

## Authors' Human Rights and Copyright Policy

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### INTRODUCTION

Few would likely disagree with the observation made by Graeme Dinwoodie in this journal some seventeen years ago that “[i]t is increasingly impossible to analyze intellectual property law and policy without reference to international lawmaking.”<sup>1</sup> International instruments influence the shape of domestic intellectual property law, and, in turn, have become vehicles for exporting domestic norms.<sup>2</sup> And international law can, and should,<sup>3</sup> inform the interpretation of domestic statutes, including those in the area of intellectual property.<sup>4</sup>

Where there might be disagreement, however, is as to the content of the relevant “international lawmaking.” A conventional list of international intellectual property instruments would doubtless include the great nineteenth century intellectual property conventions, the Paris Convention for the Protection of Industrial Property (1883)<sup>5</sup> and the Berne Convention for the Protection of Literary and Artistic Works of (1886).<sup>6</sup> There might be a nod in the direction of the 1952 Universal Copyright

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1. Graeme B. Dinwoodie, *The Integration of Domestic and International Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307, 307 (2000).

2. See generally Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT'L L. J. 218 (2002) (discussing different modalities of international intellectual property harmonization).

3. See Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44 (2016).

4. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (holding that domestic statutes should be interpreted consistently with customary international law). See generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). On the relevance of the *Charming Betsy* interpretive canon to copyright law, see Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights after Dastar*, 61 NYU ANN. SURV. AM. LAW 111, 144-50 (2005); Ginsburg, *supra* note 3, at 73-4.

5. Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 303 [hereinafter “Paris Convention”].

6. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis(1), Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter “Berne Convention”]. As Professor Sam Ricketson has noted, prior to the completion of the Paris and Berne Conventions, various nations entered into a complex web of bilateral treaties relating to intellectual property—a history that presages the intellectual property chapters that are included in the web of bilateral

Convention,<sup>7</sup> the Cold War era alternative to the Berne Convention that enabled entry into international copyright relations without member states having to jettison domestic formalities.<sup>8</sup> In this context, the TRIPS Agreement of course now looms very large, as do the 1996 WIPO “Internet Treaties,”<sup>9</sup> and treaties on “neighboring” (or related) rights.<sup>10</sup> Procedural initiatives might receive some attention, including the Madrid Agreement and Protocol,<sup>11</sup> and the Patent Cooperation Treaty.<sup>12</sup> If regional instruments were added to the list, the European Union Directives on intellectual property<sup>13</sup> would be obvious candidates, as would recent initiatives in the Association of Southeast Asian Nations (ASEAN) context to better integrate ASEAN member states’ intellectual property laws.<sup>14</sup> The intellectual property chapters in bilateral and plurilateral trade agreements—“TRIPS-plus agreements”—would also be included.<sup>15</sup>

International human rights law is seldom included in recitations of relevant international law sources,<sup>16</sup> even though leading international human rights

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FTAs that have arisen in the post TRIPS era. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* (1987).

7. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132 [hereinafter “UCC”].

8. The UCC also enabled member states to maintain copyright terms that are shorter than the Berne Convention, which, for the most part, requires a term of life of the author plus 50 years. See UCC, *supra* note 7, at art. IV.2. See generally Joseph S. Dubin, *The Universal Copyright Convention*, 42 CAL. L. REV. 89, 105-07 (1954).

9. World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997) [hereinafter “WIPO Copyright Treaty”]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-1736, 36 I.L.M. 76 (1997) [hereinafter “WIPO Performances and Phonograms Treaty”].

10. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter “Rome Convention”]; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, Oct. 29, 1971, 25 U.S.T. 309, 888 U.N.T.S. 67; Beijing Treaty on Audiovisual Performances, June 24, 2012, 51 I.L.M. 1214.

11. Madrid Agreement Concerning the International Registration of Marks art. 1, Apr. 14, 1891, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 391; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks art. 4, adopted at Madrid on June 27, 1989, S. Treaty Doc. No. 106-41.

12. Patent Cooperation Treaty, adopted at Washington on June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 23.

13. See PAUL A.C.E. VAN DER KOOIJ & DIRK J.G. VISSER, *EU IP LAW: A SHORT INTRODUCTION TO EUROPEAN INTELLECTUAL PROPERTY LAW* (2015).

14. ASEAN, Intellectual Property Portal, <https://perma.cc/5MXH-7DRX>.

15. Bilateral free trade agreements between the United States and other countries include largely standard provisions on intellectual property. See, e.g., the bilateral agreement between Singapore and the United States. United States-Singapore Free Trade Agreement, U.S.-Sing., ch. 16, May 6, 2003, State Dept. No. 04-36, 42 I.L.M. 1026.

16. Cf. SAM RICKETSON, *Intellectual Property and Human Rights*, in *COMMERCIAL LAW AND HUMAN RIGHTS* 198 (Stephen Bottomley and David Kinley eds., 2002). In recent years, a number of scholars have explored the relationship between intellectual property in detail in a series of insightful articles. In addition to path-breaking analysis by Professor Helfer in Laurence Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007) [hereinafter “Helfer, *Human Rights Framework*”], see, e.g., Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37 (2016); Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121 (2010); Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On*

instruments speak directly to the rights of authors. A foundational document in the post–World War II human rights movement, the Universal Declaration of Human Rights, announced the following guarantee to all members of the human family: “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>17</sup> This statement was broadly contemporaneous with the adoption of a similar recognition in the 1948 American Declaration on the Rights and Duties of Man,<sup>18</sup> and it was reaffirmed as article 15(1)(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>19</sup> Even if some nations, including the United States, have not ratified the ICESCR, with its source in the Universal Declaration, this guarantee of rights in respect of authors’ scientific, literary and artistic productions forms part of what has become known as the “International Bill of Rights.”<sup>20</sup>

This Article argues that human rights guarantees to protect authors’ moral and material interests should be included in the “international lawmaking” that is considered relevant to domestic intellectual property law and policy.<sup>21</sup> In the analysis that follows, the phrase “authors’ human rights” is used to describe human rights commitments to protect authors’ moral and material interests in their work.<sup>22</sup> The label “international intellectual property law” is used to denote the international instruments typically included in the “conventional list.” While this nomenclature will assist with the analysis, one of the key points advanced in this Article is that authors’ human rights should be considered a part of international intellectual property law, not separate from it.

Part I develops the descriptive claim that human rights have occupied an “outsider” position in international intellectual property law. Notwithstanding the

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*Copyright and Human Rights*, 27 WIS. INT’L L. REV. 637 (2009); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); PAUL TORREMANS, *Copyright as a Human Right*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION, INTELLECTUAL PROPERTY, PRIVACY* 1 (Paul L.C. Torremans ed., 2004).

17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 27(2) (Dec. 10, 1948) [hereinafter “UDHR”].

18. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. 13(2).

19. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1996) [hereinafter “ICESCR”].

20. See, e.g., Louis B. Sohn, *The New International Law: Protection of The Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

21. These “author-focused” guarantees are accompanied by human rights guarantees to all members of the human family to participate in culture and to share the benefits of scientific advancement. See UDHR, *supra* note 17, at art. 27(1); ICESCR, *supra* note 19, at art. 15(1)(a). These rights, and their connection with the human rights of authors, are discussed in LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* 233-42 (2011). See also Shaver & Sganga, *supra* note 16. As is discussed in Part III *infra*, the jurisprudence on authors’ rights emphasizes that the advancement of authors’ rights to the protection of the moral and material interests in their productions must not impermissibly trespass on other rights, including the right to science and culture. Article 15(1)(a) is now the topic of its own General Comment. See Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 21: The Right of Everyone to Take Part in Cultural Life*, art. 15(1)(a), U.N. Doc. E/GC.21/2005 (Jan. 12, 2006).

22. For an insightful overview of the principal international law sources of authors’ human rights, emphasizing authors’ moral rights, see ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 133-145 (2010).

unequivocal recognition in the International Bill of Rights of authors' human rights, human rights are not considered to be part of the same policy framework as international intellectual property law. Most often, human rights are seen as a source of constraints on aspects of intellectual property law that are considered to be overreaching.<sup>23</sup> The outsider position is also reflected in the approach taken by intellectual property textbook writers to the international law background for domestic law and policy. In these texts, international intellectual property law now receives quite a lot of attention. Authors' human rights however, are seldom mentioned. The approach no doubt reflects the *realpolitik* of international intellectual property. With the integration of intellectual property within the World Trade Organization (WTO) framework, and the strengthening of links to trade through TRIPS-plus agreements and other bilateral and plurilateral agreements, the implications of breaching international intellectual property prescriptions are much more serious than breaches of human rights obligations.<sup>24</sup> While understandable for that reason, overlooking authors' human rights obligations risks overlooking an important body of jurisprudence that should inform our thinking about copyright policy. Moreover, as Part II explains, the commitments of that jurisprudence align with parts of the history of international intellectual property law, most notably the universalist commitments to authors' rights that informed the ideas that animated the Berne Convention.

Part III outlines the substantive content of human rights that are focused on the rights of authors, drawing on the 2005 General Comment on article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>25</sup> that was issued by the Committee on Economic, Social and Cultural Rights in 2005,<sup>26</sup> as well as the December 2014 Report to the Human Rights Council entitled *Copyright Policy and the Right to Science and Culture*, by the Special Rapporteur in the field of cultural rights.<sup>27</sup> Neither the history of the drafting of authors' human rights guarantees, nor the interpretive jurisprudence suggests that a human rights approach to copyright is a pretext for an exorbitant expansion of the economic interests of

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23. See, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE 101-102 (2012) ("Human rights are a principal source for delimiting intellectual property, not simply expanding it.").

24. While international free trade instruments can make limited provisions for labor and environmental standards (which are, of course, human rights issues), they do not refer to the human rights of authors. See Meredith Kolsky Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 LOY. U. CHI. INT'L L. REV. 1 (2015) (discussing problems with including human rights standards in trade agreements).

25. ICESCR, *supra* note 19.

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

27. Farida Shaheed (Special Rapporteur on Cultural Rights), *Copyright Policy and the Right to Science and Culture: Report of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/28/47 (Dec. 24, 2014) [hereinafter "2014 Special Rapporteur Report"]. In 2015, the United Nations Special Rapporteur in the field of cultural rights also presented her report on patents and access to culture to the General Assembly of the United Nations. See U.N. Secretary-General, *Report of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/70/279 (Aug. 4, 2015). The latter Report is not considered further in this Article.

copyright owners. Even so, human rights jurisprudence, with its emphasis on authors' (not owners') moral and material interests, is a useful reminder of the connection between authors' rights and human dignity.

Following some brief observations about law reform contexts in which authors' human rights might be relevant, Part IV turns to a concrete illustration: the December 2016 decision of the High Court of England and Wales involving the right of authors under the U.S. Copyright Act of 1976 to terminate grants of rights.<sup>28</sup> In this case involving the British pop group *Duran Duran*, a leading English intellectual property judge decided "not without hesitation"<sup>29</sup> that U.S. termination rights did not survive a blanket assignment of rights under a contract governed by English law. The analysis in the case ranged over difficult issues of conflict of laws, and the English law of contractual interpretation.<sup>30</sup> Issues of this kind will likely be addressed if this case is taken on appeal. It is also hoped that appellate courts will engage further with the relevance of the principle of the comity of nations to the U.S. public policy commitments reflected in the termination right. Examination of those topics can be left to another occasion. This Article takes a different approach, and asks whether the emerging jurisprudence on authors' human rights might enhance our understanding of the normative background against which the appellate analysis might occur.

## I. THE "OUTSIDER" POSITION OF AUTHORS' HUMAN RIGHTS

In recent years, many NGOs, civil society groups, international organizations,<sup>31</sup> activists, and scholars have invoked human rights as a platform for challenging perceived excesses in domestic and intellectual property laws.<sup>32</sup> In the conventional way these claims are advanced, one or other aspects of intellectual property law are

28. *Gloucester Place Music Ltd. v. Simon Le Bon*, [2016] E.W.H.C. (Ch.) 3091 (Arnold, J.) (Eng.). The termination right has recently been the focus of claims by former Beatles member, Sir Paul McCartney, in *Complaint, McCartney v. SONY*, No. 17cv363 (S.D.N.Y. filed Jan. 18, 2017).

29. *Gloucester Place Music*, [2016] EWCH (Ch) 3091 at [44].

30. *Investors Comp. Scheme Ltd. v. West Bromwich Bldg. Soc'y* [1998] 1 W.L.R. 896 (H.L.) (U.K.); *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] U.K.H.L. 38, [2009] 1 A.C. 1101 (U.K.); *In Re Sigma Finance* [2009] U.K.S.C. 2, [2010] 1 All E.R. 571 (U.K.); *Rainy Sky SA v. Kookmin Bank* [2011] U.K.S.C. 50, [2011] 1 W.L.R. 2900 (U.K.); *Arnold v. Britton* [2015] U.K.S.C. 36, [2015] A.C. 1619 (U.K.); *Attorney Gen. of Belize v. Belize Telecom Ltd.* [2009] U.K.P.C. 10, [2009] 1 W.L.R. 1988 (U.K.).

31. Human Rights Council Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (Aug. 17, 2000) [hereinafter "Resolution 2000/7"] (noting the "apparent conflicts" between the international human rights regime and intellectual property). In 2001, the sub commission adopted a further resolution on the relationship between intellectual property, in which it called for the "integration" of human rights and intellectual property, and further called "upon Governments to integrate into their national and local legislation and policies provisions that, in accordance with international human rights obligations and principles, protect the social function of intellectual property" and urged "all Governments to ensure that the implementation of the TRIPS Agreement does not negatively impact on the enjoyment of human rights as provided for in international human rights instruments by which they are bound." Human Rights Council Res. 2001/21, U.N. Doc. E/CN.4/SUB.2/RES/2001/21 (Aug. 16, 2001).

32. See HELFER & AUSTIN, *supra* note 21, at 65-72.

identified as breaching one or more human rights obligations<sup>33</sup> in areas such as public health, freedom of expression, and farmers' rights.<sup>34</sup> On this analysis, taking human rights seriously demands that intellectual property should yield.<sup>35</sup> This is consistent with the conventional understanding that human rights are not a "part of" or "internal" to intellectual property. There have been some recent signs that this position is changing, at least rhetorically. For example, when the amendment to the TRIPS Agreement regarding the export of generic pharmaceuticals to countries that lacked a domestic manufacturing capacity at last came into force in 2017,<sup>36</sup> a delegate from Bangladesh "stressed the human rights dimension of the TRIPS amendment,"<sup>37</sup> and said that the TRIPS Agreement, "with its new amendment, ranks alongside important international instruments to ensure health and happiness for all."<sup>38</sup> These statements come close to characterizing the amended TRIPS Agreement *as* an instrument that can itself further human rights.<sup>39</sup> For the most part, however, human rights are regarded as an exterior source of constraints; a set of potential trumps,<sup>40</sup> not members of the same suit.

This outsider position can be detected even in the text of the recently completed WIPO Marrakesh Treaty on the rights of visually impaired people.<sup>41</sup> In broad outline, the Marrakesh Treaty mandates a series of exceptions to the rights of copyright owners in order to facilitate the creation and international transmission of works that are in formats that are accessible to visually-impaired people.<sup>42</sup> This WIPO-sponsored instrument came into force in 2016. It does refer to human rights, "[r]ecall[ing]" in its Preamble "the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society,

33. See, e.g., Andrew T.F. Lang, *Re-Thinking Trade and Human Rights*, 15 TULANE J. INT'L COMP. L. 335, 348 (2007) ("First, commentators scrutinize WTO agreements carefully to determine the kinds of policy choices these agreements may require or proscribe; and second, these policy choices are themselves carefully analyzed to determine whether and in what ways they may respectively undermine or enhance the enjoyment of human rights in particular circumstances.").

34. See Resolution 2000/7, *supra* note 31.

35. *Id.* ¶ 12 (noting that "any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, [or] education . . . is inconsistent with the legally binding obligations of the State party.").

36. *WTO IP Rules Amended to Ease Poor Countries' Access to Affordable Medicines*, WORLD TRADE ORGANIZATION (Jan. 27, 2017), <https://perma.cc/DM6W-6BZM>.

37. *WTO Members Welcome Entry into Force of Amendment to Ease Access to Medicines*, WORLD TRADE ORGANIZATION (Jan. 30, 2017), <https://perma.cc/427G-2FZ9>.

38. *Id.*

39. See RUTH OKEDIJI, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT, AND NEW DUTY-BEARERS, 211 (Margot E. Salomon et al. eds., 2007).

40. The concept of "rights as trumps" is used here in its populist sense, not in the sense prominently associated with Ronald Dworkin's work (i.e., the claim that rights should "trump" where restrictions in the name of the greater good are likely to be the product of external preferences that are corrupted by prejudices). See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 277 (1977).

41. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, <https://perma.cc/BF8Y-VG2U> [hereinafter "Marrakesh Treaty"].

42. See generally Lida Ayoubi, *The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons*, 13 N.Z. J. OF PUB. & INT'L LAW 255 (2015).

proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.<sup>43</sup> But this placement of international human rights obligations front-and-center in this WIPO instrument does not represent any radical repositioning of human rights in the international intellectual property law architecture.<sup>44</sup> Instead, it reinforces human rights' typical role: a catalyst and justification for crafting limitations on the rights of intellectual property owners.<sup>45</sup> It crafts much-needed *exceptions* to the rights of copyright owners, so as to address a desperate need of members of the human family who labor under print disabilities. Therefore, the treaty does not necessarily represent a more fundamental commitment to the *integration* of human rights within international intellectual property law.<sup>46</sup>

The conventional view that authors' human rights are outside international intellectual property law is also reinforced to some extent by the normative jurisprudence on authors' human rights. The fullest elaboration of the substantive content of these rights has been a 2005 General Comment by the Committee on Economic, Social and Cultural Rights on article 15(1)(c) of the ICESCR,<sup>47</sup> and the 2014 Special Rapporteur Report. In its first paragraph, the General Comment draws a sharp distinction between authors' human rights and intellectual property:

Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative protections as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.<sup>48</sup>

In contrast, the rights guarantee in article 15(1)(c) “derives from the inherent dignity and worth of all persons”<sup>49</sup>—which, at least according to the General Comment, is not something that can be said of intellectual property rights. Similar points are advanced in the 2014 Special Rapporteur Report.<sup>50</sup> Thus, even those *tasked* with developing the normative content of this article consider authors' human rights to be distinct from intellectual property.

This “outsider” status is also reflected in the lack of attention accorded to authors' human rights in most treatises and textbooks on domestic intellectual property. These texts readily acknowledge international intellectual property law as a source for domestic intellectual property—that is, as a body of international law that

43. Marrakesh Treaty, *supra* note 41, at Preamble.

44. Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT L. REV. 993 (2002).

45. In broad outline, the Marrakesh Treaty will enhance opportunities for cross-border distribution of copies made in reliance on them. Marrakesh Treaty, *supra* note 41, at arts. 5, 9.

46. See Jingyi Li & Niloufer Selvadurai, *Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled*, 36 EUR. I. P. REV. 653-64 (2014).

47. General Comment No. 17, *supra* note 26.

48. *Id.* at ¶ 1.

49. *Id.* at ¶ 1.1.

50. 2014 Special Rapporteur Report, *supra* note 27, at ¶ 26.

increasingly influences domestic law and policy. However, they do not typically acknowledge a similar role for human rights law. The detailed, and otherwise illuminating, discussion of “International Influences” in a leading English treatise<sup>51</sup> is typical. Under that heading, the book first presents a detailed discussion of the Paris and Berne Conventions, and their crucial intervention of imposing national treatment obligations on member states.<sup>52</sup> This is followed by a detailed description of the revisions to those treaties and the rise of the World Intellectual Property Organization. The narrative continues with a discussion of the emerging impatience of intellectual property “exporter states” with WIPO, and the use of trading power to enhance international protection of intellectual property, culminating in the incorporation of intellectual property into the General Agreement on Tariffs and Trade (GATT) system through the adoption of the TRIPS Agreement. The authors also note that the role of WIPO was not entirely eclipsed by the WTO, as is manifest by the completion in 1996 of the WIPO Copyright Treaty<sup>53</sup> and the WIPO Performers and Phonograms Treaty.<sup>54</sup> This text does mention<sup>55</sup> some relevant pushbacks (some of which were informed by human rights concerns, most prominently, the right to health), including the 2001 Doha review of TRIPS in the public health context,<sup>56</sup> and also the Convention on Biodiversity,<sup>57</sup> a topic that receives more extensive treatment later in the book.<sup>58</sup> There is, however, no recognition that international human rights law is part of the international intellectual property law framework, and no analysis of the relevant articles of the Universal Declaration on Human Rights or the ICESCR. In this context, the idea that human rights are “universal, indivisible and interdependent and interrelated”<sup>59</sup> is often overlooked.

Another leading text,<sup>60</sup> again in the context of an exhaustive and scholarly treatment of international “sources” of domestic intellectual property, does mention the European Convention on Human Rights.<sup>61</sup> Although this instrument does not include an equivalent of article 15(1)(c) of the ICESCR, the “property” protections recognized in the Convention’s first protocol have been recognized as protecting intellectual property.<sup>62</sup> At the same time, the Convention’s protection of freedom of

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51. LIONEL BENTLEY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* (2d ed. 2004).

52. *Id.* at 6.

53. WIPO Copyright Treaty, *supra* note 9, at art. 10.

54. WIPO Performances and Phonograms Treaty, *supra* note 9, at art. 16(2).

55. BENTLEY & SHERMAN, *supra* note 51, at 10.

56. World Trade Organization, Declaration on the TRIPS Agreement and Public Health (Nov. 20, 2001) WT/MIN(01)/DEC/2.

57. United Nations Convention on Biological Diversity, June 4, 1993, 1760 U.N.T.S. 79.

58. BENTLEY & SHERMAN, *supra* note 51, at 347.

59. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/24 at 20-46 (June 25, 1993), *reprinted in* 32 I.L.M. 1661 (1993) [hereinafter “Vienna Declaration”].

60. WILLIAM CORNISH, DAVID LLEWELYN & TANYA APLIN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND RELATED RIGHTS* 26-27 (7th ed. 2010).

61. Convention for the Protection of Human Rights and Fundamental Freedoms art. 53, Nov. 4, 1950, 213 U.N.T.S. 221.

62. See HELFER & AUSTIN, *supra* note 21, at 212-20. For an example of the application of the first protocol in the copyright context, see *Balan v. Moldova*, App. No. 19247/03 (Eur. Ct. H.R. 2008).



expression<sup>63</sup> is identified as a potential limit on intellectual property rights, especially copyright.<sup>64</sup> Once again, however, the specific human rights guarantees accorded to authors are not identified as a source of international law that might be relevant to the shape of domestic intellectual property law and policy.<sup>65</sup>

What might account for the separation of intellectual property and authors' human rights? Perhaps most obviously, domestic policy analysts will know that it is a failure to comply with the disciplines of TRIPS that will attract trade sanctions or fines.<sup>66</sup> The situation is quite different for human rights instruments that recognize authors' human rights. The prospect of international embarrassment for failing to respect, protect, and fulfill<sup>67</sup> authors' human rights guarantees seems far more remote. This failure presents a less significant or immediate threat than the prospect of trade sanctions or fines under the WTO system.<sup>68</sup>

Another obvious problem confronting treatise and textbook writers is that, until relatively recently, there has not been much "law" on authors' human rights that they could describe or analyze,<sup>69</sup> and its normative content has been slow to emerge.<sup>70</sup>

63. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 61, at art. 10.

64. See, e.g., *Ashdown v. Telegraph Grp. Ltd.* [2001] W.L.R. 1368 (E.W.C.A.) at [45].

65. The proposition advanced here depends on proving a negative. It is possible that some conventional intellectual property treatises and textbooks do provide a discussion of authors' human rights as a relevant source of international intellectual property law. However, this author has not been able to find one.

66. See, e.g., *Report of the Panel, United States-Section 110(5) of U.S. Copyright Act*, WTO Doc. WT/DS160/R, ¶¶ 7.1, 7.2 (June 15, 2000); *Notification of a Mutually Satisfactory Temporary Arrangement, United States-Section 110(5) of U.S. Copyright Act*, WTO Doc. WT/DS160/23 (June 26, 2003). The former document is the WTO panel report in which aspects of the U.S. copyright law (the Fairness in Musical Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830 (codified at 17 U.S.C. § 110(5)(B))) were considered to be in breach of the obligations of the United States under the TRIPS Agreement. A recent positive development has occurred in Australia. On March 22, 2017, a Bill was introduced into the Australian Federal Parliament to give effect *inter alia* to the Marrakesh Treaty. Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment (Disability Access and Other Measures) Bill 2017*. The accompanying Explanatory Memorandum included an assessment under Human Rights (Parliamentary Scrutiny) Act 2011 (Cth.). That assessment addressed a variety of different human rights, including the rights of authors that are guaranteed under the ICESCR.

67. See generally Maastricht Guidelines on Violations of Econ., Soc. & Cultural Rts., Jan. 22-26, 1997, ¶ 6, reprinted in 20 HUM. RTS. Q. 691-705 (1998) (setting forth obligations of signatories to human rights instruments guaranteeing economic, social and cultural rights).

68. For the trading partners of the United States, an additional threat is being admonished in the context of the "Special 301" procedure by the U.S. Trade Representative. See generally, Judith H. Bello & Alan F. Holmer, "Special 301": *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259 (1989).

69. Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 808 (2009) (noting, with respect to art. 27 of the UDHR and art. 15 of the ICESCR, the "lack of specific guidance within these general provisions, case law, and other authoritative normative pronouncements").

70. As such, this jurisprudence seems to exemplify Philip Alston's observations about human rights law more generally. See Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2062 (2013) (finding that "despite its prominence in many national legal orders, diplomatic discourse, academic debate, and even grassroots activist campaigns, the relevant body of law is of very recent provenance.").

With international intellectual property law, the situation is different. To be sure, until the Berne and Paris Conventions were brought under the aegis of the WTO, there were few authoritative interpretations of their principles.<sup>71</sup> But with the integration of major international intellectual property instruments in the WTO system, there are international bodies specifically charged with the task of interpreting TRIPS itself, along with the substantive rules of the Berne and Paris Conventions that are incorporated within the TRIPS regime. These include the TRIPS Council,<sup>72</sup> and panels convened under the WTO dispute settlement understanding<sup>73</sup> that elaborate on the meaning of the TRIPS articles and the other intellectual property conventions that are incorporated within the WTO framework. To be sure, the body of law is not large,<sup>74</sup> but it is growing and the understanding of TRIPS substantive norms is evolving apace.<sup>75</sup>

## II. ACCOMMODATING AUTHORS' HUMAN RIGHTS IN COPYRIGHT THINKING

What if human rights were not viewed as positioned beyond the boundaries of copyright, but instead were considered part of the same policy and legal context? Textually, there is considerable overlap between the articulation of authors' human rights and basic tenets of copyright law. And, as is noted below, the drafting history of the human rights instruments reflects a more integrated approach. In addition, some of the universalist ideas that inform human rights are also part of the history of international intellectual property law, particularly copyright law.

The human rights instruments refer explicitly to authors' moral and material interests. A link to copyright law could hardly be more clear. Authors' moral interests align with the protection of the *droit moral*, recognized in the copyright (or authors' rights) systems of most legal systems—except, of course, the United States, where the recognition is more limited and piecemeal.<sup>76</sup> Further, authors' material

71. There were, however, important scholarly exegeses, most notably Professor Sam Ricketson's path-breaking analysis of the Berne Convention. RICKETSON, *supra* note 6. A second edition of this path-breaking work was co-authored with Professor Ginsburg. See SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2005). In the past year, Professor Ricketson has published a similarly exhaustive treatment of the Paris Convention. See SAM RICKETSON, *THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY* (2015).

72. The TRIPS Council is tasked under TRIPS with monitoring the operation of the agreement. See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 68, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 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"].

73. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

74. Rochelle C. Dreyfuss & Andreas Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

75. See, e.g., Patricia Judd, *Toward a TRIPS Truce*, 32 MICH. J. INT'L L. 613 (2011).

76. See Ginsburg, *The Most Moral of Rights*, *supra* note 3. The U.S. Copyright Office announced an inquiry into the adoption of moral rights on January 23, 2017. See Notice of Inquiry, Study on the Moral Rights of Attribution and Integrity, 82 Fed. Reg. 7870 (Jan. 23, 2017).

interests also align with what is, or should be, a basic purpose of copyright law: ensuring that authors get paid. As is discussed below, the human right to the protection of authors' material interests is not the same as maximizing the profits that can be derived from a copyright. "Material interests" is instead linked to dignitary concerns, including the right to an adequate standard of living. All the same, it is important not to lose sight of the reality that at least for some creative workers, "copyright income" can be the key vehicle for securing their "material interests."

#### A. DRAFTING HISTORY

The drafters of the UDHR did not devote very much time to elaborating the underlying reasons for including authors' human rights in the instrument.<sup>77</sup> Grounded in intense comparative study, the rights articulated in the Declaration drew from commitments about freedom, dignity, and tolerance that the delegates found to be widely shared and highly prized in different cultural and religious traditions.<sup>78</sup> In the post-World War II human rights movement, the elaboration of human rights did not occur against a blank slate.<sup>79</sup> The ideas explored in the discussions of authors' human rights had much in common with those that had already influenced the shape of domestic intellectual property regimes, as well as the substantive principles that had by then been recognized in the extant intellectual property treaties, especially the Berne Convention.

In the drafting of the UDHR, there was certainly clear support from some delegates for the inclusion of authors' rights. One delegate defended the statement on authors' rights by invoking the right of the individual as "an intellectual worker, artist, scientist or writer."<sup>80</sup> The delegate from China saw the right to participate in culture and author-focused human rights as closely linked, arguing that the purpose of authors' rights was "not merely to protect creative artists but to safeguard the interests of everyone;" for that reason, he argued, "literary, artistic and scientific works should be made accessible to the people directly in their original form," which "could only be done if the moral rights of the creative artist were protected."<sup>81</sup> But even these broadly author-centric ideas were not met with universal endorsement. For example, the Australian delegate reasoned that the "indisputable right of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work."<sup>82</sup> His sentiments were echoed in some other delegates' concerns that no group should be singled out for special attention.<sup>83</sup>

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77. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, AM. J. OF JURIS. 1, 1 (1999).

78. *Id.* at 5-6.

79. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002).

80. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 218, 221 (1999).

81. *Id.* at 222.

82. *Id.* at 221.

83. *Id.* at 220.

As Audrey Chapman narrates, the ambivalence about author-focused rights continued with the drafting of the ICESCR, and it was not taken for granted that the statement in the UDHR would be transposed into the new instrument.<sup>84</sup> Led by the United States, a group of countries voiced the concern that the topic of authors' human rights was too complex to be included in the ICESCR.<sup>85</sup> The Australian delegate resisted the inclusion of author-focused human rights without further consideration of the rights of the wider community. The socialist bloc was concerned that the right to participate in culture should not become intertwined with human rights protections for property rights.<sup>86</sup>

The provision was eventually returned to the text of the ICESCR, however, due in part to the urgings of UNESCO and delegates from Uruguay and Costa Rica. These delegates argued that the right of the author and the right of the public were complementary, not opposed, and that respect for authors' rights would assure the public of the authenticity of the works they received. Along similar lines, the delegate from Israel argued that "it would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected."<sup>87</sup> Eventually, there was a majority in favor of article 15(1)(c): the final vote was 39 to 9, with 24 abstentions.<sup>88</sup>

The purpose of recounting this history is not to imply that the thinking of those responsible for the drafting of article 27(2) of the UDHR and 15(1)(c) of the ICESCR should be regarded today as having any particular normative force. For one thing, these articles are tempered by their context: guarantees of other human rights that must be accommodated in any understanding of the normative content of authors' rights, including, of course, the right to participation in culture and to benefit from scientific endeavor.<sup>89</sup> In addition, the elaboration of human rights law is too dynamic for the specific commitments of the framers—frozen in time—to hold much sway.<sup>90</sup> Even so, for present purposes, this history, and the final decisions to include authors' rights in these instruments, does, at the very least, suggest that the idea that human rights and intellectual property are ontologically distinct did not prevail—and, at least some of those involved in the drafting of the relevant articles acknowledged the common ground between human rights and copyright. As Johannes Morsink recounts, some nations sponsored the inclusion of authors' rights in the UDHR because they saw it as "a step toward the internationalization of copyright law."<sup>91</sup>

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84. Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, 35 COPYRIGHT BULL. 4. See also HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* 213-16 (2016). This section draws extensively from Professor Chapman's paper, which is reproduced in HELFER & AUSTIN, *supra* note 21, at 176 *et seq.* Page references are to the latter source. See also Shaver & Sganga, *supra* note 16.

85. *Id.* at 178.

86. *Id.* at 178-79.

87. *Id.* at 179.

88. *Id.*

89. See generally Shaver & Sganga, *supra* note 16.

90. See HELFER & AUSTIN, *supra* note 21, at 506-07.

91. MORSINK, *supra* note 80, at 221.

## B. INTEGRATION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY

To treat the human rights of authors as ontologically distinct from intellectual property rights also risks overlooking contexts in which the two appear to be more integrated. For example, a more integrated approach can also be detected in the jurisprudence that has emerged in the light of the protections for the right of property in the Optional Protocol to the European Convention on Human Rights and Fundamental Freedoms.<sup>92</sup> Unlike the UDHR and the ICESCR, the European Convention makes no specific mention of authors' moral and material interests. Even so, as is noted above, the protection of the right of property under the Convention's Optional Protocol has been applied to intellectual property.<sup>93</sup> The United Nations Committee on Economic, Social and Cultural Rights characterized the Optional Protocol as recognizing—"albeit not explicitly"—authors' human rights as benefiting from the protection of their moral and material interests in their works.<sup>94</sup> Most famously, the Optional Protocol has been invoked to protect a large corporation's rights in a trademark application.<sup>95</sup> But it has also been invoked to protect authors against misappropriation of their works by government agencies.<sup>96</sup>

It is also helpful to recall that UNESCO took part of its mandate for spearheading the initiative that eventually became the Universal Copyright Convention from the human rights guarantees for authors in the Universal Declaration of Human Rights.<sup>97</sup> And, as Jane Ginsburg has described, in meetings leading up to the drafting of the Berne Convention much was said by prominent delegates about the "universal"

92. Convention for the Protection of Human Rights and Fundamental Freedoms art. 53, Nov. 4, 1950, 213 U.N.T.S. 221. Intellectual property is also mentioned in the Charter of Fundamental Rights of the European Union, under the rubric of the "Right of Property," in article 17. Art. 17.1 simply states, "[i]ntellectual property shall be protected."

93. *Anheuser-Busch v. Portugal*, No. 73049/01 (Eur. Ct. H.R. Grand Chamber, Jan. 11, 2007) (articulating the right to the "peaceful enjoyment of . . . possessions" in Article 1 of Protocol No. 1 to the European Convention on Human Rights includes trademarks and trademark applications).

94. General Comment No. 17, *supra* note 26, at ¶ 3.

95. See *Anheuser-Busch v. Portugal*, *supra* note 93. As this decision shows, under the Optional Protocol, protections of intellectual property that are secured through the right of copyright are not limited to natural persons. Cf. General Comment No. 17, *supra* note 26, at ¶ 8 (noting that, in some circumstances, the rights afforded by article 15(1)(c) of the ICESCR can extend to groups of individuals, such as indigenous peoples). In some contexts, it will be necessary to finesse the proposition that authors' human rights guarantees under the UDHR and the ICESCR are not afforded to corporations. Some authors assign their copyrights to corporate entities that they control. This appears to be the situation in *Gloucester Place Music Ltd. v. Simon Le Bon*, [2016] E.W.H.C. 3091, where some of the defendants were the authors' own production companies. In cases such as these, the corporate entities can appropriately be characterized as vehicles for realizing the material interests of the individual authors. See also *ECtHR v. France*, App. No. 36769/08, ¶ 39 (Eur. Ct. H.R. Oct. 1, 2013), translation from French published in 45(3) INT'L REV. INTELL. PROP. & COMPETITION L. 354 (2014) (referring to the Optional Protocol in the context of a decision that recognized that countries have a wide margin of appreciation in the balancing of authors' rights and the right to freedom of expression).

96. See *Dima v. Romania*, App. No. 58472/00 (Eur. Ct. H.R. Nov. 16, 2005); *Balan v. Moldova*, App. No. 197247/03 (Eur. Ct. H.R. Nov. 16, 2008).

97. See *RICKETSON & GINSBURG*, *supra* note 71, at 1183.

nature of authors' rights.<sup>98</sup> As Ginsburg explains, these universalist ideals were distilled from a commitment to the idea that authors' contributions to culture transcend national boundaries.<sup>99</sup> Just like human rights, their protection should not be subject to the vicissitudes of the domestic polity. Here, it is salutary to recall that the intellectual history of the Berne Convention—an instrument that is a cornerstone of international intellectual property—included ideas that would not be out of place in human rights discourse.

### III. THE EMERGING JURISPRUDENCE ON AUTHORS' RIGHTS

For the most part, however, international human rights and international intellectual property laws are regarded as reflecting different legal traditions and deriving from different institutional contexts. As was noted above, most internationalist-focused commentary on copyright discloses a much fuller understanding of the latter. Accordingly, it may be useful to outline some of the emerging jurisprudence on authors' human rights.

There are now two prominent interpretive statements: the 2005 General Comment<sup>100</sup> and the 2014 Special Rapporteur Report. The General Comment characterized the core obligations imposed by article 15(1)(c) in the following terms:

The obligation to *respect* requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15(1)(c).<sup>101</sup>

Noting the distinction drawn in the General Comment between “intellectual property” and “human rights,” particularly the characterization of human rights as “fundamental, inalienable and universal entitlements,” Laurence Helfer reasons that the analysis advanced in the General Comment reflects “a vision of authors' rights as human rights that exist independently of the vagaries of state approval, recognition, or regulation.”<sup>102</sup> This is a very different conception from that typically advanced in the intellectual property context, especially in common law jurisdictions. It is, however, in line with the universalist impulses that led eventually to the completion of the Berne Convention, which now sets forth the basic apparatus of international copyright protection: minimal standards and national treatment.<sup>103</sup>

98. See Jane C. Ginsburg, *From Hypatia to Victor Hugo to Larry and Sergey: 'All the world's knowledge' and universal authors' rights*, 1 J. BRIT. ACAD. 71, 82 (2013). See also KWALL, *supra* note 22.

99. Ginsburg, *supra* note 98, at 81-82.

100. For a comprehensive analysis of General Comment No. 15, see Helfer, *Human Rights Framework*, *supra* note 16.

101. General Comment No. 17, *supra* note 26, at ¶ 28.

102. Helfer, *Human Rights Framework*, *supra* note 16, at 993.

103. Berne Convention, *supra* note 6. See generally RICKETSON & GINSBURG, *supra* note 71, at 235-356.

This commitment to the elevated status of authors' rights makes sense of the constrained approach to permissible limitations on those rights. According to the General Comment, such limitations must "be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society . . .,"<sup>104</sup> language that is facially far stricter even than the three-step test, against which limitations on intellectual property rights must be assessed.<sup>105</sup> Requiring limitations to be "strictly necessary" to further the general welfare seems significantly more onerous than testing limitations against the legitimate interests of the author, taking account of the normal exploitation of the work.

As Helfer reasons, the strictness of the test for exceptions makes sense in the light of the substantive content or "scope" of authors' human rights.<sup>106</sup> On this question, the General Comment's analysis is relatively circumspect. Contrary to the fears of those who oppose the integration of human rights and intellectual property, the General Comment makes it perfectly clear that a domestic measure that in some respect advances authors' moral or material interests is not, for that reason alone, *required* by guarantees of authors' human rights. Instead, and consistent with a commitment to the indivisibility of rights and to the dignity of all members of the human family,<sup>107</sup> the General Comment often apprehends authors' human rights through the lens of other human rights.<sup>108</sup> These include the right to science and culture and the right to benefit from scientific progress,<sup>109</sup> in addition to the right to be given the opportunity to gain one's living by work which one freely chooses,<sup>110</sup> to adequate remuneration,<sup>111</sup> to an adequate standard of living,<sup>112</sup> as well as the right of property that is recognized in the UDHR.<sup>113</sup>

Accordingly, the following syllogism has no place in a human rights-based understanding of authors' rights: Law X extracts more money from the market for works or inventions protected by intellectual property; therefore, it enhances authors' or inventors' material interests; author-focused human rights guarantee authors' material interests in their works; therefore, Law X is consistent with authors' human rights. The idea that authors deserve to be paid is a very different starting point from claims of copyright owners to an entitlement to maximize their revenue streams. Of course, the two claims are often aligned since royalty streams can redound to the benefit of authors. But the emerging human rights jurisprudence suggests that the

104. General Comment No. 17, *supra* note 26, at ¶ 22.

105. See Helfer, *Human Rights Framework*, *supra* note 16, at 994-95.

106. See *id.* at 994.

107. See Vienna Declaration, *supra* note 59.

108. This analysis draws from General Comment No. 17, *supra* note 26, at ¶ 4.

109. ICESCR, *supra* note 19, at art. 15(1)(a). For an illuminating discussion of this right, which accompanies the human rights of authors in art. 27 of the UDHR, and article 15(1)(a) of the ICESCR, see Shaver & Sganga, *The Right to Science and Culture*, *supra* note 16.

110. ICESCR, *supra* note 19, at art. 6(1).

111. *Id.* at art. 7.

112. *Id.* at art. 11(1).

113. See Wong, *supra* note 69, at 810 (2009). The protection of authors' human rights is also considered to be a "material safeguard for the freedom of scientific research and creativity activity." General Comment No. 17, *supra* note 26, at ¶ 4.

question “who gets paid?” will sometimes be as important as “how much is paid?” As for moral interests, the General Comment recognized the “protection of the personal link between the author and his/her creation.”<sup>114</sup> These ideas are also consistent with commitment to the protection of “a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential requisites for any free society.”<sup>115</sup>

The 2014 Special Rapporteur Report elaborated on these themes. As to moral rights, the Report suggests that in some contexts, a human rights approach might afford stronger protections than are currently provided under some regimes, again emphasizing the importance of the personal autonomy and dignitary interests of creative workers, noting that in the domestic policy context those who exploit works of authorship in the marketplace—producers, publishers, and distributors—often wield greater influence than individual authors.<sup>116</sup>

On the topic of the right to protection of authors’ material interests, the Special Rapporteur Report recognized the imbalance of bargaining power under which individual authors labor when entering into distribution contracts, suggesting that copyright policies could be directed at protecting authors from unfair bargains.<sup>117</sup> The Report usefully explored a variety of policy vehicles directed at helping with the realization of authors’ rights to material interests, including reversion rights—the rights at issue in the *Duran Duran* case,<sup>118</sup> as well as the *droit de suite*, and statutory licenses.<sup>119</sup> Like the General Comment, however, the 2014 Special Rapporteur Report emphasized that the human rights guarantee directed at securing authors’ material interests does not always equate with “stronger” copyright protections.<sup>120</sup> Even so, the Report also noted that the exposure of authors to large scale piracy of their works on digital networks implicates human rights issues, but deferred fully engaging with these issues in the light of countervailing concerns relating to remedial steps such as website blocking, Internet access, and content filtering which the Special Rapporteur also considered to raise human rights concerns.<sup>121</sup>

Both documents also emphasize limits on authors’ human rights, especially those imposed by other human rights obligations, including the right to freedom of expression. For example, moral rights protections should not intolerably limit other

114. General Comment No. 17, *supra* note 26, at ¶ 1.23.

115. Laurence R. Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 85, 97 (Daniel J. Gervais ed., 2006).

116. General Comment No. 17, *supra* note 26, at ¶ 38.

117. 2014 Special Rapporteur Report, *supra* note 27, at ¶ 43.

118. Noting that copyright laws should protect authors from economic “vulnerability,” resulting from unequal bargaining positions, the Special Rapporteur stated:

One technique is copyright reversion. In some countries, creators retain the right to reclaim copyright interests they have transferred after a set number of years, providing the creator a second opportunity to negotiate a better return. It is important to note that the reversion right cannot be waived by contract, protecting artists against pressure to surrender it. *Id.* at ¶ 44.

119. *Id.* at ¶¶ 44-51.

120. *Id.* at ¶ 48.

121. *Id.* at ¶ 51.



uses of protected works for such purposes as parody and pastiche.<sup>122</sup> The General Comment advanced the view that “ultimately, intellectual property is a social product and has a social function.”<sup>123</sup> Accordingly, parties to the ICESCR should ensure that their legal or other regimes for the protection of the authors’ moral and material interests do not impede states’ ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the ICESCR.<sup>124</sup> A similar approach was adopted in the Special Rapporteur Report.<sup>125</sup>

In sum, the emerging jurisprudence on authors’ human rights suggests that the rights are limited in scope (to the extent that they focus on the dignitary interests of the human creator, not maximizing the income to be derived from an author’s productions), but are normatively powerful. They recognize, as a human rights issue, the need for creative people to have the opportunity to earn an adequate standard of living; they also recognize the close connection between the creative person and his or her work.

#### IV. AREAS OF APPLICATION

The emerging jurisprudence suggests that it is no longer appropriate to describe international human rights protection for authors as a normative backwater.<sup>126</sup> While the normative content of these rights is still emerging, developments in the past several years make it much more plausible to claim that these rights should inform domestic copyright law and policy. Of course, the integration of international intellectual property law and the WTO means that the consequences of ignoring authors’ human rights are relatively less serious than is the case with TRIPS obligations. But *realpolitik* aside, the emerging jurisprudence on authors’ rights makes it possible now to recognize that copyright policy questions raise issues relating to both economic policy and human rights guarantees.

Ideally, this approach would engender a commitment to the idea that intellectual property policy engages human rights issues. In the context of authors’ rights this implies that the sources of international law that must be consulted include both international intellectual property *and* authors’ human rights, as well as other relevant human rights laws, including the right to freedom of expression, and the right to participate freely in culture. Policy and legal analysis needs to be informed by both sources of law, as well as by a sensitivity to the limitations (including limitations grounded in other human rights)<sup>127</sup> that might, in some circumstances,

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122. *Id.* at ¶¶ 36-37.

123. General Comment No. 17, *supra* note 26, at ¶ 35.

124. *Id.*

125. 2014 Special Rapporteur Report, *supra* note 27.

126. *Cf.* Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 49-50 (2003).

127. *See, e.g.*, United Nations Secretary-General and Co-Chairs of the High-Level Panel, *Report of the United Nations Secretary-General's High-Level Panel on Access to Medicines* 9 (2016), <https://perma.cc/ZM87-UMPP>. The recommendations set forth in the 2016 Report of the United Nations

give more detailed shape and content to those rights. In some contexts, this may involve emphasizing the rights of the human creators involved—asking whether, for instance, the particular policy measure is sufficiently solicitous of the opportunity of authors to derive an adequate standard of living from their works, and whether the measure accords significant protections to authors' moral interests.

### A. COPYRIGHT LAW REFORM

Honoring commitments to authors' human rights in international human rights instruments should also be a key concern in any copyright law reform agenda.<sup>128</sup> Authors' human rights could usefully inform many of the questions that will inevitably come up during such an endeavor. For example, those who still champion the resurrection of copyright formalities<sup>129</sup> might be asked whether the adverse effects of such a proposal would be disproportionately borne by authors, as compared with corporate copyright owners.<sup>130</sup> Human rights law also offers further legal and rhetorical support to those advocating for enhanced moral rights protections under U.S. copyright law.<sup>131</sup> Failure to protect authors' human rights is a breach of the Berne Convention (and arguably TRIPS as well)<sup>132</sup> in addition to breaching human rights guarantees.

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High Level Committee on the Right to Health. The Report stipulated that, consistent with the obligations to progressively realize the right to health, WTO members “*must* make full use of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities as confirmed by the Doha Declaration to promote access to health technologies when necessary,” and “*should* make full use of the policy space available in . . . the TRIPS Agreement by adopting and applying rigorous definitions of invention and patentability that are in the best interests of the public health of the country and its inhabitants.” *Id.* These statements seem to portend the emergence of a human rights obligation *to* use the flexibilities in intellectual property instruments to advance the realization of human rights.

128. Cf. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (former U.S. Copyright Register, the Hon. Maria Pallante, discussing the possibility of wide-ranging copyright law reform).

129. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 488 (2004).

130. See Graeme W. Austin, *Keynote Address, Metamorphosis of Artists' Rights in the Digital Age*, 28 COLUM. J.L. & ARTS 397, 416 (2005) (suggesting that copyright renewal or maintenance fees might be regarded by many corporations as small additions to operating costs, whereas the relative costs for individual authors might be significantly more burdensome). See also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 383 n.27 (2005) (noting that formalities “could actually discriminate against individual creators who are unable to carry the burden of legal counseling and registration”). The burdens might be particularly heavy for some kinds of authors, such as photographers, who shoot large numbers of photographs, thereby potentially increasing the administrative and cost burdens to authors, were it necessary to comply with formalities with every work. See Brad A. Greenberg, *More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1048–50 (2012).

131. See, e.g., KWALL, *supra* note 22; Ginsburg, *The Most Moral of Rights*, *supra* note 3.

132. Article 6bis of the Berne Convention requires protection of authors' moral rights. Although failure to comply with art. 6bis does not trigger the WTO dispute settlement process, it is arguable that compliance with art. 6bis is nevertheless required by the TRIPS obligation to comply with the substantive articles of the Berne Convention. See TRIPS Agreement, *supra* note 72, at art. 9(1) (requiring WTO members to comply with articles 1-20 of the Berne Convention, but stipulating that member states do not have “rights” under TRIPS in respect of art. 6bis of the Berne Convention, or the rights derived therefrom).

Authors' human rights might also inform consideration of the scope of copyright exceptions. As is discussed above, the emerging jurisprudence on authors' human rights suggests that the test for permissible exceptions is very strict. Accordingly, those responsible for crafting exceptions—and judges responsible for applying them—should be particularly cautious when exceptions might jeopardize an income stream in a way that interferes with authors' ability to earn an income from their creative work, as that idea is understood within the human rights' jurisprudence. These kinds of concerns might also bring important rule of law issues to the surface, particularly those involving access to justice questions, such as whether the costs of enforcement of rights preclude individual authors from securing meaningful protection of their rights. Accordingly, it is arguably a human rights concern that the United States still lacks a small claims copyright court.<sup>133</sup>

More detailed analysis of these and other contexts where authors' human rights might have purchase in copyright law reform must await another opportunity. Each would require a separate paper. For present purposes, it suffices to reinforce the basic point that copyright law reform engages two bodies of international lawmaking. Given the emerging jurisprudence on authors' human rights, it is no longer appropriate to ignore this body of law in the policy context.

## B. THE U.S. TERMINATION RIGHT

Copyright principles that are *designed* to further the rights of authors are an especially useful context to test the relevance of authors' human rights. The right of authors to terminate grants under their copyrights is an obvious example.<sup>134</sup> The termination right, which is set forth in complex provisions in § 203 of the Copyright Act 1976, was at issue in a December 2016 decision of the English High Court involving the pop group *Duran Duran*.<sup>135</sup> The termination right enables authors to regain their copyrights after 35 years from the assignment of those rights (or 40 years in the case of a grant of publication rights).<sup>136</sup> Its purpose is to protect authors from insufficiently remunerative bargains that they might have made early in the life of the copyright (and perhaps early in authors' careers), when the value of their creative output was not fully understood. The termination right also reflects the reality of unequal bargaining power between authors and publishers.<sup>137</sup> The importance of the

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133. A proposal for a small claims court was advanced by the U.S. Copyright Office in 2013. See UNITED STATES COPYRIGHT OFFICE, *COPYRIGHT SMALL CLAIMS* (Sept. 2013), <https://perma.cc/69BC-L5Z6>. Representatives Judy Chu and Lamar Smith recently introduced a bill, the Fairness for American Small Creators Act, which would amend the Copyright Act to introduce a Copyright Claims Board (the Board). See *Fairness for American Small Creators Act*, H.R. 6496, 114th Cong. (2016).

134. See 17 U.S.C. § 203.

135. *Gloucester Place Music*, [2016] EWCH (Ch) 3091.

136. 17 U.S.C. § 203(a)(3) (stipulating that “the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier”).

137. See H.R. Rep. No. 94-1476, at 124-28 (1976). See also Lionel Bently & Jane C. Ginsburg, “*The Sole Right Shall Return to the Author*”: *Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERK. TECH. L.J. 1475 (2011) (discussing analogous issues in the context of authors' reversion rights).

termination right is underscored by a statutory stipulation that the right remain vested in authors (or their heirs) notwithstanding any contract to the contrary.<sup>138</sup> The English judge was aware of these policies, noting that there was “no dispute that, as is obvious, the purpose of § 203 is to protect authors from the consequences of transactions which involve assignments of copyrights for the full term of those copyrights.”<sup>139</sup> The point is underscored by the legislative history: the termination right was considered necessary because it is unrealistic to assume that authors are fully capable of looking after their own interests in negotiations with publishers.<sup>140</sup>

When members of *Duran Duran* sought to terminate the transfers of their U.S. copyrights in 37 songs, they were sued by the assignee of the copyrights under a series of music publishing agreements.<sup>141</sup> English law was the governing law of the contracts. By invoking their termination right under U.S. copyright law, it was argued that the band members were (or would be if they did not withdraw the termination notices) in breach of the publishing contracts under which publication rights were granted to the plaintiffs in respect of all the songs for the whole world, for the entire life of the copyrights.

Unfortunately, the judge held that he was precluded from considering whether it would be contrary to English public policy to uphold a contractual term that prohibited exercise of the termination right under § 203 of the U.S. Copyright Act, ruling that this argument had been raised too late in the proceedings.<sup>142</sup> Instead, the judge focused principally on English contractual interpretation principles. In broad outline, these principles require any ambiguity in contractual language to be resolved by asking what the contractual language “would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”<sup>143</sup> As the judge acknowledged, it is also the case that the relevant background information can include knowledge of the relevant law.<sup>144</sup> Despite this, the judge concluded, “not without hesitation,” that the “finely balanced” arguments were weighted in favor of the assignees, not the authors of the songs. Accordingly, the band members were prevented from exercising their U.S. termination rights.

Section 203 expressly provides that the termination right applies only to copyrights governed by U.S. law and “in no way affects rights arising under any other Federal, State, or foreign laws.”<sup>145</sup> On appeal, the authors will no doubt assert that this provision must be interpreted as referring to the substantive *copyright* law, rather than rights arising under a foreign *contract*. Otherwise, the author-focused

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138. 17 U.S.C. § 203(a)(5).

139. *Gloucester Place Music*, [2016] EWCH (Ch) 3091 at [13].

140. See H.R. Rep. No. 94-1476, at 124-28.

141. Some of the contracts were with the band members' production companies. On the application of authors' human rights to corporate entities of this kind, see G.W. AUSTIN & A.G. ZAVIDOW, *Copyright Law Reform Through a Human Rights Lens*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (P.L.C. Torremans ed., 2008).

142. *Gloucester Place Music*, [2016] EWCH (Ch) 3091 at [24].

143. *Id.* at [27].

144. *Id.* at [28] (citing *Oxonía Energy Ltd v. Neuftec Ltd.*, [2008] E.W.H.C. 2127).

145. 17 U.S.C. § 203(b)(5).

protections of § 203 could simply be overridden by the device of adopting a non-U.S. governing law clause in every author's grant of rights under the copyright. In the light of this, and the statutory prohibition against the efficacy of "any agreement to the contrary,"<sup>146</sup> could it be arguable that an author's U.S. termination right should, even for contracts governed by English law, be treated as a rule of imperative application?

Fundamentally, the dispute can be understood as a contest between private bargaining rights and territorially confined property rights. The decision in the case suggests that the private bargain should trump, even though one part of the bundle of property rights assigned by the contract (the U.S. copyrights) had a particular set of incidents reflecting the public policy that it can be unfair to tether authors to bargains struck at a time when their negotiating power was likely to be relatively weak. The resolution of contractual ambiguities seldom, if ever, occurs in a vacuum.<sup>147</sup> Thus, it seems appropriate to take account of the strong public policy articulated in the U.S. statute that governs U.S. copyrights. In addition, it might also be relevant in this context to ask whether the recognition of authors' human rights could inform the interpretation of the contractual provisions.

Where authors cannot market their works directly to their public, and must depend on publishers and distributors, these kinds of author protections represent an acknowledgement of the importance of an income stream to the realization of authors' human rights guarantees. There might therefore be a plausible claim that an objective understanding of the background legal principles that are relevant to the international exploitation of an author's works includes the author-protective provisions of the law of one of the key markets where the works are to be marketed. The termination right thus reflects the key principle of the territoriality of copyrights,<sup>148</sup> and, in human rights terms, helps authors realize the material interests of their productions. Indeed, the Special Rapporteur specifically mentioned the right of termination as a vehicle for addressing authors' vulnerability as a result of their unequal bargaining position. She also stated that "[i]t is important to note that the . . . right cannot be waived by contract, protecting artists against pressure to surrender it."<sup>149</sup> Building on this analysis, the termination right—including the protections against being pressured to surrender it, is not merely a quirk of U.S. domestic law, which may or may not be overridden by a carefully drafted contract. In this instance, the U.S. provision furthers the realization of authors' human rights guarantees.

Were the issue litigated in the context of more recent music publishing contracts, parties in the position of the *Duran Duran* band members would almost certainly invoke the Rome Regulation on the Law Applicable to Contractual Obligations

146. 17 U.S.C. § 203(a)(5).

147. See generally ANDREW ROBERTSON, *The Foundations of Implied Terms: Logic, Efficacy and Purpose*, in *CONTRACT IN COMMERCIAL LAW* (Simone Degeling et al. eds., 2016).

148. See, e.g., *Quality King Distrib. v. L'Anza Research Intern. Inc.*, 523 U.S. 135, 153 (1998) (Ginsburg, J., concurring).

149. 2014 Special Rapporteur Report, *supra* note 27 at ¶ 44. The paragraph is quoted above at note 118.

(known as “Rome I”).<sup>150</sup> This instrument requires an English court in some circumstances to apply mandatory rules of the law of the country where the contract is to be performed. Under article 9(1), courts are required to give effect to mandatory rules of law of the place where a contract is to be performed “irrespective of the law otherwise applicable to the contract.”<sup>151</sup> Under article 9(3), “[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or s been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful.”<sup>152</sup>

It is not proposed here to exhaustively analyze the issues that would arise were Rome I invoked. Instead, the aim is to briefly explore whether article 9 might open

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150. Regulation No. 593/2008 of the European Parliament and of the Council, on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6. Rome I came into force in 2009, and applies only to contracts executed after Dec. 17, 2009. See Volker Behr, *Rome I Regulation A – Mostly – Unified Private International Law of Contractual Relationships Within–Most–Of The European Union*, 29 J.L. & COM. 233, 238 (2011). The contracts at issue in the *Duran Duran* case were entered into in the 1980s and 1990s. The United Kingdom was a signatory to the predecessor to the Rome Regulation, an instrument known as the Rome Convention. Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 2005 O.J. (C 334) 1 [hereinafter “Rome Convention”]. However, the United Kingdom had entered reservations in respect of the Convention’s provisions on mandatory rules of law, the predecessors to the articles discussed here (reservations were permitted under art. 22 of the Rome Convention). See Ole Lando & Peter Arnt Nielsen, *The Rome I Regulation*, 45 COMM. MARKET L. REV. 1867, 1720 (2008). As a result of this, the arguments discussed below would not have assisted the *Duran Duran* parties in the litigation. The United Kingdom remains bound by Rome I; for the purposes of the forgoing analysis, it is assumed that it will remain bound by equivalent rules, or that these rules would be treated as aligned with English common law principles of contractual interpretation. For a detailed treatment of the application of Rome I and the Rome Convention in English law, see DICEY, MORRIS, & COLLINS ON THE CONFLICT OF LAWS (Lawrence Collins ed., 15th ed. 2016).

151. Article 9 of Rome I provides:

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

At English common law, whether overriding the termination right provided by § 203(a) of the U.S. Copyright Act of 1976 was a breach of United States public policy might be analyzed in terms of whether enforcing a contract that had this effect was against the comity of nations, and, for that reason, a breach of *English* public policy. See *Foster v. Driscoll* [1929] 1 K.B. 470, 496 (enforcing a transaction involving the sale and transport of whisky which would ultimately be brought into the United States in breach of the U.S. laws held to be in breach of comity of nations). There is also a line of authority providing that a contract would not be enforced if its performance would be illegal under the law where the contract would be performed. See *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287, 291 (C.A. Eng.) (part of a chartering contract to be performed in Spain held to be unenforceable because the price for the charter exceeded maximum prices imposed by Spanish law).

152. See Rome I, *supra* note 151.

some productive lines of inquiry that might assist future authors in the position of the *Duran Duran* band members—especially if construed in the light of authors' human rights. In light of copyright's territoriality principle, it seems logical that a grant of rights for all the world is performed in every country where the copyright-protected works are to be exploited by the publisher. Accordingly, if § 203 were a mandatory rule, article 9 would be triggered. Taking article 9(3) first: under this provision the most salient inquiry seems to be whether, even assuming that the termination right was a mandatory rule of law, the performance of the kind of contract at issue in the case would be illegal. That inquiry would inevitably involve a degree of circularity. The publishers' exploitation of the copyright-protected works would be a breach of the authors' copyrights. This is because the assignment would be the publishers' shield against a finding that they were in breach of the exclusive rights secured to authors under the Copyright Act.<sup>153</sup> Exploitation for commercial advantage (the core business of music publishers) would also attract criminal liability if the exploitation were not licensed or if the copyrights were not subject to a valid assignment.<sup>154</sup> Accordingly, *if* the grant were terminated, the exploitation of the works by the publishers would be in breach of U.S. law—and, thereby, illegal. But, in the *Duran Duran* context, this does not seem to be what the “performance of the contract” involves. The relevant performance here is arguably upholding a term of the contract that, in effect, ties an author's hands. That is, the performance is to withhold from effecting the termination of the grants that shield the music publishers from having their commercial exploitation of the *Duran Duran* songs rendered unlawful under U.S. law. That may be contrary to the clear public policy behind these author protective rules, even if it is not “illegal.”

A potentially more promising line of inquiry is provided by the rule in article 9(1): “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope.” The analysis would then be more sharply focused on whether the author-protective rules of § 203 could be characterized as “mandatory rules” under the law of the United States, the place where the “U.S. copyrights” were to be exploited. Under Rome I, “mandatory rules” are not to be equated with rules that apply “notwithstanding any agreement to the contrary.” Recital 37 of Rome I specifically addresses this point, providing that “[t]he concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.”<sup>155</sup> Article 9(1) does not require a showing that performance of the

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153. Analogous principles have applied in the context of the exploitation of the renewal term, where a grant had been made to create and exploit derivative works. *See* *Stewart v. Abend*, 495 U.S. 207 (1990). In this context, the original grant no longer shields those exploiting the derivative work from an infringement action.

154. 17 U.S.C. § 506.

155. *See* Rome I, *supra* note 151. *See generally* Jacques De Werra, *What Legal Framework for Promoting the Cross-border Flow of Intellectual Assets (Trade Secrets and Music)? A View from Europe Towards Asia (China and Japan)*, INTELL. PROP. Q. 50-1 (2009) (discussing the interpretive problems with applying art. 9(2) in the context of intellectual property and knowledge transfer agreements).

contract would be illegal in the United States. It would, however, be necessary to advance the argument that § 203 safeguards the nation's "public interests, such as its political, social or economic organization."

However these issues might be resolved in a future case, the inability (at least under U.S. law) to contract around the termination right should underscore the importance of the author protective character of the rules, an idea that is reinforced in the legislative history. Moreover, to the extent that the rule bolsters the ability of authors to derive an income from their works, the termination right is part of the basic incentive structure of the copyright system. Lionel Bently and Jane Ginsburg have recently drawn attention to another "author-centric" rule that was included in very first copyright statute, the 1709 Statute of Anne.<sup>156</sup> The reversion rule in section 11 of that Act, at least in theory, gave authors, rather than publishers, greater control over the exploitation of copyrights in the second of the two fourteen-year terms. Even in the relatively instrumentalist Anglo-American copyright systems, it seems, sensitivity to the rights of authors and addressing some of the imbalances in the copyright marketplace has been a key part of the copyright edifice since its beginnings. Furthermore, the incentive framework that the United States put in place to encourage creative work was considered so fundamental that it was included in the federal Constitution,<sup>157</sup> with its invitation to Congress to enact laws that "secure" to "Authors" (not copyright owners) the "exclusive right to *their* writings."<sup>158</sup> We might therefore expect parties in the position of the *Duran Duran* members to urge that these laws are sufficiently crucial to the public interest to trigger article 9. Perhaps the key difficulty with this argument is that the termination of grants is not something that the United States has signaled should *always* occur. Instead, the termination of grants is contingent on authors exercising the right, and doing so according to a strictly prescribed timetable, and in compliance with strict formalities.<sup>159</sup> In the light of this statutory framework there may be some resistance to characterizing the termination right as "mandatory" for the purposes of Rome I.

Looking now at the issue through a human rights lens, challenging an English contract that purports to override these kinds of statutory protections should not be merely a technical matter as to which law applies to the exploitation of the *Duran Duran* songs within the United States. It also implicates the dignitary interests of creative workers, as those interests are coming to be described in the emerging human rights jurisprudence. Significantly unequal bargaining compromises the dignity of a creator, but that indignity is reinforced if authors cannot invoke provisions that are designed to address the imbalances of the publishing market. The human rights jurisprudence emphasizes measures necessary to address the inferior

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156. An Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Gr. Brit.).

157. James Madison defended the inclusion of the Copyright Power in the Constitution in the following terms: "The public good fully coincides . . . with the claims of individuals." James Madison, *The Federalist No. 43*, at 309 (Jacob E. Cooke ed., 1961).

158. United States Constitution, U.S. Const. art. I, § 8, cl. 8: "Congress shall have Power: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

159. These are set out in 17 U.S.C. §§ 203(a)(3)-(4). There are strict notice requirements, and there is a window within which the termination right must be exercised.



bargaining position of authors, the connection between the protection of authors' material interests and the ability to earn a living from one's work.

These interests are furthered by domestic policies that redress the vulnerabilities of creative workers that need to negotiate with third party distributors in order to derive an income from their creative endeavors. The alignment of termination rights with the articulation of authors' human rights in leading international human rights instruments thus reinforces the normative significance of what is at stake if the protections provided by the termination right can be overridden by the simple device of adopting a non-U.S. governing law clause in a publishing contract. In sum, the emerging jurisprudence on authors' human rights might reinforce the view that authors deserve better.

### CONCLUSION

In a brighter future, the human rights protection afforded to authors will come to be regarded as part of the normative background against which issues of the kind raised by the case against *Duran Duran* are to be resolved. At the policy level, it might also be recognized that copyright law reform engages authors' human rights. For the most part, the analysis of scholars, civil society groups and international actors has focused on human rights as a source of limitations on over-expansive intellectual property rights. That work is critically important. However, it is also useful to recall that those responsible for drafting the key international instruments concluded that authors' human rights were important enough to include in these instruments. To treat human rights only as a source of limitations overlooks salient aspects of human rights jurisprudence. As we have seen, authors' human rights also have their own inherent limitations that could form the basis for a compelling critique of exorbitant claims of copyright owners. The "outsider" characterization perhaps also risks rendering the critiques of expanded intellectual property rights weaker than they need to be. Critiques of intellectual property rights that are grounded in human rights would be more robust if they also acknowledged the indivisibility of human rights, including the rights of authors.

Attending to authors' human rights provides an opportunity for a shift in thinking about intellectual property, one that acknowledges the humanity and dignity of the creative worker, while, at the same time, acknowledging limitations on those rights and engaging with other human rights concerns. Today, the relevance of international intellectual property lawmaking to domestic intellectual property, as Graeme Dinwoodie foreshadowed, is largely taken for granted. It is time to recognize that authors' human rights are part of that international law.