

# **Collective Management of Copyrights and Human Rights in an Age of Technological Automation**

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## 1. INTRODUCTION

Public and private organizations and associations that collectively administer copyright and neighboring rights on behalf of creators and rights owners operate under a diverse array of contracts, laws, and regulations. At the center of this regulatory matrix are agreements that define the organizations' relationship with the individuals and corporations that are its members. These agreements address issues such as the criteria for membership and affiliation, the licensing, monitoring, and enforcement authority that the organizations possess, and the rules for allocating and distributing royalties. Moving outward from this contractual core are specialized laws that recognize the existence of collective management organizations (CMOs) and regulate their activities. Laws of general applicability form the outermost layer of regulation. These laws include copyright statutes, legislation regulating corporations and business associations, and, most famously, competition laws that prevent abuses of the dominant market positions that

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often follow from the concentration of licensing authority within a single entity or a very small number of entities.<sup>1</sup>

Given this complex regulatory environment of contracts and statutes, it may be surprising and perhaps unwelcome news to CMOs and their members that another body of law is relevant to the collective administration of copyright. Yet, for more than fifty years, treaties and customary international law have recognized certain moral and material interests of creators of intellectual property as human rights. Until recently, the conceptualization of these interests as internationally protected human rights was all but unexplored. Although both the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR or “the Covenant”) protect the moral and material interests of authors and inventors,<sup>2</sup> as well as the public’s right “to enjoy the arts and to share in scientific advancement and its benefits,”<sup>3</sup> these provisions provide only a skeletal outline of how to develop human rights-compliant rules and policies for governments to promote creativity and innovation. They also leave unanswered the critical question of how those rules and policies interface with existing intellectual property protection systems.

Since the early 2000s, commentators and scholars have highlighted the need to develop a distinctive human rights framework for intellectual property.<sup>4</sup> Over the last few decades, intellectual property protection standards have expanded dramatically, both in their subject matter and in the scope of the economic interests they protect. Nation states have also linked these rights to the world trading system, creating new opportunities for enforcement at the international and national levels. These twin developments have made

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<sup>1</sup> For a comprehensive discussion of these laws, regulations, and contracts, see D. Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations*. (Boston: Little Brown & Co., 1993), at 519-620. For a comparative perspective on the different types of laws and regulations affecting CMOs and their activities, see Q. Xu, *Collective Management of Music Copyright: A Comparative Analysis of China, the United States and Australia* (Abingdon/New York: Routledge, 2023), at 43-66.

<sup>2</sup> Universal Declaration of Human Rights, Art. 27(2); International Covenant on Economic, Social and Cultural Rights, Arts. 15(1)(c) & 15(1)(b).

<sup>3</sup> UDHR, *ibid.*, Art. 27(1).

<sup>4</sup> See, among others, L. Helfer, “Toward a Human Rights Framework for Intellectual Property” (2007), 40 *U.C. Davis Law Review* 971; C. Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2016); P.L.C. Torremans (ed), *Intellectual Property Law and Human Rights* (Wolters Kluwer, 4<sup>th</sup> edition, 2020).

intellectual property protection rules relevant to an expanding array of value-laden economic, social, and political issues, including public health, education, agriculture, privacy, and free expression.<sup>5</sup> Most recently, the longstanding proliferation and commodification of intellectual property rights has faced two new global challenges – the quest for sustainable development and the rise of artificial intelligence (AI) technologies. Although apparently unrelated, both of these phenomena called for human-centered reflections and reform proposals to modernize intellectual property rules to the benefit of the entire global community in a balanced manner.<sup>6</sup>

This chapter considers in depth one aspect of this emerging human rights framework - the relevance of the “creators’ rights”<sup>7</sup> provisions of the ICESCR to the collective administration of copyright in general and to the policies and practices of CMOs in particular. It also addresses in somewhat less detail other human rights treaty provisions and international court rulings that are relevant to collective rights management.

The chapter focuses primarily on interpretive documents issued by the Committee on Economic, Social and Cultural Rights (“the ICESCR Committee” or “the Committee”). The Committee is a supervisory body of eighteen human rights experts who monitor the implementation of the Covenant - a treaty that imposes legally binding obligations upon 171 states parties.<sup>8</sup> Because many of the Covenant’s provisions are

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<sup>5</sup> For further discussion of these trends, see L. Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2004), 22 *Netherlands Quarterly of Human Rights* 167, at 171-75; L. Helfer, “Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking” (2004), 29 *Yale International Law Journal* 1, at 26-45.

<sup>6</sup> See, *inter alia*, M.L. Montagnani, “(Digital) Circular Economy and IPRs: A Story of Challenges and Opportunities” (2023) *IIC*, 54(7), 1009-1012; A. Strowel, *Le droit d’auteur de ses origines à l’ère numérique et du Big Data - Regards posés* (Brussels: Larcier, 2021).

<sup>7</sup> To avoid confusion with terms such as *droit d’auteur*, this chapter uses the phrase “creators’ rights” to describe the legal entitlements that for authors and inventors recognized in international human rights law. As explained in greater detail below, these legal protections are not coterminous with those of copyright or *droit d’auteur*. For a general discussion of the distinctions between the latter two concepts, see A. Strowel, *Droit D’auteur et Copyright: Divergences et Convergences* (Paris: Librairie générale de droit et de jurisprudence, 1993) (comprehensively comparing *droit d’auteur* and copyright).

<sup>8</sup> United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, Signatories and States Parties, online: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4)>.

ambiguously worded, one of the Committee's principal functions is to provide guidance to member nations as to the treaty's meaning. This guidance takes the form of non-binding but persuasive recommendations that can serve as focal points for legal change at the national level. Formally, these recommendations are directed to governments and other state actors. But their scope - like that of the ICESCR itself - is not limited to public laws or regulations. They extend as well to individuals, groups, and business associations - including CMOs - whose actions implicate social, economic and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations.<sup>9</sup>

The ICESCR Committee's initial foray into the intellectual property arena began in the Fall of 2001, when it published an official Statement on Human Rights and Intellectual Property<sup>10</sup> that contained a preliminary analysis of the treaty's intellectual property provisions and their relationship to other economic and social rights. The Statement contemplated that the Committee would eventually publish more extensive "general comments" on Article 15, the provision of the Covenant most relevant to intellectual property issues.<sup>11</sup> The first of these general comments, an exegesis on Article

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<sup>9</sup> For a thoughtful and influential analysis of these issues, see A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1996), 422.

<sup>10</sup> Committee on Economic, Social and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Follow-up to the day of general discussion on Article 15.1(c), Monday, 26 November 2001" (14 December 2001), E/C.12/2001/15, [Statement on Human Rights and Intellectual Property], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F2001%2F15&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F2001%2F15&Lang=en)>.

<sup>11</sup> *Ibid.*, at para. 2. In addition to reviewing periodic reports by states on the measures they have taken to comply with the Covenant, the ICESCR Committee periodically issues "general comments" that infuse the treaty with greater clarity and meaning. Although these interpretative statements do not bind states parties, they create widely shared expectations as to the meaning of the treaty's text. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995). General comments specify states' commitments in far greater detail than the treaty itself, for example by identifying certain "core obligations" for states to provide "at the very least, minimum essential levels of each of the rights" in the treaty. See Committee on Economic, Social and Cultural Rights, "General Comment No. 3, The nature of States parties obligations (Art. 2, par. 1 of the Covenant)" (14 December 1990), E/1991/23 at para. 10 [General Comment No. 3], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2F](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2F)>

15(1)(c) - “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” - was published by the Committee in the Fall of 2005.<sup>12</sup> Two further documents followed, General Comments No. 21 and No. 25,<sup>13</sup> completing the Committee’s elaboration of the normative content and state party obligations stemming from all of the provisions in Article 15.<sup>14</sup>

These documents provide a partial outline of a human rights framework for intellectual property, one aspect of which we analyze in the remainder of this chapter. Most importantly, the documents demonstrate that such a framework is not restricted to protecting creators and innovators and the fruits of their intellectual endeavors. Rather, they give equal importance to protecting the rights of the public to benefit from the scientific and cultural progress that intellectual property products can engender. However, a challenging task for the ICESCR Committee - and for other advocates of a human rights framework for intellectual property - is how to strike an appropriate balance

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CESCR%2FGEC%2F4758&Lang=en> (where core obligations are distinguishable from “obligations of result”, which states may achieve by a variety of means over time).

<sup>12</sup> Committee on Economic, Social and Cultural Rights, “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) of the Covenant), General Comment No. 17 (21 November 2005), E/C-12/GC/1712 [hereinafter General Comment No.17], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F17&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F17&Lang=en)>. On 9 May 2008 and on 9 October 2018, the ICESCR Committee held a “Day of General Discussion” on Article 15. The inputs received and the resulting documentation of the meeting are available online: <<https://www.ohchr.org/en/events/days-general-discussion-dgd/2018/general-discussion-draft-general-comment-article-15-icescr>>.

<sup>13</sup> Committee on Economic, Social and Cultural Rights, “Right of everyone to take part in cultural life (Art. 15(1)(a) of the Covenant)” General Comment No.21 (21 December 2009), E/C.12/GC/21 [hereinafter General Comment No. 21], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F21&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F21&Lang=en)>; Committee on Economic, Social and Cultural Rights, “General comment No.25 (2020) on science and economics, social and cultural rights (Article 15(1)(b), (2), (3) and (4) of the Covenant (30 April 2020), E/C.12/GC/25 [hereinafter General Comment No. 25], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F25&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F25&Lang=en)>.

<sup>14</sup> For recent analyses, see, inter alia, A. Mazibrada, M. Plozza and S.P. Mann, “Innovating in uncharted terrain: on interpretation and normative legitimacy in the CESCR’s General Comment No. 25 on the right to science” (2023), 27 *The International Journal of Human Rights* (forthcoming); S.P. Mann, H. Porsdam and Y. Donders, “‘Sleeping Beauty’: The Right to Science as a Global Ethical Discourse” (2020), 42 *Human Rights Quarterly* 332.

between these two sets of rights - a balance that promotes compliance with the treaty obligations and the underlying values of human rights law and that provides a coherent interface with existing national and international intellectual property protection systems.

A few caveats are in order before analyzing how these issues play out in the context of CMOs. This chapter assumes that readers have at least a rudimentary understanding of copyright and neighboring rights laws and how creative works protected by such laws are collectively administered,<sup>15</sup> but it does not presume familiarity with international human rights law or its application to intellectual property issues. In addition, the chapter does not provide an exhaustive treatment of the many intersections between human rights and copyright,<sup>16</sup> but instead analyzes a selection of salient legal and policy issues relating to collective administration and leaves a more comprehensive treatment of other aspects of a human rights framework for intellectual property to future studies.

The remainder of the chapter proceeds as follows. Part 2 provides an overview of the ICESCR Committee's statement on human rights and intellectual property and of its General Comments. It highlights basic distinctions between the Committee's approach to protecting creators and the approach adopted in intellectual property treaties and national intellectual property laws, with the goal of making the Committee's analysis more accessible to intellectual property lawyers and legal scholars. Part 3 provides an overview of the key concepts in the Committee's analysis relevant to the collective administration

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<sup>15</sup> For a "basic definition" of the functions that collective management organizations perform, see M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), 165 at 17 (stating that the "owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and . . . collect remuneration, and distribute it among the owners of rights").

<sup>16</sup> Readers seeking additional analysis of these issues may wish to consult the following sources: P. Torremans, ed., *Intellectual Property and Human Rights* (The Hague: Kluwer Law International, Fourth ed, 2020); C. Geiger, ed., *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar 2016); L. Helfer & G. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011); P. Torremans, ed., *Copyright and Human Rights: Freedom of Expression - Intellectual Property - Privacy* (The Hague: Kluwer Law International, 2004), 181; J. Griffiths and U. Suthersanen, eds., *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005), 474.

of copyright and neighboring rights. It argues that a human rights framework for intellectual property supports many of the functions that CMOs already perform. Part 3 notes, however, that certain practices and policies of CMOs may be in tension with the analysis of the Covenant enunciated by the ICESCR Committee. Part 4 considers in greater depth three specific legal and policy issues with important human rights implications: whether membership in CMOs should be mandatory or voluntary, whether CMOs should promote national culture, and whether CMOs can rely on AI systems to enhance the efficiency of their activities in ways that enhance the human rights of creators. Part 5 briefly concludes.

## 2. INTRODUCING A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

If intellectual property lawyers were asked to list the freedoms and liberties that international human rights law protects, they would likely name widely recognized civil and political rights, such as the prohibitions of slavery, torture, and the crime of genocide, or perhaps due process rights and freedom of expression, association, or privacy. More internationally-minded responses might mention economic and social guarantees, including the right to health care, food, and education. These are also internationally protected human rights, although their precise scope - as well as their recognition by countries such as the United States - remains a subject of genuine debate.

Few observers, however, would list the rights of intellectual property creators as human rights. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of foundational principles than the UDHR includes in its catalogue of rights and freedoms a statement that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>17</sup> The UDHR’s drafting history makes clear that the protection of creators’ rights was no accident, even if the drafters’

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<sup>17</sup> UDHR, *supra* note \_\_, Art. 27(2).

precise intentions remain elusive.<sup>18</sup> Support for these rights also finds expression in nearly identical language in the ICESCR, an international agreement that makes the UDHR's economic and social guarantees binding as a matter of treaty law.<sup>19</sup>

The endorsement of creators' rights in these documents establishes broad areas of overlap between human rights law and intellectual property law. But these texts also suggest many important differences between the two fields: differences in philosophy, differences in regulatory objectives, and differences in the subject matter and scope of legal protection for the products of human creativity.

In part, these differences are themselves textually engendered. The thrust of multilateral intellectual property treaties such as the Berne, Rome, and Paris Conventions and the TRIPS Agreement is to establish minimum standards of protection for authors, inventors, and other owners of intellectual property products.<sup>20</sup> These treaties also recognize the public's interest in the distribution of and access to those products. However, they do so principally in the form of carefully constrained exceptions and limitations to authors' and inventors' exclusive rights. Two provisions of the TRIPS Agreement, which set out the treaty's "objectives" and "principles," indicate that the protection and enforcement of intellectual property rights should contribute to the "mutual advantage" of "producers and users of technological knowledge"<sup>21</sup> and should "promote the public interest in sectors of vital importance to [members'] socio-economic and technological development".<sup>22</sup> But these provisions are, at least at present, under-

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<sup>18</sup> J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), at 220-221.

<sup>19</sup> See M. Green, "Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights" (October 9, 2000), E/C.12/2000/15, online: <[https://digitallibrary.un.org/record/428872/files/E\\_C.12\\_2000\\_15-EN.pdf?ln=en](https://digitallibrary.un.org/record/428872/files/E_C.12_2000_15-EN.pdf?ln=en)>.

<sup>20</sup> Berne Convention for the Protection of Literary and Artistic Works [Berne Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [Rome Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement].

<sup>21</sup> TRIPS Agreement, Art. 7.

<sup>22</sup> *Ibid.* Art. 8.1.

enforced and have yet to affect the interpretation of TRIPS' substantive intellectual property provisions by WTO dispute settlement panels.<sup>23</sup>

In contrast to this approach, a human rights framework for intellectual property puts the public's interest front and center and on an equal footing with property rights in intangibles. The very same ICESCR article that protects the rights of creators also requires states to protect "the right of everyone" to "enjoy the benefits of scientific progress and its applications", and to take steps "necessary for the conservation, the development and the diffusion of science and culture."<sup>24</sup> This has acquired particular relevance during the recent COVID-19 pandemic, when this right was interpreted as an obligation by States "to guarantee all persons access to vaccines" and a "duty of international cooperation and assistance to ensure access to vaccines wherever needed".<sup>25</sup>

## 2.1 THE ICESCR COMMITTEE'S GENERAL COMMENT NO. 17

The Committee's General Comment on creators' rights reveals the difficulties of expanding the text of Article 15(1)(c) of the Covenant into a coherent framework for analyzing intellectual property from a human rights perspective. The draft is a lengthy, densely worded, and somewhat repetitive document of 57 paragraphs divided into six parts: (1) an introductory section that explains the basic's premises of the Committee's analysis; (2) a close textual reading of Article 15(1)(c)'s "normative content"; (3) a section outlining states parties' legal obligations, including general, specific, core, and

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<sup>23</sup> See P. Yu, "The Objectives and Principles of the Trips Agreement" (2009) *Houston Law Review* 46 at 1018; R. Howse, "The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times", (2000) 3 *Journal of World Intellectual Property* 493 at 502; R. Okediji, "Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement", (2003) 17 *Emory International Law Review* 819 at 914.

<sup>24</sup> ICESCR, *supra* note \_\_, Arts 15(1)(b) & 15(2). For a comprehensive analysis, see A. Chapman, "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and its Applications", (2009) 8 *Journal of Human Rights* 1.

<sup>25</sup> Committee on Economic, Social and Cultural Rights, "Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property" (12 March 2021), E/C.12/2021/1, at para. 3 [Statement on Affordable Vaccination Against COVID-19, International Cooperation and Intellectual Property], online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2F2021%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2F2021%2F1&Lang=en)>.

related obligations; (4) an analysis of actions or omissions that would violate the Article; (5) a section on how creators' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations.

This organizational structure may seem unfamiliar or even mystifying to intellectual property lawyers, in particular the distinction between "legal obligations" and "violations". But the methodology should be recognizable to foreign ministries, human rights scholars, and others familiar with social and economic rights, who have followed the Committee's efforts, in other general comments, to provide detailed and concrete interpretations of the ICESCR's many ambiguous clauses. The Committee has struggled to clarify the meaning of a treaty whose open-ended provisions are to be realized over time, taking into account the limited resources available to member states, particularly to developing countries.<sup>26</sup> To prevent these limiting principles from emptying the Covenant's economic, social and cultural rights of all meaning, the Committee has developed a "violations approach" that distinguishes "core obligations" - to which all states must give immediate effect - from other obligations that may be achieved progressively as additional resources become available.<sup>27</sup>

These core commitments include obligations to respect, to protect, and to fulfill the rights of authors. As the Committee explains:

The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to protect requires States to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfill requires States to adopt appropriate

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<sup>26</sup> The ICESCR requires states parties to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means". ICESCR, *supra* note \_\_, Art. 2(1). These provisions establish programmatic and flexible commitments that are to be achieved over time.

<sup>27</sup> General Comment No. 3, *supra* note \_\_ at para. 10. See also A. Chapman, "Conceptualizing the Right to Health: A Violations Approach" (1998), 65 *Tennessee Law Review* 389.

legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).<sup>28</sup>

These three core obligations, although framed in the distinctive language of human rights law, should, upon further reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar states from violating creators' material and moral interests themselves, most notably in the form of infringements by government agencies or officials;<sup>29</sup> they mandate "effective protection" of those interests by means of legislation recognizing creators' rights and specifying the modes for their protection, including protection of "works which are easily accessible or reproducible through modern communication and reproduction technologies";<sup>30</sup> and they require states to provide judicial and administrative remedies and other measures for creators to prevent unauthorized uses of their works (i.e. injunctions) and to recover compensation for such uses (i.e. damages), and, more broadly, to facilitate creators' participation in decisions that affect their moral and material interests.<sup>31</sup>

These obligations also overlap with certain provisions in intellectual property treaties, most notably the Berne Convention's reproduction right, the "making available" right in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the enforcement provisions in the TRIPS Agreement.<sup>32</sup> This commonality suggests that states can meet the requirements of Article 15(1)(c), at least in part, by ratifying international intellectual property agreements and by enacting national copyright and neighboring rights laws. The ICESCR's state reporting procedures strongly support this claim.<sup>33</sup> Since the early 1990s, states parties have regularly cited to such

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<sup>28</sup> General Comment, *supra* note \_\_ at para. 28; *see also ibid.* at paras. 44-46 (discussing actions and omissions that violate these three obligations).

<sup>29</sup> *Ibid.* at paras 30 and 44.

<sup>30</sup> *Ibid.* at paras. 31 and 45.

<sup>31</sup> *See ibid.* at paras. 34 and 46.

<sup>32</sup> Berne Convention, Art. 9; WIPO Copyright Treaty, Art. 8; WIPO Performances and Phonograms Treaty, Art.10; TRIPS Agreement, Arts. 41-51 & 61.

<sup>33</sup> ICESCR, *supra* note \_\_, Art. 16 (requiring states to submit periodic "reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized" in the Covenant).

treaties and laws to demonstrate their compliance with the creators' rights provisions in the Covenant.<sup>34</sup>

Notwithstanding the commonalities between these two legal regimes, the Committee's core obligations approach to creators' rights leaves many issues unresolved. Most notably, it does not define the content of "moral and material interests" which states are required to "respect, protect, and fulfill." Nor does it specify whether - and if so how - a human rights framework for creators' rights differs from the legal rules contained in intellectual property treaties and domestic legislation. The next section considers the Committee's treatment of these key definitional issues.

## 2.2 DEVELOPING A DISTINCTIVE HUMAN RIGHTS FRAMEWORK FOR CREATORS' RIGHTS

General Comment No. 17 gives detailed attention to the differences between creators' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the "scope of protection" of creators' rights in Article 15(1)(c) "does not necessarily coincide

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<sup>34</sup> See, e.g., Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic reports: Sri Lanka" (4 February 2016), E/C.12/LKA/5, at para. 224, online: <<https://undocs.org/Home/Mobile?FinalSymbol=E%2FC.12%2FLKA%2F5&Language=E&DeviceType=Desktop&LangRequested=False>> (citing the ratification of the Berne Convention and the TRIPS Agreement to demonstrate compliance with Article 15 of the Covenant); Committee on Economic, Social and Cultural Rights, "Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial reports: Pakistan" (4 February 2016), E/C.12/PAK/1, at para. 334, online: <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPAK%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPAK%2F1&Lang=en)> (citing the ratification of the Berne Convention, the Universal Copyright Convention, and the TRIPS Agreement to demonstrate compliance with Article 15 of the Covenant); Committee on Economic, Social and Cultural Rights, "Considerations of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial reports: Bangladesh" (4 August 2017), E/C.12/BGC/1, at para. 347, online: <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=E%2FC.12%2FBGD%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=E%2FC.12%2FBGD%2F1&Lang=en)> (citing the ratification of the Berne Convention and the TRIPS Agreement to demonstrate compliance with Article 15 of the Covenant).

with what is termed intellectual property rights under national legislation or international agreements”.<sup>35</sup> But what, precisely, are these differences in scope?

The Committee first compares foundational principles. It notes that “[...] human rights are fundamental as they are inherent in the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity for the benefit of society as a whole”.<sup>36</sup> Since intellectual property rights are granted by the state, they may also be taken away by the state. They are temporary, not permanent; they may be “revoked, licensed or assigned”;<sup>37</sup> and they may be “traded, amended or even forfeited”,<sup>38</sup> commensurate with the regulation of a “social product [that] has a social function”.<sup>39</sup> By contrast, human rights are enduring, “fundamental, inalienable and universal entitlements”.<sup>40</sup> These statements reflect a vision of creators’ rights that exist independently of the vagaries of state approval, recognition or regulation.

Turning to specifics, the Committee identifies several distinctive features of creators’ rights. For example, Article 15(1)(c) applies only to “individuals, and under certain circumstances groups of individuals and communities”.<sup>41</sup> Corporations and other legal entities are expressly excluded.<sup>42</sup> This represents a profound departure from Anglo-

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<sup>35</sup> General Comment, *supra* note \_\_ at para. 2; *see also ibid.* at para. 3 (“It is . . . important not to equate intellectual property rights with the human right recognized in Article 15, paragraph 1(c)”).

<sup>36</sup> *Ibid.* at para. 1.

<sup>37</sup> *Ibid.* at para. 2.

<sup>38</sup> *Ibid.*

<sup>39</sup> Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 4. This formulation is echoed in the Committee’s Statement on Affordable Vaccination Against COVID-19, International Cooperation and Intellectual Property, *supra* note -- at para. 7 (“The Committee recalls that intellectual property rights are not a human right, but a social product, having a social function”) and in General Comment No. 25 at para. 62 (“The Committee reiterates that ultimately, intellectual property is a social product and has a social function”).

<sup>40</sup> Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 6.

<sup>41</sup> General Comment, *supra* note \_\_ at para. 1.

<sup>42</sup> *See ibid.* at para. 7 (stating that the drafters of ICESCR Article 15 “considered authors of scientific, literary or artistic productions to be natural persons”); Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 6 (contrasting human rights approach authors’ rights with that of intellectual property regimes which “are increasingly focused on protecting business and corporate interests and investments”).

American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products, for example of works made for hire.<sup>43</sup>

Moreover, the legal protections provided to natural persons have a distinctive human rights flavor. Consider the issue of equality. A cornerstone of intellectual property treaties is the “national treatment” of foreign authors.<sup>44</sup> A human rights approach also encompasses the principle of equality between domestic and foreign creators. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for “vulnerable or marginalized groups”.<sup>45</sup> Equality also has a process dimension, which requires states to provide creators with information “on the structure and functioning of . . . legal or policy regime[s]”, and to facilitate their participation in “any significant decision-making processes with an impact on their rights and legitimate interests”, either directly or through “professional associations”.<sup>46</sup>

These comparisons between human rights law and intellectual property law have some surprising consequences. If the moral and material interests of creators are fundamental, then the ability of governments to regulate them - either to protect other human rights or to achieve other social objectives - ought to be exceedingly narrow. Indeed, the Committee has developed a stringent test for assessing the legality of state

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<sup>43</sup> 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright”).

<sup>44</sup> See, e.g., S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987), 981 at 17-38; D. Vaver, “The National Treatment Requirements of the Berne and Universal Copyright Conventions” (1986), 17 *International Review of Industrial Property and Copyright Law* 577.

<sup>45</sup> General Comment, *supra* note \_\_ at para. 39; see also Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 7 (stating that “human rights instruments place great emphasis on protection against discrimination”, and that the rights guaranteed in the Covenant “must 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”).

<sup>46</sup> General Comment, *supra* note \_\_ at paras. 18 and 14.

limitations of social and economic rights,<sup>47</sup> a standard that it reaffirms in the General Comment on Article 15(1)(c).

According to this test, governmental restrictions on creators' rights must be "[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, and [4] and must be strictly necessary for the promotion of the general welfare in a democratic society".<sup>48</sup> In addition, such limitations must "be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed."<sup>49</sup> This highly restrictive, multipart standard is far more constraining than the now ubiquitous "three-step test" used to assess the treaty-compatibility of exceptions and limitations in national copyright laws.<sup>50</sup>

Yet if restrictions on creators' rights are to be so rigidly scrutinized (and, presumably, so rarely upheld), how, then, are governments to strike a balance between those rights on the one hand and the public's interest in access to knowledge on the other - a balance that the Committee views as a key feature of Article 15(1)(c) and that it emphasizes throughout the draft?<sup>51</sup> A close parsing of the text suggests a blueprint from which the Committee may ultimately construct a distinctive human rights framework for intellectual property.

The key to understanding this framework is to identify the purposes of recognizing authors' moral and material interests *as* human rights.<sup>52</sup> According to the

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<sup>47</sup> See Committee on Economic, Social and Cultural Rights, "General Comment No. 14 - The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)" (8 2000), E/C.12/2000/4, at para. 28, online: <[www.unhchr.ch/tbs/doc.Nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.Nsf/(symbol)/E.C.12.2000.4.En?OpenDocument)> (discussing government's burden to demonstrate legality of limitations on the right to health).

<sup>48</sup> General Comment, *supra* note \_\_ at para. 22 (bracketed numbers added).

<sup>49</sup> *Ibid.* at para. 23 (bracketed numbers added).

<sup>50</sup> See J. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (2001), 187 *Revue Internationale du Droit d'Auteur* 3; M. Ficsor, "How Much of What?: The 'Three-Step Test' and Its Application in Two Recent WTO Dispute Settlement Cases" (2002), 192 *Revue Internationale du Droit d'Auteur* 110.

<sup>51</sup> See General Comment, *supra* note \_\_ at paras 22, 35, and 39.

<sup>52</sup> This interpretation is consistent in subsequent interpretations by the Committee. See General Comment No. 21 at para 2 ("The right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15 (...) [including] the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author"); General Comment No. 25 at para. 12 ("The

Committee, such rights serve two essential functions. First, they “safeguard the personal link between authors and their creations and between people or other groups and their collective cultural heritage”.<sup>53</sup> And second, they protect “basic material interests which are necessary to enable authors to enjoy an adequate standard of living”.<sup>54</sup>

These two statements, which recur throughout the document,<sup>55</sup> suggest the existence of an irreducible core of rights - a zone of personal autonomy in which creators can achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential requisites of any free society.<sup>56</sup> Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But they are not required under Article 15 of the Covenant and, as a result, are not subject to the restrictive exceptions and limitations test quoted above. Stated differently, once a country guarantees creators these two core rights - one moral, the other material - any additional intellectual property protections the country provides “must be balanced with the other rights recognized in the Covenant,” and must give “due consideration” to “the public interest in enjoying broad access to ‘authors’ productions”.<sup>57</sup> The ICESCR thus gives each state discretion to eschew these additional

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Committee (...) stressed the difference between this human right [of protection of the moral and material interests of authors], which protects creators of scientific discoveries, and ‘most legal entitlements recognized in intellectual property systems’”).

<sup>53</sup> General Comment, *supra* note \_\_ at para. 2. This “personal link” is protected by legislation that enables authors “to claim authorship for their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their works, which would be prejudicial to their honour or reputation.” *Ibid.* at para. 41(b). The Committee’s language closely tracks the moral rights provisions in Article 6*bis* of the Berne Convention and in many national laws.

<sup>54</sup> *Ibid.* at para. 2.

<sup>55</sup> The Committee repeats variants of the “personal link” language a total of six times, and it reasserts the “adequate standard of living” formulation no less than nine times -- repetitions that suggest the importance of these concepts to its analysis.

<sup>56</sup> Cf. Torremans, *supra* note \_\_ at 5 (drafters of UDHR believed that the best way to avoid recurrence of abuses of science, technology, and copyrighted propaganda that occurred during Second World War would be “to recognize that everyone had a share in the benefits and that . . . those who made valuable contributions were entitled to protection”).

<sup>57</sup> General Comment, *supra* note \_\_ at paras. 22 and 35. See also *ibid.* at para. 11 (stating that nothing in Article 15(1)(c) prevents states parties from “adopting higher protection standards” in intellectual property treaties or national laws, “provided that these standards do not disproportionately impede the enjoyment by others of their Covenant rights”).

legal protections altogether or, alternatively, to shape them to take account of the particular economic, social, and cultural conditions within its borders.<sup>58</sup>

Seen from this perspective, creators' rights are both more and less expansive than copyright and neighboring rights regimes. They are more expansive in that rights within the core zone of autonomy are subject to a far more stringent test for restrictions than the test applicable to exceptions and limitations in copyright and neighboring rights treaties and national laws. They are less expansive, however, in that a state need not recognize additional creators' rights lying outside of this zone or, if it does recognize such rights, must give appropriate weight to other human rights, to the public's interest, and to other policy objectives - calibrations that may permissibly vary from one country to another.

### 3. HUMAN RIGHTS AND THE COLLECTIVE ADMINISTRATION OF COPYRIGHT: A PRELIMINARY ASSESSMENT

Where does the collective administration of copyright and neighboring rights fit within this legal paradigm? Although the General Comment No. 17 references issues of collective administration only sparingly, the Committee's detailed analysis of Article 15(1)(c) suggests a number of ways in which CMOs can help to enhance creators' rights. However, that analysis also reveals certain collective management practices that are in tension with the Covenant's intellectual property provisions. The discussion below provides an overview of these competing perspectives.

The only express mention of CMOs in the General Comment appears in the discussion of how to protect creators against infringement by third parties. This is hardly surprising, inasmuch as the obligation "to protect" is the legal hook that the ICESCR Committee has used to require governments to regulate the activities of non-state and private actors (in contrast to other Covenant provisions that impose obligations on state

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<sup>58</sup> See *ibid.* at para. 18 (stating that "the precise application" of authors' and inventors' moral and material interests "will depend on the economic, social and cultural conditions prevailing in a particular State party").

actors alone).<sup>59</sup> One method for states to provide such protection is “by establishing systems of collective administration of authors’ rights”.<sup>60</sup> Collective administration is particularly appropriate, in the Committee’s view, where works are “easily accessible or reproducible through modern communication and reproduction technologies.”<sup>61</sup> A second, more oblique reference to CMOs appears in the discussion of the obligation “to fulfill”, which requires governments “to promote the realization” of Article 15(1)(c).<sup>62</sup> These conditions include funding and other affirmative measures to facilitate “the formation of professional associations”, and “to ensure the active and informed participation” of authors in those associations to protect their moral and material interests.<sup>63</sup>

### 3.1 CMO ACTIVITIES THAT ENHANCE THE HUMAN RIGHTS OF CREATORS AND USERS

Although the references to collective administration in the General Comment No. 17 are sparse, the document’s overall analysis supports many of the activities that CMOs perform. In fact, where prevailing modes of exploiting protected works make it difficult or impossible for authors to control their creations on an individualized basis, CMOs are likely to be essential features of human rights-compliant, 21<sup>st</sup> century copyright systems.

Distilled to their essence, CMOs enable copyright owners to enforce their rights where the transaction costs of negotiating individual licenses and pursuing individual enforcement preclude mutually beneficial transactions with users.<sup>64</sup> In particular, CMOs

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<sup>59</sup> *Ibid.* at para. 31; *see also* General Comment No. 14, *supra* note \_\_ at paras. 33, 35 (discussing states’ affirmative obligation “to protect” against infringements of the right to health by third parties).

<sup>60</sup> *Ibid.* at para. 31.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* at para. 46.

<sup>63</sup> *Ibid.* at paras. 34 and 46.

<sup>64</sup> *See* L. Helfer, “World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act” (2000), 80 *Boston University Law Review* 93 at 110 (“These [transaction] costs include identifying numerous potential licensees in disparate locations, negotiating with them over payment terms, monitoring compliance with each licensing agreement and taking legal action to prevent infringements.”).

perform four functions that the Committee identifies as necessary for the “effective protection” of creators’ rights: (1) they prevent infringement by third parties, (2) they collect and distribute compensation for uses of protected works authorized by copyright owners,<sup>65</sup> (3) they make it possible for copyright owners to retain exclusive control over their creative output in situations in which user groups are likely to pressure legislators to convert such control into the lesser right to receive remuneration from compulsory licenses,<sup>66</sup> and (4) they administer the collection and distribution of remuneration under statutory and mandatory collective rights management systems.

In addition to these core functions, CMOs also carry out a variety of ancillary activities that provide human rights benefits. These include representing the interests of creators before legislatures and administrative agencies, providing social services such as health benefits and pensions for authors, and promoting creativity through awards, prizes, and fellowships.<sup>67</sup> By engaging in these additional functions, CMOs not only assist states in complying with Article 15(1)(c), they also help them to satisfy the obligations of other U.N. treaties<sup>68</sup> as well as the Marrakesh Treaty to Facilitate Access to Published Works

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<sup>65</sup> See General Comment, *supra* note \_\_ at paras. 31 and 45; see also Helfer, *ibid.* at 110 (stating that CMOs “reduce transaction costs in several significant ways. They provide a clearinghouse for users seeking licenses, they collect and distribute revenues to the songwriters, composers and publishers who are their members, they monitor the activities of licensees and they take enforcement action where necessary to vindicate their members’ rights”).

<sup>66</sup> See Ficsor, *supra* note \_\_ at 17 (arguing against pressures to abolish exclusive rights and convert them to a “mere right to remuneration” and proposing collective management of rights as an alternative). See also S. Nérison, *La Gestion Collective des Droits des Auteurs en France et en Allemagne: quelle légitimité?* (Paris: IRJS Editions, 2013) at 629 and 734 (pointing out that CMOs should not be subject to an obligation to license, as this would undermine the core justification of the collective management model, i.e. the ultimate enhancement of the copyright holder’s bargaining power).

<sup>67</sup> See, e.g., Ficsor, *supra* note \_\_ at 149-50; Sinacore-Guinn, *supra* note \_\_ at 211-12.

<sup>68</sup> The U.N. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, entered into force 18 March 2007, recommends that states parties adopt measures to encourage the “creation, production, dissemination, distribution and enjoyment of . . . domestic cultural activities, goods and services” and those “aimed at nurturing and supporting artists and others involved in the creation of cultural expressions.” Arts. 6(2)(b) & 6(2)(g). The Convention also encourages states parties “to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate and have access to their own cultural expressions [and] to have access to diverse cultural expressions from within their territory as well as from other countries of the world.” Arts. 7(1)(a) & 7(1)(b). CMOs could serve as vehicles for helping states to achieve these objectives.

for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.<sup>69</sup> It is not surprising, therefore, that several states parties to the ICESCR have referred favorably to legislation establishing collective management systems in their reports to the Committee.<sup>70</sup>

Collective management of copyright also enhances the rights of user groups under Article 15 of the Covenant, although the benefits are more equivocal than those accruing to creators.<sup>71</sup> Blanket licenses, the mainstay of so many CMOs, authorize the unlimited use of all works within the organization's repertoire for a specific period of time. Such licenses avoid the time and expense of individually negotiating specific uses for specific works. For users who require immediate access to a broad array of creative consent, blanket licenses also promote spontaneity in exploiting protected works.<sup>72</sup> For

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<sup>69</sup> WIPO Doc. VIP/DC/8, adopted on 27 June 2013, entered into force on 30 September 2016 (Marrakesh Treaty). The Marrakesh Treaty requires ratifying states to introduce specific mechanisms in their respective national copyright laws to facilitate the availability and accessibility of literary and artistic works for persons with visual disabilities. See Laurence R. Helfer, Molly K. Land, Ruth L. Okediji and Jerome H. Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford: Oxford University Press, 2017) In addition, the Marrakesh Treaty allows each ratifying state to decide whether these mechanisms are subject to remuneration (Art. 4.5). In countries that require remuneration, CMOs may negotiate blanket or collective licenses that facilitate the conversion of copyrighted works into the accessible formats and their availability of such works to those with visual disabilities. See, e.g., German Copyright Act (Copyright Act of 9 September 1965, Federal Law Gazette I, p. 1273, last amended in 2021), which states in Section 45c(4) that remuneration claims stemming from uses by authorized entities may only be asserted by a collecting society.

<sup>70</sup> See, e.g., Committee on Economic, Social and Cultural Rights, "Initial Reports: Niger, Implementation of the International Covenant on Economic, Social and Cultural Rights" (18 July 2017), E/C.12/NER/1, at paras. 333-4, online: <<https://daccess-ods.un.org/tmp/5458074.80812073.html>> (reporting about the creation of the Niger Copyright Office and its affiliation with the International Confederation of Societies of Authors and Composers as a means to effectively protect the rights of authors and the integrity of their creations); Committee on Economic, Social and Cultural Rights, "Sixth periodic report under articles 16 and 17 of the Covenant: Denmark" (15 November 2018), E/C.12/DNK/6, at para. 220, online: <<https://daccess-ods.un.org/tmp/6145348.54888916.html>> (illustrating the compliance with Article 15 of the Covenant by mentioning copyright collective licenses among the measures carried out at national level).

<sup>71</sup> See generally G. Davies, "The Public Interest in the Collective Administration of Rights" (March, 1989), *Copyright* 81 at 84-87.

<sup>72</sup> See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1 at 20 (United States Supreme Court), online: <[caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=441&invol=1](https://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=441&invol=1)> (last visited: 1 August 2023) ("Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a

those with more particularized needs, however, the benefits of blanket licenses are less clear, since the “all or nothing” bargains they embody compel consumers to purchase more works at higher prices than they would otherwise be willing to pay.<sup>73</sup> Whether the aggregate benefits to users outweigh the costs depends in part on the extent to which governments regulate CMO licensing practices, a subject addressed in greater detail below.

### 3.2 CMO ACTIVITIES THAT DETRACT FROM THE HUMAN RIGHTS OF CREATORS AND USERS

Some form of collective management of creators’ rights is essential to ensure compliance with Article 15(1)(c) where the transaction costs of individual licenses are high. Not all of the functions that CMOs perform are human rights enhancing, however. To the contrary, the monopoly position that CMOs enjoy - both in relation to users and, in some cases, in their dealings with the creators who are their members - generate incentives for the organizations to behave in ways that limit the human rights of both groups. These incentives highlight the need for governments to regulate (1) the licenses that CMOs offer to users, (2) the relationships between CMOs and their members, and (3) the relationships among the members themselves.<sup>74</sup>

As to the first issue, governments in nearly all countries in which CMOs operate exercise some form of regulatory control over licensing practices to prevent abuse of

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reliable method of collecting for the use of their copyrights.”). This need for immediate access is one reason why blanket licenses are the norm for public performance rights for musical works. *See* Ficsor, *supra* note \_\_ at 37-48 and Sinacore-Guinn, *supra* note \_\_ at 747-68.

<sup>73</sup> *See* A. Katz, “The Potential Demise of Another Natural Monopoly: New Technologies and the Future of Collective Administration of Copyrights” (May 2004), *U Toronto Law and Economics Research Paper No. 04-02*, online: <<http://ssrn.com/abstract=547802>> or <<http://law.bepress.com/cgi/viewcontent.cgi?article=1034&context=alea>>; Stanley M. Besen, S. Kirkby and S. Salop, “An Economic Analysis of Copyright Collectives” (1992), 78 *Virginia Law Review* 383 at 393.

<sup>74</sup> *See* Sinacore-Guinn, *supra* note \_\_ at 237 (“The disadvantages of private [CMOs] fall into two general categories: problems in relationship to the organization’s activities on the creator’s behalf and problems related to the relationship between the organization and the creator.”). *See also* Nérissou, *supra* note \_\_ at 717 (highlighting the rigidity that often characterize national rules on the constitution, modification, and monitoring of the practices of CMOs).

their dominant positions. The source, extent and enforcement of these regulations vary widely, however. In some countries, copyright laws limit CMO activities. In others, administrative agencies, tribunals, or other specialized regulatory bodies monitor CMO activities and adjudicate complaints by licensees. And in still other nations, users seek relief from the courts by filing competition or antitrust claims against CMOs, leading to judicial monitoring of licensing practices in the form of detailed consent decrees.<sup>75</sup>

How do human rights principles inform government regulation of CMO abuses? As explained above, a human rights framework for intellectual property requires a balance between the rights of creators and the rights of the public. In striking this balance, “the private interests of authors and inventors should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration”.<sup>76</sup> Regulation of licensing practices is one way to avoid such undue advantage. According to the ICESCR Committee, states must prevent private parties from imposing “unreasonably high” license fees or royalties that interfere with other rights in the Covenant, including the right to education and to culture.<sup>77</sup>

The consequences of this statement for government regulation of CMOs are uncertain, however. The Committee provides no guidance for determining when royalties are unreasonably high. And the examples that it identifies as potentially problematic - high costs of access to essential medicines, plant seeds, schoolbooks, and other learning materials<sup>78</sup> - do not include the works of entertainment or popular culture that are often subject to collective management. Nevertheless, the Committee’s reference to the price that users pay to access copyrighted works as part of the overall balance of creators’

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<sup>75</sup> See Ficsor, *supra* note \_\_ at 142-44; Helfer, *supra* note \_\_, at 110-11 & n.64; see also S. Helm, “Intellectual Property in Transition Economies: Assessing the Latvian Experience” (2003), 14 *Fordham Intellectual Property Media & Entertainment Law Journal* 119 at 200-01 (discussing supervisory functions performed by Ministry of Culture in relation to Latvian copyright collectives).

<sup>76</sup> General Comment, *supra* note \_\_ at para. 35; see also Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 17 (similar quotation). With specific regard to science, see also General Comment No. 25, *supra* note \_\_ at para 62 (“A balance much be reached between intellectual property and the open access and sharing of scientific knowledge and its applications, especially those linked to the realization of other economic, social and cultural rights, such as the rights to health, education and food.”).

<sup>77</sup> General Comment, *supra* note \_\_ at para. 35.

<sup>78</sup> *Ibid.*

rights, suggests that states must provide some form of meaningful regulation of CMO licensing practices to comply with their obligations under the Covenant.

The second and third areas of human rights scrutiny concern the relationship between CMOs and their members, and among their members *inter se*. Two provisions of the General Comment are relevant to these issues: the restriction of creators' rights to natural persons, and the more capacious equality norms that the ICESCR endorses.

The exclusion of corporations and other business entities from the rights protected in Article 15(1)(c) suggests that states parties must give special solicitude to individual creators who are compelled, either by law or as a practical matter, to enforce their rights through collective management systems.<sup>79</sup> Government supervision to ensure equal treatment for individual creators encompasses a broad range of issues, including the terms of CMO membership, transfers of rights from individuals to the collective, the distribution of royalties, and participation by copyright owners in CMO decisions that affect their interests.<sup>80</sup> Efforts by record labels and movie studios to appropriate all or nearly all revenue from digital streaming, on-demand services and other online activities, as well as the diminution of royalties resulting from divergent regulation of CMOs and the corporate owners of sound recordings, are also areas of increasing concern and targeted legislative intervention.<sup>81</sup>

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<sup>79</sup> This is particularly true for CMOs organized in a form other than an authors' association, in which creators may exercise somewhat greater control. *See* Sinacore-Guinn, *supra* note \_\_ at 235-36 (discussing distinction between "membership organizations" and "corporate non-membership organizations").

<sup>80</sup> *See* Ficsor, *supra* note \_\_ at 21, 132 and 143. Where a CRO is a public entity -- as is often true in developing countries -- the government is required to address these issues as part of its obligation "to respect" the rights of creators. *See* General Comment, *supra* note \_\_ at paras. 30 and 44.

<sup>81</sup> *See, e.g.*, D. Gervais, K. Marcus & L. Kilgore, "The Rise of 360 Deals in the Music Industry" (Mar./Apr. 2011) *Landslide* Vol. 3 No. 4 (describing 360 Deals as a way for record labels to "transfer income from artists to the labels—hardly a sustainable future for those trying to make a living as performers"); Ben Sisario, "Music Industry Pushes Unified Message on Compensation" (1 Apr. 2014) *N.Y. Times* at B4 (explaining how federal court oversight of music publishers via CMO consent decrees results in a 13-to-1 ratio of royalties that digital streaming services pay to music publishers as compared to record labels); E. Priest, "The Future of Music Copyright Collectives in the Digital Streaming Age" (2021) 45 *Colum. J. L. & Arts* at 11-14 (reviewing the Music Modernization Act of 2021, adopted by the U.S. to regulate more stringently the licensing of digital streaming of music content, and to ensure fair distribution of revenue from

Corporate and equality issues also arise in another area of CMO governance - the relationship between individual creators and business owners who belong to the same organization. Several scholars have noted the growing conflicts between these two classes of rights holders from the agglomeration of intellectual property-related businesses and the concomitant expansion of corporate influence over CMO decision making.<sup>82</sup> Although principles of “equity” and “solidarity” among rightsholders are enshrined in many CMO charters, the recent erosion of these principles highlights the potential of the Covenant’s broader nondiscrimination rules to bolster equality for individual creators in their relations with corporate rights owners.<sup>83</sup>

#### 4. THREE HUMAN RIGHTS CONCERNS OF COLLECTIVE ADMINISTRATION: MANDATORY MEMBERSHIP, PROMOTING NATIONAL CULTURE AND USE OF ARTIFICIAL INTELLIGENCE SYSTEMS

The preceding section provided a thumbnail sketch of a human rights framework for the collective administration of copyright and neighboring rights, emphasizing both the benefits and the detriments of CMOs for achieving the balanced protection of creators’ rights pursuant to the framework adopted by the ICESCR Committee. This section provides a more detailed analysis of three legal and policy questions with important human rights implications: (1) whether participation in CMOs should be voluntary or mandatory, (2) whether such organizations should promote national culture in addition to the licensing, enforcement, and royalty distribution activities that comprise the core of their work, and (3) whether they can use AI systems to enhance the economic efficiency of their operations.

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streaming services and publishers to individual authors and performers through a system of compulsory licensing centrally managed by a new Mechanical Licensing Collective).

<sup>82</sup> See R. Wallis, C. Baden-Fuller, M. Kretschmer and G. Klimis, “Contested Collective Administration of Intellectual Property Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity” (1999), 14 *European Journal of Communication* 5 at 6-8 (analyzing the consequences of increasing concentration of ownership and integration in the music industry); G. Jokhadze, “The Big Ones of the Music Industry: Copyright and Human Rights Aspects of the Music Business” in I. Ziemele, ed., *Expanding The Horizons of Human Rights Law* (Boston: Martinus Nijhoff Publishers, 2005), 290 at 237-38 (same).

<sup>83</sup> See Wallis *et al.*, *supra* note \_\_ at 14-15, 19 and 22-23.

#### 4.1. SHOULD MEMBERSHIP IN CMOs BE MANDATORY OR VOLUNTARY?

The question of whether creators should be required to join collective management organizations has long vexed intellectual property commentators. On the one hand, mandatory membership, and the exclusion of other modes of exploitation it implies, helps to achieve the economic efficiencies and practical benefits that justify collective administration in the first instance, such as issuing blanket licenses and reducing the costs of negotiations, enforcement actions, and royalty distributions. But mandatory participation in a CMO also raises serious concerns for creators. In its most extreme incarnation, compulsory membership precludes creators from issuing individual licenses for their own works, compels participation in an organization whose policies they may disfavor (and which they may be legally or practically precluded from modifying), and requires affiliation with other creators with whom they may not wish to associate.<sup>84</sup>

Similar concerns led the European Court of Human Rights (ECtHR) to find “closed-shop agreements” - contracts that require employees to join a trade union as a condition of gaining or maintaining employment - to violate the right to freedom of association.<sup>85</sup> Article 11 of the European Convention on Human Rights guarantees freedom of association, “including the right to form and to join trade unions.”<sup>86</sup> It does not, however, expressly mention a right *not* to associate with such unions. Nevertheless, in *Sørensen and Rasmussen v. Denmark*, the ECtHR found that compelling an employee to join a union impermissibly interfered with the rights guaranteed by Article 11.<sup>87</sup>

In reaching this result, the court explained that states have a positive obligation to intervene in private employment relationships to secure the rights guaranteed in Article

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<sup>84</sup> For a discussion of these competing viewpoints, see Sinacore-Guinn, *supra* note \_\_ at 289-303. In this book, see the contributions by [Ficsor] [Geiger et al.] [van Gompel] [EDITORS TO ADD CROSS REFERENCE IN FINAL REVIEW]

<sup>85</sup> *Sørensen and Rasmussen v. Denmark*, Application Nos. 52562/99 & 52620/99, Eur. Ct. H.R. (2006) (Sørensen).

<sup>86</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS No. 5 (European Convention), Art. 11.

<sup>87</sup> Sørensen, *supra* note \_\_ at ¶ 36.

11.<sup>88</sup> In reviewing this intervention, the ECtHR considers whether the government has struck “a fair balance . . . between the competing interests of the individual and of the community as a whole,”<sup>89</sup> weighing the state’s justification for permitting closed-shop agreements against the extent to which they frustrate an employee’s right to freedom of association.<sup>90</sup> In *Sørensen and Rasmussen*, the ECtHR found that most states parties to the European Convention no longer support closed shop agreements, suggesting that the agreements were no longer “an indispensable tool for the effective enjoyment of trade union freedoms.”<sup>91</sup> In light of this growing regional trend, the court found that Denmark’s interest in maintaining closed shop agreements was insufficient to outweigh the harm to the employees’ freedom of association.<sup>92</sup>

While labor unions and CMOs are not directly analogous, the human rights concerns raised by compulsory membership in a labor union may have repercussions for compulsory membership in CMOs. Both closed-shop agreements and compulsory CMO membership affect an individual’s livelihood. However, whereas closed-shop agreements threaten the loss of employment for failure to join a union, mandatory membership in a CMO ensures that creators receive revenue from the licensing of their works.

Nevertheless, there are strong arguments that mandatory membership in CMOs impermissibly trenches on freedom of association in industrialized countries. In particular, compulsory membership rules are an overly broad means of advancing society’s interest in facilitating access to creative works through a single licensing mechanism. The obvious efficiency gains of collective rights management will convince most rights holders to join CMOs voluntarily. These incentives are strong enough to enable CMOs to withstand the modest diminution of membership and revenue that would result from offering creators an exit option, a choice among multiple organizations, or permitting individual or open content licensing.<sup>93</sup>

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<sup>88</sup> *Id.* at ¶ 57.

<sup>89</sup> *Id.* at ¶ 58.

<sup>90</sup> *Id.* at ¶ 58.

<sup>91</sup> *Id.* at ¶ 75.

<sup>92</sup> *Id.*

<sup>93</sup> *Cf.* Gervais, *supra* note \_\_ at 26 (“In the same way that rightsholders should be free to decide whether they want to be part of a collective scheme (except perhaps where individual

The application of the ECtHR's balancing test to mandatory CMO membership may differ, however, for developing countries with nascent creative industries. Many developing countries have only limited experience in encouraging creativity within their borders and in promoting the licensing of protected works. As one commentator has explained:

[T]he national cultural industries in these developing nations are frequently underdeveloped and the national repertoire underutilized.... From the government's perspective, and that of many creators as well, [initiatives to promote creativity] will be weakened to the extent that a significant number of national creators fail to participate in this collective effort. Furthermore, in many such countries, the number of creators involved is relatively small and so lacking in income that there is little potential for the native industry to develop without a coordinated comprehensive (and often subsidized) governmental effort.<sup>94</sup>

Mandating membership in CMOs is an appropriate response to these economic and social conditions. It centralizes public and private efforts to promote local culture and creativity in a single entity, enhancing their effectiveness. Such an approach is also consistent with a recognition of the special needs of developing countries that the ICESCR Committee emphasizes in its General Comment.<sup>95</sup> Admittedly, the freedom of choice and associational rights of individual creators are constrained by compulsory membership.<sup>96</sup> Under the conditions described above, however, in which collective management not only generates royalties but also helps to build the requisites of a national copyright culture, restrictions on the rights of individual creators can be justified under the stringent standard that the ICESCR Committee endorses and under the

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management is impossible), they should be free to create new Collective Management Organizations.”).

<sup>94</sup> Sinacore-Guinn, *supra* note \_\_ at 291.

<sup>95</sup> See General Comment, *supra* note \_\_ at para. 40.

<sup>96</sup> The Covenant protects these associational rights expressly. See ICESCR, *supra* note \_\_, Art. 8(1)(a) (recognizing the right “of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests”).

ECtHR's balancing test in the *Sørensen and Rasmussen* case.<sup>97</sup> As the economic and cultural situation in developing countries improves, however, such restrictions will become increasingly difficult for governments to justify.

For many years, freedom of association concerns relating to mandatory CMO membership were of mostly theoretical interest.<sup>98</sup> As a practical matter, certain modes of exploiting protected works required collective action, and creators had little choice but to license these works collectively rather than individually. It thus made little difference whether a state formally mandated CMO membership by statute or whether its decision to confer monopoly status on a particular CMO effectively compelled creators to join the organization.<sup>99</sup> Recently, however, two legal and technological developments have increased the salience of analyzing mandatory participation from a human rights perspective.

The first development concerns online licensing of copyrighted works. Digital media, Internet technologies and advanced decentralized database systems such as blockchain technologies<sup>100</sup> create new opportunities for exploiting protected works, opportunities that collective rights management can greatly facilitate. But the ease of digital communications, the pervasive labeling of works with rights management information, and the security provided by technological protection measures also enable creators to negotiate with users directly and to license their works themselves.<sup>101</sup>

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<sup>97</sup> See General Comment, *supra* note \_\_ at paras 22-23; Sørensen, *supra* note \_\_ at ¶ 58; see also *supra*, Part I.B.

<sup>98</sup> Sinacore-Guinn, *supra* note \_\_ at 289 (stating that the issue of “voluntary versus nonvoluntary collective affiliation” is “rarely addressed directly in the legal literature or by governmental authorities”).

<sup>99</sup> World Intellectual Property Organization, “Collective Administration of Copyright and Neighboring Rights” (1989), *Copyright* 309 at 342 (WIPO, *Collective Administration*).

<sup>100</sup> See B. Bodo, D. Gervais and J.P. Quintais, “Blockchain and smart contracts: the missing link in copyright licensing?” (2018) 26(4) *International Journal of Law and Information Technology* at 322-23 (explaining how blockchain technologies can be used by individual right holders as well as by expert licensing bodies such as CMOs).

<sup>101</sup> See C. Graber, C. Govoni, M. Girsberger, and M. Nenova, eds., *Digital Rights Management: The end of Collecting Societies?* (Berne: Staempfli Publishers Ltd., 2005); 251; Ficsor, *supra* note \_\_ at 96-106; D. Gervais, “Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective” (2002), 1 *Canadian Journal of Law and Technology* 21, online: <<https://digitalcommons.schulichlaw.dal.ca/cjlt/vol1/iss2/2/>>.

The practical feasibility of issuing individual licenses substantially raises the stakes associated with CMO membership rules. Many, perhaps most, creators will continue to manage their works collectively. For these individuals, it may seem of little consequence whether membership is mandatory or permissive. But the collective enterprise as a whole may suffer if rights owners are not required to participate.<sup>102</sup> This is particularly true if global media companies that control large portfolios of protected works withdraw them from the system.<sup>103</sup> It is also a risk if popular creators or performing artists opt out of the collective to demand higher royalties than a CMO could negotiate on their behalf as part of a blanket license.<sup>104</sup> In either case, it is smaller and less well known individual creators who may suffer.<sup>105</sup>

Whether and to what extent these dark predictions come to pass affects whether state regulation of CMO membership rules is consistent with international human rights law. If a mass exodus of corporate rights owners or popular artists from the collective denies other creators the opportunity “to enjoy an adequate standard of living” from their creative endeavors,<sup>106</sup> a human rights framework may require governments to favor exclusive participation in such organizations and to refocus regulation on providing members with the means to hold CMOs accountable and to participate in CMO decisions

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<sup>102</sup> A. Dietz, “Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe” (2002), 49 *Journal of the Copyright Society of the U.S.A.* 897 at 911 (noting arguments that “an unduly rapid transition from collective management to individual management of rights [in digital networks] could disturb the established, socially balanced system of distribution”).

<sup>103</sup> Wallis, *supra* note \_\_ at 21-22 (discussing the “threat to the stability of collecting societies” from the withdrawal of multinationals’ repertoires from collective administration).

<sup>104</sup> See Ficsor, *supra* note \_\_ at 97-98 (noting this possibility but arguing that it is counterproductive for individual creators and for the collective as a whole).

<sup>105</sup> As one group of commentators recently stated: “The threats [from recent challenges to CMOs] are greatest to those who earn modest royalties, especially from companies not linked with [major multinational conglomerates]. These artists . . . will find themselves squeezed twice. First, the collective agencies may ignore them, as their needs are costly to service. Second, the companies which represent them will have to be more aggressive if they are to survive.” Wallis, *supra* note \_\_ at 25. With regard to CMO risk management strategies in response to decreasing revenue streams, the Court of Justice of the European Union has ruled that CMOs in one EU member state cannot raise membership rates unfairly and disproportionately higher than those in other EU countries. Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome* [2017] EU:C:2017:689, at paras. 38 and 51.

<sup>106</sup> General Comment, *supra* note \_\_ at para. 2.

that affect their interests.<sup>107</sup> These concerns could also justify government-mandated CMO membership rules under the ECtHR’s balancing test. On the other hand, individual and collective licensing may coexist harmoniously in certain media. Where they do, a human rights framework weighs strongly in favor of giving creators the freedom to decide which option to pursue, including the decision to license their works both individually and as part of the collective.

A second trend that may alter the calculus of whether CMO memberships should be mandatory or voluntary concerns the rise of Creative Commons and similar organizations that promote open content licensing of copyrighted works.<sup>108</sup> Open content licenses authorize third parties to exercise some or all of a creator’s exclusive rights without remuneration for such uses. In doing so, they facilitate sharing of ideas, information, and protected content between authors and users, and directly promote “the public interest in enjoying broad access to new knowledge” - two goals endorsed by Article 15 of the Covenant and by the ICESCR Committee.<sup>109</sup> Some advocates of open content licensing also make the more controversial assertion, that a limited relinquishing of exclusive rights promote creativity more effectively than existing proprietary models.<sup>110</sup>

Whatever the merits of this claim, there can be little doubt that open content licenses challenge the economic interests of CMOs.<sup>111</sup> They thus create potential conflicts between these organizations and their members that raise human rights concerns. One

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<sup>107</sup> *Ibid.* at paras. 18 and 34.

<sup>108</sup> See, e.g., “Creative Commons”, <creativecommons.org/>; Open Definition, “Guide to Open Licensing”, <<https://opendefinition.org/guide/>>; Unsplash, “License”, <https://unsplash.com/license> (for images); “EFF Open Audio License Version 1.01”, <[https://web.archive.org/web/20070208085151/http://www.eff.org/IP/Open\\_licenses/20010421\\_eff\\_oal\\_1.0.html](https://web.archive.org/web/20070208085151/http://www.eff.org/IP/Open_licenses/20010421_eff_oal_1.0.html)> (for music).

<sup>109</sup> ICESCR, *supra* note \_\_, Art. 15(2) (requiring states parties to take steps “necessary for the conservation, the development and the diffusion of science and culture”); General Comment, *supra* note \_\_ at para. 35 (asserting that states parties must give “due consideration” to “the public interest in enjoying broad access” the production of authors.).

<sup>110</sup> See, e.g., *A Guide to Open Content Licenses*, *supra* note \_\_ (discussing models of collaborative production that are alternatives to copyright).

<sup>111</sup> See Gervais, *supra* note \_\_ at 28 & fn. 77 (reproducing statement by a Canadian collecting society urging authors to “be prudent in granting free permissions”, since the frequent grant of such permissions could be interpreted “as a lack of support for the collective licensing system”, and urging authors to forward all requests for free licenses to the CMO for processing).

way to resolve these conflicts would be by allowing creators to assign all of their works to CMOs on a nonexclusive basis, thereby preserving the right to distribute those same works through open content licenses. This approach accords with the diversity of arrangements (many of them nonexclusive) by which creators currently transfer their rights to CMOs.<sup>112</sup> But it elides the difficulties that widespread open content licensing would create for copyright and neighboring rights collectives which produce human rights benefits for both creators and users.<sup>113</sup>

More nuanced solutions are needed to balance the competing interests at stake. These could include requiring creators to transfer exclusive rights to the collective for an initial term of years or authorizing transfers on a work-by-work basis, thereby preserving some works for open content licensing. A more comprehensive solution might involve adapting the extended collective licensing system originally used in Scandinavian countries. Under this system, “as soon as a substantial number of rights holders of a certain category agree to participate in a collective scheme, the scheme is automatically extended not only to other national rights holders in works of the same category, but to all foreign ones as well.”<sup>114</sup> Creators are not required to participate, however, and they may opt out of the collective system or veto the use of their works.<sup>115</sup> Such an approach, recently embraced by the European Union as a compulsory mechanism for uses of so-called out-of-commerce works by cultural heritage institutions and as an optional scheme for other types of works,<sup>116</sup> places the burden on creators to exclude their works from the collective.

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<sup>112</sup> See Gervais, *supra* note \_\_ at 27-32.

<sup>113</sup> See *supra* Part 3.1.

<sup>114</sup> Gervais, *supra* note \_\_ at 29.

<sup>115</sup> Sinacore-Guinn, *supra* note \_\_ at 405 and 407.

<sup>116</sup> Art. 8 and 12 of Directive EU 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 (CDSM Directive). See also S. Depreeuw “Mandatory collective management of copyright: When the road to deadlock is paved with good intentions” (9 February 2022) Kluwer Copyright Blog, online: <<https://copyrightblog.kluweriplaw.com/2022/02/09/mandatory-collective-management-of-copyright-when-the-road-to-deadlock-is-paved-with-good-intentions/>> (explaining how, even before the adoption of the CDSM Directive, EU Member States were not free to implement mandatory and extended collective management schemes for copyrights without a scrutiny of EU legal principles), and the contributions by [van Gompel, Chapter #] and [Scandinavia, Chapter ##] [editors to add].

In addition to collecting and distributing royalties on behalf of their members and enforcing their rights against licensees and infringers, many CMOs engage in a broad range of social, educational, and cultural activities. In the cultural field, these activities seek to “promot[e] the creation of new works and the use of all national works” through grants to creators; competitions, awards and scholarships; workshops and educational programs; and promoting works by local artists, creators, and performers.<sup>117</sup> In some countries, these cultural activities are mandated by statute; in others they are permitted but not required by law; and in still others, cultural promotions are wholly private ventures.<sup>118</sup>

Commentators continue to debate the legality and wisdom of entrusting CMOs with the promotion of culture. Those who favor such an entrustment argue that cultural activities provide at least an indirect benefit to CMO members by encouraging public respect for creators and their works. Cultural promotions also provide additional incentives for creativity (especially by new or impecunious authors) and highlight classes of works that would otherwise go unnoticed or underappreciated by consumers.<sup>119</sup>

Opponents counter that authorizing CMOs to perform promotional activities conflicts with creators’ exclusive rights and risks diminishing the public legitimacy of such organizations. As to the first issue, opponents claim that authors give only nominal consent for expenditures on cultural activities by joining an organization that already engages in such practices. As to the second issue, the monopoly licensing powers that CMOs possess already generate suspicion of collective entities in the eyes of user groups. “In the face of such suspicion, it is appropriate that the collective only undertake to do that which is absolutely essential to its primary mission: the administration of creative rights.”<sup>120</sup>

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<sup>117</sup> *Ibid.* at 479 and 484-85.

<sup>118</sup> See Dietz, *supra* note \_\_ at 912-13.

<sup>119</sup> See *ibid.* at 913; Sinacore-Guinn, *supra* note \_\_ at 484-93.

<sup>120</sup> Sinacore-Guinn, *supra* note \_\_ at 499.

To balance these competing perspectives, the amount deducted for cultural activities has remained generally ten per cent or less of royalties collected.<sup>121</sup> Within the last decade, however, some CMOs have urged their fellow organizations to reduce or even eliminate the deduction for cultural activities, both to maximize the distribution of royalties and to ensure that foreign authors do not subsidize the promotion of culture in other countries.<sup>122</sup> This trend has been most pronounced among CMOs operating in common law countries; it has made less headway in European collection societies.<sup>123</sup>

The cultural activities that CMOs perform - and the debates over their propriety - have never been assessed in human rights terms. Commentators analyzing the issue from an intellectual property perspective make a strong case that the promotion of culture by CMOs can weaken creators' exclusive rights. But a human rights framework proceeds from a very different premise. So long as these organizations perform their core functions and provide sufficient remuneration for authors "to secure ... an adequate standard of living" from their creative endeavors, then the state - by assisting CMOs to perform these functions - has complied with Article 15(1)(c)'s mandate to protect creators' "basic material interests".<sup>124</sup>

Having satisfied this obligation, however, any additional royalties that the organizations collect need not be distributed to their members. Such royalties fall outside the zone of autonomy mandated by Article 15(1)(c) and within the scope of a state's

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<sup>121</sup> WIPO, *Collective Administration*, *supra* note \_\_ at 348.

<sup>122</sup> See PRS for Music, "Annual Transparency Report 2022", online: <<https://www.prsformusic.com/about-us/track-record/2022>>, at 3 (explaining that "[c]ultural deductions are donated to the PRS Foundation. . . . No deductions are made for educational purposes. In 2022, in order to meet pre-existing commitments to this charity, these deductions were taken from two sources . . . : (1) non-licence revenue not due to foreign societies (i.e. investment income) and, to the extent that that such investment income was insufficient to meet the commitment, from (2) PRS's own reserve fund").

<sup>123</sup> See World Intellectual Property Organization, "International Survey on Private Copying. Law and Practice" (2015) WIPO Publication No.1037E/16, at 12 (noting France and Germany as examples of countries where the amounts of social and cultural deductions from the total private copy levies revenue of CMOs remain substantial); Austrian Collecting Society of Audiovisual Authors, "General principles for other deductions (as administrative costs) including deductions for the SKW [social and cultural institutions]" (21 June 2016), online: <<https://www.vdfs.at/en/about/>> (indicating the national statutory 50% of legal deduction for storage media remuneration and an additional 10% voluntary deduction by way of voluntary resolution of the CMO's general assembly, both for social and cultural purposes).

<sup>124</sup> General Comment, *supra* note \_\_ at para. 2.

discretion to weigh creators' private interests in receiving additional remuneration against other cultural goals that benefit the public at large.<sup>125</sup> It is a proper exercise of this discretion for states parties to delegate to CMOs a broad array of functions "necessary for the conservation, the development and the diffusion of science and culture".<sup>126</sup> Such functions undoubtedly include the promotional activities that CMOs already perform. And there is no reason - from a human rights perspective, at least - why funding for such activities should be limited to ten per cent of royalties collected.<sup>127</sup>

Of course, nothing in the ICESCR requires states parties to appoint CMOs as their agents to conserve, develop, and diffuse national culture. Many other options are available, including the creation of educational, not-for-profit, or other specialized entities dedicated to studying, preserving, and disseminating cultural products.<sup>128</sup> These activities may be undertaken by government agencies directly or by private actors operating with state support.

Alternatives that decouple the promotion of culture from CMOs' core functions have the advantage of respecting the wishes of creators who object to cultural subsidies but who are required, either by law or as a practical matter, to participate in the collective administration of their works.<sup>129</sup> However, such alternatives require governments to fund the promotion of culture from public revenues that are already overburdened. Officials may therefore be tempted to place the financial burden of promoting culture on CMOs rather than diminish the "available resources" for more pressing government programs, including those implementing other social and economic rights protected by the Covenant.<sup>130</sup>

One final area of CMO cultural activities requires separate analysis: the promotion of national culture in developing countries with funds acquired from the

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<sup>125</sup> See *supra* Part 2.2.

<sup>126</sup> ICESCR, *supra* note \_\_, Art. 15(2).

<sup>127</sup> The more complex legal issues raised by funding cultural activities with the royalties collective on behalf of foreign creators are discussed in greater detail below.

<sup>128</sup> See Sinacore-Guinn, *supra* note \_\_ at 505-07 (discussing alternative methods for promoting culture by entities other than CMOs).

<sup>129</sup> See *supra* Part 4.1.

<sup>130</sup> ICESCR, *supra* note \_\_, Art. 2(1) (requiring states parties to "take steps . . . to the maximum of [their] available resources" to fully realize the rights in the Covenant).

licensing works of foreign creators. Commentators have long noted the tension between cultural promotion activities by CMOs and the national treatment rules of intellectual property treaties. Because foreign rights holders do not benefit from most cultural programs undertaken in other nations, the argument goes, they do not receive same treatment that domestic rights owners enjoy.<sup>131</sup> Consequently, “deductions for cultural activities “are only allowed if ... foreigners, directly or indirectly (through their representatives) approve them”.<sup>132</sup>

This issue continues to be debated in intellectual property circles. According to one influential report by the World Intellectual Property Organization (WIPO), the Berne and Rome Conventions categorically preclude member states from imposing cultural deductions on foreign creators in their national laws, at least with respect to exclusive rights protected by those treaties.<sup>133</sup> But another WIPO study, written by a leading scholar of collective management of copyright and neighboring rights, suggests a way to resolve the national treatment issue voluntarily in the case of developing countries. According to this study, the “foreign partner organizations [of developing country CMOs] may find it appropriate to allow an even higher level of cultural and social deductions [than ten per cent] in order to assist those organizations to establish an appropriate management system and copyright infrastructure and to encourage creativity”.<sup>134</sup>

A human rights framework favors this special solicitude for developing states and eschews an expansive interpretation of the national treatment rule. “International assistance” from rich to poor nations is an important dimension of rights protection in the ICESCR.<sup>135</sup> More importantly, the Covenant provides special rules for developing countries, which “with due regard to human rights and their national economy, may

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<sup>131</sup> Sinacore-Guinn *supra* note \_\_ at 491 and 502; WIPO, *Collective Administration*, *supra* note 79, at 348.

<sup>132</sup> WIPO, *Collective Administration*, *supra* note \_\_ at 348.

<sup>133</sup> *Ibid.* (unequivocally responding in the negative to the question whether “any discrimination by collective administration organizations (or by legislation regulating their activities” [is] permissible to the detriment of rights owners who are . . . foreigners”).

<sup>134</sup> Ficsor, *supra* note \_\_ at 151.

<sup>135</sup> ICESCR, *supra* note \_\_, Art. 2(1).

determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”<sup>136</sup>

At first glance, this text appears to conflict with the national treatment rule to the extent that it authorizes developing countries to enact legislation that mandates or permits public or private CMOs to discriminate against foreign creators and rights holders.<sup>137</sup> The Committee’s interpretation of this provision, however, suggests that the creators’ rights provisions of the Covenant apply both to foreigners and to a State’s own nationals.<sup>138</sup> This interpretation also raises - but does not resolve - the more difficult question of how to resolve conflicts between a state’s obligations under a human rights treaty and the commitments the state has undertaken by ratifying intellectual property conventions.

#### 4.3. CAN CMOs’ USE ARTIFICIAL INTELLIGENCE SYSTEMS TO ENHANCE HUMAN RIGHTS OF CREATORS?

Both human rights and intellectual property experts are increasingly engaging with the cutting-edge technologies made possible by artificial intelligence (AI) systems. Such systems can process vast amounts of data in ways that are similar to the human brain. Deep learning models can be taught to classify and recognize patterns in photos, text, audio and other inputs and to automate tasks that previously required human intelligence, such as describing images, transcribing audio files, and even – in the case of generative AI models – creating entirely new texts, images, and sounds. This new technological frontier poses several new challenges to regulating the creation and use of original works.

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<sup>136</sup> *Ibid.*, Art. 2(3).

<sup>137</sup> Of course, no treaty prevents foreign CMOs and their members from entering into agreements with CMOs in developing countries to authorize the withholding of foreign works royalties for cultural purposes in those countries. *See* Ficsor, *supra* note \_\_ at 151. The plausibility of such voluntary contributions seems questionable, however. If, as noted above, rights holders are pressuring CMOs to reduce or eliminate domestic cultural promotions, it seems unlikely that they will support cultural deductions that provide benefits only in other countries.

<sup>138</sup> General Comment, *supra* note \_\_ at para. 21.

AI systems are also rapidly restructuring collective rights management as CMOs invest in advanced technologies, especially for music recognition.<sup>139</sup> Collecting societies are starting to deploy AI algorithms capable of memorizing vast repertoires, rapidly detecting any online or offline uses, and automatically calculating royalties.<sup>140</sup> For instance, CMOs such as PRS for Music, ASCAP, GEMA, IMRO, APRA/AMCOS have partnered with Soundmouse, an automated system of music cue-sheet reporting that dramatically reduces human involvement in monitoring and licensing activities.<sup>141</sup> The development of such automation software occurred in response to the exponential increase of data flows about online uses of protected works that CMOs have had to contend with.<sup>142</sup>

The shift of CMOs' primary mission – from the approximation of blanket and extended licensing toward a business model of data management and automated rights enforcement – has both positive and negative aspects when examined through the lens of human rights. On the one hand, the implementation of AI systems by CMOs represents a significant improvement in enforcement and the ability to recoup so-called “unmatched” royalties,<sup>143</sup> thus leading to more effective protection of creators' materials interests

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<sup>139</sup> See PRS for Music, “PRS for Music & PPL partner with music tech company Audoo” (9 August 2023), online: <<https://www.prsformusic.com/press/2023/prs-audoo-uk-launch-release>> and M. Stassen, “GEMA acquires majority stake in music recognition technology firm SoundAware Group”, Music Business Worldwide (24 July 2023) (announcing partnerships between world-leading CMOs and music tech companies aimed to enhance the collection of music performance data and royalties distribution across the world).

<sup>140</sup> See Orfium, online: <<https://www.orfium.com/collecting-societies/>> (a service that offers to “manage everything from gathering cue sheets to matching against usage logs, and processing into your CMO’s internal systems (...) identify and track music in tv and radio commercials for collecting societies (...) delivers music usage reports”); Muzooka, online: <<https://www.muzooka.com/solutions/publishers-collecting-societies>> (a similar service “powered by a database of 150M+ recordings and 50M+ musical works, along with proprietary, AI-enhanced algorithms” that promises to “make proper connections where others fail to”).

<sup>141</sup> PRS for Music, “Soundmouse by Orfium”, online: <<https://www.prsformusic.com/what-we-do/who-we-work-with/soundmouse-by-orfium>> (listing all specific uses of the Soundmouse system across the mentioned CMOs).

<sup>142</sup> Music Business Worldwide, “Collecting societies are struggling to keep up with the influx of millions of lines of data” (13 May 2018), online: <<https://www.musicbusinessworldwide.com/the-future-of-digital-performance-rights-management/>>.

<sup>143</sup> The MLC, “The Mechanical Licensing Collective Receives \$424 Million in Historical Unmatched Royalties from Digital Service Providers” (16 February 2021) online:

avored by the ICESCR Committee.<sup>144</sup> Such systems can also enhance the efficiency of revenue collection and the accuracy of distributions among CMO members, thus buttressing the principles of equal treatment embedded in ICESCR Article 15(1)(c). The potential of AI systems to provide legal certainty to users by opening up monitored access to repertoires represents a further advantage that resonates with the balance between the rights of creators and users in the manner envisioned by the Committee throughout its general comments on Article 15.

On the other hand, introducing algorithms into the decision-making processes of CMOs suggests three problematic consequences from a human rights perspective. First, the mirage of a “perfect” system of enforcement<sup>145</sup> hides the risk of over-enforcement that could impinge upon other economic, social and cultural rights. Second, overreliance on algorithms may reduce the focus of CMOs on emerging or underrepresented creators, clashing with the non-discriminatory interpretations of Article 15 that foreground disadvantaged and marginalized groups.<sup>146</sup> Third, the development of AI-enabled licensing and enforcement may emphasize material interests in a way that overshadows the moral interests of creators.<sup>147</sup> For example, the desire of creators to facilitate specific uses or users of their works may fall prey to the high level of standardization that CMOs embrace when relying on AI systems, thus making ad hoc tailored licensing harder to achieve.

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<<https://blog.themlc.com/press/mechanical-licensing-collective-receives-424-million-historical-unmatched-royalties-digital>>.

<sup>144</sup> General Comment, *supra* note \_\_ at 10 (“In order not to render this provision devoid of any meaning, the protection afforded needs to be effective in securing for authors the moral and material interests resulting from their productions.”). See also *ibid* at 45 (explaining one of the interpretations of the states’ violation to protect as the “failure to ensure that third parties adequately compensate authors, including indigenous authors, for any unreasonable prejudice suffered as a consequence of the unauthorized use of their scientific, literary and artistic productions.”).

<sup>145</sup> See Muzooka, *supra* note \_\_ (“In this age of digital music delivery, proper matching is crucial in order to monetize any repertoire of musical works. From DSPs to UGC platforms like YouTube and TikTok, collecting for *every possible digital spin* is the only way to maximize revenue from those assets”) (emphasis added).

<sup>146</sup> General Comment, *supra* note \_\_ at 20-21.

<sup>147</sup> General Comment, *supra* note \_\_ at 12-13 (explaining the rationale underlying the protection of moral interests “to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations”, protecting the “honour and reputation” of creators).

## 5. CONCLUSION

This chapter has explored how a human rights framework for creators' rights - as outlined by the ICESCR Committee in the General Comment on Article 15(1)(c) and in the Statement on Human Rights and Intellectual Property - intersects with the collective administration of copyright and neighboring rights. In concluding our analysis of these issues, we raise two broader questions: first, what are the practical consequences of a human rights framework for the regulation of CMOs; and second, does that framework improve upon the existing legal and policy landscape?

In answering the first question, it bears reemphasizing that the Committee's general comments on all clauses of Article 15 of the ICESCR - which give primacy to economic and social rights over intellectual property treaties - are nonbinding, although highly persuasive, interpretations of the ICESCR. Given this soft law status, governments may challenge the Committee's analysis. To date, this has not been the case for the Committee's interpretations of Article 15, but states have opposed other general comments issued by other UN human rights treaty bodies.<sup>148</sup>

Assuming, however, that most states parties endorse or at least acquiesce in the Committee's analysis, the general comments on Article 15 can serve several useful functions. They can assist governments in reporting to the Committee on the steps they have taken, and the difficulties they have encountered, in implementing the Covenant domestically.<sup>149</sup> The general comments can also act as a catalyst for generating information about how different countries address the human rights dimensions of

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<sup>148</sup> For example, the United States has objected to several general comments issued by the Human Rights Committee, the treaty body that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR). *See, e.g.,* General Comments – Government Responses, *Observations on General Comment No. 24 (52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, United States of America*, CCPR A/50/40/Vol.1, Annex VI (1995) (contesting the authority of the UN Human Rights Committee to issue binding interpretations of the ICCPR), online: <[www.bayefsky.com/general/a\\_50\\_40\\_vol\\_i\\_1995.php](http://www.bayefsky.com/general/a_50_40_vol_i_1995.php)>.

<sup>149</sup> ICESCR, *supra* note \_\_, Arts. 16-17 (setting forth reporting obligations of states parties to the ICESCR).

intellectual property, including the regulation of CMOs.<sup>150</sup> Building on this knowledge and experience, the Committee can provide more detailed guidance to governments on how to balance the competing human rights concerns raised by the collective administration of copyright, including the issues discussed in this chapter.

The answer to the second question posed above - whether a human rights framework for intellectual property improves upon the existing legal and policy landscape - depends in part on whether affected actors believe that the current system is now or will soon be in need of reform. In the past, user groups have been the most frequent and vociferous critics of collective management of copyright.<sup>151</sup> But recent developments – such as the online distribution and new digital uses of protected works, the growing number of works controlled by corporate rights owners<sup>152</sup> and, most recently, the rise of AI technologies as a new frontier of automation and de-humanization of copyright management – have increased conflicts between individual and corporate rights owners and between CMOs and their members. In this climate, a consensus may eventually develop on the need for change. If so, a human rights framework offers a possible focal point around which all parties can structure a revised regulatory regime.

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<sup>150</sup> Given the many complex issues that Article 15 encompasses, the Committee should make a particular effort to discuss collective societies in its dialogues with governments during the state reporting process.

<sup>151</sup> See Helfer, *supra* note \_\_ at 113-19; Sinacore-Guinn, *supra* note \_\_ at 238-39.

<sup>152</sup> See Graber, *supra* note \_\_; Jokhadze, *supra* note \_\_; Wallis, *supra* note \_\_.