

25. Universalism, Pluralism or Isolationism? The Relationship between Authors' Rights and Creators' Human Rights

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It is sometimes suggested that authors' rights¹ are protected under international human rights law. This claim is often supported by reference to the "creators' rights"² established under Article 27(2) of the Universal Declaration of Human Rights (UDHR)³ and Article 15(1)(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR)⁴. Article 27(2) of the UDHR is framed in the following terms:

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.⁵

If authors' rights, as established in international copyright law, were indeed human rights, claims to the universalism of copyright norms would be significantly reinforced as, in addition to the obligations imposed by international agreements such as the Berne Convention and Agreement on Trade Related Aspects of Intellectual Property (TRIPS)⁶, states would assume duties to protect authors under human rights instruments. Such duties would not be limited by an author's nationality, as is currently the case with international copyright agreements, and individual creators might, in certain circumstances, be entitled to bring proceedings directly against states for failure to comply with their obligations to protect creators' rights.⁷ Within such a system, the concept of "creators' rights" in human rights law would also be expected to play a role in shaping policy at international and national level, as an important element within a pluralist international *acquis*.⁸

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¹ The term "authors' rights" is employed here to describe the rights granted to authors under international and national copyright/authors' rights systems. In this chapter, "authors' rights" and "copyright" are generally employed synonymously.

² The term "creators' rights" is used to describe the rights provided to authors under UDHR, art. 27(2) and ICESCR, art. 15(1)(c), and equivalent provisions in human rights and constitutional documents.

³ Universal Declaration of Human Rights (10 Dec. 1948) A/RES/217(III) (hereinafter UDHR).

⁴ International Covenant on Economic Social and Cultural Rights (16 Dec. 1966) (hereinafter ICESCR).

⁵ See sect. §25.01 *infra* for the text of art.15(1)(c).

⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 Apr. 1994), 1869 UNTS 299.

⁷ Individual communications to the Committee on Economic, Social & Cultural Rights alleging violation of the ICESCR can be made against state parties which have ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 Dec. 2008), A/RES/63/117; To date, only a relatively small minority of states have ratified the Optional Protocol; see, <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> (accessed 10 Jun. 2019).

⁸ For discussion of the potential of such a pluralist copyright *acquis*, see Graeme W. Austin, *Authors' Human Rights & Copyright Policy* Columbia Journal of Law & the Arts 405 (2017); Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *A Neofederalist Vision of TRIPS* (Oxford University Press 2012).

Is it true, then, that the authors' rights protected under copyright laws are synonymous with the creators' rights protected in human rights law? If not, what is the relationship between the two sets of rights? These are the issues explored in this chapter. Section §25.01 outlines the argument that author's rights are protected as human rights. It focuses on creators' rights, but touches also on arguments that authors' rights are encompassed within other generally recognized human rights, such as the right of freedom of expression and the right of property. The chapter then moves on to examine the scope of creators' rights within international human rights law (§25.02), doing so by reference to the reports of the United Nations' (UN) Committee of Economic, Social & Cultural Rights⁹ and the UN Human Rights Committee's Special Rapporteur in the field of cultural rights.¹⁰ These emphasize significant distinctions between authors' rights and creators' rights and, as a consequence, challenge the universalist claim that human rights law provides fundamental reinforcement for the norms established in copyright law.

Section §25.03 seeks to establish the known contours of the relationship between authors' rights and creators' rights. It is suggested that, while it is very difficult to argue that the copyright system as a whole is supported by the international obligation to protect creators' rights, there are aspects of the current system which would appear to be based on human rights norms. Similarly, there are aspects of copyright law, at international and national level, which sit uneasily with the obligations assumed by states under Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. The chapter concludes by arguing that there is a significant (if unresolved) relationship between authors' rights and creators' rights, but that we currently do not have a mutually-supportive, pluralist copyright *acquis* in which the international copyright system is underpinned by the human rights of creators. Rather, as a matter of politics and doctrine, the two systems operate in relative isolation from one another. This situation is unlikely to change until, at very least, the scope and effect of creators' rights is defined in greater detail. The means through which such clarification might be achieved are briefly considered.

There has been relatively little written on creators' rights in the human rights scholarship and the literature in copyright has focused predominantly on the history of Article 27(2) and Article 15(1)(c) and their potential consequences for authors' rights. This chapter seeks to break new ground by examining the nature of the relationship between these two forms of legal claim and, in particular, by asking whether it is possible to say, with any degree of certainty, that certain features of the law of authors' rights are either required, or precluded, by international human rights law.

§25.01 Authors' Rights as Human Rights

Human rights arguments have frequently been advanced by *users* of copyright works. Increasingly, however, authors and other right-holders have also begun to rely on human, or

⁹ See sect. §25.02[B] *below*.

¹⁰ See sect. §25.02[C] *below*.

fundamental, rights in support of claims relating to works or other subject-matter. Sometimes such arguments are made in general terms, without linkage to specific rights recognized under international human rights instruments or under national constitutions.¹¹ There is a clear relationship between such general claims and the universalist rationales of international copyright law.¹² The Berne Convention, established with the intention of providing borderless rights for authors, has itself been described as a form of human rights document.¹³ However, arguments premised upon specific rights granted under international human rights law, or equivalent regional or national constitutional instruments, are now also commonly advanced.

In a European context, property is the most obviously relevant right in this regard.¹⁴ Authors' claims to be entitled to rely on the right of property have received particular support from the inclusion of a "right of intellectual property" in the European Union's (EU) Charter of Fundamental Rights.¹⁵ In several Judgments of the Court of Justice, Article 17(2) has served to anchor the interests of authors and other rightholders within a framework of "fair balance".¹⁶ It has also provided a bulwark against unjustified interference with authors' rights by national legislators.¹⁷ However, the right of property has significant limitations from the perspective of creators. It does not specifically recognize creativity, providing only a general guarantee of established legal entitlements (including the authors' rights provided by law) against expropriation and other unjustified interference. Thus, for example, the right of property will not support of an author's claim to legal protection where such protection has not previously been recognized in positive law.¹⁸

Given property's limitations in this respect, it is not surprising that attempts have also been made to establish a human rights foundation for authorship on other widely-recognized rights protected under international and domestic bills of rights. Thus, for example, the rhetorical description of copyright law as the "engine of free expression"¹⁹ is often repeated and attempts are sometimes made to argue that authors' rights reflect the right to freedom of expression as

¹¹ For an example of such an enquiry, see Michel Vivant, *Authors' Rights, Human Rights* 174 RIDA 60 (1997).

¹² For a discussion of the universalist foundations of authors' rights, see Jane Ginsburg, *From Hypatia to Victor Hugo to Larry and Sergey: All the World's Knowledge and Universal Authors' Rights* British Academy Review 39 (2013).

¹³ See Berne Union Assembly, Solemn Declaration Commemorating the Centenary of the Berne Convention (27Jun. 1986), as reproduced in Copyright 373 (1986).

¹⁴ For detailed discussion, Caterina Sganga, *Propertizing European Copyright* (Edward Elgar, 2018).

¹⁵ Charter of Fundamental Rights of the European Union, Official Journal C 326, 26/10/2012, P. 391–407, art 17(2); This provision simply confirms that intellectual property is covered by the Charter's general guarantee of property rights (art. 17(1)); See, Case C-70/10 Scarlet Extended v SABAM (2011) EU:C:2011:771, par. 43.; Case C-314/12 UPC Telekabel v Constantin Film Verleih GmbH (2014) EU:C:2014:192, par. 61.

¹⁶ See, for example, Case C-160/17, GS Media BV v Sanoma Media Netherlands BV (2016) EU:C:2016:644.

¹⁷ See, Case C-277/10 Luksan v Van der Let (2012) EU:C:2012:65.

¹⁸ For a discussion of the limitations of the right of property in this regard, see Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature* at Research Handbook on Human Rights and Intellectual Property 132 (Christophe Geiger ed., Edward Elgar 2015).

¹⁹ Harper & Row v. Nation Enterprises 471 US 539, 558 (1985).

a matter of theory.²⁰ These have, however, had little effect in substantive doctrine, where the argument that freedom of expression encompasses a justiciable right not to speak, or a right not to speak in particular terms, has not been widely accepted.²¹ Similarly, while the rights of privacy and dignity have had an impact in some jurisdictions,²² their impact in copyright law has not been more generally recognized.

The most likely foundations for the argument that creators are protected in human rights law therefore remain the rights protected under Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. The text of the former has been set out in the introduction to this chapter above. Article 15(1)(c), which is based on Article 27(2), provides that:

The States Parties to the present Covenant recognize the right of everyone: ...
(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.²³

The rights set out in the UDHR are not directly enforceable.²⁴ However, there is an enforcement mechanism for the rights protected under the ICESCR. Contracting states are obliged periodically to report on the measures they have taken to comply with the Convention and, where a state has ratified the Optional Protocol to the ICESCR, a right of individual petition to the Committee on Economic, Social & Cultural Rights arises. The obligations imposed by “cultural rights”, such as Article 15(1)(c), are not equivalent to the civil and political rights protected under “first generation” rights instruments such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights, under which state

²⁰ See, for example, L. Kim Treiger-Bar-Am, *The Moral Right of Integrity – a Freedom of Integrity* at vol. 2, *New Directions in Copyright Law* 128 (Fiona Macmillan ed., Edward Elgar 2006); For analysis of the claim that copyright is “the engine of free expression”, see Neil W. Netanel, *Copyright’s Paradox* 81-108 (Oxford University Press 2008).

²¹ Although, for the acceptance of a comparable example based on the freedom of thought, conscience and religion under the EU Charter of Fundamental Rights (art. 10), see the Opinion of Advocate General Szpunar in Case C-516/17 Spiegel Online GmbH v Volker Beck (2019) EU:C:2019:16, par. 79.

²² For discussion see Josef Drexler, *Constitutional Protection of Authors’ Moral Rights in the European Union* at Human Rights & Private Law: Privacy as Autonomy 159-176 (Katja S. Ziegler ed., Hart Publishing 2007).

²³ Art 15(1) as a whole provides that:

“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.”

Limitations imposed on the rights granted under the ICESCR are permissible, as long as certain general conditions are satisfied, see ICESCR, art. 4.

²⁴ Although it has been suggested that the UDHR has the force of customary international law, see Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* 133 (Stanford University Press 2010); Peter Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework* 40 *University of California at Davis Law Review* 1039, 1046 (2007).

parties are required immediately to satisfy all protected rights.²⁵ By contrast, it is recognized that a state's ability to satisfy economic, social and cultural rights depends, to an extent, on its resources. Accordingly, the ICESCR generally imposes an obligation upon states progressively to realize rights such as the creators' rights established under Article 15(1)(c).²⁶

The national reports filed by states in compliance with the ICESCR tend not to focus on Article 15(1)(c) and no individual petitions based on that provision have yet been brought under the Protocol. Nevertheless, this absence of definitive guidance on the meaning of creators' rights under the international human rights system has not served to deter claims that the rights granted under Article 27(2) and Article 15(1)(c) support the rights of authors under national and international copyright systems. Thus, for example, in its submission to the Human Rights Council's Special Rapporteur in the field of cultural rights in 2014, the International Publishers Association wrote that:

Copyright (understood as encompassing both economic and moral rights) is a concretisation of the human rights of creators: their freedom [...] to create science, their freedom of expression ... It is our view that human rights and intellectual property rights are not only compatible, but also mutually supportive and interdependent.²⁷

It is not only lobbyists who have stressed the close relationship between authors' rights and creators' rights. In her pioneering work on the legislative history of creators' rights, Chapman described Article 27(2) and Article 15(1)(c) as giving rise to a "human right to intellectual property".²⁸ Bécourt has argued that the "Universal Declaration considers copyright to be a human right in itself, within the more general context of the right to culture"²⁹ and Dietz and Françon have written that "...to attack copyright is to attack a human right, the highest and most venerable form of legal protection of human activity".³⁰ More recently, Minero has noted that at the "international level, copyright is considered a fundamental or human right in Art 27 of the Universal Declaration of HR".³¹

²⁵ However, *see* the discussion of "core obligations" in section §25.02[B] *below*.

²⁶ For a brief summary of the obligations imposed, see Committee on Economic, Social & Cultural Rights, *Human Rights & Intellectual Property: Statement by the Committee on Economic, Social & Cultural Rights*, par. 11 (14 Dec. 2001) E/C.12/2001/15. For a more detailed review of the institutional context of the relationship between intellectual property law and international human rights, *see* Laurence R. Helfer & Graeme W. Austin, *Human Rights & Intellectual Property* 1-89 (CUP 2011).

²⁷ Jens Bammel, *Consultation on the Impact of Intellectual Property Regimes on the Enjoyment of the Right to Science and Culture*, (15 Sept. 2014), <https://www.ohchr.org/Documents/Issues/CulturalRights/ConsultationIntellectualproperty/International%20Publishers%20Association.pdf> (accessed 13 Jun. 2019).

²⁸ *See*, for example, Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection* *Journal of International Economic Law* 861, 866 (2002).

²⁹ Daniel Bécourt, *Copyright and Human Rights* *Copyright Bulletin* 13, 14 (1998(3)).

³⁰ Adolph Dietz & André Françon, *Copyright as a Human Right* *Copyright Bulletin* 7, 8 (1998(3)).

³¹ Gemma Minero, *Intellectual Property Rights & Human Rights: Coinciding and Cooperating* at *Intellectual Property Law & Human Rights* 163-184, 169 (Paul Torremans ed., 3rd ed, Wolters Kluwer, 2015); *See also* Paul Goldstein & Bernt Hugenholtz, *International Copyright: Principles, Law & Practice* 23 (3rd ed., Oxford

Thus, it would appear that there is a relatively widely-held view that the creators' rights protected under the international human rights system map closely onto the authors' rights established in international and national copyright law. In its strongest form, this view suggests that the international human rights system provides a "right to copyright" in the exact, detailed sense established in copyright law. In reality, however, this position is difficult to sustain. National copyright systems vary significantly and it is difficult to see how creators' rights can be linked closely with the detailed requirements of positive statutory law. It might more plausibly be claimed that creators' rights require the implementation of the leading features, at least, of the international system of authors' rights. Under such an interpretation, a state party to the UDHR and/or ICESCR might, for example, be obliged to ensure that all Berne Convention "authors" benefit from the core moral and economic rights granted under international copyright treaties for the full term of protection guaranteed under those treaties and that exceptions and limitations upon those rights are not unreasonably extensive.

In this more general sense, then, can the equation between authors' rights and creators' rights be sustained? In order to answer this question, it is necessary to consider how creators' rights have been interpreted in international human rights law.

§25.02 Creator's Rights as Human Rights

The texts of Article 27(2) and Article 15(1)(c) suggest a connection with positive copyright law, but provide limited normative guidance on their interpretation. Furthermore, as suggested above, there is little to illuminate these provisions in the responses of the Committee on Economic, Social & Cultural Rights to national reports or, as yet, in responses to individual complaints under the Additional Protocol. Do the *travaux préparatoires* clarify the scope and effect of creators' rights?

[A] *Travaux préparatoires*

The circumstances in which both Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR were agreed have been investigated in detail.³² Commentators on the legislative history of these provisions nevertheless tend to suggest that the *travaux* provide little guidance on the establishment of a consistent interpretation of creators' rights in international human

University Press, 2013) 23; Jorgen Blomqvist, *Primer on International Copyright and Related Rights* 17 (Edward Elgar 2014).

³² See, for example, Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* 217-222 (Philadelphia: University of Philadelphia Press 1999); Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)* 35 *Copyright Bulletin* 4, 10-13(2001); Maria Green, *Drafting History of the Article 15(1)(c) of the International Covenant* (9 Oct. 2000) UN Doc E/C.12/2001/15; Henning Grosse Ruse-Khan (n 8) §8.05, 8.10 (Oxford University Press 2016); Peter Yu (n. 24) 1039; Ragnar Adalsteinsson & Páll Thórhallson, *Article 27 at The Universal Declaration of Human Rights: a Common Standard of Achievement* (Gudmundur Alfredsson & Asbjorn Eide eds, Brill, 1999) 577-580.

rights law.³³ It is clear that the inclusion of creators' rights in both the UDHR and the ICESCR was controversial,³⁴ that Article 27(2) was a disputed addition during the drafting of the UDHR and that there was no automatic carry-over of that provision into the ICESCR. Some of the states which promoted the inclusion of creators' rights in international human rights law were clearly motivated by a desire to strengthen international copyright law³⁵ and, in particular, some seem to have been keen to bolster the patchy protection available for moral rights at an international level.³⁶ There is also evidence that some states were motivated, at least in part, by a desire to influence the ongoing negotiation of international copyright agreements.³⁷ However, there was also considerable resistance to the inclusion of creators' rights in international human rights law, on the grounds that creators' rights were not human rights³⁸ or that the issues raised by authors' rights were simply too complex to be resolved within a human rights framework and were better handled in the domain of international copyright law.³⁹ Furthermore, a number of states noted that creators' rights, as agreed, were to be read alongside both the other elements of Article 27 and Article 15 that guaranteed access to culture⁴⁰ and the rights protected under other Articles of the Convention.⁴¹

There is thus no doubt that the creators' rights provided under Article 27(2) and Article 15(1)(c) are historically connected to the structures of authors' rights law. However, given their contested origins, the nature of this relationship remains relatively obscure. Most importantly, it is difficult to establish the scope and effect of creators' rights without understanding more about the relationship between those rights and other elements of Article 27 and Article 15(1), at least. The *travaux* give little guidance on this issue. Fortunately, however, further sources of interpretative assistance have subsequently become available. Two UN human rights bodies, the Committee on Economic, Social & Cultural Rights (CESCR) and the Human Rights Council have sought to clarify the nature and scope of creators' rights through the provision of interpretative guidance. In 2006, the CESCR issued "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".⁴² In 2014, the United Nations' Human Rights Council's Special Rapporteur in the field of cultural rights

³³ See, for example, Henning Grosse Ruse-Khan (n. 8) §8.07; Peter Yu (n. 24) 1050.

³⁴ Grosse Ruse-Khan (n. 8) 805; Peter Yu (n. 24) 1054; Roberta Rosenthal Kwall (n. 24) 134; See also, UN Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Copyright Policy & the Right to Science & Culture, par. 30, (24 Dec. 2014) UN Doc A/HRC/28/57.

³⁵ Johannes Morsink (n. 32) 221.

³⁶ Peter Yu (n. 24) 1039, 1081-1083.

³⁷ See Audrey Chapman (n. 32) 4, 10.

³⁸ Johannes Morsink (n. 32) 221.

³⁹ Maria Green (n. 32) 8.

⁴⁰ For discussion of the importance of balancing the various rights protected under art. 15(1), see Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: on Copyright & Human Rights* Wisconsin International Law Journal 637-662 (2010); Audrey Chapman (n. 32) 4, 13; Henning Grosse Ruse-Khan (n. 8) §8.10.

⁴¹ Ragnar Adalsteinsson & Páll Thórhallson (n. 32) 575-596, 580.

⁴² Committee on Economic, Social & 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, (12 Jan. 2006) UN Doc E/C12/GC/17 (General Comment 17).

issued her report on *Copyright Policy and the Right to Science and Culture*.⁴³ Together, these offer important guidance on the interpretation of creators' rights and have been described as an "emerging jurisprudence".⁴⁴ It is to these documents which we now turn.

[B] General Comment No 17 of the Committee on Economic, Social & Cultural Rights

By the 1990s, the negotiation of new international intellectual property agreements (TRIPS, in particular) had given rise to considerable disquiet in some quarters. It was argued that the ratcheting-up of intellectual property protection (including copyright) under such agreements threatened important public interests, including access to medicines and to education. It was in this climate of challenge to international norm-setting in intellectual property law that the CESCR decided that further clarification of the concept of creators' rights in international human rights law was required. A "preliminary contribution" was made in the Statement on *Human Rights & Intellectual Property* ("2001 Statement"), which aimed to identify key human rights principles deriving from Article 15(1)(c) of the ICESCR and, in particular, to distinguish those principles from those applicable in intellectual property law.⁴⁵ This statement notes that the realms of trade, finance and investment are not exempt from the requirements of international human rights law and calls upon bodies such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) to take appropriate account of the rights protected under the ICESCR.⁴⁶ It distinguishes emphatically between human rights (such as creators' rights), which are described as "fundamental as they derive from the human person as such", and intellectual property rights, which are instrumental policy tools.⁴⁷ It also stresses the importance of non-discrimination and the consequent need to pay particular attention to the most disadvantaged and marginalized individuals and groups in society, at national and international levels. In general terms, the 2001 Statement notes the need to maintain a balance between the two aspects of Article 15 of the ICESCR:

On the one hand, article 15.1 (a) and (b) recognizes the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. On the other hand, article 15.1 (c) recognizes the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. When adopting and reviewing intellectual property systems, States should bear in mind the need to strike a balance between those concurrent Covenant provisions.⁴⁸

⁴³ UN Doc A/HRC/28/57 (n. 33).

⁴⁴ Graeme W. Austin (n. 8) 405, 418.

⁴⁵ Committee on Economic, Social & Cultural Rights, *Human Rights & Intellectual Property: Statement by the Committee on Economic, Social & Cultural Rights*, (14 Dec. 2001) E/C.12/2001/15 (2001 Statement); For discussion, see Audrey Chapman (n. 28) 861.

⁴⁶ 2001 Statement, §3, 9; It also declares that all those affected by intellectual property regimes should be entitled to participate in decision-making process in an active and informed manner.

⁴⁷ *id.* §6.

⁴⁸ *id.*, §17.

Furthermore, it notes that state parties to the ICESCR were not only under a duty progressively to realize the right protected under Article 15(1)(c), but also came under certain obligations that had immediate effect under that provision, including “core obligations”.⁴⁹

The CESCR followed up the 2001 Statement with more detailed interpretative guidance on creators’ rights in “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” (General Comment 17).⁵⁰ This document, which has been referred to as a “key point of reference for analysis of the normative content of Article 15(1)(c)”,⁵¹ restates the general principles set out in the 2001 Statement. In particular, it reiterates the distinction between creators’ rights, which are inherent to human beings and intellectual property rights, which are instrumental policy tools.⁵² It also notes again that creators’ rights must be balanced against other important human rights and public interests.⁵³ Additionally, it provides further detail on the normative content of Article 15(1)(c), noting, for example, that creators’ rights are granted to natural persons (including groups of natural persons)⁵⁴ and that legal entities, while recognized as proprietors of rights in intellectual property law, are not covered by Article 15(1)(c).⁵⁵ Concerning the nature of the cultural productions covered by creators’ rights, General Comment 17 explains that “any scientific, literary or artistic production” is a broader category than the “literary and artistic works” protected under the Berne Convention⁵⁶ and encompasses “scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities” and “performances and oral traditions”.⁵⁷

By reference to Article 27(2) of the UDHR,⁵⁸ General Comment 17 identifies the “moral interests” of authors as a particularly important aspect of the creators’ rights established under Article 15(1)(c). It suggests that these interests are defined in a manner which aligns very closely with the moral rights guaranteed under the Berne Convention and include both a right

⁴⁹ *id.*, §11.

⁵⁰ General Comment 17; For discussion, see Hans M. Haugen, *General Comment No. 17 on “Author’s Rights”* 10(1) *Journal of World Intellectual Property* 53 (2007); Laurence R Helfer, *Toward a Human Rights Framework for IP* *University of California, Davis Law Rev* 971 (2007); Graeme W. Austin & Amy G. Zavidow, *Copyright Law Reform through a Human Rights Lens* at *Intellectual Property Law & Human Rights* 303-333 (Paul Torremans ed., , 3rd ed., Wolters Kluwer 2015).

⁵¹ Laurence R Helfer and Graeme W. Austin (n. 26) 172; Although it has been noted that the 2001 Statement and the General Comment are interpretative, rather than binding. See Laurence R. Helfer (n. 50) 988; Henning Grosse Ruse-Khan (n. 8) §8.12.

⁵² General Comment 17, §1.

⁵³ *id.* 35.

⁵⁴ General Comment 17, §8, 32; The rights of indigenous persons are a particular issue of concern for the Committee.

⁵⁵ *id.* 7, 8.

⁵⁶ See, Berne Convention for the Protection of Literary and Artistic Works (24 Jul. 1971), TRT/BERNE/002, art. 2.

⁵⁷ General Comment 17, §9.

⁵⁸ *id.* 12.

to attribution and an integrity right.⁵⁹ At the same time, it explains the concept of “material interests” in a manner which is not so obviously aligned with international copyright norms, stating that:

The term of protection of material interests under article 15, paragraph 1(c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production.⁶⁰

According to General Comment 17, state parties to the ICESCR are obliged to ensure that remedies for violation of creators’ moral and material interests are available, accessible and efficient.⁶¹ They must also make sure that access to such remedies is provided in a non-discriminatory manner and that particular attention is paid to the interests of disadvantaged and marginalised groups.⁶² Any limitations upon the rights of authors must pursue a legitimate aim and must be proportionate (in line with ICESCR, Article 4)⁶³ and may be accompanied by an obligation to provide compensation to authors.⁶⁴

In addition to this outline of the standards of protection required under Article 15(1)(c), General Comment 17 seeks to elaborate the nature of the obligations placed upon state parties to the ICESCR. As noted in the previous section of this chapter, in line with other economic, social and cultural rights protected under international human rights instruments, creators’ rights are subject to an obligation of progressive realization, an obligation which is sensitive to the resource constraints of individual states. Within this framework, states have duties to respect, protect and fulfill creators’ rights.⁶⁵ The duty to *respect* precludes states from infringing the moral interests of creators and from unjustifiably infringing their material interests.⁶⁶ The obligation to *protect* those interests encompasses a duty to safeguard creators against third parties, including a duty to ensure compensation for unlicensed use. The obligation to *fulfill* the requirements of Article 15(1)(c) requires states to maintain judicial, administrative or other appropriate remedies for creators, to facilitate the formation of professional and other associations representing the moral and material interests of authors and to promote the involvement of creators in decision-making on policies having an impact on their interests.⁶⁷ General Comment 17 also confirms that Article 15(1)(c) imposes certain immediately effective

⁵⁹ *id.* 13.

⁶⁰ *id.* 16; However, protection must be effective §10.

⁶¹ *id.* 18.

⁶² *id.* 19.

⁶³ *id.* 22-23. It has been noted that the proportionality standard applicable may be more exacting than the equivalent doctrine in international copyright law (the so-called “three-step test”). See, for example, Graeme W. Austin & Amy G. Zavidow (n. 50) 303-333, 320-321.

⁶⁴ General Comment 17, §24.

⁶⁵ For discussion in this context, see Lea Shaver & Caterina Sganga (n. 40) 637-662.

⁶⁶ *id.* 30.

⁶⁷ *id.* 34.

obligations, including a prohibition on measures that reduce the existing level of protection available to authors without particular justification⁶⁸ and a duty to satisfy certain current “core obligations”, which are set out in the following terms:⁶⁹

- (a) To take legislative and other necessary steps to ensure the effective protection of the moral and material interests of authors;
- (b) To protect the rights of authors to be recognized as the creators of their scientific, literary and 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;
- (c) To respect and protect the basic material interests of authors resulting from their scientific, literary or artistic productions, which are necessary to enable those authors to enjoy an adequate standard of living;
- (d) To ensure equal access, particularly for authors belonging to disadvantaged and marginalized groups, to administrative, judicial or other appropriate remedies enabling authors to seek and obtain redress in case their moral and material interests have been infringed;
- (e) To strike an adequate balance between the effective protection of the moral and material interests of authors and States parties’ obligations in relation to the rights to food, health and education, as well as the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right recognized in the Covenant.

It is noteworthy that, while the terminology employed to describe the core obligation to protect the *moral* interests of attribution and integrity is closely aligned with the text of Article 6*bis*, Berne Convention, the equivalent obligation to respect and protect the material interests of authors is more qualified, as it is limited to “basic” material interests, being those which are “necessary to enable those authors to enjoy an adequate standard of living”.

[C] Report of the Special Rapporteur in the Field of Cultural Rights, 2014

Following a 2009 Resolution, the United Nations’ Human Rights Council appointed Farida Shaheed, as “independent expert in the field of cultural rights”⁷⁰. In 2012, the title of “Special Rapporteur in the field of cultural rights” was conferred upon her and the period of her mandate was extended.⁷¹ In the course of this mandate, Shaheed produced ten linked reports on various aspects of the cultural rights protected under the international human rights *acquis*.⁷² In

⁶⁸ *id.* art. 27 (retrogressive measures).

⁶⁹ *id.* 39.

⁷⁰ United Nations, Human Rights Council, Resolution 10/23 (26 Mar. 2009).

⁷¹ The mandate was extended and Farida Shaheed served in the role until 2015, *see* <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/MandateInfo.aspx> (accessed 14 Jun. 2019).

⁷² For reflection on the mandate and reports, *see* Farid Shaheed, *The United Nations Cultural Rights Mandate: Reflections on the Significance and Challenges* at Negotiating Cultural Rights 21 (Lucky Belder & Helle Porsdam eds., Edward Elgar 2017); Farid Shaheed, *Introductory Remarks by the Special Rapporteur* at Intellectual Property

December 2014, she issued her “Copyright Policy and the Right to Science and Culture” report,⁷³ which was intended to provide further clarification of the relationship between authors’ rights and the creators’ rights protected under the UDHR and the ICESCR. The terminology employed in her report is significant. Shaheed describes the rights set out in Article 27 of the UDHR and Article 15(1) of the ICESCR collectively as the “right to science and culture.” This concept encompasses both aspects of those rights: on the one hand, the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications⁷⁴ and, on the other, the right of authors to the protection of the moral and material interests resulting from their scientific, literary or artistic productions.⁷⁵ The choice of terminology emphasizes the linked nature of the different elements of the “right to science and culture” and, in so doing distinguishes this right yet more clearly from the rights granted under intellectual property laws. The aspect of the right to science and culture which has been referred to above as “creators’ rights” (i.e., the rights protected under Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR) is described by Shaheed as the right to “protection of authorship”.⁷⁶

While building on the conclusions of General Comment 17,⁷⁷ the Special Rapporteur explores the relationship between creators’ rights and copyright in a much more detailed and discursive manner than the earlier document. Having explained the “dual aspects of cultural participation and protection of authorship”,⁷⁸ Shaheed emphasizes concerns about inequity and lack of transparency in the making of international copyright law and forcefully reiterates the distinction between creators’ rights and authors’ rights:

It is sometimes claimed that intellectual property rights are human rights, or that [Art 15(1)(c)] recognizes a human right to protection of intellectual property along the lines set out by the TRIPS Agreement and other intellectual property treaties. The Committee on Economic, Social and Cultural Rights has stressed that this equation is false and misleading. Some elements of intellectual property protection are indeed required — or at least strongly encouraged — by reference to the right to science and culture. Other elements of contemporary

& Access to Science 19-20 (Christophe Geiger ed., CEIPI/ICTSD 2016); Mylene Bidault, *Intellectual Property Policies & the Right to Science and Culture: the Work of the Special Rapporteur in Context* at Intellectual Property & Access to Science 21-29 (Christophe Geiger ed., CEIPI/ICTSD 2016); Lea Shaver, *Intellectual Property & the Right to Science and Culture: the Reports of the Special Rapporteur in the Field of Cultural Rights* at Intellectual Property & Access to Science 30-41 (Christophe Geiger ed., CEIPI/ICTSD 2016).

⁷³ A/HRC/28/57 (n. 33); The Special Rapporteur also produced a subsequent report on patent law and cultural rights, see UN Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Patent Policy & the Right to Science & Culture, (4 Aug. 2015) UN Doc A/HRC/70/279.

⁷⁴ See UDHR, art. 27(2); ICESCR, arts. 15(1)(a), (b).

⁷⁵ UDHR, art. 27(1); ICESCR, art. 15(1)(c); Shaver’s academic work influenced the Special Rapporteur’s choice of terminology (Lea Shaver, *The Right to Science & Culture* Wisconsin Law Review 121-84 (2010)); See Lea Shaver (n. 72) 30-41, 31.

⁷⁶ A/HRC/28/57 (n. 33) §26-29.

⁷⁷ *id.* 12.

⁷⁸ *id.* §9.

intellectual property laws go beyond what the right to protection of authorship requires, and may even be incompatible with the right to science and culture.⁷⁹

Again, it is emphasized that creators' rights exist for the benefit of human beings.⁸⁰ On this basis, it is suggested that creators' rights are aligned with the personality-based, "moral rights" philosophy of civil law states such as France and Germany.⁸¹ The "moral interests" protected under Article 27(2) of the UDHR and Article 15(1)(c) are explicitly identified with the rights required under Article 6*bis* of the Berne Convention.⁸² However, in keeping with the dual conception of the right to science and culture, such "moral interests" are also considered potentially to cover the interest in the creative re-use of others' works, such as in parody.⁸³

In the case of material interests, the Special Rapporteur identifies the problem of power relations in the relationship between human authors and the corporate bodies with whom authors enter into contractual arrangements.⁸⁴ She suggests that the introduction of author-protective rules, such as unwaivable "reversion rights", *droit de suite* and statutory licensing, where these do not already exist, might serve to address this problem.⁸⁵ She also emphasizes that the introduction of exceptions and limitations, coupled with a right to remuneration, might satisfy the dual aspects of the right to science and culture in a nuanced manner.⁸⁶ At the same time, it is made very clear that authors' material interests may be protected by means other than copyright; for example, through minimum wage protections, collective bargaining and the adoption of policies promoting the cultural sector and the right to science and culture.⁸⁷ By comparison with the lengthy term of protection required under national and international copyright laws, it is suggested that creators' material interests may be secured through relatively short-term measures.⁸⁸

Shaheed also states that copyright exceptions and limitations have the potential to play a particularly important role as valuable tools in securing the "cultural participation" aspect of the right to science and culture (supporting, for example, follow-on creativity, education,

⁷⁹ *id.* §26 (footnotes omitted). For an even more strongly-worded assertion of the distinction between the two rights, see Fiona Macmillan, *Copyright Policy and the Right to Science and Culture – Report 2014 (A/HRC/28/57)* at Negotiating Cultural Rights 181-198 (L Belder & H Porsdam eds., Edward Elgar 2017) 181-198.

⁸⁰ *id.* §27, 28; Again, the rights of indigenous persons are emphasised §55-59, 114-118.

⁸¹ *id.* §33. This is a tendency which had also been identified by others, see Francois Dessemontet *Copyright & Human Rights* at Jan J.C. Kabel & Gerard J.H.M. Mom, *Intellectual Property & Information Law: Essays in Honour of Hermann Cohen* 113 (Kluwer 1998) (the UDHR and the ICESCR said to "mark the apex of the French vision of literary and artistic property, as opposed to the Anglo-American 'mercantilist' view ensconced in TRIPS" at 114).

⁸² *id.* §35.

⁸³ *id.* §36-39.

⁸⁴ *id.* §40-43.

⁸⁵ *id.* §44-47; On the potential role that termination rights might play in supporting creators' rights, see also Graeme W. Austin (n. 8) 405.

⁸⁶ *id.* §48.

⁸⁷ *id.* §49.

⁸⁸ *id.* §50, drawing explicitly on General Comment 17 here (see General Comment 17, §16).

access to works for people with a disability and translation into non-dominant languages), while also providing authors with income through statutory compensation mechanisms.⁸⁹ Without being entirely prescriptive, she floats a number of potential developments that might serve the right to science and culture in this area – the introduction of flexible, fair use-type limitations⁹⁰ and mandatory limitations⁹¹ in national laws and the negotiation of further Marrakesh-like treaties relating to libraries, archives and education at international level.⁹² She also suggests that open licensing systems, and support for those systems by public bodies, have considerable potential to assist in satisfying state obligations under the right to science and culture.⁹³

Human rights often have important procedural aspects. The Special Rapporteur provides a number of examples of procedural initiatives which she considers to have the capacity to bring copyright law and the right to science and culture into closer alignment.⁹⁴ She also advocates more transparent, participatory copyright law-making processes, the application of human rights assessment processes to legislation and the adoption of human rights-compliant canons of legal interpretation.⁹⁵ Measures to combat infringement in a digital environment, such as criminal sanctions and website blocking, are not to be adopted where they would have a disproportionate impact on other human rights such as the right of freedom of expression.⁹⁶

§25.03 Universalism, Pluralism or Isolationism? – Author’s rights and creator’s rights

What does this examination of the meaning of creators’ rights within the human rights community tell us about the relationship between these rights and the law of authors’ rights, at international and national level? First, it seems abundantly clear that any argument that creators’ rights underpin and justify the copyright system as it stands currently is misconceived. Claims, by lobbyists, or others, that creators’ rights give rise to a straightforward “right to copyright”, are simply wrong.⁹⁷ Nevertheless, even though General Comment 17 and the Special Rapporteur go out of their way to highlight the fact that creators’ rights cannot be *equated* with authors’ rights, there is clearly an important link between the rights protected under the positive law of the copyright system and the rights protected under Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. This is apparent from the text of those provisions, from the historical records of their negotiation and from General Comment 17 and

⁸⁹ *id.* §71-72.

⁹⁰ *id.* §73.

⁹¹ *id.* §74.

⁹² *id.* §76.

⁹³ *id.* §77-84.

⁹⁴ *id.* §85-89.

⁹⁵ *id.* §90-97.

⁹⁶ *id.* §51.

⁹⁷ *id.* §26; Any such claim is “false and misleading”.

the report of the Special Rapporteur themselves.⁹⁸ However, the exact nature of this link remains uncertain.

In these circumstances, can it be said that any aspects of the legal system for the protection of authors' rights are *required* under international human rights law?⁹⁹ Conversely, is it possible to say that any features of the existing system are *inconsistent* with creators' rights, as conceived within the UN's human rights bodies?¹⁰⁰ In considering the first of these questions, the strongest claim can be made in relation to moral rights.¹⁰¹ It has been seen above that there is a clear linkage between the "moral interests" that must be protected as an element within creators' rights and the moral rights required under the Berne Convention and protected in the authors' rights laws of most jurisdictions. The desire to promote the broader adoption of positive moral rights protection was an instrumental factor at the time that the creators' rights provisions of the international human rights documents were negotiated. It has also been demonstrated that both General Comment 17 and Farida Shaheed's report connect the "moral interests" aspect of creators' rights closely with the rights of attribution and integrity required under the Berne Convention. Beyond this, however, the human rights documents do not provide clear guidance on the precise shape that national moral rights regimes should take. It is not clear, for example, whether the author-centric focus of creators' rights militates in favor of a more generous approach to moral rights than that adopted in many common law jurisdictions, requiring legal protection against unauthorized divulgence of a work or a broader concept of infringement under the integrity right.¹⁰² Nevertheless, in this area, it seems possible to discern the outline requirements of the obligation to protect creators' rights and it therefore seems reasonable to argue that creators' rights underpin the integrity and attribution rights in national copyright laws. Accordingly, it might be difficult for a state that provides no, or only weak, moral rights protection to argue that it has complied with its obligation to protect creators' rights under international human rights law.¹⁰³

⁹⁸ Shaver notes that the Report of the Special Rapporteur suggests a need to reform, rather than abandon, the current rules of copyright law (*see* Lea Shaver (n. 72) 30-41, 34).

⁹⁹ The Special Rapporteur suggests that some aspects of copyright protection are required, or at least strongly encouraged (*see* her report at §26). However, she does not specify *which* aspects these are. Restrictively interpreted, this statement may only refer to moral rights, but it is far from certain that it is so limited.

¹⁰⁰ There is disagreement as to the relative hierarchy of international norms, including international human rights norms (*see* Henning Grosse Ruse-Khan (n. 8) [8.93]-[8.94]); Consequently, human rights obligations may not, in any event, prevail over rules deriving from international copyright law.

¹⁰¹ *See* Roberta Rosenthal Kwall (n. 24); Michel Vivant, *Authors' Rights*, *Human Rights* 174 RIDA 60 (1997).

¹⁰² These possibilities are floated by Austin and Zavidow. *See* Graeme W. Austin & Amy G. Zavidow (n. 50) 303-333, 331.

¹⁰³ The United States has no comprehensive system of moral rights protection and the statutory moral rights provided for authors in the United Kingdom are undermined by serious limitations (including the possibility of waiver). The possibility that there might be an incompatibility in this respect between the international human rights law's requirement to protect creators' rights and a legal system such as that of the United States has been noted by commentators. *See*, for example Peter Yu (n. 24) 1039, 1082-83. Any conflict is hypothetical because, while the United States has signed the ICESCR, it has not ratified the Convention.

In the case of creators' *material* interests, the picture is nowhere near as clear. There is no obvious terminological link between the texts of Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR and the exclusive rights provided to creators in the international law of authors' rights. Furthermore, as noted above, both General Comment 17 and the report of the Special Rapporteur emphasize that states are entitled to protect creators' material interests by mechanisms other than exclusive rights. However, even here, it can be suggested that there is at least some form of link between the existing structures of positive authors' rights law and creators' rights. The detailed focus on the contours of substantive copyright law in the Special Rapporteur's report implicitly suggest that states may legitimately seek to secure the material interests of creators through an appropriately calibrated law of authors' rights, as long as that body of rules is applied in a non-discriminatory manner.¹⁰⁴ Indeed, it might even be suggested that it is assumed that this is the methodology that states will generally employ in protecting creators' rights. Nevertheless, there is little or nothing in the human rights materials that dictates the *scope* of authors' exclusive rights, as long as effective support for creators' material interests is provided.

It has plausibly been suggested that, in order to comply with their obligation to secure creators' rights, states must take a stricter approach to exceptions and limitations to those rights than is permissible under the so-called "three-step step" established in international copyright law.¹⁰⁵ However, the creators' rights protected in human rights law are much more narrowly drawn than the exclusive rights operating in copyright law and, accordingly, it is difficult to draw meaningful conclusions from the distinction between the two proportionality tests. Furthermore, the focus on access to culture in both General Comment 17 and the report of the Special Rapporteur suggest that the space for exceptions and limitations in copyright law ought to be expanded rather than restricted under the influence of creators' rights.

Having thus sketched what can be said with any certainty about the relationship between creators' rights and the *substantive* rules of authors' rights regimes, it is important to pause for a moment to consider *procedural* issues. General Comment 17 makes it clear that, whatever its form, the legal protection of the moral and material interests of creators must be effective.¹⁰⁶ It is also clear that such protection must be applied in a non-discriminatory manner¹⁰⁷ and that particular regard must be paid to the interests of disadvantaged persons.¹⁰⁸ It has been suggested that these requirements may support the prohibition on formal preconditions for protection that forms an important element of the current international system for the protection of authors' rights.¹⁰⁹ They may, at the same time, challenge the compatibility of certain other aspects of the current international (and national) structure of authors' rights law. From a

¹⁰⁴ For discussion of potential situations in which the application of such rules might apply in a discriminatory manner, see Laurence R. Helfer & Graeme W. Austin (n. 26) 199-211.

¹⁰⁵ See (n. 63).

¹⁰⁶ General Comment 17, §10, 18, 31, 32, 34.

¹⁰⁷ *id.* §19]- [21].

¹⁰⁸ *id.* §20, 34, 39, 46; A/HRC/28/57 (n. 33) §66. For a suggested example of a situation in which a copyright system may not adequately protect the rights of disadvantaged creators, see Graeme Austin (n. 8) 405, 423.

¹⁰⁹ See Laurence R. Helfer & Graeme W. Austin (n. 26) 206-210.

human rights perspective, the fact that the protection of a copyright work depends to some extent on the nationality of its author seems difficult to justify. For example, in the United Kingdom, an Iranian author may not be able to exercise her authorial rights in a manner that supports her moral and material interests, while an Australian author may be able to do so in comparable circumstances. It seems unlikely that the creators' rights of the Iranian author are adequately protected.¹¹⁰ Similarly, while international copyright law generally prohibits contracting states from discriminating against the nationals of other contracting parties, it does not prohibit discrimination against a state's own nationals. Again, it appears difficult to justify the potential consequences of this rule from a human rights perspective.¹¹¹

§25.05 Conclusion

This chapter has sought to examine the nature of the relationship between authors' rights, as established under international, regional and national copyright laws, and the creators' rights protected under international human rights law. In particular, it has considered whether the two regimes support one another and/or whether there are any aspects of the current copyright system which are difficult to reconcile with creators' rights. It has been demonstrated that, while there are clear connections between the two bodies of rules, their precise relationship has yet to be determined. For this reason, many of the copyright reform proposals advanced on the supposed foundation of creators' rights (including some of the Special Rapporteur's more detailed suggestions) are unconvincingly speculative. It is certainly possible to understand the general direction in which fuller recognition of creators' rights would be likely to lead copyright law. It would favor a human author-centric system of authors' rights that provides significant space for the public interest in access to culture and follow-on creativity. However, there are very few policy outcomes which can clearly be described as *dictated*, or *precluded*, by creators' rights. The substantive requirements of Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR are not yet sufficiently clearly defined to support such detailed claims. If creator's rights are to have a more fully integrated influence on the legal structures protecting authors' right in future, their content will need to be plotted in greater detail. Many states have constitutional rights that draw specifically on Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR. Jurisprudence on those provisions may shed interesting light on the potential application of the concept of creators' rights in specific situations.¹¹² In future, responses to

¹¹⁰ Cf. Jorgen Blomqvist (n. 30) 17.

¹¹¹ See Laurence R. Helfer & Graeme W. Austin (n. 26) 209-210; Jorgen Blomqvist (n. 31) 17.

¹¹² For a discussion of these provisions, see Christopher Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property* at Intellectual Property Law & Human Rights 115, 129-130 (Paul Torremans ed., 3rd ed, Wolters Kluwer, 2015); Christopher Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles* at Research Handbook on Human Rights & Intellectual Property 661, 674-675 (Christopher Geiger ed., Edward Elgar 2015); Adolf Dietz, *Constitutional and Quasi-Constitutional Clauses for the Justification of Authors' Rights (Copyright) – From Past to Future* at Exploring the Sources of Copyright – Proceedings of the ALAI Congress 2005 55 (AFPIDA 2007); ALAI Proceedings 2005. For particular examples of the operation of such provisions, see Martin Husovec, *Tank Man Hits the Constitutional Court*, <http://copyrightblog.kluweriplaw.com/2015/04/06/tank-man-hits-the-constitutional-court/> (accessed 14 Jun. 2019); Maximiliano Marzetti, *Community Right to Access Unpublished*

individual complaints under the Additional Protocol, may also serve to flesh out the scope and requirements of international human rights law in this area.

The gulf between creators' rights and authors' rights is not purely doctrinal, of course. There are important institutional impediments to the further integration of the two legal regimes. The response to the Special Rapporteur's report on "Copyright Policy and the Right to Science and Culture" was indicative.¹¹³ The critical stance adopted by Shaheed was welcomed by some.¹¹⁴ However, it was met with hostility by groups representing right-holders and by states that have historically dominated the policy-making arena in intellectual property law.¹¹⁵ The report itself appears to have had negligible impact on the institutions within which copyright policy is determined. It is difficult to escape the sense that authors' rights and creators' rights occupy distinct institutional spheres. Within human rights culture, although human rights scholars have written very little about Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR, it is understood that there is an inconsistency between the requirements of creators' rights and the positive law of authors' rights and that creators' rights ought to prevail. By contrast, within copyright culture, it is often assumed that international human rights law provides a "right to copyright".¹¹⁶ The leading texts on author's rights have next to nothing to say about creators' rights, even where such discussion might have been expected.¹¹⁷ If a more pluralist international copyright *acquis* is ever to be established, these two spheres will need to be drawn more closely together.

Work Trumps Moral Rights of Heir, Argentine Court Says, <https://www.ip-watch.org/2013/04/11/community-right-to-access-unpublished-works-trumps-moral-rights-of-heir-argentine-court-says/> (accessed 14 Jun. 2019).

¹¹³ For discussions of the response, see Mylene Bidault (n. 72) 21-29, 26-27; Lea Shaver (n. 72) 30-41, 40-41.

¹¹⁴ See, for example, Fiona Macmillan (n. 79) 181-198.

¹¹⁵ See, for example, Keith Harper, Statement of US Ambassador to the Human Rights Council, <https://geneva.usmission.gov/2015/03/11/human-rights-council-dialogue-with-special-rapporteurs-item-3/> (accessed 14 Jun. 2019). See also Monika Emert, "EU Copyright Review Divisive; French MEP Says UN Expert Lacks Balance", <https://www.ip-watch.org/2015/05/07/eu-copyright-review-divisive-french-mep-calls-un-expert-too-unbalanced/> (accessed 14 Jun. 2019); Mylene Bidault (n. 72) 26-27; Lea Shaver (n. 72) 40-41.

¹¹⁶ A more nuanced perspective has been provided by a specialist group of scholars with a particular interest in human rights and international law.

¹¹⁷ See, for example, Jane Ginsburg, "The Most Moral of Rights: the Right to be Recognized as the Author of One's Work", Columbia Public Law Research Paper No 14-517, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806316 (accessed 14 Jun. 2019).