

THE RIGHT TO TAKE PART IN CULTURAL LIFE: ON COPYRIGHT AND HUMAN RIGHTS

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ABSTRACT

Article 15(1)(a) of the International Covenant on Economic Social and Cultural Rights—a source of binding law in 160 countries—recognizes “the right of everyone to take part in cultural life.” This article suggests how lawmakers and jurists might give meaning to this provision, with particular attention to issues arising in an age of digital culture. The authors conclude that the right to take part in cultural life should be understood in terms of the ability to access, enjoy, engage, and extend upon a common cultural inheritance and that realizing this right will require significant reforms in international intellectual property law.

I. INTRODUCTION

For over a decade, legal scholars and public interest advocates have endeavored to defend creative and communicative liberty against efforts at excessive control through copyright, particularly in the online world. Jamie Boyle’s calls for an “environmentalism for the Net,”¹ Larry

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¹ James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L. J. 87 (1997). See also James Boyle, *Op-Ed., Sold Out*, N.Y. TIMES, Mar. 31, 1996, at E15; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008), available at <http://thepublicdomain.org/thepublicdomain1.pdf> (arguing that the use of intellectual property protection to solve the “public goods problem” of knowledge goods is inefficient and may retard scientific and cultural innovation).

Lessig's inspiration to the Free Culture movement,² the founding of the Creative Commons initiative, Yochai Benkler's work on the Wealth of Networks,³ Jonathan Zittrain's concern for the Future of the Internet,⁴ and the Access to Knowledge mobilization described by Amy Kapczynski⁵ all hail in this line. Concerned about efforts to further expand copyright enforcement, these scholars have advocated for the value of preserving individual freedom to create and share cultural works.

These arguments have been phrased in terms of the public interest, liberty, creativity, and economic development. Rarely, however, have they been phrased in terms of international human rights.⁶

Now is the time to do so. The United Nations Committee on Economic, Social and Cultural Rights has recently breathed new life into a long-obscure provision of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷ In November of 2009, it issued the first concrete guidance to States Parties to the ICESCR on their responsibilities with respect to "the right to take part in cultural life."⁸

² See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2003), available at <http://www.free-culture.cc/>. See also Lawrence Lessig, *Foreword*, 70 LAW & CONTEMP. PROBS. 1 (2007), available at <http://www.law.duke.edu/journals/lcp/lcptoc70spring2007>; Lawrence Lessig, *Free(ing) Culture for Remix*, 4 UTAH L. REV. 961 (2004); Lawrence Lessig, *The Failures of Fair Use and the Future of Free Culture*, in CUT: FILM AS FOUND OBJECT IN CONTEMPORARY VIDEO (2005); FreeCulture.org – Students for Free Culture, <http://www.freeculture.org>.

³ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006), available at <http://yupnet.org/benkler/> (arguing that recognition of knowledge as a non-rivalrous good requires questioning the efficiency of strong exclusive rights on intellectual property, particularly in the digital era).

⁴ JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* (2009), available at <http://yupnet.org/zittrain/> (highlighting concern that the increasing trend toward a more controlled Internet experience threatens its very cultural generativity). See also RON DEIBERT ET AL., *ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING* (2008), available at <http://opennet.net/accessdenied> (contextualizing the practices of more than 40 countries currently engaged in Internet filtering).

⁵ See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804 (2008) (examining the emergence of a global social movement under the umbrella of "access to knowledge" through the lens of frame mobilization theory, and its implications for IP law and politics).

⁶ But see Lawrence Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971, 1017-18 (2007) (suggesting the possibility of using the human rights framework to press for greater public access to patented and copyrighted goods).

⁷ International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, available at http://www.unhchr.ch/html/menu3/b/a_icescr.htm [hereinafter ICESCR].

⁸ The CESCR's General Comments offer interpretative guidance for States Parties to the ICESCR and are looked to by courts adjudicating socio-economic rights claims as highly persuasive

This new “General Comment” forms a key part of the international law that courts in many countries look to as persuasive evidence of how to domestically interpret human rights. As such, the Committee’s work should be understood as part of a larger, ongoing interpretative process.

This ongoing process will have a strong impact on the future development of legal norms related to creative and communicative freedoms. At present, 160 countries are parties to the ICESCR.⁹ In these countries, the treaty’s rights provisions have the same status as domestic constitutional law. Although the United States is not a member of the treaty, its legal norms are ultimately influenced by international law and the legal reasoning practices of fellow democracies.¹⁰

Although the Committee’s recently issued General Comment constitutes an essential starting point of interpretation, many aspects of the right to take part in cultural life still await further clarification. This includes conceptualization of the important relationship between the right to cultural life and the protection of intellectual property.

The General Comment includes as a “basic premise” that “the right of everyone to take part in cultural life is closely related to . . . the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author.”¹¹ Nevertheless, the General Comment itself does not elaborate on the nature of the interrelationship between these two rights and their important implications for the regulation of intellectual property. This article takes up this challenge.

In this article, we suggest how the right to take part in cultural life should be interpreted so as to take advantage of the insights of recent scholarship on free culture and access to knowledge. In so doing, we also

authority. The decision to develop a General Comment on the right to take part in cultural life was formalized by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) at its 37th Session, November 24, 2006. The CESCR offered an opportunity for public input into the process with its Day of General Discussion on ‘The Right to Take Part in Cultural Life’ on May 9, 2008 during its 40th Session. The Committee published the final product of this consultation on November 20, 2009. U.N. ECON & SOC. COUNCIL [ECOSOC], *General Comment No. 21: Right of everyone to take part in cultural life (art 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/21, (Nov. 20, 2009) [hereinafter General Comment No. 21].

⁹ Status of ICESCR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

¹⁰ See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

¹¹ General Comment No. 21, *supra* note 8, ¶ 2.

indicate how supporters of free culture and access to knowledge can frame their concerns in terms of human rights. Developing this additional framing is not just an academic exercise, but an important strategic maneuver. By using the international human rights framework, free culture advocates can build cross-border alliances, leverage the support of human rights organizations and institutions, and open up new avenues for impact litigation.

Following the interpretative methodology of the Committee, the article begins by taking up the key terms “cultural life,” “take part in” and “everyone.” Sketching out interpretive touchstones for these phrases, with special reference to the themes of free culture and access to knowledge, we offer both theoretical groundings as well as practical examples.

Next, the article examines the relevance of the right to take part in cultural life to the Internet and digital technologies, as well as to current debates over intellectual property law. Here, we suggest that the current historical moment offers both unique opportunities as well as urgent challenges for protecting this right.

Finally, the article suggests what specific steps governments should take to honor the right to take part in cultural life. Specifically, we argue that states recognizing the right to take part in cultural life have a legal obligation to ensure that their intellectual property frameworks do not provide excessive protections at the expense of cultural participation.

II. FRAMEWORK AND DEFINITIONS

First and foremost, “the right to take part in cultural life” must be understood within the broader human rights framework.¹² In the various international human rights instruments recognizing the right to take part in cultural life, it always appears alongside two additional components.¹³

¹² The recently issued General Comment underlines at the outset the close relationship between the right to take part in cultural life and (i) the other cultural rights contained in Article 15; (ii) a number of other rights enshrined in the ICESCR – such as the right to education, the right to self-determination and the right to an adequate standard of living; (iii) Article 27 UDHR, along with a list of provisions from numerous international Conventions, cited in notes 1-10. *See* General Comment No. 21, *supra* note 8, ¶¶ 2-3.

¹³ Closely parallel (but not identical) language appears at Article 27 of the 1948 Universal Declaration of Human Rights [hereinafter UDHR], Article 13 of the 1948 American Declaration on the Rights and Duties of Man [hereinafter American Declaration], Article 15 of the 1976 ICESCR, and Article 14 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador.) We

These three provisions address (a) cultural participation, (b) access to science and technology, and (c) protection of authorship.¹⁴ Although listed distinctly, these three are identified by the treaty as interrelated aspects of a single human right.¹⁵ No consensus term has yet emerged to refer to this overarching right, of which the right to take part in cultural life is but one aspect.¹⁶ We suggest, however, that the three-part

focus here on Article 15 of the ICESCR as this is the treaty that is binding upon the greatest number of countries. Article 27 of the UDHR similarly states: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” G.A. Res. 217A, U.N. Doc A/810 at 76, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Similarly, Article 13 of the 1948 American Declaration mentions “the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries” alongside the protection of authorship. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth Int’l Conf. of Am. States (May 2, 1948).

¹⁴ Typical of the pattern, Article 15 of the ICESCR reads:

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

ICESCR, *supra* note 7, at art. 15.

¹⁵ Immediately following the three-part elaboration as set forth in note 14 above, the text of Article 15 continues: “the steps to be taken by the States Parties to the present Covenant to achieve the full realization of *this right* shall include those necessary for the conservation, the development and the diffusion of science and culture.” *Id.* (emphasis added). The Covenant’s use of the singular noun “this right” rather than the plural formulation “these rights” indicates that the 15(1)(a-c) provisions were understood as three interrelated aspects of a single right, rather than as distinct and separable rights provisions.

¹⁶ The UDHR and the ICESCR do not designate short titles for each of their rights provisions. Certain usages, however, have become common, such as “the right to health” and “the right to education.” No such key phrase has yet emerged as generally accepted for this particular provision. The American Declaration and the Protocol of San Salvador do designate short titles for each provision. In these documents, the three provisions—referencing culture, science, and moral and material interests—are grouped under the short title “Right to the Benefits of Culture.” The phrases “right to culture” and “access to knowledge” have also been used by some scholars. See, e.g. Boutros Boutros-Ghali, *The Right to Culture and the Universal Declaration of Human Rights*, in CULTURAL RIGHTS AS HUMAN RIGHTS 73 (UNESCO 1970), available at <http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf> (“By the right of an individual to culture, it is to be understood that every man has the right of access to knowledge, to the arts and literature of all peoples, to take part in scientific advancement and to enjoy its benefits, to make his contribution towards the enrichment of cultural life.”). In the past two decades, however, the phrase “cultural rights” has come to be used to refer to the rights of minority and indigenous peoples to preserve their languages and traditions, as protected by Article 27 of a separate treaty,

framework is best understood as recognizing a universal human right to science and culture,¹⁷ in which access and participation are touchstone concepts.¹⁸

As used by United Nations documents, the term “science and culture” broadly includes all fields of human knowledge including technology, arts and crafts, science and social science, folk wisdom, etc.¹⁹ The right to science and culture thus recognizes and protects the right of everyone to participate in the advancement and share in the benefits of human knowledge—both scientific and cultural.²⁰ This broader framework sheds light on how to interpret specific terms within “the right to take part in cultural life.”

A. “CULTURAL LIFE”

The term “cultural life” might be read in an anthropological sense, as “the distinctive set of ideas, social behavior, way of life and

the International Covenant on Civil and Political Rights. To avoid confusion, therefore, we advocate “the right to science and culture” as the best shorthand.

¹⁷ According to this perspective, see General Comment No. 21, *supra* note 8, ¶ 47 (“Given the interrelationship between the rights set out in Article 15 of the Covenant (. . .), the full realization of the right of everyone to take part in cultural life also requires the adoption of the steps necessary for the conservation, the development and the diffusion of science and culture, as well as steps to ensure respect for the freedom indispensable for scientific research and creative activity, in accordance with paragraphs 2 and 3, respectively, of Article 15”).

¹⁸ For a fuller elaboration of this framework, see Lea Shaver, *The Right to Science and Culture*, 2010 WISC. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1354788> (outlining a theory of the right to science and culture, with particular attention to the implications of the right for intellectual property law, including both copyright and patents).

¹⁹ The United Nations Educational, Scientific and Cultural Organization (UNESCO) was established in 1945 “to contribute to peace and security by promoting collaboration among the nations through education, science and culture.” Constitution of the United Nations Educational, Scientific and Cultural Organization, http://www.icomos.org/unesco/unesco_constitution.html [hereinafter UNESCO Constitution], art. 1(1). See also *id.* at art. 1(2)(c): “To realize this purpose the Organization will. . . Maintain, increase and diffuse knowledge; By assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions; By encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information; By initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.”

²⁰ See Shaver, *supra* note 18.

patterns of communication of a particular society or people.”²¹ Unquestionably, the right of indigenous peoples to live, preserve and pass on their cultural traditions is an important element of the right to take part in cultural life.²² Indeed, this may be the most frequently analyzed dimension of this right in prior scholarship,²³ and extensively informs the interpretative guidance recently given by the Committee.²⁴

Conservation of traditional cultural life, however, is but one aspect. The Covenant’s text places equal emphasis on the need to pursue conservation, development, and diffusion.²⁵ It is thus essential to have a broader understanding of “cultural life” that more fully captures these multiple possibilities.

As intended by the framers of “the right to take part in cultural life,” the phrase includes not only traditional customs that distinguish each ethnic community but all the ways in which human beings express creativity, seek beauty and truth, exchange ideas, and create shared meanings. In the Committee’s own words, the concept “encompasses, inter alia ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environment, food, clothing and shelter, the arts, customs and traditions, through which individuals, groups of individuals and communities express their humanity and the meaning they give to

²¹ Collective Dimensions of the Right to Take Part in Cultural Life, 2, U.N. Doc. E/C.12/40/17, (May 9, 2008) (Submitted by Mr. Ephraim Nimni to the Comm. on Econ., Soc. and Cultural Rights, Fortieth Session) *available at* <http://www2.ohchr.org/english/bodies/cescr/docs/discussion/EphraimNimni.pdf>.

²² The cultural rights of indigenous groups and other ethnic minorities are also separately protected other mechanisms. See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 27, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, art. 2, 4, U.N. Doc. A/RES/47/135 (Feb. 3, 1993), Convention on the Rights of the Child, G.A. Res. 44/25, art. 30, U.N. Doc. A/44/49 (Nov. 20, 1989).

²³ See Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core of the Obligations Related to Article 15 (1) (a) of the International Covenant on Economic, Social and Cultural Rights*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 281 (Audrey Chapman & Sage Russell eds., 2002).

²⁴ See General Comment No. 21, *supra* note 8, ¶¶ 7, 16, 27, 36-37, 49(d), 50(c), 53, 55(c) & 73.

²⁵ ICESCR, *supra* note 7, at art. 15(2): “The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.”

their existence, and build their world view representing their encounter with the external forces affecting their lives.”²⁶

Cultural life takes many forms: traditional culture, high culture, popular culture, and even digital culture.²⁷ It includes folklore, scientific journals, how-to books, and Wikipedia; storytelling, Haiku, detective novels, and blogs. It includes folk song, gamelan, the Beatles, and mp3s; Ndebele house painting, Pablo Picasso, scrap-booking, and digital photography. Cultural life includes ritual performance and kabuki theatre; Bollywood and YouTube. Twenty years from now, it will include new media and genres not yet imagined.

The choice of the phrase “cultural life” rather than simply “culture” uniquely suggests an understanding of cultural life as something vibrant and dynamic,²⁸ a diverse phenomenon that changes and develops.²⁹ Whether the society in question is “traditional” or not, cultural life is ever-changing; the result of individual creativity reinterpreting existing knowledge as a cultural resource.³⁰ According to

²⁶ General Comment No. 21, *supra* note 8, ¶ 13.

²⁷ “Digital culture,” according to Dr. Charlie Gere, Director of the Institute for Cultural Research at the University of Lancaster, refers to “the vast range of applications and media forms that digital technology has made possible, including virtual reality, digital special effects, digital film, digital television, electronic music, computer games, multimedia, the Internet, the World Wide Web, digital telephony and Wireless Application Protocol (WAP), as well as the various cultural and artistic responses to the ubiquity of digital technology, such as Cyberpunk novels and films, Techno and post-pop music, the ‘new typography,’ net.art and so on.” CHARLIE GERE, DIGITAL CULTURE 11-12 (2001). Professor John Palfrey of Harvard Law School describes a generation of “digital natives” born after 1980, for whom the digital culture is the norm. “Digital natives. . . express themselves creatively in ways that are different from the ways their parents did at their age. Many digital natives perceive information to be malleable; it is something they can control and reshape in new and interesting ways. That might mean editing a profile on MySpace or encyclopedia entries on Wikipedia, making a movie or online video, or downloading a hot music track—whether lawfully or not. Whether or not they realize it, they have come to have a degree of control over their cultural environment that is unprecedented. . . . Digital natives, at their most creative, are creating parallel worlds on sites like Second Life. And after they do, they record parts of that world and post a video of it on YouTube. . . in a new art form called ‘machinima.’” JOHN PALFREY, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 6 (2008).

²⁸ General Comment No. 21 describes the concept of culture as “an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.” *See* General Comment No. 21 *supra* note 8, ¶ 13.

²⁹ This understanding is, again, highlighted in the recent guidance issued by the Committee. General Comment No. 21, *supra* note 8, ¶ 11.

³⁰ *See generally* FREDRIK BARTH, BALINESE WORLDS (1993) (questioning the longstanding anthropological conception of traditional cultures as static and integrated, and offering a more complex theory of continuous cultural reinvention by individuals as part of the larger community).

the cultural theorist Fredrik Barth, culture “springs not from one source and is not of one piece” but is made when people “participate in multiple, more or less discrepant, universes of discourse; they construct different, partial, and simultaneous worlds in which they move.”³¹

To take an example from American culture, this phenomenon may be observed in Jazz music. This genre emerged in a setting where many musicians borrowed and reinterpreted each other’s work; together, they invented a new musical genre with worldwide appeal. This example may be typical of cultural invention. In the words of Larry Lessig, “There is no art that doesn’t reuse.”³²

The phrase “cultural life” may also suggest that human beings are not fully “alive” unless they are empowered to take part—in the ways and forms that they choose—in this essential aspect of the human experience.

B. “TAKE PART IN”

Article 15 does not suggest that cultural life should evolve in any certain direction, but rather emphasizes the need for encouragement, freedom, and popular participation.³³ In this way, rights-bearers themselves act both individually and collectively to shape the evolution of cultural life, as co-creators of culture.

From this perspective, the phrase “to take part in” takes on central importance: participation is the essence of the right.³⁴ Difficulty

³¹ Fredrik Barth, *The Analysis of Culture in Complex Societies*, 54 *ETHNOS* 120, 124, 130 (1989). For further analysis, see Fredrik Barth, *Transnationalism*, in *BLOOMSBURY GUIDE TO HUMAN THOUGHT* 57 (Kenneth McLeish ed., 1993).

³² The context of Lessig’s quote is a criticism of the impact of strong IP protection on later creativity. “There is no art that doesn’t reuse. And there will be less art if every reuse is taxed by the appropriator. Monopoly controls have been the exception in free societies; they have been the rule in closed societies.” Lawrence Lessig, *May the Source Be With You*, *WIRED*, Dec. 2001, at 78, available at http://www.wired.com/wired/archive/9.12/lessig_pr.html.

³³ “The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.” ICESER, *supra* note 7, at art. 15(4). “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” *Id.* at art. 15(3). “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.” *Id.* at art. 15(1)(a).

³⁴ In defining the scope and the meaning of “to participate” or “to take part”, the General Comment No. 17 delineates three main components of the right protected under Article 15(1)(a), i.e. the participation in cultural life, the access to cultural life and the contribution to cultural life. These three elements are completely interrelated both in terms of general definitions and in terms of policies required to implement them. General Comment No. 21, *supra* note 8, ¶ 15.

in defining the sometimes slippery noun “cultural life” may therefore in large part be overcome by a careful explication of the verbs that cultural participation implies.

The right “to take part in” culture consists in the ability to consume and create, individually and with others. Culture exists to be shared, and to inhabit a culture is to contribute to it. To take part in cultural life implies the ability to access, enjoy, engage with and extend the cultural inheritance; to enact, wear, perform, produce, apply, translate, modify, extend and remix; to manifest, share, reinterpret, critique, combine and transform.

Cultural participation also requires access to cultural materials, tools and information and the freedom to create, transform, share and trade cultural works and techniques.³⁵

C. “EVERYONE”

In line with the emphasis on participation and cooperation, reference to the right of “everyone” to take part in cultural life is essential. “Everyone” includes women as well as men, children as well as adults, popular classes as well as elites, rural dwellers as well as urbanites, the poor as well as the wealthy, and amateurs as well as professionals.³⁶

In this last respect, it is important to note that the right to science and culture’s provision on protection of moral and material interests does not establish special rights for a class of professional authors; rather, it takes pains to recognize the right of “everyone” in authorship.³⁷ From the human rights standpoint, everyone is called to be an author, not merely to participate passively as a consumer.³⁸

³⁵ See *id.*

³⁶ This interpretation is supported by reference to Article 2.2 and Article 3 of the Covenant, on non-discrimination. “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICESCR, *supra* note 7, at art. 2.2. “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” *Id.* at art. 3.

³⁷ For exact language, see *supra* notes 14, 16.

³⁸ It should be emphasized also that the “author” whose moral and material interests are protected by human rights law may not coincide with the “author” protected by the contemporaneous copyright laws. In the former, the attribution to “everyone” of the human right to be protected in her role of “author” is strictly linked with her creative “paternity” of the cultural product. In the

Realizing the right of everyone to cultural participation requires the elimination of discriminatory barriers, as well as special measures to prevent limitations of geography, language, poverty, illiteracy or disability from blocking full and equal participation.³⁹

For instance, persons with blindness or other reading disabilities currently face enormous obstacles in gaining access to cultural materials.⁴⁰ The World Blind Union has been pressing the WIPO Standing Committee on Copyright and related Rights (SCCR) since 2003 to make it easier to distribute copyrighted works to the blind in accessible formats.⁴¹ In May 2009, a proposed Treaty for Reading

latter, individual authorship may not be required to claim the material privileges of copyright protection. An opposition between users and consumers is also introduced, based on the proprietary approach to intellectual creations, envisioned as goods to be commercialized in the market. Thus the Committee on Economic, Social and Cultural Rights has previously emphasized that many aspects of intellectual property law cannot find support in human rights law. Rather protection of “moral interests” refers to “the right of authors to be recognized as the creators of their scientific, literary or artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their productions that would be prejudicial to their honour or reputation” and protection of “material interests” refers solely to measures necessary “to enable those authors to enjoy an adequate standard of living. The interest of corporate authors and other commercial “rights holders” do not have a place in human rights law. U.N. COMMITTEE ON ECON., SOC. & CULTURAL RTS., *General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c), of the Covenant)*, ¶¶ 13, 15, U.N. Doc. E/C.12/GC/17 (Nov. 7-25, 2005), available at [https://www.unhcr.ch/tbs/doc.nsf/89856b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](https://www.unhcr.ch/tbs/doc.nsf/89856b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf) [hereinafter General Comment No. 17].

³⁹ See U.N. COMMITTEE ON ECON. SOC. & CULTURAL RTS., *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/20 (July 2, 2009), available at <http://www.unhcr.org/refworld/type,GENERAL,,,4a60961f2,0.html> (outlining the obligations of States Parties to the Covenant to prevent and remedy discrimination in the enjoyment of rights); U.N. COMMITTEE ON ECON., SOC. & CULTURAL RTS., *General Comment No. 5, Persons with disabilities*, U.N. Doc E/1995/22 at 19 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003) at <http://www1.umn.edu/humanrts/gencomm/epcomm5e.htm> (specifically discussing the dimension of nondiscrimination for persons with disabilities). The General Comment No. 21 devotes an entire part to “persons and communities requiring special protection,” such as women, children, older persons, persons with disabilities, minorities, migrants, indigenous people, persons living in poverty, General Comment No. 21, *supra* note 8, ¶¶ 25-39.

⁴⁰ General Comment No. 21’s section concerning “persons with disabilities” mentions the obligation to “recognize these persons’ right to access cultural material (...) in accessible forms.” General Comment No. 21, *supra* note 8, ¶ 31.

⁴¹ World Intellectual Property Organization, Information Meeting on Digital Content for the Visually Impaired (Nov. 3, 2003) (prepared by Francisco Javier Martinez Calvo), available at http://www.wipo.int/edocs/mdocs/mdocs/en/digvi_im_03/digvi_im_03_1_rev_1.html.

Disabled Persons was introduced for consideration at the SCCR, which would create internationally harmonized exceptions and limitations to copyright in order to reduce barriers to cultural works for those with blindness or other reading disabilities; the proposal remains under consideration.⁴²

More broadly, the dominant model of selling access to cultural works for a standard fee—enabled by global copyright enforcement—creates significant barriers to cultural participation in developing countries. Empirical evidence suggests that rights holders not only fail to discount cultural goods for sale in developing countries, but that prices are frequently *higher* in such countries than in the US.⁴³ This example highlights the importance of designing IP regimes to promote competition—and therefore affordability—in the markets for information goods.

III. NEW OPPORTUNITIES . . . AND CHALLENGES

The right to take part in cultural life was first recognized in 1948.⁴⁴ Today, its realization faces new opportunities in the age of digital culture, but also new challenges, in the form of expanding and tightening intellectual property rules.

⁴² See Dan Pescod, The “Right to Read”—Why a WIPO Treaty for Print Disabled People? (April 2009), <http://www.keystudies.org/ojs/index.php/kes/article/viewPDFInterstitial/43/79> (last visited Feb. 23, 2010).

⁴³ See, e.g. Lawrence Liang & Achal Prabhala, *Comment: Reconsidering the Pirate Nation*, 7 SOUTH AFRICAN J. OF INFORMATION AND COMMUNICATION 108, 110-11 (2006), available at <http://www.sajic.org.za/index.php/SAJIC/article/view/SAJIC-7-8/87>. Liang and Prabhala found that a person could buy a copy of THE OXFORD ENGLISH DICTIONARY, Arundati Roy’s THE GOD OF SMALL THINGS, and Nelson Mandela’s LONG WALK TO FREEDOM in the United States for a grand total of \$44.10. Purchasing the same books in South Africa, however, would require the equivalent of \$87.52. In India, in contrast, the books could be acquired for slightly less than the U.S. prices, at a grand total of \$36.10, a discount the authors attribute to publisher’s need to compete with widespread distribution of “pirated” books sold at even lower prices. *Id.* at 111. Relative to local incomes, however, the true cost of the books should be understood as equivalent to \$937.27 in South Africa, and an astonishing \$2409.50 in India. *Id.* Clearly, access to these cultural goods through legal market means is restricted to a very small slice of South African and Indian societies. A similar study suggests that, when the gap in purchasing power is taken into account, “the relative price of a book in Brazil is 270% higher than in Japan and 150% higher than in the United States.” Pedro Nicoletti Mizukami et al., “*Exceptions and Limitations to Copyright in Brazil: A Call for Reform*,” in ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 89 (Lea Shaver ed., 2008).

⁴⁴ See UDHR, *supra* note 13, at art. 2; American Declaration, *supra* note 13, at art. XIII.

A. THE INTERNET AND DIGITAL TECHNOLOGIES

Technological developments of the past twenty years have greatly advanced the ability of everyone to take part in cultural life.

Public and private not-for-profit efforts led to the formation of the Internet, the first all-purpose global communications network. This new technology enables the co-creation, sharing, and enjoyment of cultural expressions across old barriers of geography and time.

Newspapers that formerly enjoyed limited distribution are now accessible globally, preserved and searchable in online archives.⁴⁵ Rural radio stations are using the Internet to access cultural materials and read them aloud in local languages for common enjoyment and edification.⁴⁶ Medical personnel have much greater access to scientific literature thanks to online archives and search engines.⁴⁷

The Internet has also created a fundamental shift in the cost structure of knowledge sharing and distribution.

In the era of print, film, and tape, cultural works had to be produced in capital-intensive facilities and then physically shipped to customers around the globe. Recorded knowledge was therefore expensive and scarce.

Today, cultural works may be digitally rendered, costlessly reproduced and instantaneously transmitted at the touch of a button. Scientific and cultural knowledge no longer need to be expensive and scarce, but may be freely shared as widely as the digital infrastructure permits.

The emergence of the Internet has also fueled the rapid development of digital technologies, which have brought new tools for cultural creation into more hands.

When the ICESCR was signed in 1966, the technology for recording music was extremely expensive. Now residents of Brazilian

⁴⁵ For links to online newspapers from around the world, visit Internet Public Library, <http://www.ipl.org/div/news/>.

⁴⁶ Lynne Gallagher and Djilali Benamrane, *Rural Access by Radio and Internet Helps Close the Digital Divide*, INTERNET SOCIETY, Apr. 2001, available at <http://www.isoc.org/oti/articles/0401/gallagher.html>.

⁴⁷ See, e.g., Library of the National Medical Society, <http://www.ccsublishing.com/> (last visited Feb. 18, 2010). Many medical journals still impose access barriers to their online archives, charging a steep subscription fee. The trend toward open access scientific publication, however, is growing. In this model, revenues are realized through other means, so that online access may be made available free to all.

periferias can operate a home studio, record their own music, and promote it from an Internet café.⁴⁸ Digital video technology has similarly enabled the flourishing of the world's third-largest film industry in Nigeria.⁴⁹

Software tools now exist to read digital text aloud to the illiterate or disabled.⁵⁰ Similar tools are being developed to provide free, instantaneous translation between languages.⁵¹

These developments greatly enhance access to knowledge and the possibilities for everyone to take part in cultural life by helping to overcome earlier barriers created by geographic distance and cost. To fully realize their promise, governments should invest in efforts to close the digital divide and ensure the freedom of the Internet.

B. INTELLECTUAL PROPERTY LAW

Intellectual property law is also a topic of particular importance to cultural participation. The architects of the human rights treaties have consistently placed language recognizing the right to cultural participation and the interests of authors side-by-side, always in the same article.⁵² This structure is no accident, but rather an acknowledgement of the inherent tension between IP protections and widespread access to science and culture.

It is well established in human rights law that intellectual property rights are not themselves human rights.⁵³ Rather, IP protections

⁴⁸ The Brazilian genre of *tecnobrega* has flourished in these conditions, becoming a major source of cultural participation and livelihood, facilitated also by the lack of copyright enforcement in Brazil. See Pedro Nicoletti Mizukami & Ronaldo Lemos, *From Free Software to Free Culture: The Emergence of Open Business*, in Shaver, *supra* note 43, at 26-63.

⁴⁹ "Nollywood" refers to the young and dynamic film industry of Nigeria, which is now the third largest in the world, after the United States and India. The Nigerian film industry thrives in an environment where copyright law is not enforced, favoring a diverse industry of inexpensively produced movies sold at prices affordable to all classes. To view a short film about the Nigerian film industry, go to THIS IS NOLLYWOOD, <http://www.thisisnollywood.com/trailer.htm> (last visited Feb. 18, 2010).

⁵⁰ For a demonstration of one such technology, available in several languages, visit <http://text-to-speech.imtranslator.net/speech.asp> (last visited Feb. 23, 2010).

⁵¹ For a demonstration of one such technology, courtesy of Google, visit http://translate.google.com/translate_t#. Enter text in the language of your choice, select the destination language and hit "translate." The translation software is still far from perfect, but is being improved every day.

⁵² See UDHR, *supra* note 13; American Declaration, *supra* note 13; ICESCR, *supra* note 7.

⁵³ "In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property

are a policy tool designed to serve specific social purposes. To the extent that these rules conflict with fundamental norms of human rights law, the IP rules must be adjusted.

The need for this balancing has been widely acknowledged in the abstract.⁵⁴ Yet there has so far been little concrete discussion of where,

systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements." General Comment No. 17, *supra* note 38, ¶ 2.

⁵⁴ In 2001, the High Commissioner for Human Rights emphasized that Article 15 charges States "...to design IP systems that strike a balance between promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge." The High Commissioner for Human Rights, *Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001), available at http://shr.aaas.org/article15/Reference_Materials/E_CN.4_Sub.2_2001_12_Add.1_Eng.pdf (last visited Feb. 23, 2010).

In the same year, the United Nations Committee on Economic, Social and Cultural Rights cautioned that "...[i]n an effort to provide incentives for creation and innovation, private interests should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration." U.N. Committee on Econ., Soc. & Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human rights and intellectual property: Statement by the Committee on Economic Social and Cultural Rights*, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001), [hereinafter Statement on IP and Human Rights].

In 2005, the first ever UNESCO World Report affirmed: "It will... be necessary to find a balance between protecting intellectual property and promoting the public domain of knowledge: universal access to knowledge must remain the pillar that supports the transition to knowledge societies." UNESCO WORLD REPORT, TOWARD KNOWLEDGE SOCIETIES 26 (2005), <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf> (last visited Feb. 23, 2010).

Most recently, the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications acknowledged that "the right to enjoy the benefits of scientific progress and its applications may create tensions with the intellectual property regime, which is a temporary monopoly with a valuable social function that should be managed in accordance with a common responsibility to prevent the unacceptable prioritization of profit for some over benefit for all." Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, July 16-17, 2009, available at http://shr.aaas.org/article15/Reference_Materials/VeniceStatement_July2009.pdf (last visited Feb. 23, 2010). The Statement stopped short of suggesting what specific measures might be required to ensure such a management. *See id.*

Even trade treaties uninformed by a human rights perspective have recognized the need to balance protections for intellectual property with the public interest in access to knowledge. In

precisely, IP rules might need to be adjusted in deference to the right to take part in cultural life. This last section provides some starting points for this vital discussion.

IV. LEGAL OBLIGATIONS OF STATE PARTIES

Each human right imposes three types of obligations upon States Parties to the Covenant: obligations to *respect*, *protect*, and *fulfill*.⁵⁵ The obligation to *respect* requires States Parties to refrain from taking measures that interfere with the right of everyone to take part in cultural life. The obligation to *protect* requires States Parties to take appropriate measures to prevent third parties from interfering with the right of everyone to take part in cultural life. The obligation to *fulfill* requires States Parties to implement programs and other positive measures to ensure full enjoyment of the right to take part in cultural life.

A. RESPECT: CONSTRAINTS ON STATE ACTION

The obligation to respect human rights requires governments to refrain from acting in ways that inappropriately limit enjoyment of the right. A right may be violated by extralegal state action, or by laws that unjustifiably constrain the right, either facially or as applied to a particular situation.

With regard to the right to take part in cultural life, laws and policies should be designed to expand access to knowledge and opportunities for participation, emphasizing the participatory dimension of all people—individually and collectively—as both consumers and co-creators of culture.⁵⁶

1996 the WIPO Copyright Treaty acknowledged “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.” World Intellectual Property Organization Copyright Treaty, pmbl., Dec. 20, 1996, 36 I.L.M. 65.

⁵⁵ General Comment No. 17, *supra* note 38, ¶¶ 28-34. *See also* Meeting of Experts on the Limburg Principles as to the Nature and Scope of Violations of Economic, Social and Cultural Rights, Jan. 22-26, 1997, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 6, available at <http://202.54.104.236/intranet/eip/legislation/uploads/Masstricht%20Guidelines%20on%20Violations%20of%20Economic.pdf> (last visited Feb. 23, 2010); General Comment No. 21, *supra* note 8, ¶ 48 (reiterating that the obligations to respect, protect, and fulfill apply equally to the right to take part in cultural life).

⁵⁶ *See supra* note 36 and accompanying text. One of the three components of the right protected under Article 15 (1) (a) is the “contribution to cultural life”, defined as “the right of everyone to

States' self-reports on measures taken to respect the right to take part in cultural life typically focus only on efforts to eliminate discriminatory barriers.⁵⁷ This sole focus overlooks the possibilities that poorly designed laws—such as an imbalanced IP regime—may negatively impact cultural participation across the entire society.⁵⁸

Exclusive copyright privileges necessarily limit the ability of other people to take part in cultural life by interacting with that content. Such limits must be carefully considered and judged to be consistent with the right of everyone to take part in cultural life and the social function of intellectual property.⁵⁹

be involved in creating the spiritual, material, intellectual and emotional expression of the community.” General Comment No. 21, *supra* note 8, ¶ 15.

⁵⁷ Under the terms of the ICESCR, state parties are required to make periodic reports to the treaty's standing committee; more than 80 State reports have been presented to the CESCR since 2001. These are publicly available at <http://www2.ohchr.org/english/bodies/cescr/sessions.htm> (last visited Feb. 23, 2010). Within these reports, the dominant view treats the concept of discriminatory barriers in three senses: (a) all those obstacles hindering the physical access to libraries, schools, theatres or, more generally, structures devoted to culture and education; (b) the lack of infrastructures and cultural projects in rural areas; (c) any different treatment reserved to ethnic minorities. No attention, however, is paid to the discriminatory impact on visually-disabled and minority-language groups of inadequate copyright exceptions and limitations to facilitate accessible translations and adaptations of cultural works; nor to the relevance of laws and regulations that may interfere with the right to science and culture for all segments of society.

⁵⁸ Very few state reports mention intellectual property at all. These typically mention IP only for its relevance as an incentive to authors and inventors. The potentially negative impact of IP law on those seeking to take part in cultural life is typically ignored. Only three reports pay attention to the connection between IP and possible impacts on the right to take part in cultural life: those of Brazil (2001), Belgium and Canada. U.N. Econ. & Soc. Council [ECOSOC], Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum, Brazil, U.N. Doc. E/1990/5/Add.53 (Nov. 20, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.5.Add.53.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.5.Add.53.En?Opendocument); ECOSOC, Implementation of the International Covenant on Economic, Social and Cultural Rights, Second periodic reports submitted by States Parties under articles 16 and 17 of the Covenant, Addendum, Belgium, U.N. Doc. E/1990/6/Add.18 (Mar. 5, 1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.6.Add.18.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.6.Add.18.En?Opendocument); ECOSOC, Implementation of the International Covenant on Economic, Social and Cultural Rights, Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Belgium, U.N. Doc. E/C.12/BEL/3 (Sept. 21, 2006), available at http://shr.aas.org/article15/State_Reports/Belgium/Third_report_extract_Eng.pdf; ECOSOC, Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic reports submitted by States Parties under articles 16 and 17 of the Covenant, Canada, U.N. Doc. E/C.12/CAN/5 (Aug. 30, 2005), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.CAN.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.CAN.5.En?OpenDocument) (underlining the nuances of the interplay between IPRs and consumer rights).

⁵⁹ General Comment No. 17, *supra* note 38, ¶ 35-38.

Cultural participation requires access to materials and tools, as well as freedom to create and share,⁶⁰ including freedom from fear of criminal or civil prosecution for acts of creativity and participation. In this sense, a balanced IP regime is one that adequately protects freedom of expression, access to knowledge, and the public domain.⁶¹

One essential means to strike the appropriate balance between cultural participation and protection of authorship is through exceptions and limitations to copyright.⁶² Common examples include exceptions to permit the free use of copyrighted materials for: classroom use, scholarship, personal copies, format conversion, library lending, archiving, criticism and comment, translation into lesser-used languages, reverse-engineering for interoperability, research purposes, disabled accessibility, distance education, time-shifting, sampling, etc.

In legal systems following the fair use or fair dealing approaches, exceptions and limitations may be judicially defined. In legal systems lacking this tradition, however, statutory lists of exceptions and limitations are often inadequate to protect the right to take part in cultural life. All governments should provide a legal mechanism whereby

⁶⁰ Similar language is used by the General Comment No. 21 when defining the concept of participation in cultural life: "Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others; and to act creatively and take part in creative activity." General Comment No. 21, *supra* note 8, ¶ 15. Furthermore, the Comment refers to the concept of access in connection with the obligation to "respect", and namely with the adoption of specific measures aimed at achieving respect for the right of everyone to "enjoy freedom of opinion, freedom of expression (. . .) and the right to seek, receive and impart information and ideas of all kinds and forms." General Comment No. 21, *supra* note 8, ¶ 49(b). It is specified that this obligation implies "the right of all persons to access, and to participate in, varied information exchanges, and to access cultural goods and services, understood as vectors of identity, values and meaning." *Id.*

⁶¹ For a scholarly examination of the importance of the public domain, see BOYLE, THE PUBLIC DOMAIN, *supra* note 1. For a discussion of how the participatory nature of digital culture in particular is under threat today, see TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE (2007).

⁶² "The task of developing a global approach to limitations and exceptions (L&E's) is one of the major challenges facing international copyright law today. As mechanisms of access, L&E's contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement. Appropriately designed L&E's may alleviate the needs of people around the world who still lack access to books and other educational materials, and also open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination and storage of information." P. BERNT HUGENHOLTZ & RUTH L. OKEDJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT, FINAL REPORT 3 (2008), available at http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf (last visited Feb. 23, 2010).

individuals can challenge laws that do not adequately respect the right to take part in cultural life and petition for justified exceptions.⁶³

Another key issue is the right of public participation in the decision-making process when laws are adopted that impact the right to take part in cultural life.⁶⁴ Considering that taking part in cultural life also includes the right to be an active protagonist of the political process concerning it, particular importance must be attributed to the procedural right to “active and informed participation of all those affected by intellectual property regimes.”⁶⁵ The right to science and culture, in this sense, has to be considered as a prismatic value, with both substantive and procedural dimensions.

Care must also be taken that measures adopted to enforce copyright do not violate human rights. Severe penalties for copyright infringement must not be permitted to create a climate of fear and uncertainty that leads to self-censorship of cultural participation. In this respect, the increasing use of criminal penalties for ordinary copyright infringement is cause for concern. So too are recent proposals in some States to ban suspected copyright infringers from the Internet without judicial process.⁶⁶ Access to the Internet is not a privilege, but part of the

⁶³ As an example of a justified exception not foreseen by statutory law, Internet search engines rely on the ability to access, copy and represent existing works in order to perform their function. Yet the laws of many jurisdictions do not formally provide an exception for Internet search engines. The Draft Treaty on Access to Knowledge has proposed establishing such an exception as a matter of international law. Within this proposal, the exclusive rights of copyright holders shall not apply to the use of works in connection with Internet search engines, “so long as the owners of works do not make reasonably effective measures to prevent access by Internet search engines, and the Internet search engine service provides convenient and effective means to remove works from databases upon request of the right-owner.” A2K Treaty Draft, Article 3-1-IX, at http://www.cptech.org/a2k/a2k_treaty_may9.pdf.

⁶⁴ General Comment No. 21 includes in the category of the obligation to respect the adoption of specific measures aimed to protect the right to “freely take part in an active and informed way and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under Article 15 paragraph 1(a).” See General Comment No. 21, *supra* note 8, at ¶ 49(e). A similar principle is applied to indigenous people: State parties should respect their “free, prior and informed consent (. . .) in all matters covered by their specific rights.” See General Comment No. 21, *supra* note 8, ¶ 37.

⁶⁵ Statement on IP and Human Rights, *supra* note 54, ¶ 9.

⁶⁶ An example is the so-called “Creation and Internet Law”, enacted the French Parliament last spring after a heated debate. A provision allowing the HADOPI to disconnect alleged copyright infringers from the Internet was recently redacted by the French Constitutional Council. See Nate Anderson, *French Court Savages “Three-Strikes” Law, Tosses it Out*, ARS TECHNICA, June 10, 2009, <http://arstechnica.com/tech-policy/news/2009/06/french-court-savages-3-strikes-law-tosses-it-out.ars>. The European Parliament has rejected this approach at the regional level. Paul Meller, *Europe Rejects Plan to Criminalize File Sharing*, INFOWORLD, Apr. 10, 2008, available at <http://www.infoworld.com/article/08/04/10/Europe-rejects-plan-to-criminalize-file->

fundamental human right to take part in cultural life; any limitations on that right must be consistent with human rights norms.

For analogous reasons, governments should refrain from enacting laws on Internet service providers that might have a chilling effect on their activities. A doctrine of limited liability, freeing the service provider from responsibility for users' copyright infringement, is infinitely preferable to a world in which Internet managers attempt to police and block private communications.

The Committee on Economic, Social and Cultural Rights has previously recommended that every state conduct a general human rights impact assessment of their IP regimes.⁶⁷ Such efforts offer an important opportunity to evaluate whether these legal frameworks adequately respect the right to take part in cultural life.

B. PROTECT: REGULATING PRIVATE ACTORS

The duty to *protect* requires countries to take appropriate steps to prevent third parties from interfering with the right of everyone to take part in cultural life. In this sense, governments must address the impact that misleading copyright claims, abuse of technical protection measures (TPMs), and anti-competitive practices may have on cultural participation.

Misleading copyright notices frequently threaten criminal penalties for accessing cultural materials, without acknowledging fair uses or relevant exceptions and limitations. Such practices intimidate individuals from exercising their human rights and have a chilling effect on cultural participation. Where States Parties allow third parties to so

sharing_1.html; see also Resolution on European Agenda for Culture in a Globalising World, EUR. PARL. DOC. P6_TA 0124 38 ¶ 52 (2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:247E:0032:0041:EN:PDF> (last visited Feb. 23, 2010). A similar measure has recently been introduced in Korea; the Korean proposal would also give the Minister of Culture, Sports and Tourism authority to shut down websites. IP LEFT, UNOFFICIAL TRANSLATION OF THE "THREE STRIKE OUT (GRADUATED RESPONSE)" PROVISION IN THE COPYRIGHT LAW AMENDMENT BILL PROPOSED BY THE MINISTRY OF CULTURE, SPORTS AND TOURISM IN JULY, 2008, available at http://www.ipleft.or.kr/bbs/view.php?board=ipleft_5&id=488&page=1&category1=3 (last visited Feb. 23, 2010).

⁶⁷ The Committee recommended that States Parties and other international actors "should [...] consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions" General Comment No. 17, *supra* note 38, ¶ 35.

abuse the right to take part in cultural life without penalty, a violation of Article 15(1)(a) exists.

To take part in cultural life requires not only freedom from overly restrictive laws, but also freedom from technological barriers. Recent efforts to “lock down” digital content through TPMs may impose limits on access to cultural works beyond those authorized by law. For example, a balanced copyright law might permit sharing or sampling copyrighted materials for educational purposes; yet third parties may employ TPMs to make such uses technologically impossible.⁶⁸ Where the law fails to prevent or to impose penalties for such abuse—or, worse, facilitates the abuse by imposing civil or criminal penalties on TPM circumvention without regard to whether the circumvention was justified—the right to take part in cultural life is violated.

More generally, both States Parties and third parties must ensure that the technical architecture of the Internet is designed to protect access, freedom of expression and privacy. Software code may regulate human behavior even more powerfully than legal code.⁶⁹ Human rights, including the right to take part in cultural life, must therefore be made part of Internet governance and corporate social responsibility for companies that manage Internet infrastructure.

It may also happen that a perfectly legitimate law produces, in its application, distortive effects adverse to its original rationale. Firms may seek to exploit legitimately acquired IP rights in order to crowd out competitors, resulting in higher prices or diminished innovation.⁷⁰ A human rights assessment of IP law must be sensitive to unintended effects on market competition for cultural goods and tools, which is essential to maximize access and affordability.

⁶⁸ “[C]ontent providers and lawmakers have begun to implement significant changes in the way copyright is applied in a digital culture. At the core of these changes is a fundamental shift in strategy, from regulating the use of technology through law to regulating the design of the technology so as to constrain use.” GILLESPIE, *supra* note 61, at 6. For a complete comparative analysis of the legal development of the TPMs system and its consequence in terms of limitation of public domain, see Nicola Lucchi, *Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection, Technological Measures and New Business Models under E.U. and U.S. Law*, 53 BUFF. L. REV. 1111, 1160-61, 1167 (2005).

⁶⁹ LARRY LESSIG, CODE 2.0 124-26 (2006).

⁷⁰ U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 2-3 (2007), available at www.usdoj.gov/atr/public/hearings/ip/222655.pdf (last visited Feb. 23, 2010).

Consumers' interests may also be harmed by unfair contract terms.⁷¹ The obligation to *protect* thus imposes duties on governments to ensure that companies do not use unequal bargaining power for purposes that would limit cultural participation.

C. FULFILL: POSITIVE MEASURES AND PROGRAMS

Cultural participation requires effective access to existing cultural goods, information and tools; these are the raw materials for future creativity and participation. The obligation to *fulfill* requires States Parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to take part in cultural life.

The text of Article 15 provides specific guidance on the nature of obligations to fulfill the right: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."⁷² Article 15 also points to "the encouragement and development of international contacts and co-operation in the scientific and cultural fields."⁷³

States' self-reports on measures taken to fulfill the right to take part in cultural life have frequently emphasized the number of museums and cultural centers that are made affordable to the public. The Committee's recent guidance to some extent reinforces this traditional focus in identifying the importance of "guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events."⁷⁴ A focus on traditional, institutional modes of cultural access,

⁷¹ See Margaret Jane Radin, *Regime Change in Intellectual Property Law: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 184 (2003); Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 142, 147 (2004) (noting that TPMs and mass standardized contracts may effectively rewrite the terms of the public-private copyright bargain). See also LUCIE GUIBAULT & NATALI HELBERGER, EUROPEAN CONSUMER LAW GROUP, COPYRIGHT LAW AND CONSUMER PROTECTION (2005) available at <http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf> (last visited Feb. 23, 2010) (explaining a European perspective of copyright law).

⁷² ICESCR, at art. 15(2).

⁷³ *Id.* at art. 15(4).

⁷⁴ General Comment No. 21, *supra* note 8, ¶ 54(d).

however, may overlook the many new opportunities for fulfilling this right.

Governments can also fulfill the right to take part in cultural life by orienting their public procurement, education, cultural and information policies to promote access to knowledge and knowledge sharing. State support for open access journals and archives,⁷⁵ open educational resources,⁷⁶ and open source software⁷⁷ should be highlighted. Publicly funded research and artwork should be made available through open access journals or archives, or under Creative Commons licenses,⁷⁸ to promote greater access to cultural materials and possibilities for participation. States can also fulfill the right to knowledge by making information about State activities publicly available through access to information laws.⁷⁹

Apart from the realm of IP, States must also make efforts to close the digital divide and progressively realize the goal of universal access to the Internet. Well-established dimensions of accessibility, affordability, acceptability and quality developed in the context of access to health care apply here as well.⁸⁰ Because the ultimate end is to realize the right to cultural participation, it is essential that prospective users are

⁷⁵ For an explanation of Open Access scholarship and its importance to human rights, see Gavin Yamey, *Open Access to Health and Human Rights*, PUBLIC LIBRARY OF SCIENCE, 23 July 2008, <http://www.plos.org/cms/node/384>. See also Gavin Yamey & Calestous Juma, *Improving Human Welfare: The Crucial Role of Open Access*, 29 SCI. EDITOR, 163, 163-65 (2006), <http://eprints.rclis.org/archive/00007963/02/Unbound—Edited—Final.pdf> (last visited Feb. 23, 2010).

⁷⁶ For an explanation of Open Education and its importance to cultural participation, see The Cape Town Open Education Declaration, Sept. 14-15, 2007, <http://www.capetowndeclaration.org/read-the-declaration> (last visited Feb. 23, 2010).

⁷⁷ For an explanation of Open Source Software and its importance to human rights, see Andy Oram, *Why Human Rights Requires Free Software*, O'REILLY, Nov. 10, 2002, <http://www.oreillynet.com/pub/a/network/2002/10/11/platform.html> (last visited Feb. 23, 2010). Although software may at first glance seem to have more to do with "science" than with "culture" there is substantial overlap. Consider the example of Wikipedia as an output of cultural innovations in software design.

⁷⁸ Creative Commons licenses facilitate the free international exchange of cultural materials by providing advance permissions for others to take part in enjoying, sharing, extending or transforming the materials without payment or special authorization. See Creative Commons.org, International, <http://creativecommons.org/international/> (last visited Feb. 18, 2010).

⁷⁹ See, e.g., The Right to Information Act, No. 22, Acts of Parliament 2005, available at <http://righttoinformation.gov.in/rti-act.pdf> (last visited Feb. 23, 2010).

⁸⁰ U.N. COMMITTEE. ON ECON., SOC. & CULTURAL RTS., *General Comment No. 14, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 12-13, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at <http://www1.umn.edu/humanrts/gencomm/escgencom14.htm> (last visited Feb. 23, 2010).

empowered to use the Internet not only to access the work of others, but also to share their own creations.

D. PROGRESSIVE REALIZATION AND CORE CONTENT

These three-fold legal obligations can also be analyzed through the lens of “progressive realization” and “core content.” This concept distinguishes those aspects of the right whose implementation is subject to economic constraints and must be gradually implemented (progressive realization), versus elements that require immediate implementation (core content).⁸¹

Expanding access to the Internet requires significant investments in infrastructure and is therefore subject to the logic of progressive realization. Many other aspects of expanding access to knowledge, however, can and should be immediately implemented.

Unlike access to education, health care or water, access to knowledge is less dependent on the availability of resources. “Knowledge goods are . . . fundamentally different from physical goods and services. They can be copied. They can be shared. They do not have to be scarce. The rich and the poor can be more equal with regard to knowledge goods than to many other areas.”⁸²

It will be decades, at least, before educational opportunities are expanded worldwide so as to enable everyone to make maximum use of their right to take part in cultural life. It does not need to take decades to reform IP law to bring about the environment of encouragement, freedom and public participation envisioned by the right to take part in cultural life.

The General Comment stresses that States Parties to the ICESCR should “undertake whatever measures they can to ensure that the policies and decision” of the international organizations of which they are members “in the field of culture and related areas are in conformity with the obligations under the Covenant.”⁸³

⁸¹ U.N. COMMITTEE ON ECON., SOC. & CULTURAL RTS., *General Comment No. 3: The nature of States parties' obligations (Art. 2, para. 1 of the Covenant) (Fifth session, 1990)*, ¶¶ 1-2, U.N. Doc. E/1991/23 (Dec. 14, 1990), available at <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (last visited Feb. 23, 2010).

⁸² CPTech.org, *Access to Knowledge: Overview*, <http://www.cptech.org/a2k/> (last visited Feb. 18, 2010).

⁸³ General Comment No. 21, *supra* note 8, ¶ 75.

More specifically in the area of intellectual property, we can say that states should work nationally and internationally to immediately implement legal reforms to eliminate unjustified barriers to access to knowledge, expand exceptions and limitations, and ensure that penalties for copyright infringement are proportionate. Toward this end, a human rights impact assessment should be conducted on IP frameworks in particular, which are too often adopted without broad public input or attention to human rights consequences. Adequate procedures must also be made available for citizens to challenge in court laws that restrict access to knowledge.

Going forward, any proposed expansion of copyright protections must also be subjected to a human rights impact assessment to ensure it does not constitute a retrogressive measure.

V. CONCLUSION

As this article has demonstrated, international human rights law provides a potentially fertile source of legal norms to advance calls for Internet freedom, Free Culture, Access to Knowledge and the Creative Commons. Scholars and advocates in these camps should work to ensure that the right to take part in cultural life is interpreted and applied in ways that support the push for a more open approach to cultural creativity. Recent work by the United Nations Committee on Economic, Social and Cultural Life draws new attention to this right. Yet further work is still needed to draw out the implications of the right for intellectual property policy, particularly in the Internet age.

Pursuing this strategic opportunity will require advocates of intellectual property reform to pursue greater engagement with international human rights institutions and national processes based on human rights claims. Copyright laws that inadequately promote access and opportunities for popular participation in cultural creation constitute the most significant barrier to cultural participation that exists today. Human rights bodies should be encouraged to address this problem head-on.

Attention should also be given to the national level, where many countries allow for domestic litigation of international human rights norms, or have related provisions in their national constitutions. So far, the right to take part in cultural life has been little litigated in these fora. The process of reshaping IP law to better reflect human rights obligations

will not be achieved merely through statements of principle. Adequate legal reforms are essential, as is a jurisprudence that reflects awareness of the human rights dimensions of copyright.