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## **The Right to Take Part in Cultural Life**

LEA SHAVER & CATERINA SGANGA\*

*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 provision, however, has so far been little interpreted. This essay suggests how lawmakers and jurists might give meaning to the right to take part in cultural life, 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.*

### INTRODUCTION

For over a decade, there has been a flowering of legal scholarship and civil society advocacy defending creative and communicative liberty against efforts at greater control, particularly in the on-line

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\* Lea Shaver is an Associate Research Scholar and Lecturer in Law at Yale Law School, where she is a Faculty Fellow of the Information Society Project at Yale Law School. Caterina Sganga is a PhD candidate in Private Comparative Law at Scuola Superiore Sant’Anna, Pisa, Italy; she also holds an LLM from Yale Law School. The authors would like to express their deep appreciation to their colleagues at the Information Society Project at Yale Law School, and in particular the participants of the Fall 2008 Access to Knowledge Practicum, for their contributions, feedback and support.

world. Jamie Boyle's calls for an "environmentalism for the Net,"<sup>1</sup> Larry Lessig's inspiration to the Free Culture movement,<sup>2</sup> the founding of the Creative Commons initiative, Yochai Benkler's work on the Wealth of Networks,<sup>3</sup> Jonathan Zittrain's concern for the Future of the Internet,<sup>4</sup> and the Access to Knowledge mobilization described by Amy Kapczynski<sup>5</sup> all hail in this line.

Concerned about efforts to further expand copyright enforcement, these scholars have all 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

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<sup>1</sup> James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 Duke Law J. 87 (1997). See also, James Boyle, "Sold Out," NEW YORK TIMES, March 31, 1996, available at [http://www.law.duke.edu/boylesite/Sold\\_out.htm](http://www.law.duke.edu/boylesite/Sold_out.htm); James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 J. Law & Contemp. Problems 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).

<sup>2</sup> 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 L. & 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, Milwaukee Art Museum 2005; Website of the Students for Free Culture, [www.freeculture.org](http://www.freeculture.org).

<sup>3</sup> 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).

<sup>4</sup> 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 John Palfrey, Jonathan Zittrain, Ron Deibert, & Rafal Rohozinsky, 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).

<sup>5</sup> See generally, Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804 (2008), available at <http://yalelawjournal.org/117/5/kapczynski.html> (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).

economic development. Rarely, however, have they been phrased in terms of international human rights.<sup>6</sup>

It is time, now, to do so.

A process is already underway at the United Nations to interpret “the right to take part in cultural life,” as protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>7</sup> The outcome of this interpretative effort—for better or for worse—will have a strong impact on the future development of legal norms.

At present, 160 countries are parties to the ICESCR.<sup>8</sup> 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, ultimately our legal norms, too, are influenced by international law and the legal reasoning practices of our peer democracies.

In the pages that follow, the authors suggest how this little-studied right 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 indicate how supporters of free culture and access to knowledge can frame their concerns in terms of human rights.

The essay begins by taking up the key terms “cultural life,” “take part in” and “everyone.” Sketching out proposed definitions and interpretive touchstones for these phrases, we offer both theoretical groundings as well as practical examples.

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<sup>6</sup> But see, Lawrence Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971 (2007) at 1017-1018 (suggesting the possibility of using the human rights framework to press for greater public access to patented and copyrighted goods).

<sup>7</sup> 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 37<sup>th</sup> Session, November -24, 2006. 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 authority. 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 40<sup>th</sup> Session. The two CESCR committee members most closely involved in the drafting process are Virginia Bonoan-Dandan (Philippines) and Jaime Marchan Romero (Ecuador).

<sup>8</sup> Status as of 29-07-2009, United Nations, *Treaty Series*, vol. 993, p. 3; depositary notification C.N.781.2001.TREATIES-6 of 5 October 2001, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

Next, the essay moves to examine 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 essay suggests what specific steps governments should take to honor the right to take part in cultural life. Specifically, we recommend that states recognizing the right to take part in cultural life must ensure that their intellectual property frameworks do not provide excessive protections at the expense of cultural participation.

### FRAMEWORK AND DEFINITIONS

First and foremost, “the right to take part in cultural life” must be understood within the broader framework of what we refer to as “the right to science and culture.”

In the various international human rights instruments where the right to take part in cultural life is recognized, it always appears alongside two additional components.<sup>9</sup> These three provisions address (a) cultural participation, (b) access to science and technology, and (c) protection of authorship.<sup>10</sup> These three components must be

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<sup>9</sup> Closely parallel, but not identical, language appears at Article 27 of the 1948 Universal Declaration of Human Rights, Article 13 of the 1948 American Declaration on the Rights and Duties of Man, Article 15 of the 1976 International Covenant on Economic, Social and Cultural Rights, 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 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 Universal Declaration of Human Rights 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.” 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.

<sup>10</sup> 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;

understood as interrelated aspects of a single human right<sup>11</sup>—“the right to science and culture.”<sup>12</sup>

As used by UNESCO and the ICESCR, the term “science and culture” is understood broadly to include all fields of human knowledge including technology, arts and crafts, science and social

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(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.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) [hereinafter ICESCR].

<sup>11</sup> Immediately following the four-part elaboration as set forth in note 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.” ICESCR, Article 15, italics added. The Covenant’s use of the singular noun “this right” 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.

<sup>12</sup> “The right to science and culture” is our preferred terminology for the three interrelated provisions of human rights law described above, however, it is not yet widely accepted.

The Universal Declaration 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. B. Boutros-Ghali, “The right to culture and the Universal Declaration of Human Rights” in *Cultural Rights as Human Rights* (UNESCO 1970), at <http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf> at p. 73: “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, the International Covenant on Civil and Political Rights. To avoid confusion, therefore, we advocate “the right to science and culture” as the best shorthand.

science, folk wisdom, etc.<sup>13</sup> 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.<sup>14</sup>

This broader framework sheds light on how specific terms within “the right to take part in cultural life” should be understood.

#### "Cultural life"

The term “cultural life” might be understood in an anthropological sense, as “the distinctive set of ideas, social behavior, way of life and patterns of communication of a particular society or people.”<sup>15</sup> Unquestionably, the right of indigenous peoples to live, preserve and pass on their cultural traditions is an important element of the right to

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<sup>13</sup> 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.” Article 1(1), Constitution of the United Nations Educational, Scientific and Cultural Organization, Adopted in London on 16 November 1945, [http://www.icomos.org/unesco/unesco\\_constitution.html](http://www.icomos.org/unesco/unesco_constitution.html) [hereinafter UNESCO Constitution]. Article 1(1). See also Article 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.”

<sup>14</sup> For a fuller discussion of this broader context, see Author, *The Right to Science and Culture*, \_\_ L. REV. \_\_ (2010), available at <http://ssrn.com/abstract=1354788> (forthcoming) (discussing the right to science and culture, with particular attention to the implications of the right for international intellectual property law).

<sup>15</sup> Collective Dimensions of the Right to Take Part in Cultural Life, Background Paper Submitted by Mr. Ephraim Nimni to the Committee on Economic, Social and Cultural Rights, Fortieth Session, E/C.12/40/17, 9 May 2008, <http://www2.ohchr.org/english/bodies/cescr/docs/discussion/EphraimNimni.pdf>.

take part in cultural life.<sup>16</sup> Indeed, this may be the most frequently analyzed dimension of this right.<sup>17</sup>

Conservation of traditional cultural life, however, is but one aspect. The Covenant's text places equal emphasis on the need to pursue "the conservation, the development and the diffusion of science and culture."<sup>18</sup> A broader understanding of "cultural life" that more fully captures its multiple possibilities is thus essential.

As intended by the framers of "the right to take part in cultural life," we suggest, 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.

Cultural life takes many forms: traditional culture, "high" culture, popular culture and even "digital culture."<sup>19</sup> It includes folklore,

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<sup>16</sup> The cultural rights of indigenous groups and other ethnic minorities are also separately protected by Article 27 of the ICCPR, Article 2 and 4 of the Declaration on the Rights of Minorities and Article 30 of the Children's Rights Convention, as well as by other treaties.

<sup>17</sup> 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 Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, New York, 2002, 281.

<sup>18</sup> ICESCR, Article 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."

<sup>19</sup> "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), at <http://books.google.com/books?id=VLrQ6bcwlwUC>. 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

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. It includes ritual performance and kabuki theatre; Bollywood and YouTube.

Twenty years from now, it will include new media and genres as yet unimagined.

The choice of the phrase “cultural life” rather than simply “culture” uniquely suggests an understanding of cultural life as something vibrant and dynamic, a diverse phenomenon that changes and develops.

Whether the society in question is “traditional” or not, cultural life is ever-changing, as the result of individual creativity reinterpreting existing knowledge as a cultural resource.<sup>20</sup> According to 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.”<sup>21</sup>

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 others work; together, they invented a new musical genre with worldwide appeal.<sup>22</sup>

The phrase “cultural life” may also suggest that human beings are not fully “alive” unless they are empowered to take part—in the ways

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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 (2008) at 6, <http://books.google.com/books?id=hqJi8FaayN8C>.

<sup>20</sup> See generally Fredrik Barth, *Balinese Worlds* (1993) (questioning the traditional 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).

<sup>21</sup> Fredrik Barth, *The Analysis of Culture in Complex Societies*, 3-4 *ETHNOS* 120, 1989, 124. For further analysis, see Frederik Barth, *Transnationalism*, in Kenneth McLeish (ed.), *Bloomsbury Guide to Human Thought*, Bloomsbury Publishing, London, 1993, 57.

<sup>22</sup> This example may be typical of all cultural invention. In the words of Larry Lessig, “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.” Larry Lessig, *May the Source be With You*, *WIRED*, December 2001, [http://www.wired.com/wired/archive/9.12/lessig\\_pr.html](http://www.wired.com/wired/archive/9.12/lessig_pr.html).

and forms that they choose—in this essential aspect of the human experience.

### "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.<sup>23</sup> 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. Difficulty 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 to 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, interpret, read, modify, extend and remix; to manifest, interact, share, repeat, reinterpret, translate, critique, combine and transform.

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

### "Everyone"

In line with the emphasis on participation and cooperation, emphasis on the right "of everyone" to take part in cultural life is also 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.<sup>24</sup>

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<sup>23</sup> ICESCR, Article 15(4): "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." ICESCR, Article 15(3): "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity." ICESCR, Article 15(1)(a): "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life."

<sup>24</sup> This interpretation is supported by reference to Article 2.2 and Article 3 of the Covenant, on non-discrimination. ICESCR, Article 2.3: "The States Parties to the

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.<sup>25</sup> From the human rights standpoint, everyone is called to be an author; not merely to participate passively as a consumer.<sup>26</sup>

Realizing the right of everyone to cultural participation requires the elimination of discriminatory barriers, as well as special measures to prevent barriers of geography, language, poverty, illiteracy or disability from blocking full and equal participation.<sup>27</sup>

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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, Article 3: "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".

<sup>25</sup> For exact language, see *supra* note .

<sup>26</sup> 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 latter, an opposition between users and consumers is 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 commercial "rights-holders" do not have a place in human rights law. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c)), U.N. Doc. E/C.12/2005, 21 November 2005, [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf), [hereinafter General Comment no.17] ¶ 39(e).

<sup>27</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009), at <http://www1.umn.edu/humanrts/gencomm/escgencom20.html> (outlining the obligations of States Parties to the Covenant to prevent and remedy discrimination in the enjoyment of rights); Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc

For instance, persons with blindness or other reading disabilities currently face enormous obstacles in gaining access to cultural materials. The World Blind Union (WBU) 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.<sup>28</sup> In May 2009, a proposed Treaty for Reading 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.<sup>29</sup>

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.<sup>30</sup>

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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).

<sup>28</sup> World Intellectual Property Organization, *Information Meeting on Digital Content for the Visually Impaired*, Geneva, 3 November 2003, [http://www.wipo.int/edocs/mdocs/mdocs/en/digvi\\_im\\_03/digvi\\_im\\_03\\_1\\_rev\\_1.html](http://www.wipo.int/edocs/mdocs/mdocs/en/digvi_im_03/digvi_im_03_1_rev_1.html).

<sup>29</sup> See Dan Pescod, *The “Right to Read”– Why a WIPO Treaty for Print Disabled People?* KESTUDIES Vol 3 (2009), at [kestudies.org/ojs/index.php/kes/article/viewPDFInterstitial/43/79](http://kestudies.org/ojs/index.php/kes/article/viewPDFInterstitial/43/79).

<sup>30</sup> See, e.g. Lawrence Liang and Achal Prabhala, *Comment: Reconsidering the Pirate Nation*, 7 SOUTH AFRICAN J. OF INFORMATION AND COMMUNICATION 118 (2006), 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. 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, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira de

This example highlights the importance of designing IP regimes to promote competition—and therefore affordability—in the markets for information goods.

#### NEW OPPORTUNITIES... AND CHALLENGES

The right to take part in cultural life was first recognized in 1948.<sup>31</sup> 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.

#### The Internet and Digital Technologies

The ability of everyone to take part in cultural life has been greatly advanced in the last twenty years through technological developments.

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 expression across old barriers of geography and time.

Newspapers that formerly enjoyed limited distribution are now accessible globally, preserved and searchable in online archives. Rural radio stations are using the Internet to access cultural materials and read them aloud in local languages for common enjoyment and edification<sup>32</sup>. Medical personnel have much greater access to scientific literature thanks to online archives and search engines.

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 individually physically shipped to customers around the globe. Recorded knowledge was therefore expensive and scarce.

In the digital era, cultural works may be digitally rendered, instantaneously and costlessly reproduced and transmitted across wired and wireless networks at the touch of a button. Scientific and

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Souza, "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 (ed. Lea Shaver 2008) (citing Fabio Sa Earp and George Kornis, *A Economia da Cadeia Productiva do Livro* (2005)).

<sup>31</sup> *Supra* note .

<sup>32</sup> Lynne Gallagher and Djilali Benamrane, *Rural Access by Radio and Internet Helps Close the Digital Divide*, <http://www.isoc.org/oti/articles/0401/gallagher.html>.

cultural knowledge no longer need to be expensive and scarce, but may be freely shared as widely as the 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 *periferias* can operate a home studio, record their own music and promote it from an Internet café<sup>33</sup>. Similarly, digital video technology has enabled the flourishing of the world's third-largest film industry in Nigeria<sup>34</sup>.

Software tools now exist to read digital text aloud to the illiterate or disabled.<sup>35</sup> Similar tools are being developed to provide free, instantaneous translation between languages.<sup>36</sup>

These developments greatly enhance access to knowledge and the possibilities for everyone to take part in cultural life. To fully realize their promise, governments should invest in efforts to close the digital divide, and ensure the freedom of the Internet.

### Intellectual Property Law

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<sup>33</sup> The Brazilian genre of *tecnobrega* has flourished in these conditions, becoming a major source of cultural participation and livelihood. To learn more about how the emergence of *tecnobrega* music has been facilitated by the lack of copyright enforcement in Brazil, see Pedro Nicoletti Mizukami and Ronaldo Lemos, "From Free Software to Free Culture: The Emergence of Open Business," in *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development*, ed. Lea Shaver (2008) 26-63, available at [http://www.law.yale.edu/documents/pdf/ISP/A2K\\_BRAZIL.pdf](http://www.law.yale.edu/documents/pdf/ISP/A2K_BRAZIL.pdf).

<sup>34</sup> "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. For more information, visit [http://en.wikipedia.org/wiki/Cinema\\_of\\_Nigeria](http://en.wikipedia.org/wiki/Cinema_of_Nigeria) or go to <http://www.thisisnollywood.com/trailer.htm> to view a short film about the Nigerian film industry.

<sup>35</sup> For a demonstration of one such technology, courtesy of the International Herald Tribune, visit <http://www.iht.com/articles/2007/10/11/business/download.php> and click on "Listen to Article." A computerized voice will read the text aloud.

<sup>36</sup> For a demonstration of one such technology courtesy of Google, visit [http://translate.google.com/translate\\_t#](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.

Intellectual property law is also a topic of particular importance to cultural participation.

The architects of the human rights treaties—including the ICESCR, the UDHR and the American Declaration—have consistently placed language recognizing the right to cultural participation and the interests of authors side-by-side, always in the same article.<sup>37</sup> This structure is no accident, but rather an acknowledgement of the inherent tension between intellectual property 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.<sup>38</sup> Rather, IP protections 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.<sup>39</sup> Yet there has so far been little concrete discussion of where,

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<sup>37</sup> *Supra* note .

<sup>38</sup> ICESCR, General Comment no.17, ¶ 2: “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 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.” See also discussion at note .

<sup>39</sup> 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, U.N. Doc. E/CN.4/Sub.2/2001/13, 27 June 2001, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2001.13.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.13.En?Opendocument), ¶ 10.

In the same year, the United Nations Committee on Economic, Social and Cultural Rights cautioned that “in an effort to provide incentives for creation and innovation, private interests should not be unduly advantaged and the public interest

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.

#### LEGAL OBLIGATIONS OF STATE PARTIES

Each human right imposes three types of obligations upon States Parties to the Covenant.<sup>40</sup> The obligation to *respect* requires States Parties to refrain from taking measures that interfere with the right of

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in enjoying broad access to new knowledge should be given due consideration.” Committee on Economic, Social & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C12/2001/15, 14 December 2001, [http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/\\$FILE/G0146641.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf) [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* (2005) 26, <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf>.

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.” Copy on file with the author, at para. 4. The Statement stopped short of suggesting what specific measures might be required to ensure such a management.

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 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.” 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 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.”

<sup>40</sup> General Comment no.17, ¶¶ 28-34. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, ¶ 6, [http://www1.umn.edu/humanrts/instate/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instate/Maastrichtguidelines_.html)

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.

#### 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 on face 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.

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.<sup>41</sup> This sole focus overlooks the possibilities

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<sup>41</sup> Under the terms of the International Covenant on Economic, Social and Cultural Rights, state parties are required to make periodic reports to the treaty's standing committee. See Caterina Sganga, *An Analysis of State Reports on Article 15 of the International Covenant on Economic, Social and Cultural Rights*, unpublished draft (on file with the authors). Sganga's work analyzes more than 80 State reports presented to the CESCR since 2001.

Sganga's analysis of these reports reveals that States Parties tend to analyze the duty to respect the right to take part in cultural life primarily, if not solely, through the elimination of discriminatory barriers. Moreover, states' concept of discriminatory barriers is quite narrow. Within these reports, the dominant view of State Parties 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 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.

that poorly designed laws—such as an imbalanced IP regime—may negatively impact cultural participation across the entire society.<sup>42</sup>

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.<sup>43</sup>

Cultural participation requires access to materials and tools, and freedom to create and share, 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.<sup>44</sup>

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<sup>42</sup> See Sganga, *An Analysis of State Reports*, *supra* note 41. 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, Belgium and Canada. BRASIL, Initial reports submitted by States parties under articles 16 and 17 of the Covenant, August 21<sup>st</sup>, 2001, E/1990/5/Add.53, at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/cf07bb34d2d65883c1256bab0037ce95/\\$FILE/G0146156.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/cf07bb34d2d65883c1256bab0037ce95/$FILE/G0146156.pdf); BELGIUM, Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant, December 23<sup>rd</sup> 1997, E/1990/6/Add.18, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.6.Add.18.En?Opendocument;ID.](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.6.Add.18.En?Opendocument;ID.), Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant, April 2005, E/C.12/BEL/3, at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/443/59/PDF/G0644359.pdf?OpenElement>; CANADA, Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, August 17<sup>th</sup> 2005, E/C.12/CAN/5, at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4f07de4ea236e858c125711500574ff8/\\$FILE/G0543784.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4f07de4ea236e858c125711500574ff8/$FILE/G0543784.pdf) (underlining the nuances of the interplay between IPRs and consumer rights).

<sup>43</sup> General Comment no.17, ¶ 35-38.

<sup>44</sup> For a scholarly examination of the importance of the public domain, see James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," 66 *Law & Contemporary Problems* 33 (2003), available at [http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003)). 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), at [http://books.google.com/books?id=UETvzT\\_9l0sC](http://books.google.com/books?id=UETvzT_9l0sC).

One essential means to strike the appropriate balance between cultural participation and protection of authorship is through exceptions and limitations to copyright.<sup>45</sup>

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, scholarship, 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 terribly inadequate to protect the right of access to knowledge. All governments should provide a legal mechanism whereby individuals can challenge laws that inadequately respect the right to take part in cultural life and petition for justified exceptions.<sup>46</sup>

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. Considering that taking part in cultural life includes also the right to be an active protagonist of the political process concerning it, a particular importance must be attributed to

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<sup>45</sup> "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 and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, 6 March 2008, p. 3, [http://www.soros.org/initiatives/information/articles\\_publications/publications/copyright\\_20080506/copyright\\_20080506.pdf](http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf).

<sup>46</sup> 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.

the procedural right to "active and informed participation of all those affected by intellectual property regimes."<sup>47</sup> 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 concerning.

So too are recent proposals in some States to ban suspected copyright infringers from the Internet without judicial process.<sup>48</sup> Access to the Internet is not a privilege, but part of the 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 (ISP) which 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

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<sup>47</sup> Statement on IP and Human Rights, ¶ 9.

<sup>48</sup> 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, at <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, IDG News Service, "Europe rejects plan to criminalize file sharing," *InfoWorld*, 10 April 2008, at [http://www.infoworld.com/article/08/04/10/Europe-rejects-plan-to-criminalize-file-sharing\\_1.html](http://www.infoworld.com/article/08/04/10/Europe-rejects-plan-to-criminalize-file-sharing_1.html). European Parliament, European agenda for culture in a globalising world, Resolution P6\_TA(2008)0124, 10 April 2007, ¶ 52, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0124+0+DOC+XML+V0//EN&language=EN>, 12. 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, 10 October 2008, [http://www.ipleft.or.kr/bbs/view.php?board=ipleft\\_5&id=488&page=1&category1=3](http://www.ipleft.or.kr/bbs/view.php?board=ipleft_5&id=488&page=1&category1=3)

rights impact assessment of their IP regimes.<sup>49</sup> Such efforts offer an important opportunity to evaluate whether these legal frameworks adequately respect the right to take part in cultural life.

### Protect: Regulating Private Actors

The duty to *protect* requires countries to take appropriate 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 fraudulent claims of copyright, 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 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 freedom from overly restrictive laws, but also freedom from technological barriers.

Recent efforts to "lock down" digital content through technological protection measures (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.<sup>50</sup>

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<sup>49</sup> 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, ¶35.

<sup>50</sup> "[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." Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (2007), p. 6, [http://books.google.com/books?id=UETvzT\\_9l0sC](http://books.google.com/books?id=UETvzT_9l0sC). 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* (April 2005), available at <http://ssrn.com/abstract=704101>.

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.<sup>51</sup> 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 happen, indeed, that a perfectly legitimate law produces, in its application, distortive effects, totally adverse to its original rationale. Firms may seek to exploit IP rights in order to crowd out competitors, resulting in higher prices or diminished innovation.<sup>52</sup> Consumers' interests may also be harmed by unfair contract terms. 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.

#### 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 of access to knowledge, specifying that "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

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<sup>51</sup> Larry Lessig, Code 2.0 (2006), <http://books.google.com/books?id=lmXIMZiU8yQC>.

<sup>52</sup> U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, 2 (2007), available at [www.usdoj.gov/atr/public/hearings/ip/222655.pdf](http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf).

culture."<sup>53</sup> Article 15 also points to "the encouragement and development of international contacts and co-operation in the scientific and cultural fields."<sup>54</sup>

States' self-reports on measures taken to fulfill the right to take part in cultural life frequently emphasize the number of museums and cultural centers that are made affordable to the public.<sup>55</sup> A narrow focus on institutional modes of cultural access, however, can overlook the many new opportunities for fulfilling this right.

Governments can 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. States supports for open access journals and archives<sup>56</sup>, open educational resources<sup>57</sup> and open source software<sup>58</sup> should be highlighted. Publicly-funded research and artwork should be made available through open access journals or archives, or under Creative Commons licenses,<sup>59</sup> to promote greater access to cultural materials

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<sup>53</sup> ICESCR Article 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."

<sup>54</sup> ICESCR Article 15(4): "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."

<sup>55</sup> Sganga, *An Analysis of State Reports*, *supra* note 41.

<sup>56</sup> 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 and Calestous Juma, *Improving Human Welfare: The Crucial Role of Open Access*, 2006 *Science Editor* 29(5), pp. 163-165, available at <http://eprints.rclis.org/archive/00007963/02/Unbound--Edited--Final.pdf>

<sup>57</sup> For an explanation of Open Education and its importance to cultural participation, see The Cape Town Open Education Declaration, 14-15 September 2007, <http://www.capetowndeclaration.org/read-the-declaration>.

<sup>58</sup> For an explanation of Open Source Software and its importance to human rights, see Andy Oram, "Why Human Rights Requires Free Software," O'Reilly, 10 November 2002, <http://www.oreilynet.com/pub/a/network/2002/10/11/platform.html>. 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.

<sup>59</sup> 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 <http://creativecommons.org/international/>.

and possibilities for participation.<sup>60</sup> States also fulfill the right to knowledge by making information about State activities publicly available through access to information laws.<sup>61</sup>

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.<sup>62</sup> Because the ultimate end is to realize the right to cultural participation, it is essential that prospective users are empowered to use the Internet not only to access the work of others, but also to share their own creations.

### Progressive Realization and Core Content

These three-fold legal obligations can also be analyzed through the lens of “progressive realization.” This concept distinguishes between those aspects of the right whose implementation is subject to economic constraints and must be gradually realized, versus elements that require immediate implementation, the so-called “core content.”<sup>63</sup>

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

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<sup>60</sup> 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 <http://creativecommons.org/international/>.

<sup>61</sup> See, e.g., India's 2005 Right to Information Act, [http://en.wikipedia.org/wiki/Right\\_to\\_Information\\_Act](http://en.wikipedia.org/wiki/Right_to_Information_Act).

<sup>62</sup> See Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), <http://www1.umn.edu/humanrts/gencomm/escgencom14.htm>, at para. 12-13.

<sup>63</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003). <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm>.

Unlike access to education, health care or water, access to knowledge is less dependent on the availability of resources, because "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."<sup>64</sup>

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.

States Parties to the Covenant should immediately implement legal reforms to eliminate unjustified barriers to access to knowledge, expand exceptions and limitations and ensure that penalties for copyright infringement are not disproportionate.

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.

#### CONCLUSION

As this essay 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. By taking up the cause of "the right to take part in cultural life," scholars and advocates in these camps can help ensure that this article of international public law is interpreted and applied in ways that support the push for a more open approach to cultural creativity.

Pursuing this strategic opportunity will require greater engagement with international human rights institutions, particularly the United Nations Committee on Economic, Social and Cultural Rights. Attention should also be given to the national level, where many countries have related provisions in their national constitutions, or allow for domestic litigation asserting the rights in the ICESCR.

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<sup>64</sup> CPTech, Access to Knowledge: Overview, <http://www.cptech.org/a2k/>.