commentators have suggested that this case should not be viewed as support for the proposition that there is a property-based human right to intellectual property.<sup>74</sup> This is because a decision of the European Court of Human Rights is limited to its jurisdiction. Furthermore, the language of the ECHR is not identical to the language of the Article 17 of the

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overturned, and the Portuguese Supreme Court dismissed Annheuser’s appeal. *Id.* ¶¶ 18, 19, 22–24.

70. *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36, ¶¶ 1–3 (Grand Chamber 2007).

71. This included the Paris Convention and TRIPS. The human rights court took into consideration a Bilateral Agreement between the Czech Republic and Portugal on appellations of origin and indications of source as well as international agreements on intellectual property, Community law, and domestic law. *Id.* ¶¶ 25–30, 34–35.

72. *Id.* ¶ 84. The Grand Chamber of the European Court of Human Rights chose not to interfere with the conclusions of the national court: “[t]hese are questions whose rightful place was before the domestic courts. The Supreme Court decided in its judgment of 23 January 2001 to reject the applicant company’s argument based on an alleged violation of the priority rule. In the absence of any arbitrariness or manifest unreasonableness, the Court cannot call into question the findings of the Supreme Court on this point.” *Id.* at ¶ 85.

73. *Id.* ¶ 72 (After reviewing cases where property rights had been asserted with respect to patents and copyrights, the court concluded, “[i]n the light of the above-mentioned decisions, the Grand Chamber agrees with the Chamber’s conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such.”); *see also* Joint Concurring Opinion of Judges Steiner and Hajiyev ¶¶ 1–2 (“We agreed with the majority that there has been no violation of Article 1 of Protocol No. 1, but on other grounds. In our view, Article 1 of Protocol No. 1 does apply, in general, to intellectual property. This was accepted by both the parties but there has never been any clear statement of this principle by the Court in the past. We therefore agree that Article 1 of Protocol No. 1 is applicable to intellectual property in general and to a duly registered trade mark.”).

74. Wong, *supra* note 18, at 811.

UDHR and Article 15 (1)(c) of the ICESCR, both of which provide for the protection of moral and material interests.<sup>75</sup> It has been suggested that because there is no provision for the protection of moral and material interests under the ECHR, that there was no alternative to protect the trademark interest except as a property right.<sup>76</sup>

However, there is no reason to assume that one could not have rights to the material interests in one's intellectual creations or that those material interests could not also be considered property. The two rights do not appear to be mutually exclusive, and indeed, the right to material interests coincides with the property interest.<sup>77</sup> Moreover, there are instances outside of the context of the European human rights system where property interests have been asserted in intangible rights. American courts have, in various instances, treated intellectual property interests as property rights,<sup>78</sup> and recognized trademarks, trade secrets, and other intangible rights as property under U.S. law.<sup>79</sup> There is a wealth of U.S. jurisprudence where the courts refer to some forms of intellectual property as property and have treated trademarks and trade secrets as constitutionally protected property.<sup>80</sup>

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75. *Id.*

76. *Id.*

77. *General Comment No. 17, supra* note 55, at 3 (“Moreover, the realization of article 15, paragraph 1 (c), is dependent on the enjoyment of other human rights guaranteed in the International Bill of Human Rights and other international and regional instruments, such as the right to own property alone as well as in association with others.”); Robert L. Ostergard, Jr., *Intellectual Property: A Universal Human Right?*, 21 HUM. RTS. Q. 156, 175 (1999) (“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. The basis for such a claim without doubt lies in the Western conception of property rights. What this implies is that, similar to the ownership of property, people also have an exclusive right to their ideas, creations, and inventions.”).

78. James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 290 (2013) (stating that it may not make a difference to the human rights discussion whether or not the property is constitutionally protected).

79. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 10 (2004) (discussing various cases where the courts have referred to intellectual property rights as “property”).

80. *See id.* at 10–11 (2004) (discussing various cases where the courts have referred to intellectual property rights as “property”); *see generally* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007); Adam Mossoff, *Is*

As the next section will explain, it is possible to support the assertion that there is a human right to intellectual property protection either as property or as the material or moral interest of the author.

## II. HUMAN RIGHTS TO INTELLECTUAL PROPERTY PROTECTION?

There is a legal basis for the view that intellectual property protection could be considered a human right.<sup>81</sup> While this claim can be supported, the argument can also be made that the human rights in question are distinct from copyright and patent protection. Other scholars have already engaged in thoughtful analysis of the right to intellectual property as a human right.<sup>82</sup> Thus, this Article will offer limited analysis of this issue. It is clear that human rights instruments offer some basis for claiming a human right to intellectual property or something similar to an intellectual property right.

A human right to intellectual property protection may stem from the obligation to protect the material and moral interests of the creator.<sup>83</sup> Alternatively, to the extent that one treats patents, copyrights, trademarks, and other intangible rights as property, a human right to intellectual property can be based in the obligation to protect property interests.<sup>84</sup> The two international human rights instruments that are most pertinent to the discussion are the Universal Declaration of Human Rights<sup>85</sup> (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>86</sup>

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*Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005) (noting that the courts have not recognized patents as constitutionally protected property rights).

81. Chapman, *supra* note 12, at 316–17.

82. For a comprehensive discussion of the human right to intellectual property, see Yu, *supra* note 7; Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Wong, *supra* note 18; Yu, *supra* note 55.

83. UDHR, *supra* note 10, art. 27; International Covenant on Economic, Social and Cultural Rights art. 15(1)(c), Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

84. International Covenant on Civil and Political Rights art. 17, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

85. UDHR, *supra* note 10, art. 17.

86. ICCPR, *supra* note 84. This agreement is silent with respect to property as a human right or intellectual property as a human right.

There are also regional instruments that may provide a basis for individuals to make human rights based intellectual property claims, as was done in *Budweiser*.<sup>87</sup> The European Union protects human rights through the Charter on Fundamental Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights or ECHR).<sup>88</sup> The American Declaration of the Rights and Duties of Man (American Declaration)<sup>89</sup> also requires human rights protections that may intersect with intellectual property law. While these instruments are applicable only within their relevant regions, the concepts are pertinent to the broader discussion. The following discussion elaborates on the intersection between human rights and intellectual property.

#### A. *Material and Moral Interests*

The precise meaning of the human rights obligations as they relate to intellectual property law is uncertain and requires further consideration.<sup>90</sup> However, human rights bodies have set out some of their interpretations of these obligations and how they may differ from intellectual property law.<sup>91</sup> The language of the UDHR and the ICESCR evokes both patent and copyright law. The right to protect

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87. See *supra* notes 56–57.

88. Convention, *supra* note 2. The Charter on Fundamental Rights and the European Convention on Human Rights became binding throughout the EU through the Treaty of Lisbon. See EUROPA, *Fundamental Rights within the European Union*, available at [http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/index\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/index_en.htm) (“The European Union (EU) attaches great importance internally to human rights. Its human rights principles are set out in the Treaty on the European Union and the Charter on Fundamental Rights.”). The Treaty of Lisbon amended the Treaty on the European Union and the Treaty Establishing the European Community. See EUROPA, *Treaty of Lisbon*, available at [http://europa.eu/lisbon\\_treaty/full\\_text/index\\_en.htm](http://europa.eu/lisbon_treaty/full_text/index_en.htm) (“The Treaty of Lisbon amends the EU’s two core treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter is renamed the Treaty on the Functioning of the European Union. In addition, several Protocols and Declarations are attached to the Treaty.”).

89. American Declaration of the Rights and Duties of Man art. XXIII, adopted by the Ninth International Conference of American States, Bogotá, Colombia, May 2, 1948, OEA/Ser. L./VI.23 Rev. [hereinafter American Declaration].

90. See *General Comment No. 17*, *supra* note 55.

91. *Id.*

material and moral interest resulting from literary or artistic productions sounds similar to copyright protection.<sup>92</sup> The protection of material and moral interests resulting from scientific productions may overlap with patent law.<sup>93</sup> The full scope of these rights is not yet understood, but the United Nations Committee on Economic Social and Cultural Rights has offered some guidance in General Comment 17.<sup>94</sup>

Specifically, Article 27 (2) states, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>95</sup> Article 15 (1)(c) of the ICESCR provides for the protection of material and moral interests through language similar to that found in the UDHR.<sup>96</sup> The same is true with respect to Article XIII of the American Declaration, which provides that everyone “has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.”<sup>97</sup>

As the ICESCR Committee observes, the right to benefit from the protection of the moral and material interests may not coincide with the level of protection or the means of protection provided through intellectual property law.<sup>98</sup> The human right to the material and moral interests in one’s creations may not be identical to the rights extended by the current intellectual property law framework.<sup>99</sup> In fact, intellectual property laws may fall short of protecting rights to creative works even if those works might be protectable under a human rights framework.<sup>100</sup> For example, one may

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92. Chapman, *supra* note 12.

93. *Id.*

94. *General Comment No. 17, supra* note 55.

95. UDHR, *supra* note 10, art. 27.

96. ICESCR, *supra* note 83, art. 15(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.”).

97. American Declaration, *supra* note 89, art. XIII.

98. *General Comment No. 17, supra* note 55, ¶ 10 (because the human right may differ from the scope of intellectual property rights under national law, the ICESCR Committee stressed the importance of not equating these two different of rights).

99. *Id.* ¶¶ 2–3.

100. Wong, *supra* note 18, at 807.

be able to claim a human right to a creative work, even if the work fails to meet the standards for originality in copyright, or novelty under patent law.<sup>101</sup> However, rights owners will tend to focus on the areas of overlap to advance their goals rather than the possible distinctions.

The human right to material interests may overlap with the right to property. Some commentators contend that the property right articulated in Article 17 of the UDHR may not be the basis for the right to the protection of material interests.<sup>102</sup> However, others have argued that the right to “material interests” implies a right to own property.<sup>103</sup> Even if one concludes that a material interest is something less than a property right, the language suggests some kind of proprietary or pecuniary interest.

### *B. The Right to Property*

As one scholar argues, if the right to own property is a human right, and if copyright, trademarks, and patents are treated as property, then one might reasonably conclude that intellectual property rights are human rights.<sup>104</sup> Although controversial in some respects,<sup>105</sup> the right to own property and not to be arbitrarily deprived thereof, is an international human right.<sup>106</sup> The Universal Declaration of Human Rights (UDHR) protects property rights, which arguably include intellectual property rights. Article 17 (1) of the UDHR states:

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101. In order to obtain a patent, an applicant must demonstrate that their invention is new, useful and non-obvious. TRIPS Agreement, *supra* note 8, art. 27.

102. Yu, *supra* note 55, at 734.

103. Wong, *supra* note 18, at 813–14.

104. *Id.* at 810 (“[I]nsofar as property ownership is a fundamental human right . . . and IPRs are property rights, it follows that IPRs are human rights.”).

105. Icelandic Human Rights Centre, *The Right to Property* (Nov. 15, 2013), available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightscconceptsideasandfora/substantivehumanrights/therighttoproperty/> (“One of the more controversial and complex human rights is the right to property. The right is controversial because the very right which is seen by some as central to the human rights concept is considered by others to be an instrument for abuse, a right that protects the ‘haves’ against the ‘have-nots.’ It is complex, because no other human right is subject to more qualifications and limitations and, consequently, no other right has resulted in more complex case-law of, for instance, the supervisory bodies of the ECHR.”).

106. UDHR, *supra* note 10, art. 17.

- 1) Everyone has the right to own property alone as well as in association with others,
- 2) No one shall be arbitrarily deprived of his property.<sup>107</sup>

One could dispute the treatment of intangible property rights as “property” due to the differences between tangible property and rights in intangible goods.<sup>108</sup> Indeed, the rationale for treating property as fundamental rights, including the desire to promote social order and stability, should arguably not be extended to intangible goods.<sup>109</sup> Nonetheless, courts have been willing to treat intellectual property rights as property interests, including within the human rights context.<sup>110</sup> If patents, copyrights, trademarks and other intangible rights are treated as property, then this provides an additional basis for human rights claims.

Although some may question whether or not the right to property in the UDHR includes private property,<sup>111</sup> there is support for the view that the property rights referred to in human rights instruments include both communal and private property. The right to property in Article 17 of the UDHR generated a significant amount of debate because some countries, like the United States, supported a right to private property, while others, like the former Soviet Union, wanted the property right to reflect different economic systems.<sup>112</sup> Ultimately, as is the case with many

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107. *Id.*

108. Yu, *supra* note 55, at 732 (“Despite this modern-day tendency to consider intellectual property as private property, the international or regional human rights instruments neither endorse nor reject the use of property right to protect interests in intellectual creations.”).

109. HELFER & AUSTIN, *supra* note 21, at 62.

110. *See* Annheuser-Busch, Inc. v. Portugal, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

111. Yu, *supra* note 55, at 733.

112. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 182 (Random House 2001) (“Article 17 on property rights occasioned much debate. The United States strongly supported a right to own private property and to be protected against public taking of private property without due safeguards. The United Kingdom’s Labour government representatives, however, took the position that the article should be omitted, arguing that the regulation of property rights was so extensive everywhere in the modern world that it made no sense to speak of a right to ownership. Many Latin Americans took an entirely different tack: they wanted the article to specify enough private property for a decent existence. The Soviets, for their part, object to the idea that a decent existence should be grounded in private property and insisted that the article should take account of

international agreements, the language was left vague enough to accommodate the views of different nations.<sup>113</sup>

Neither the ICESCR nor the *International Covenant on Civil and Political Rights* (ICCPR) contain a provision on the right to property.<sup>114</sup> This was primarily due to the fact that the right to property was a politically sensitive issue between capitalist and socialist countries.<sup>115</sup> However, the right to property is recognized in a number of human rights instruments, such as the American Declaration,<sup>116</sup> the American Convention on Human Rights,<sup>117</sup> and the African Charter on Human and People's Rights.<sup>118</sup> The European Convention on Human Rights<sup>119</sup> also recognizes the right to private property,<sup>120</sup> including intellectual property for both natural and legal persons.<sup>121</sup>

TRIPS requires governments to compensate intellectual property owners for compulsory licensing.<sup>122</sup> This provision creates an obligation, not unlike provisions on takings or expropriation of private property, to compensate the intellectual property owner for use without permission. Hence, even in the absence of express reference to property interests *per se*, TRIPS appears to be consistent with an

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the different economic systems in various countries.”).

113. *Id.* at 183.

114. *See* ICCPR, *supra* note 84.

115. Yu, *supra* note 55, at 733.

116. American Declaration, *supra* note 89, art. XXIII (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”).

117. Signed at San José, Costa Rica, Nov. 22, 1969.

118. *See* African Charter on Human and People's Rights art. 14, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”).

119. Rome, Italy, Nov. 4, 1950.

120. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Paris, France, Mar., 20, 1952 (“Every 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 and subject to the conditions provided for by law and by the general principles of international law.”).

121. *See* *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

122. TRIPS Agreement, *supra* note 8, art. 31(h) (“The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.”).

understanding of intellectual property rights as property interests of some kind.

The question is whether a human right to property leads to a stronger property interest, or if the scope of any such human right is narrower than a legal property interest. Arguably, the interdependence and indivisibility of human rights limits the right to property to the extent that it interferes with other human rights.<sup>123</sup> Yet this limitation generates additional complications. For instance, when does the human right to intellectual property interfere with the human right to health? Conversely, when does the human right to health interfere with the human right to intellectual property protection, and how would one balance these two competing interests? Does the human rights framework offer superior balancing tools to those available under the extant intellectual property system? Arguably, if intellectual property protection is not a human right, then the human right—as a natural entitlement—should prevail. In addition, some human rights instruments limit the right to property. For example, the American Declaration limits the property right to that “as meets the essential needs of decent living and helps to maintain the dignity of the individual . . .” which suggests that one is only entitled to as much property as one needs.<sup>124</sup> Certainly, this kind of language would be useful in tempering any claim to a very strong property interest. The UDHR does not contain such language, but indicates that one can be deprived of one’s property as long as this is not done “arbitrarily.”<sup>125</sup>

Moreover, in the current environment, it is doubtful that courts and governments, or treaty negotiators and industry associations that are looking to increase intellectual property protections will encourage a human rights balancing.<sup>126</sup> Since patents, copyrights, and trademarks have already been strengthened by the characterization as property<sup>127</sup> and as “trade-related,” the greatest risks from a human rights framework pertain primarily to the framing of intellectual

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123. Nickel, *supra* note 6, at 984–85.

124. American Declaration, *supra* note 89, art. XXIII.

125. UDHR, *supra* note 10, art. 17.

126. See TPP, *supra* note 49, and ACTA, *supra* note 49, as recent examples of the upward ratchet.

127. See Carrier, *supra* note 79.

property protection as a natural entitlement.<sup>128</sup> The global intellectual property system already favors intellectual property producers and largely fails to take human rights considerations into account.<sup>129</sup> Treating intellectual property protection as a human right may simply exacerbate this problem. However, using human rights law to *constrain* intellectual property could be an effective balancing strategy. This is because, as discussed below, the lens through which we view rights can impact their legal treatment.

### III. FRAMING: HUMAN RIGHTS & INTELLECTUAL PROPERTY

#### A. *The Distinct Purposes of Intellectual Property and Human Rights*

Intellectual property law could benefit from some human rights concepts. However, these two areas of law are distinct in significant ways. The UDHR is the core international instrument that sets out the generally recognized human rights and freedoms.<sup>130</sup> Adopted by the United Nations General Assembly after the establishment of the United Nations following the Second World War,<sup>131</sup> the UDHR is not a binding treaty, but rather a set of aspirational principles.<sup>132</sup> However, scholars have suggested that UDHR has been incorporated into custom, as evidenced by various rules of customary international law such as those relating to torture.<sup>133</sup>

While human rights law is based in international law, there is a relationship with American values, even if the United States does not apply international law in its domestic

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128. *But see* Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, SOCIAL PHILOSOPHY & POLICY vol. 29, no. 2 (2012) (using Lockean natural rights theory to argue that intellectual property rights are natural entitlements).

129. Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805 (2007).

130. Donnelly, *supra* note 19, at 288 (“Virtually all states accept the authority of the Universal Declaration of Human Rights.”).

131. The Universal Declaration of Human Rights was adopted by General Assembly resolution 217A at its third session in Paris on December 10, 1948. UDHR, *supra* note 10.

132. *See* GLENDON, *supra* note 112, at 177.

133. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1990).

courts.<sup>134</sup> In fact, the United States played an important role in the development of the UDHR, with Eleanor Roosevelt chairing the Drafting Committee.<sup>135</sup> In many respects, these international human rights principles are the result of American led efforts and philosophies.<sup>136</sup> The same is true for the intellectual property rules that were implemented through TRIPS. Human rights law and enforceable intellectual property standards were both developed through international instruments that were influenced by American philosophies.

The two areas of law have little else in common. The nature of human rights is distinct from the nature of intellectual property rights. Human rights are inalienable rights enjoyed by all human beings.<sup>137</sup> They are, therefore, also universal and indivisible.<sup>138</sup> As universal rights that can be exercised by individuals against the state and society, human rights are often viewed as a means to achieve social values that improve the human condition.<sup>139</sup> Hence, protecting human dignity is said to be the primary principle underlying human rights laws. In addition, some human rights scholars characterize the protection of the weak and

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134. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

135. United Nations, *The Universal Declaration of Human Rights: History of the Document (UDHR)* (Nov. 4, 2013), available at <http://www.un.org/en/documents/udhr/history.shtml>.

136. GLENDON, *supra* note 112, at xviii (“When read as it was meant to be, namely as a whole, the Declarations’ vision of liberty is inseparable from it calls to social responsibility (inspired in part by Franklin Roosevelt’s famous ‘four freedoms’—freedom of speech and belief, freedom from fear and from want). Its organic unity was, however, one of the first casualties of the cold war.”).

137. Donnelly, *supra* note 19, at 283.

138. See, e.g., Vienna Declaration and Programme of Action art. 5, World Conference on Human Rights, Vienna, Austria, June 25, 1993, U.N. Doc. A/CONF.157/23 [hereinafter Vienna Declaration] (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”).

139. Donnelly, *supra* note 19, at 284 (“Human rights—equal and inalienable entitlements of all individuals that may be exercised against the state and society—are a distinctive way to seek to realize social values such as justice and human flourishing.”).

vulnerable as the goal of human rights law.<sup>140</sup> Intellectual property laws, by comparison, are not designed to protect the weak and vulnerable, but to stimulate innovation and creativity.<sup>141</sup>

The United Nations Committee on the ICESCR (the “Committee”), distinguishes between human rights, which it describes as “fundamental, inalienable[,] and universal entitlements” and intellectual property rights that are granted by states primarily to stimulate innovation and creativity.<sup>142</sup> There are a number of other differences between human rights and intellectual property rights. For instance, unlike human rights, intellectual property rights are time-limited, transferable, and revocable.<sup>143</sup> By comparison, any human right to the protection of one’s creative or inventive work could presumably continue indefinitely. Thus, framing intellectual property rights through a human rights lens could lend support to claims to perpetual rights that become difficult to challenge or deny.

The Committee also characterizes intellectual property as protecting “business and corporate interests and investments,” whereas the human right to the protection of material and moral interests preserves the personal link between the author and her creation and the author’s ability to enjoy an adequate standard of living.<sup>144</sup> Clearly, however, intellectual property law is not limited to protecting

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140. Sally Engle Merry et al., *Law From Below: Women’s Human Rights and Social Movements in New York City*, 44 LAW & SOC’Y REV. 101, 102 (2010) (“Protecting the vulnerable and powerless is clearly fundamental to the aspirations of human rights. The system of human rights law seeks to protect the dignity and well-being of all humans, regardless of their citizenship, race, gender, or class . . . . Human rights law promises the weakest and most excluded people protections equal to those of the wealthy and the privileged.”).

141. *General Comment No. 17*, *supra* note 55; TRIPS Agreement, *supra* note 8, pmb.; U.S. CONST. art. 1, § 8, cl. 8; Megan M. Carpenter, *Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?*, 99 TRADEMARK REP. 892, 901–02 (2009).

142. *General Comment No. 17*, *supra* note 55, ¶ 1.

143. *Id.* ¶ 2.

144. *Id.* (“Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.”).

businesses—it protects both natural and legal persons.<sup>145</sup> Indeed, some human rights protections, such as the right to freedom of expression and the right to property, have been extended to both natural and legal persons. Could the same be true for a human right to intellectual property protection? If so, it may be erroneous to assume that human rights law will support a more balanced intellectual property system.

*B. Human Rights Principles to Constrain or Promote?*

The relationship between human rights and intellectual property is not immediately obvious. Nonetheless, these two seemingly distinct fields can intersect in at least two ways. First, the “limiting approach” uses human rights to *limit* intellectual property protections when they interfere with other rights, like access to medicines or freedom of speech.<sup>146</sup> The human rights framework can also be used to contemplate *intellectual property protection as a human right*.<sup>147</sup> This Article focuses on the latter because this approach could result in the use of human rights law to expand intellectual property protections.<sup>148</sup>

Some human rights scholars have advocated taking human rights obligations into account in order to limit intellectual property excesses. For instance, Molly Land argues that governments should “limit the effects of intellectual property rights in order to protect international human rights.”<sup>149</sup> Peter Yu proposes the use of a human rights framework for intellectual property on the basis that

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145. Megan M. Carpenter, *Intellectual property: A human (not corporate) right*, in FORGOTTEN RIGHTS, FORGOTTEN CONCEPTS 312, 312–13 (2012) (“The temptation to categorize intellectual property rights as solely a vehicle for protection of corporate interests is great . . . . And while corporate interests dominate, as they do in other areas of human rights such as the food industry or the health industry, it is crucial not to lose sight of the fundamental policies behind intellectual property law, particularly the interests of the humans behind human creativity.”).

146. An example would be the access to medicines movement. For instance, although the Doha Declaration, *supra* note 43, does not explicitly reference human rights law, it advocates a balancing between the public health and intellectual property protection.

147. See Wong, *supra* note 18.

148. Helfer, *supra* note 82, at 1015–18.

149. Molly Beutz Land, *Intellectual Property Rights and the Right to Participate in Cultural Life* at 1, INST FOR INFO. LAW & POLICY, White Paper Series 08/09 No. 2 (2009).

such a framework is “socially beneficial and that it will enable the development of a balanced intellectual property system.”<sup>150</sup> One of the early advocates of a human rights approach to intellectual property, Audrey Chapman, suggests that human rights would require that intellectual property laws “facilitate and promote scientific progress and its application and do so in a manner that will broadly benefit members of society on an individual as well as collective level.”<sup>151</sup> Laurence Helfer advocates a human rights framework for intellectual property in which intellectual property is employed as a tool to achieve human rights ends. Under this framework, Helfer suggests that intellectual property rules should be modified when they hinder human rights outcomes.<sup>152</sup> These proposals are consistent with the limiting approach and they are more likely to curtail, rather than exacerbate, the potential excesses of intellectual property law. These authors seem to be seeking a way for intellectual property rules to work harmoniously with human rights norms and possibly to have intellectual property law help promote human rights objectives.

There is, however, another aspect to the human rights and intellectual property discussion—one that could have an effect contrary to the goal of achieving more balance in the global intellectual property system. The human rights framework is not restricted to curtailing intellectual property rights but also encompasses the notion of promoting a right to *intellectual property protection as a human right*. Noting the importance of intellectual property in the information economy, Chapman argues that legal instruments and decisions can have “significant ramifications” for the

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150. Yu, *supra* note 7, at 1123.

151. Chapman, *supra* note 7.

152. Helfer, *supra* note 82, at 1018 (“A third human rights framework for intellectual property . . . first specifies the minimum outcomes—in terms of health, poverty, education, and so forth—that human rights law requires of states. The framework next works backwards to identify different mechanisms available to states to achieve those outcomes. Intellectual property plays only a secondary role in this version of the framework. Where intellectual property law helps to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified . . . . But the focus remains on the minimum level of human well-being that states must provide, using either appropriate intellectual property rules or other means.”).

protection of human rights.<sup>153</sup> She asserts, therefore, that it is "important for the human rights community to claim the rights of the author, creator and inventor, whether an individual, a group or a community, *as a human right*."<sup>154</sup> Peter Yu also discusses using a human rights framework to protect creators' material and moral interests while using intellectual property rules to promote other human rights.<sup>155</sup> Similarly, Mary Wong, discussing copyright law, argues that there is a human right to intellectual property protection that encompasses both moral rights and property rights.<sup>156</sup>

These scholars have made thoughtful arguments that are appealing insofar as they describe the use of human rights law primarily as a tool to empower human producers or users of intellectual property protected goods. Using human rights to ameliorate the potential deleterious effects of intellectual property rights on human interests seems consistent with the goal of achieving greater balance between protecting intellectual property owners and promoting other societal goals. However, characterizing intellectual property as a human right has the potential to lead to undesirable consequences.

Kal Raustiala, for instance, queries whether the marriage of intellectual property and human rights will make intellectual property rights "more socially just, or just more powerful."<sup>157</sup> Raustiala cautions that in the current environment of ever increasing intellectual property protections,<sup>158</sup> a human rights approach to intellectual property could "entrench some dangerous ideas" about the inviolable nature of property rights as human rights.<sup>159</sup> If one

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153. Chapman, *supra* note 12, at 308.

154. *Id.*

155. Yu, *supra* note 7, at 1149 ("The successful development of a human rights framework for intellectual property not only will offer individuals the well-deserved protection of their moral and material interests in intellectual creations, but also will allow states to harness the intellectual property system to protect human dignity and respect as well as to promote the full realization of other important human rights.").

156. Wong, *supra* note 18.

157. Raustiala, *supra* note 38, at 1023.

158. *Id.* at 1034 ("Traditional knowledge is hardly the only area in which new international-protected IP rights have been proposed: there are efforts underway today to negotiate new international rules on broadcast rights, audiovisual performances, and patents, as well as . . . geographic indications.").

159. *Id.* at 1023.

cannot violate such rights, the effect will be to further strengthen intellectual property rights, rather than weaken them.<sup>160</sup> Raustiala refers to the efforts to protect indigenous traditional knowledge<sup>161</sup> as an example of the dangerous proliferation of intellectual property rights.<sup>162</sup> Although seemingly sympathetic to the plight of indigenous peoples, he cautions that new international property rules are not the solution.<sup>163</sup>

Robert Ostergard criticizes the concept of intellectual property rights as human rights because they may conflict with other human rights that should be prioritized.<sup>164</sup> He further objects to promoting human rights to intellectual property because it would allow intellectual property producers to promote their interests while ignoring national development objectives.<sup>165</sup> In my view, the case against a human right to intellectual property protection becomes even stronger if multinational corporations can utilize the framework to their benefit.

### C. *The Risks of Promoting a Human Right to Intellectual*

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160. *Id.* at 1032 (“Just as the popularization of the term ‘intellectual property’ probably helped raise the salience of the underlying rights of patent, copyright, trademark, and the like—and likely enhanced political support for government intervention to protect these rights by tapping into the strong respect for property rights present in many parts of the world—the introduction of human rights language to the policy debate over IP may have a similar strengthening influence.”).

161. The World Intellectual Property Organization defines traditional knowledge as follows: “Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.” WIPO, *supra* note 45. For example, traditional knowledge includes Yoga and traditional medicinal knowledge.

162. Raustiala, *supra* note 38, at 1032.

163. *Id.*

164. Ostergard Jr., *supra* note 77, at 175–76 (“The declaration of IP as a universal human right is problematic within the framework of physical well-being established in this article because the UN position does not recognize the hierarchy of IP that exists. Under the Universal Declaration, the registered trademark for a multinational corporation is accorded the same importance and protection as a patent for medicinal purposes.”).

165. *Id.* at 175 (“By promoting IP as a guaranteed right, the [Universal] Declaration gives IP producers significant latitude in abrogating any responsibility to promote national development, though producers often argue for greater access to foreign markets and the protection of IP in those markets.”).

*Property*

Adopting human rights principles is not a purely theoretical consideration. This framework can have practical implications for intellectual property law.<sup>166</sup> The approach taken to intellectual property, whether trade-based or human rights-oriented, and the terminology used with respect to intellectual property rights can shift our understanding of the nature of the rights.<sup>167</sup> The way we frame global discussions about intellectual property can, therefore, influence our understanding of intellectual property rights, perhaps even more than the language of specific legislative instruments.<sup>168</sup>

In addition to being comprised of a set of laws, human rights law has been described as encompassing a set of values, whose “core ideas are human dignity, equality, nondiscrimination, protection of bodily integrity from state violence as well as other forms of violence, and freedom . . . .”<sup>169</sup> These values, derived from the European Enlightenment and the American Revolution, are generally believed to represent the consensus of the international community.<sup>170</sup> Thus, as a set of values and beliefs, a human

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166. Raustiala, *supra* note 38, at 1036 (“While well-intentioned, human rights rhetoric may aid, rather than hinder, the efforts at enclosure and in the process exacerbate an already troubling erosion of the public domain. This is not to imply that there is little that is positive in the expanding marriage of human rights and IP. As noted above, there are significant efforts to use human rights instruments and concepts to roll back some of the more egregious elements of TRIPS.”).

167. *Id.* at 1032 (“Just as the popularization of the term ‘intellectual property’ probably helped raise the salience of the underlying rights of patent, copyright, trademark, and the like—and likely enhanced political support for government intervention to protect these rights by tapping into the strong respect for property rights present in many parts of the world—the introduction of human rights language to the policy debate over IP may have a similar strengthening influence.”); SELL, *supra* note 47, at 5 (“The way that issues are framed can make a great deal of difference in terms of what is and what is not considered legitimate.”).

168. Raustiala, *supra* note 38, at 1037 (“More significant than any specific agreement or text are the possible political effects of incorporating the human rights paradigm into IP law . . . . [T]he risk is that the language and politics of human rights, as it filters into the language and politics of IP rights, will make it harder for governments to resist the sirens songs of those seeking ever more powerful legal entitlements.”).

169. Merry et al., *supra* note 140, at 107.

170. *Id.* (“Although these values are widespread, a central aspect of the human rights system is the way its legal apparatus legitimates its core principles by claiming that they represent the consensus of the ‘international

rights approach is not strictly a matter applying pertinent human rights laws. Intellectual property norms can be informed by human rights values, even in the absence of controlling law.<sup>171</sup>

Merging intellectual property and international trade has altered our understanding and characterization of intellectual property at a global level.<sup>172</sup> In addition, scholars observe that the “proPERTIZATION” of patent, copyright, and trademark has changed not only the narrative, but also the legal treatment of intangible rights.<sup>173</sup> As Michael Carrier explains, the “proPERTIZATION” of intellectual property has been part of the trend towards making intellectual property rights stronger.<sup>174</sup> Liam O’Melinn decries the framing of copyright and patents as property as an attempt at “a subtle but decisive shift in the purpose of intellectual property law in the direction of purely private entitlement and away from any public benefit.”<sup>175</sup> In this way, characterizing intellectual property rights as property is consistent with the trend towards increased intellectual property protection.<sup>176</sup> The discussion of patents, copyrights and trademarks as property has shaped our understanding of intellectual property rights and, as some scholars have observed, it has affected the nature of the rights by making them stronger. Intellectual

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community.’ This value system grows out of a long history of human rights advocacy dating from the European Enlightenment, and the articulation of its values in the French Revolution, the American Revolution, the anti-slavery movement and many others.”).

171. For instance, the access to medicines movement, which can be supported on the basis of the right to health that is articulated in Article 25 of the UDHR, is an example of using human rights principles to impact intellectual property law. UDHR, *supra* note 10, art. 25. The Doha Declaration on TRIPS and Public Health is a concrete result of the efforts to address some of the negative effects of intellectual property rights on access to medicines.

172. I have argued this point more fully elsewhere. See Osei-Tutu, *supra* note 28.

173. Carrier, *supra* note 79, at 5 (“The proPERTIZATION of IP is in fact unfortunate. But it also appears to be irreversible.”); Liam Séamus O’Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 144 (2007).

174. Carrier, *supra* note 79, at 10 (“In continually strengthening IP, courts have characterized it as a type of property.”).

175. O’Melinn, *supra* note 173, at 144.

176. The “upward ratchet,” as it has been described, is apparent in agreements like the TRIPS Agreement, *supra* note 8, ACTA, *supra* note 49, TPP, *supra* note 49, the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), and copyright term extension, to name a few examples.

property rights are explicitly recognized in the TRIPS Agreement as private rights<sup>177</sup> and they are now generally recognized as property rights,<sup>178</sup> despite some suggestions that they would be more appropriately characterized as privileges.<sup>179</sup>

The characterization of copyrights, patents, and other intangible rights as *human rights* may further hinder the ability of governments to limit such rights where they interfere with competing social and policy goals. A human right to intellectual property protection drives intellectual property law further towards the language of rights rather than the more limiting language of privileges.<sup>180</sup> It also promotes a natural rights approach to intellectual property law rather than a utilitarian one.<sup>181</sup>

The utilitarian approach views intellectual property as a tool to achieve a certain end, rather than an inherent right.<sup>182</sup> The advantage of the utilitarian conception of intellectual property law is that the entitlement can be interpreted in light of the objectives of the law, and not on some asserted natural right of the intellectual property owner. Consistent with the utilitarian approach to intellectual property,<sup>183</sup> the goals of patent and copyright law in the United States are regularly interpreted in light of the stated Constitutional objective: “to promote the progress of science and the useful

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

178. Wong, *supra* note 18, at 777 (“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.”).

179. PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 5 (Ashgate 1996).

180. Shaver, *supra* note 7.

181. See Donnelly, *supra* note 19, at 286 (“Natural or human rights ideas first developed in the modern West. A full-fledged natural rights theory is evident in John Locke’s *Second Treaties of Government*, published in 1689 in support of the so-called Glorious Revolution. The American and French Revolutions first used such ideas to construct new political orders.”).

182. DRAHOS, *supra* note 179, at 5.

183. Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 *HAMLIN L. REV.* 601, 606 (2003) (“Beginning with the first Patent Act of 1790 and continuing through the adoption of the Berne Convention Standards in 1989, the basis given for Anglo-American systems of intellectual property has been utilitarian in nature, and not grounded in the natural rights of the author or inventor.”).

arts.”<sup>184</sup>

Like the “propertization” of intellectual property, a natural rights conception of intellectual property will have the tendency to lead to greater protection of the entitlement.<sup>185</sup> This is because such discussion centers less on the question of whether the laws are promoting “progress” and more on the asserted natural right of the creator to this legal protection—either based on labor theory or the natural extension of the person theory.<sup>186</sup> In the context of a natural rights approach, one can argue more effectively to restrict the ability of the state to limit such rights, regardless of whether the goal of promoting progress is being achieved or impeded.

Similarly, contemplating intellectual property through a human rights lens can alter the way we understand, characterize, and develop intellectual property at a global level. Prioritizing human rights, like freedom of expression,<sup>187</sup> or less widely accepted rights like the right to food,<sup>188</sup> over state-granted intellectual property rights shifts the balance in favor of access instead of protection. By contrast, treating intellectual property protection as a human right could make it more difficult to place limitations on intellectual property rights.<sup>189</sup>

Of course, human rights law permits, under certain circumstances, the imposition of limits, albeit only to the extent that may reasonably be necessary, and often for a limited period of time.<sup>190</sup> The concept of indivisibility of human rights—that all human rights are interdependent and that all rights must be respected—naturally imports some balance into a human rights system because there is no

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184. U.S. CONST. art. I, § 8.

185. See Carrier, *supra* note 79, at 10.

186. See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 4–9 (Harvard Univ. Press 2011).

187. UDHR, *supra* note 10; ICCPR, *supra* note 84.

188. UDHR, *supra* note 10; ICESCR, *supra* note 83.

189. HELFER & AUSTIN, *supra* note 21, at 514. The Supreme Court has clearly stated that the public domain is not inviolable. See *Golan v Holder*, 132 S. Ct. (2012) 873, 891 (“However spun, these contentions depend on an argument we considered and rejected above, namely that the Constitution renders the public domain largely untouchable by Congress.”).

190. See ICCPR, *supra* note 84, Art. 4; Hafner-Burton et. al, Emergency and Escape: Explaining Derogations From Human Rights Treaties, 65 INTERNATIONAL ORGANIZATION, 673, 676 (2011).

hierarchy of rights.<sup>191</sup> However, as intellectual property and human rights serve fundamentally different purposes, the balance that is struck under intellectual property law may be distinct from that which is reached under human rights law. Thus, under the human rights framework for intellectual property, there may be times when intellectual property law performs the balancing function and times when human rights laws would provide the necessary guidance.

In balancing the interests of an intellectual property owner against the human right to health, for instance, the balancing of interests should favor the human right to health. For instance, access to medicines, formulated as part of the right to health under Article 25 of the UDHR, could be prioritized over the twenty-year patent term. Prioritizing human rights can be attributed to the goal of protecting human dignity as well as the state's ability to limit rights that are granted as a concession of the state. Under this analysis, fundamental human rights trump limited state-granted rights. In the context of international law, it could be argued, at least theoretically, that intellectual property rights should not interfere with inviolable human rights. However, if the patent right is characterized as a human right, it becomes less clear that other human rights, such as the right to health, should be prioritized. A human right to patent protection would be an inviolable right and therefore, at least conceptually, stronger than the twenty-year limited patent right that is currently available in all WTO member states.

Some of the concerns about strengthening intellectual property rights may be alleviated by concluding that corporations cannot claim that they have a human right to intellectual property protection.<sup>192</sup> Some scholars and human rights experts see the framework as excluding corporations.<sup>193</sup> If the human rights aspects extend only to natural persons,

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191. Vienna Declaration, *supra* note 138, ¶ 5 ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."); Nickel, *supra* note 6, at 984–85.

192. Yu, *supra* note 55, at 728.

193. Chapman, *supra* note 7; Yu, *supra* note 7.

and not to legal persons, then the potential for expansion of intellectual property rights seems less significant. Individuals would be able to assert their rights against corporations that own the intellectual property but the reverse would not hold true.<sup>194</sup> However, corporations have not been completely precluded from using human rights law to protect their intellectual property interests.<sup>195</sup> It is reasonable to anticipate that, given the opportunity, corporations would utilize human rights laws or principles to support their intellectual property claims.

In his analysis of the human right to intellectual property, Peter Yu responds to three areas of critique.<sup>196</sup> The first is that the elevation of intellectual property to the status of human rights is undesirable; the second is the risk of institutional capture by powerful rights holders; and the third is that the human rights framework is a Western concept that is not necessarily well suited to non-Western countries.<sup>197</sup> This Article focuses on the first two challenges that Yu identified. However, rather than accepting that corporations are naturally excluded from the framework, this Article considers the possibility of corporate claims to intellectual property protection based on human rights principles.

How corporations fit into the human rights framework for intellectual property is partially determined by differing theoretical approaches to corporations. As our conception of the corporation evolves, so does the corporation's ability to assert its rights. Thus, any human rights approach to intellectual property must take into consideration the potential for legal persons to use human rights law to frame their claims.

#### IV. CORPORATIONS AND THE HUMAN RIGHTS FRAMEWORK

The question of corporations asserting rights based on human rights laws or principles is more complex than it may

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194. Yu, *supra* note 7, at 1128–1131 (arguing that corporate intellectual property rights would have no human rights basis and therefore cannot rise to the level of human rights).

195. See generally *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

196. Yu, *supra* note 7, at 1124.

197. *Id.*

initially appear. In response to skepticism about the utility of human rights for intellectual property law, some scholars who support the use of a human rights framework for intellectual property dismiss the possibility that corporations could claim a human right to intellectual property protection.<sup>198</sup> As Chapman writes with respect to patents and copyrights, "a strong case can be made that a human rights approach requires that individuals, but not legal entities like corporations, be accorded the moral and material benefits" under Article 15 of the ICESCR.<sup>199</sup> After all, human rights are for *human* beings and not for artificial persons that were created by law.<sup>200</sup> In addition, human rights law may be seen as way to protect the weak and the vulnerable, rather than corporations that may have more wealth and power than some countries.<sup>201</sup> However, some human rights are enshrined as fundamental rights in domestic constitutions and extended to legal persons.

As Laurence Helfer and Graeme Austin observe in their treatise on intellectual property and human rights:

Protecting the intellectual property of corporations under the rubric of fundamental rights may strike many observers as fundamentally misguided. But the text and drafting history of several human rights treaties reveal a desire to protect the possessory interests of both businesses and natural persons. In particular . . . the rule of law in general and the stability and predictability of property rights would be undermined if governments could arbitrarily deprive any class of owners of their possessions . . . .<sup>202</sup>

While recognizing that governments may limit property

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198. See Chapman, *supra* note 12, at 316; Yu, *supra* note 55, at 728–30; *General Comment No. 17*, *supra* note 55, ¶ 4.

199. Chapman, *supra* note 12, at 317.

200. *Id.* at 316 ("By its very nature, a human right is vested in individuals, and in a few instances a community, but never in an economic corporation. Nor is there a basis in human rights to justify using intellectual property instruments as a means to protect economic investments.").

201. Merry et al., *supra* note 140, at 102 ("Protecting the vulnerable and powerless is clearly fundamental to the aspirations of human rights. The system of human rights law seeks to protect the dignity and well-being of all humans, regardless of their citizenship, race, gender, or class . . . . Human rights law promises the weakest and most excluded people protections equal to those of the wealthy and the privileged.").

202. HELFER & AUSTIN, *supra* note 21, at 62.

interests in favor of particular social and economic objectives, Helfer and Austin do not characterize a human right to intellectual property as excluding legal persons.<sup>203</sup>

The extension of human rights laws to corporations applies only to some human rights. If there is a rational basis for protecting corporate property rights in the context of a human rights framework, then arguably this can include patents, copyrights and trademarks as well. Moreover, it has been suggested that in light of the efforts to hold transnational corporations accountable for violations of international human rights law, legal persons should be recognized as having rights under the law.<sup>204</sup> It would be inaccurate to characterize legal persons as being entitled to human rights as a general claim. Nonetheless, if the goal of the human rights framework for intellectual property is to improve human outcomes in areas like health, food, and access to knowledge, then corporate claims must be considered. The potential for legal persons to successfully expand intellectual property protections by framing their claims using human rights concepts is pertinent to the ultimate utility of the framework. Corporate human rights-based claims are not without support in theory and existing jurisprudence.

As previously noted, the European Convention on Human Rights recognizes that corporations can assert human rights protection for their intellectual property.<sup>205</sup> There is no equivalent regime in the United States. However, the United States Supreme Court decision in *Citizens United v. Federal Election Commission*, while not directly applicable to the intellectual property and human rights framework, provides a useful analytical lens.<sup>206</sup> In this case, the Supreme Court

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203. *Id.*

204. Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y 197, 200 (2007) ("This article posits that transnational corporations possess legal personality sufficient to be granted rights in a manner similar to those granted to human beings in modern human rights law. In recognizing such status, the article contends that transnational are rights-carrying persons in addition to being duty-bearing entities.").

205. See *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007).

206. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), 130 Sup. Ct. 876 (concluding that a "prohibition on corporate independent expenditure is an outright ban on speech."). *Id.* at 882 (declining to limit the free speech rights

considered corporate claims regarding the right to free speech, which is both a constitutional right<sup>207</sup> and an international human right.<sup>208</sup> Noting that corporate speech has long been protected in the United States,<sup>209</sup> the Court concluded that the political speech of corporations is also protected.<sup>210</sup> The Court rejected the argument that corporations’ political speech should not be protected because they are not natural persons.<sup>211</sup> The Court also grappled with the exercise of corporate rights in *Burwell v. Hobby Lobby*.<sup>212</sup>

It is true that such cases have no precedential value in the intellectual property and human rights context.<sup>213</sup> Indeed, the international human rights framework is not directly applicable in the United States,<sup>214</sup> and American law does not directly impact international human rights law. Nonetheless, the principles that guided the *Citizens United* decision are helpful in discussing human rights and fundamental rights in relation to corporations. In particular, if the basis for distinguishing between legal and natural persons, or between different kinds of legal persons, is rejected by courts or other actors, the assertion that a human right to intellectual property cannot include corporate persons may need to be more adequately supported.

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of non-media corporations).

207. U.S. CONST. amend. I.

208. The Universal Declaration on Human Rights, Article 18, states, “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” UDHR, *supra* note 10, art. 18.

209. *Citizens United*, 558 U.S. 310, 130 Sup. Ct. 876 at 883 (“The Court has recognized that First Amendment Protection applies to corporations.”). *Id.*

210. *Id.* at 900 (“The Court has thus rejected the argument that.”). *Id.*

211. *Id.*

212. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–83 (2014). In this case, the Supreme Court held 5-4 that the Religious Freedom Restoration Act prohibition on the government substantially burdening a “person’s” free exercise of religion includes corporate persons. *Id.*

213. First, the rights in question are different; second, a U.S. constitutional law decision does not set a legal precedent for the interpretation of international human rights obligations. Nonetheless, the principles from the case are consistent with a trend towards the increased protection of corporate interests, both in Europe and the United States.

214. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); Merry et al., *supra* note 140, at 103 (“Historically, human rights were meant for export, not for domestic consumption.”).

An analytic approach that refuses to distinguish natural persons from legal persons could be applied to other fundamental rights that are enjoyed by both natural persons and corporations. This includes intellectual property claims that are based on human rights law or principles. Given that both legal and natural persons own patents, trademarks, and copyrights, is it possible that emphasizing the human rights aspects of intellectual property could end up primarily benefitting corporations?<sup>215</sup> Ultimately, even commentators who argue that corporations cannot claim human rights *per se* acknowledge that corporations could, through national law, assert rights that are based on human rights law.<sup>216</sup>

Importantly, the human rights framework, should it become widely accepted, could have a significant impact in nations that incorporate international human rights principles when interpreting their domestic laws.<sup>217</sup> Indeed, many countries attempt to interpret their domestic laws as consistent with their international obligations.<sup>218</sup> Furthermore, to the extent that a human rights lens becomes part of the intellectual property dialogue, we must

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215. Helfer, *supra* note 82, at 1015 (“In this vision of the future . . . industries and interest groups that rely upon intellectual property for their economic well-being would invoke the authors’ rights provisions and property rights provisions in human rights treaties to further augment existing standards of protection . . . . Early intimations of this version of the framework’s future are already apparent.”).

216. Yu, *supra* note 7, at 1130 (“To be certain, even though the protection of human rights is limited to individuals, countries are free to extend through national legislations ‘human-rights’ like protection to corporations or other collective entities.”).

217. Michael Kirby, J., *The Role of International Standards in Australian Courts*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 704, 705 (Steiner & Alston eds. 2000) (“The traditional view of most common law countries has been that international law is not part of domestic law . . . . More recently, however, a new recognition has come about of the use that may be made by judges of international human rights principles and their exposition by the courts, tribunals, and other bodies established to give them content and effect. This reflects both the growing body of international human rights law and the instruments, both regional and international, which give effect to that law.”).

218. Jorg Polakiewicz, *The Application of the European Convention on Human Rights in Domestic Law*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1001, 1003 (Steiner & Alston eds. 2000) (“It is common practice in many countries that the courts give statutes, wherever possible, an interpretation which is in line with the Convention. National courts are indeed required to ensure that international responsibility of their country arising from wrongful application of or disrespect for rules of public international law be avoided.”).

contemplate interpretations of intellectual property obligations not only under domestic law, but also within the context of TRIPS.<sup>219</sup>

The intellectual property standards in the TRIPS Agreement were shaped by the interests of intellectual property producing industries and their representative organizations.<sup>220</sup> A handful of powerful corporations are credited with the standardized approach to intellectual property rights that are reflected in the TRIPS Agreement.<sup>221</sup> The trend towards greater intellectual property protection is evident from the various bilateral agreements<sup>222</sup> as well as negotiations on multilateral agreements like the Trans-Pacific Partnership Agreement.<sup>223</sup> We should expect this upward trend to continue.<sup>224</sup> Thus, even if the ultimate goal is to limit the ability of corporations to benefit from a human rights framework for intellectual property, this can be best achieved by first acknowledging the potential for corporations to appropriate a human rights lens for their own benefit. This analysis will depend, to some extent, on how we understand the corporation.

#### A. *Who is the Corporation?*

This Article does not attempt to engage in a comprehensive analysis of corporations and their role in society. However, in contemplating whether a corporation can claim human rights to its intellectual property, one must

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219. The relationship between the TRIPS Agreement and other international agreements that reference intellectual property rights raises a number of interesting questions that go beyond the scope of this paper.

220. STIGLITZ, *supra* note 25, at 116; SELL, *supra* note 47, at 96–97.

221. SELL, *supra* note 47, at 96 (“In effect, twelve corporations made public law for the world.”).

222. See <http://www.ustr.gov/trade-agreements/free-trade-agreements> for a list of bilateral trade agreements. Many of these have provisions aimed at ensuring strong intellectual property protections.

223. See Office of the United States Trade Representative, Trans-Pacific Partnership: Summary of U.S. Objectives, *available at* <http://www.ustr.gov/tpp/Summary-of-US-objectives>.

224. James M. Buchanan, *Toward Analysis of Closed Behavioral Systems*, in *THEORY OF PUBLIC CHOICE: POLITICAL APPLICATIONS OF ECONOMICS* 11, 16–17 (Buchanan & Tollison eds. 1972) (“The economic model of behavior is based on the motivational postulate of individual utility maximization . . . . The actors who behave ‘economically’ choose ‘more rather than less’ with more and less being identified in units of goods that are independently identified and defined. This becomes a prediction about behavior in the real world.”).

give some consideration to the question: who is the corporation?

There are two predominant theoretical articulations of the corporation.<sup>225</sup> First, the concession theory postulates that corporations are created by the state and have only the rights that are granted to them by the state.<sup>226</sup> Thus, under the concession theory it is acceptable for the government to restrict the activities of corporations.<sup>227</sup> The second theory is the aggregate or contractual theory, which treats corporations as a collective of individuals who have come together under the form of the corporation.<sup>228</sup> Under this theory, the corporation is seen as based on private contracts between individuals.<sup>229</sup> These individuals do not lose the rights they would enjoy as individuals merely because they came together to form a legal entity.<sup>230</sup> Other theorists describe the corporation as a kind of “super person” that has received extensive protection from the law.<sup>231</sup> According to the real entity theory of the corporation, the corporation is viewed as having an existence of its own, one that is distinct from its shareholders and that is not controlled by the state. If corporations are viewed in this light, they are more easily characterized as having natural rights.<sup>232</sup>

The currently prevailing theory of corporate personality

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225. Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 201 (2006) (“Theorists continue to hold that the corporation is the product of either a concession or a contract.”).

226. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635 (“Under this view, the corporation is a legal fiction and incorporation a special privilege or concession awarded by the state.”).

227. O' Melinn, *supra* note 225, at 201.

228. Pollman, *supra* note 226, at 1641 (“The theory had roots in a view of the corporation as a partnership or contract among the shareholders.”).

229. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 203 (“In its most recent incarnation, the private aggregation idea has assumed the garb of neoclassical economics under the ‘corporation as a nexus of contracts’ rubric. Advocates of this theory have used the freedom-of-contract metaphor to support their shareholder primacy, anti-regulatory policy objectives.”).

230. Pollman, *supra* note 226, at 1641–42.

231. O' Melinn, *supra* note 225, at 201 (“This Article challenges the two preeminent theories of the corporation—contract and concession—by arguing that the corporation is a special kind of moral personality for which the law has made extensive accommodation.”).

232. Pollman, *supra* note 226, at 1642 (“This view of the corporations as ‘real’ and ‘natural’ suggested inherent, inviolable rights.”).

in the United States is the contract or aggregate theory.<sup>233</sup> If one analyzes corporate rights based on the aggregate theory of the corporation, there will be a tendency to equate the rights of the legal person with those of the natural person unless the right is one which is clearly not applicable to a legal person—like the right to be free from torture. To an even greater extent than the contract or aggregate theory of the corporation, treatment of the corporation as some kind of natural super person lends itself to the conclusion that the corporation should have the same rights as a natural person.<sup>234</sup> As one scholar writes, the corporation “is far better viewed as an immortal being with a soul, its existence and its entitlements based neither on sovereign grace nor on contracts entered into by rugged individuals, but on a moral personality distinct from that of both the individual and the state.”<sup>235</sup>

Clearly, the concession theory provides the strongest basis for the state to limit the role of the corporation.<sup>236</sup> Under the concession theory, which is no longer prevalent, one could more confidently assert that corporations are naturally excluded from a human rights framework. However, if the law indeed treats the corporation as an aggregate of individuals, who do not lose their rights by virtue of being a collective, or as a “super person,” then any assumption that corporations will be frustrated in their efforts to claim human rights to their intellectual property is flawed.

Another consideration that is pertinent to the human rights discussion is the nature of the corporation.

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233. O'Melinn, *supra* note 225, at 203 (“In recent years, the contractual view has become increasingly dominant, and although the concession theorists have provided continuous resistance, the contractual theory has nonetheless defined the terms of the discussion.”).

234. *Id.* (“The modern corporation is a social force and legal person without peer, an exceptional person treated unlike other persons before the law. The corporation has truly become a new kind of juristic person, defying the traditional categories of law and occupying a privileged place akin to that of an aristocracy.”).

235. *Id.*

236. Pollman, *supra* note 226, at 1635 (“Under this view, the corporation is a legal fiction and incorporation a special privilege awarded by the state. Accordingly, this view supported the government-imposed limitations on corporations of the time because if incorporation is a state grant, it follows that it can be a limited one.”).

Corporations can be private business corporations, or they may be municipal corporations or public not-for profit entities like churches and universities.<sup>237</sup> Should it matter whether the corporation is a large for-profit entity like the Monsanto Company,<sup>238</sup> or an indigenous group that wants to protect its traditional knowledge?

Monsanto, for example, is a multinational corporation. It is also a corporation that has outraged many due to its aggressive stance on its intellectual property, genetically modified organisms and its treatment of farmers.<sup>239</sup> For instance, the film *Food, Inc.*<sup>240</sup> was highly critical of Monsanto and other large food companies. The *Food, Inc.* film generated sufficient consumer reaction that Monsanto has attempted to respond to consumer criticisms, including concerns about its aggressive enforcement of its patents.<sup>241</sup> Critics of transnational corporations, like Monsanto, may be highly uncomfortable with the prospect of these companies using human rights law to argue for stronger patent rights. By comparison, the Seminole Tribe<sup>242</sup> of Florida is a federally recognized American Indian tribe with a proud history and culture.<sup>243</sup> It may even have culture and traditions that it would like to have protected as traditional knowledge.<sup>244</sup>

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237. O' Melinn, *supra* note 225, at 205.

238. Monsanto is a Delaware corporation, with global offices. See Monsanto Co., *Restated Certificate of Incorporation of Monsanto Company* (2013), available at <http://www.monsanto.com/whoweare/Pages/certificate-of-incorporation.aspx>.

239. See Organic Consumers Association, *Millions Against Monsanto*, <http://www.organicconsumers.org/monsanto/>.

240. See Public Broadcasting Service, *Food, Inc., A Robert Kenner Film: Film Description* (Apr. 21, 2010), [http://www.pbs.org/pov/foodinc/film\\_description.php](http://www.pbs.org/pov/foodinc/film_description.php).

241. Monsanto Co., *Food, Inc. Movie*, <http://www.monsanto.com/food-inc/Pages/default.aspx>.

242. Seminole Tribe of Florida, *Government - How we operate*, <http://www.semtribe.com/Government/BoardofDirectors.aspx> ("The Seminole Tribe of Florida, Inc., is a federal corporation. In the corporate charter, [t]he Board of Director's specific purpose is stated, 'To further the economic development of the Seminole Tribe of Florida by conferring upon said Tribe certain corporate rights, powers, privileges and immunity; to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the Department of Interior.'").

243. Seminole Tribe of Florida, *The Seminole Tribe of Florida*, <http://www.semtribe.com/>.

244. The World Intellectual Property Organization defines traditional

Advocates of the human rights framework for intellectual property also tend to be supportive of a collective right to traditional knowledge.<sup>245</sup> One might argue that since traditional knowledge holders tend to be groups, their claims will be similar to those of the legal person from the perspective of aggregate theory. Indeed, as is the case of the Seminole Tribe, some of these indigenous groups may be legally incorporated persons. Not only is the Seminole Tribe a federal corporation, it is a wealthy corporation,<sup>246</sup> and the owner of the Hard Rock Café.<sup>247</sup> This is but one example of the complexity of the arguments and the potential actors who might seek to benefit from a human right to intellectual property protection.

Overall, the right to moral interests is not easily extendable to corporations if these rights are analyzed pursuant to a natural rights approach to intangible creations and in line with the view that the creativity is an expression of the human self.<sup>248</sup> It is also initially difficult to envision how the material or moral interests of the creator could be

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knowledge as follows: “Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.” WIPO, *supra* note 45.

245. Chapman, *supra* note 12; Helfer, *supra* note 82.

246. Dara Kam, *State cashing in on extra \$4.3 million of Seminole gambling money*, NEWS SERV. OF FLORIDA (Oct. 22, 2013), available at <http://www.naplesnews.com/news/2013/oct/22/state-cashing-in-on-extra-43-million-of-seminole/> (“With the expiration of a gambling deal with the Seminole Indians on the horizon, the tribe for the first time has raked in so much money that it sent an extra \$4.3 million to the state.”).

247. See Hard Rock Café International, Inc., *Seminole Ownership*, <http://www.hardrock.com/corporate/ownership.aspx> (“In 2004, the Seminole Tribe opened two Seminole Hard Rock Hotels and Casinos in Florida. With the March 2007 acquisition of the Hard Rock brand, the Seminole Tribe of Florida added the prestige of one of the world’s most respected brands.”). The deal excluded the Hard Rock Las Vegas casino as well as the one in London, England, and rights to Hard Rock intellectual property in Brazil, Australia, Israel, Venezuela and much of the Western United States. See NBC News, *Seminole Tribe buys Hard Rock café business* (Dec. 8, 2006), available at [http://www.nbcnews.com/id/16090321/ns/business-world\\_business/t/seminole-tribe-buys-hard-rock-cafe-business/#.VGbogyvF-Ck](http://www.nbcnews.com/id/16090321/ns/business-world_business/t/seminole-tribe-buys-hard-rock-cafe-business/#.VGbogyvF-Ck).

248. *General Comment No. 17*, *supra* note 55, ¶ 12 (“The protection of the ‘moral interests’ of authors was one of the main concerns of the drafters of article 27, paragraph 2, of the Universal Declaration of Human Rights . . . . Their intention was to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations.”).

considered applicable to anyone other than a natural person, particularly since only a natural person can be a creator. Yet, a group of persons could be considered the “creator.”<sup>249</sup> In the dialogue regarding protection for traditional knowledge, it is often asserted that traditional knowledge innovation is generated by a group, rather than an individual.<sup>250</sup> Presumably, if the human right is recognized as a collective right as well as an individual right, the right to the protection of moral and material interests should extend to the group.<sup>251</sup> This is particularly so if one interprets the rights of the corporation in accordance with the aggregate theory.<sup>252</sup>

In addition, intellectual property law protects group interests where the owner is not a natural person. Geographical indications can protect collective rights that do not necessarily pertain to a natural person. A geographical indication identifies a good as originating in a particular region or locality, where a given “quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>253</sup> In the United States, geographical indications are protected as certification marks under the Lanham Act.<sup>254</sup> A certification mark is used by someone other than the owner of the mark and serves to indicate the source of the good.<sup>255</sup> The right to use a geographical indication may be given to a natural or legal person, but the holder of the right will often be a governmental or non-governmental organization, rather than a natural person. These rights are particularly pertinent to the discussion about a human rights framework because geographical indications have been proposed as one way to protect traditional knowledge that has not otherwise been protected under the current intellectual property system.<sup>256</sup>

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249. *General Comment No. 17, supra* note 55.

250. *Id.*

251. *Id.*

252. *See* Millon, *supra* note 229.

253. TRIPS Agreement, *supra* note 8, art. 22 (defining geographical indications as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”).

254. 15 U.S.C. §§ 1052, 1127, 2054 (2012).

255. 15 U.S.C. § 1127.

256. Daniel J. Gervais, *Traditional Knowledge: Are We Closer to the*

One could argue that a human right to intellectual property protection should pertain to the creator or the "author" of the work.<sup>257</sup> In patent law for instance, inventors are presumed to be natural persons.<sup>258</sup> However, it would be necessary to address the fact that copyright law, for instance, sometimes distinguishes the legal creator and owner of the work from the physical creator of the work. Under the work-for-hire doctrine, for example, the copyright belongs to the person who commissioned the work rather than the artist.<sup>259</sup> The law treats the commissioner of the work, and not the artist, as the author.<sup>260</sup> Likewise, if the work is made in the course of employment, the copyright belongs to the employer rather than the employee.<sup>261</sup> To the extent that a trademark could be considered a literary or artistic production, the human right to the material and moral interests could encompass trademark as well. Trademark law, however, provides protection to the user of the mark, not necessarily the creator of the mark.<sup>262</sup>

Of course, a human right to the creative work does not have to follow the same path as the legal right. In such a case, a human right to intellectual property might constrain the legal owner of the work from taking certain actions with regard to the work. This could create a balancing effect by forcing the legal owner to accommodate human rights principles. On the other hand, there may be reasons for a human right to intellectual property to follow the legal route and treat the person who commissioned the work, whether it

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*Answer(s)? The Potential Role of Geographical Indications*, ILSA J. INT'L & COMP. L. 551, 563 (2009).

257. UDHR, *supra* note 10, art. 27(2).

258. Sean M. O'Connor, *Speech, Authorship, and Inventorship: A New Approach to Corporate Personhood* 35 (Univ. of Wash. Sch. of Law, Legal Studies Research Working Paper No. 2012-03), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2016568](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016568) ("In stark contrast to the copyright system, the patent system does not allow for corporate persons to be inventors. Interestingly, while it is commonly understood that inventorship lies only in natural person inventors, nothing in the Patent Act expressly states this.").

259. 17 U.S.C. §§ 101, 201(b) (2012).

260. 17 U.S.C. §§ 101, 201(b).

261. 17 U.S.C. §§ 101, 201(b); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

262. GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARKS AND UNFAIR COMPETITION: LAW & POLICY 306–07 (3d ed. 2010).

is a natural or legal person, as the creator of the work.

Unlike moral rights, which are arguably pertinent only to natural persons, the protection of a proprietary or pecuniary interest could reasonably extend to legal persons. This is because property owners, and individuals with some kind of proprietary interest, can be legal or natural persons. The language of Article 17 of the UDHR suggests that both individuals and groups have a right to own property. Thus, whether one views a corporation as an individual or as a collective of human individuals,<sup>263</sup> there is some basis for corporations to claim property rights under the rubric of human rights. Moreover, the rationale for protecting property rights as fundamental rights may be equally applicable to natural and legal persons.<sup>264</sup> It has been suggested that the inclusion of corporate interests under European human rights law is due to recognition that the ability of governments to arbitrarily deprive any group of their possessions would undermine the rule of law.<sup>265</sup> Thus, the potential for corporations to successfully justify stronger intellectual property protections by framing their claims using human rights concepts is a relevant consideration to the potential impact of a human rights framework for intellectual property.<sup>266</sup> The tendency for intellectual property owners will be to focus on their human right to intellectual property protection rather than contemplating ways to limit their ownership interests. Before concluding, this Article offers some preliminary thoughts on ways to limit corporate claims within the context of a human rights framework.

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263. Applying aggregate theory or the natural entity theory of the corporation, respectively.

264. HELFER & AUSTIN, *supra* note 21, at 62 (“In particular, the treaties’ drafters understood that the rule of law in general and the stability and predictability of property rights in particular would be undermined if governments could arbitrarily deprive any class of owners of their possessions, although they also recognized that states should have considerable leeway to adopt and modify economic and social policies that adversely affect private property interests.”).

265. *Id.*

266. *Id.* (“Claims involving corporate property violations . . . allege that human rights law requires more extensive protection of inventions, trademarks, and creative works.”).

### *B. Limiting Corporate Claims*

As in the *Budweiser* case, legal persons may seek to protect their intellectual property under human rights law. Alternatively, legal persons could adopt human rights principles or framing in order to strengthen their intellectual property claims. Rather than discounting the possibility of corporate claims, it is worth contemplating how to limit the scope of potential corporate claims, if this is indeed the goal.

One possible approach is to completely disaggregate the ownership of the intellectual property from the human rights aspects of the intellectual property. Since there will always be a natural person creator, it would be possible to always attribute any intellectual-property-related human right back to the human *creator* but not to the *owner* of the intellectual property. If the human rights aspect of the intellectual property always relates back to the creator, rather than the owner of the right, then even if there is a strengthened intellectual property right, it will remain with the natural person.<sup>267</sup> For instance, purchasing intellectual property protected goods does not amount to a transfer of the intellectual property right, or any associated human rights. The transfer of the physical good is distinct from the transfer of the intellectual property right. Likewise, the transfer of ownership in an intellectual property right could be distinguished from the transfer of any associated human right.

Thus, while corporations could own intellectual property rights, any associated human right, including the property right, could remain with the human creator. This does not alleviate possibility of having a more entrenched right, but it is one possible way to limit claims by legal persons. This is also more consistent with the common understanding of human rights as being based on the inherent dignity of the human person. The challenge that arises with distinguishing between the owner and the creator is that, as discussed previously, there may be instances where the work is the result of collaboration and the creator is a legal person or a

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267. This could make the transfer of intellectual property rights highly complicated. Since human rights are inalienable, one would expect the human right to the intellectual property protection to be non-transferable, despite the transferability of the legal right.

group of persons rather than a single natural person. Under the aggregate theory of the corporation, it is more difficult to argue that we should limit the rights of the corporate entity, or any collective of individuals than it would be under the concession theory of the corporation.

Yet, a human right to intellectual property protection does not need to follow the path of intellectual property law. Work for hire, for example, does not need to have any place in the human rights and intellectual property framework. If human rights protection to the moral and material interests in creative products takes a route of its own, this distinction could be helpful in reducing concerns about potential corporate capture of the human rights lens. Nonetheless, there are risks to promoting a human right to intellectual property. Since none of the pertinent human rights instruments speaks of intellectual property *per se*, it is possible, and preferable, to refrain from merging these two distinct areas of law.

#### CONCLUSION

The implications of a human rights framework depend on whether the framework is used to limit intellectual property rights or to promote a human right to intellectual property protection. Framing intellectual property rights as human rights could alter our perception and treatment of these rights. The effect of characterizing patents, trademarks, and copyrights as property rights is indicative of the importance of framing.<sup>268</sup> In light of the European approach to corporate human rights, the global trend towards increased intellectual property rights, and the treatment of corporate rights under European and American law, it is difficult to discount corporations in the dialogue about a human rights framework.<sup>269</sup> The concept of a human right to intellectual property protection may facilitate the ability of intellectual property owners, many of whom are transnational corporations, to assert that they have fundamental property

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268. See generally Carrier, *supra* note 79, at 5.

269. See generally *Annheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 (Grand Chamber 2007); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–83 (2014).

interests in their patents, copyrights, or trademarks.

The greatest appeal of the human rights approach and the greatest prospect for human rights to have a moderating effect on intellectual property law is in the use of human rights to *limit* intellectual property protection where intellectual property rules negatively affect human rights interests. The potential downside of adopting a human rights approach is most evident with respect to use of the framework to promote intellectual property protection. For this reason, an author's human right to the protection of the moral and material interests resulting from any scientific, literary or artistic production should be recognized as distinct from the existing intellectual property protection. Human rights law can counter intellectual property law where the two come into conflict, but these two areas of law should not be merged, even if the goal is to promote greater balance.