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Intellectual Property: The Promise and Risk of Human Rights[1]

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ABSTRACT (EN): The intersection of intellectual property and human rights is a relatively new site in the search for balance in intellectual property law and policy. Although this intersection opens up intellectual property to a unique kind of interdisciplinary analysis, only the human rights system appears to have seized the opportunity, while its intellectual property rights counterpart remains reluctant to engage. There are, so far, different competing first impressions over the nature of the intersection between intellectual property and human rights. Despite empirical credence of the conflict narrative, the co-existence or complementary thesis of the intellectual property and human rights interface has greater prospects for a meaningful and balanced rapprochement between the two. This chapter argues for a critical scrutiny of the human rights appeal of intellectual property rights in order to avoid its potential for being hijacked by stronger stakeholders at the expense of their weaker opponents for whom intellectual property rights have strong paradoxical ramifications.

RÉSUMÉ (FR): L'intersection entre la propriété intellectuelle et les droits de la personne est un point relativement nouveau dans la recherche d'un équi-

1 Thanks to Professor Tesh Dagne for reading and commenting on this paper in draft. I am grateful to Professor Scassa, Professor Goudreau, Madelaine Saginur, and B Courtney Doagoo, the conveners of the 2012 Intellectual Property Scholars Workshop, for inviting me to speak, and to the members of the academy and anonymous reviewers of this contribution for their helpful feedback.

libre en droit et en politique de la propriété intellectuelle. Même si cette intersection ouvre la porte à une analyse interdisciplinaire unique pour la propriété intellectuelle, le système des droits de la personne semble être seul à en avoir saisi l'occasion, tandis que son homologue en droit de la propriété intellectuelle demeure réticent à se lancer. Jusqu'à maintenant, il existe plusieurs premières impressions sur la nature de l'intersection entre la propriété intellectuelle et les droits de la personne. Malgré les croyances empiriques concernant le narratif du conflit, la thèse de la coexistence ou de la complémentarité dans l'interface entre la propriété intellectuelle et les droits de la personne donne un plus grand espoir de rapprochement sérieux et équilibré entre les deux. Ce chapitre plaide pour un examen critique minutieux de l'attrait des droits de la personne pour la propriété intellectuelle, pour empêcher que le potentiel des premiers soit détourné par des parties prenantes aux dépens de leurs opposants plus faibles pour qui les droits de la propriété intellectuelle ont des fortes ramifications paradoxales.

A. INTRODUCTION

Striking a just balance between rights holders and users of innovations and creativity is a constant quest of intellectual property (IP) law and policy. Both in their statutory and common law derivations, intellectual property rights (IPRs) have built-in mechanisms for negotiating this balance. However, the complexity and multiplicity not only of various claimants to IPRs but also of IP regimes make the quest for balance contentious and elusive. These factors have also yielded diverse conceptual frameworks for the discourse of balance in IP jurisprudence. That discourse challenges the adequacy of so-called built-in mechanisms in IP law to respond to public policy considerations and diverse renditions of the balance narrative.

Aside from when the analysis focuses on specific statutory accommodations in national IP laws,[2] the diverse conceptual frameworks for broaching

2 See, for example, copyright statutes' accommodation or lack thereof of freedom of expression under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and the *Fourth Amendment of the United States Constitution,* US Const amend IV; see Ysolde Gendreau, "Copyright and Freedom of Expression in Canada" in Paul LC Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law, 2004) 21–36 [Torremans, *Freedom of Expression*]; Wendy Gordon, "Do We Have a Right to Speak in Another's Language? *Eldred* and the Duration of Copyright" in Torremans, *Freedom of Expression*, *ibid*.

the issue of balance include discourse on IP and development, IP and economic empowerment, IP and access to knowledge (A2K), and, lately, IP and human rights (HRs). These binary configurations are overlapping and are distinguished in regard to conceptual emphasis. After all, at least on a rhetorical level, A2K is integral to realization of HRs and, when optimized, both can yield favourable development outcomes.

The focus of this chapter is on the intersection between HRs and IPRs at global policy-making levels.[3] We approach the HRs-IP discourse as a fairly new site in the search for balance in IP law and policy. In trying to understand the tenor of the emerging interface between HRs and IP, an interesting question is how to characterize the nature of that engagement from an *interdisciplinary* perspective, with a view to reflecting on the lessons to be learned therefrom, and hinting at the dangers thereto, especially the prospects and implications of HRs' ratchet of IP.

This chapter is divided into five sections. The first explores the context for the entente between HRs and IP. The second examines the one-sided nature of the rapprochement as driven by the international HRs system amidst a cold reception by its IP counterpart. The third identifies Article 15 of the *International Covenant on Economic, Social, and Cultural Rights*[4] as articulating a direct connection between IP and HRs. The section notes, however, that too much emphasis on Article 15 appears to undermine the general depth of *ICESCR* provisions and their ramifications in regard to core areas of "conventional HRs." This narrow approach is fatal in framing the interface between IP and HRs, especially as the two increasingly collide.

In a tripartite framework, section four examines the paradox, the attraction, and the danger of an uncritical conception of IP as HRs, with emphasis on the potential boomerang effect on indigenous peoples' rights, specifically traditional knowledge (TK). The concluding segment adopts a *disciplinary* analysis, reflecting on the competing and complementary conceptions of the nature of the relationship between IP and HRs. It argues that despite empirical evidence of a conflict approach, the co-existence/complementary thesis has prospects for a meaningful and balanced HRs-IP rapprochement.

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3 *Ibid*. There are few safety nets for mitigating the negative impacts of international intellectual property law in contrast to the national systems, especially in developed countries.

4 GA Res 2200A (XXI), UNGAOR, 1966, Supp No 16, UN Doc A/6316, 993 UNTS 3 at 49 (entered into force 3 January 1976) [*ICESCR*].

B. HUMAN RIGHTS AND INTELLECTUAL PROPERTY: ANATOMY OF RAPPROCHEMENT

Though HRs and IP laws may have followed different paths in their development,[5] they evolved in shared contexts. According to Grosheide, both evolved amidst inequalities occasioned by rapid industrial and economic advances in Europe in the eighteenth and nineteenth centuries and the consequential expansion of international trade by economically and technologically dominant countries.[6] That expansion in international commerce called attention to IP as a mechanism for negotiating access[7] to innovation by less technologically endowed countries.

The foundational multilateral IP instruments came into being in the second half of the nineteenth century,[8] a period that symbolized the foundation of the modern HRs regime.[9] In terms of developments in HRs and IP in the twentieth century, Grosheide suggests that the legislative histories of the 1948 *Universal Declaration of Human Rights*[10] and the 1994 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS*)[11] are equally indicative of identical socio-economic circumstances.[12]

Despite the foregoing insinuations, HRs and IP remained "strangers."[13] This is so for diverse reasons, not the least of which is the continuing historical subjugation of economic, social, and cultural rights, notably by the US, a leading champion of IP, which has failed to ratify the *ICESCR*. In addition, there is no *direct* involvement of institutions with true IP credibility on the

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5 See Laurence R Helfer, "Human Rights and Intellectual Property: Conflicts or Coexistence?" (2003) 5 Minn Intell Prop Rev 47 [Helfer, "Conflicts"].

6 See Willem Grosheide, ed, *Intellectual Property and Human Rights: A Paradox?* (Cheltenham, UK: Edward Elgar, 2010) at 3–5.

7 Developing countries also perceive IP as a stumbling block to access to innovation.

8 For example, the *Paris Convention for the Protection of Industrial Property,* 20 March 1883, 828 UNTS 305; *Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, 1161 UNTS 3.

9 Grosheide, above note 6 at 4, n 4, and n 6.

10 GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) [*UDHR*].

11 15 April 1994, 1869 UNTS 299, 33 ILM 1197 [*TRIPS*].

12 See Grosheide, above note 6 at 5 and n 6; compare Helfer, "Conflicts," above note 5; Laurence R Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40:3 UC Davis L Rev 971 [Helfer, "Framework"]; Peter K Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40:3 UC Davis L Rev 1039 at 1041 [Yu, "Reconceptualizing"]; Philippe Cullet, "Human Rights and Intellectual Property Protection in the TRIPS Era" (2007) 29:2 Hum Rts Q 403 at 430, noting that human rights and intellectual property evolved separately.

13 See Helfer, "Conflicts," above note 5 at 47.

subject of interface between IP and HRs. Recently, however, "international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other."[14] The neglected rights of indigenous peoples in international HRs processes and the consequences of the *TRIPS*-instigated seismic shift of IP into the trade arena have been identified as the sparks that dissipated the fog separating HRs and IP.[15] Perhaps, more important is the expansion of HRs and IP in the past several decades in directions that have made their collision inevitable.

Indigenous peoples' pressure on the international system over the reclamation of their cultural and traditional knowledge was, in part, a response to IP's facilitation of exploitation of those knowledge forms.[16] Indigenous peoples have made modest progress after decades of rough and tumble politics of the international HRs system. This is evident, in part, through the *United Nations Declaration on the Rights of Indigenous Peoples*,[17] and the progressive induction of indigenous knowledge onto the agenda of not only IP law and policy but also the overall global knowledge and cultural governance.[18]

Although the *UNDRIP*s takes a holistic approach to indigenous peoples' rights, those rights are largely rooted in HRs. The document makes a strong link between TK and IP in its elaboration of indigenous peoples' rights.[19] Within the four decades of the making of the *UNDRIP*s, TK has found traction in diverse regimes such as biodiversity, medicine, agriculture, cultural property, and intangible cultural heritage, linking them with IP in furtherance of the HRs of indigenous peoples.[20]

TRIPS also provoked severe backlash on a number of fronts with HRs implications. The impacts of *TRIPS* on public health, especially on access to medicines, became the flashpoint for linking IP with HRs from a con-

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14 *Ibid*.

15 *Ibid*.

16 See Toshiyuki Kono, ed, *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Antwerp: Intersentia, 2009).

17 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 (2008) [*UNDRIP*s].

18 See Michael F Brown, "Can Culture be Copyrighted?" (1998) 39:2 Current Anthropology 193; see also Chidi Oguamanam, "Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics" (2008) 11:1 Journal of World Intellectual Property 29.

19 See *UNDRIP*s, above note 17, art 31.

20 See, generally, Charles R McManis, ed, *Biodiversity & the Law: Intellectual Property, Biotechnology & Traditional Knowledge* (London: Earthscan, 2007).

flict paradigm.[21] Stronger IP protection in the wake of the digital and biotechnology revolutions of the mid-twentieth century removed the leverage which less-developed countries had to tailor their policies in areas of innovations in agriculture and plant genetic resources to national economic exigencies.[22] It was not long before *TRIPS* attained notoriety as a catalyst for the aggravated North-South development gap, and the principal reason for the negative link between IP and a broad range of HRs, including the rights to food, health, education, and the freedom of expression.[23]

The global public health crisis sparked by the HIV/AIDS pandemic forced a reluctant but inchoate attempt to recalibrate *TRIPS*. Attempts by the US and a coalition of pharmaceutical corporations to shut down the Mandela-led post-apartheid South Africa's legislative response to facilitate access to patented HIV/AIDS medicines sparked a global outrage.[24] A few years later, that outrage gave impetus to the 2001 Ministerial Declaration on *TRIPS* Agreement and Public Health (*Doha*).[25] The latter sought to pave the way for World Trade Organization (WTO) member countries with no, or insufficient, pharmaceutical manufacturing capacity to access patented medicines through a process that purports to abridge the rights of patent holders.[26] The *Doha Declaration* was a symbolic pushback by the WTO process against criticisms from the UN on the negative HRs impact of *TRIPS*. Article 4 of the *Doha Declaration* reads:

> We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health . . . . we affirm that the

21 See Cynthia M Ho, "Current Controversies Concerning Patent Rights and Public Health in a World of International Norms" in Toshiko Takenaka, ed, *Patent Law and Theory: A Handbook of Contemporary Research* (Cheltenham, UK: Edward Elgar, 2008); James Thuo Gathii, "Rights, Patents, Markets and the Global AIDS Pandemic" (2002) 14:2 Fla J of Int'l L 261.

22 See Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); Tzen Wong & Graham Dutfied, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (New York, NY: Cambridge University Press, 2011).

23 See JH Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?" (2000) 32:3 Case W Res J Int'l L 441.

24 Gathii, above note 21; Ho, above note 21.

25 WTO, Ministerial Conference, *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2, 4th Sess, (2001), online: WTO http://wto.org/english/thewto_e/minist_e/min01_e/mindecl_*TRIPS*_e.htm [*Doha Declaration*].

26 See Frederick M Abbott & Jerome H Reichman, "The DOHA Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under Amended TRIPS Provisions" (2007) 10:4 J of Int'l Econ L 921.

> Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.[27]

A year before the *Doha Declaration*, the United Nations Sub-Commission on the Protection and Promotion of Human Rights adopted *Resolution 2000/7: Intellectual Property and Human Rights*.[28] Paragraph 2 of the Resolution declares:

> [S]ince the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.[29]

The Resolution sets a tone for a collaborative scrutiny by UN HRs actors and IP institutions, including the World Intellectual Property Office (WIPO), the World Health Organization (WHO), the United Nations Development Program (UNDP), the United Nations Conference on Trade and Development (UNCTAD), and the Convention on Biological Diversity (CBD), to explore and deepen their analysis of the impacts of *TRIPS* on HRs. The UN High Commissioner for Human Rights urged the "Committee on Economic, Social and Cultural Rights [CESCR] to clarify the relationship between intellectual property rights and human rights . . . through the drafting of a general comment on this subject."[30]

The following year, in 2001, the CESCR issued a statement on *Human Rights and Intellectual Property*,[31] in which it identified "the key human rights principles deriving from the *Covenant* that are required to be taken into account in the development, interpretation and implementation of contemporary intellectual property regimes."[32] The CESCR outlines the context in which HRs are implicated in IP[33] and notes that

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27 *Doha Declaration*, above note 25.
28 E/CN 4/Sub 2/Res/2000/7, UNHCHR, 52nd Sess, (2000).
29 *Ibid* at para 2.
30 *Ibid* at para 11.
31 CESCR, *Human Rights and Intellectual Property: Statement by the Committee on Economic Social and Cultural Rights*, E/C 12/2001/15, UNHCHR, 27th Sess, (2001).
32 *Ibid* at para 2.
33 *Ibid* at para 1.

> [t]he allocation of rights over intellectual property has significant economic, social and cultural consequences that can affect the enjoyment of human rights. The contemporary importance of intellectual property for human rights reflects two developments. The first is the expansion of the areas covered by intellectual property regimes to include, for example, patenting of biological entities, copyright print protections in the digital domain, and private intellectual property claims with respect to cultural heritage and traditional knowledge. The second is the emergence of universal rules on intellectual property protection in the global trading system.[34]

In the document, the CESCR enunciated the HRs principles[35] that would guide its interpretive functions when HRs come into contact with IP.[36] It counsels that the principles are subject to refinements and elaborations.[37]

Like the CESCR, the WHO seized the momentum to galvanize opposition to *TRIPS* on the basis of its negative impact on the HR to health.[38] Indeed, the WHO was one of the principal actors that gave life to the *Doha Declaration*.[39] It assumed responsibility for pushing back on *TRIPS*'s impact on access to medicines, an issue that was topical in a few flashpoint developing countries.[40] The WHO was charged by its governing body in 1999 to "examine the impact of the WTO on national drug policies and essential drugs and to make recommendations for collaboration between the WTO and WHO."[41] It adopted proactive strategies, including provision of technical advisory support for developing countries both in regard to exploiting various flexibilities in *TRIPS* and on the issues of exercise of compulsory licences and par-

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34 *Ibid* at para 1. They are universality, indivisibility and interdependence of human rights, equality and non-discrimination, participation, accountability, general legal obligations, core obligations, international cooperation and assistance, self-determination, and balance.

35 See above note 31 at para 2.

36 *Ibid*.

37 See, generally, Susan K Sell, "TRIPS and the Access to Medicines Campaign" (2002) 20:3 Wis Int'l LJ 481 at 504–6; Susan K Sell, "The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions" (2004) 77:2 Temp L Rev 363 at 389.

38 Susan K Sell, "TRIPS-Plus Free Trade Agreements and Access to Medicines" (2007) 28:1 Liverpool Law Review 41 at 48.

39 For example, South Africa, Brazil, Namibia, Malawi, Zimbabwe.

40 WHA, *Revised Drug Strategy*, Res 52.19 WHO, 52nd World Health Assembly (Geneva: WHO, 1999), online: WHO www.who.int/phi/WHA52.19.pdf.

41 *Ibid* at 92–93. In addition, the WHO occasionally issues a world drug strategy, an instrument oriented toward an anti-free market approach to drug procurement that assists mainly less developed countries in fashioning their national drug plans.

allel importation of patented drugs.[42] The WHO maintains that *TRIPS* and, for that matter, IP as a whole is a burden on the HR to health, insisting that "access to essential drugs is a human right"[43] and that "essential drugs are not simply another [trade] commodity."[44]

Not only have the UN HRs system and other bodies such as the WHO initiated a rapprochement between HRs and IP, part of their approach is to penetrate the IP policy-making arenas in order to infuse them with HRs consciousness. For instance, the High Commissioner for HRs has sought observer status with the WTO in order to engage in the review of *TRIPS*.[45] Similarly, the High Commissioner, the WHO, and many NGOs have observer status at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC).

The pressure on IP by several actors helps to highlight its jurisdictional perviousness:

> [T]he nature of the UN human rights system and the WHO's interest [i]n intellectual property call into question what it actually means to say that an organization, such as WIPO or the WTO, has a special jurisdiction, mandate, or competence in regard to intellectual property matters. That claim is certainly in need of critical and urgent revision. Intellectual property issues are complex, and they transcend the competence or jurisdiction of a few organizations.[46]

This observation is equally true in relation to open-ended disciplinary interests around IP. *TRIPS* is the source of the festering of the "relatedness" concept in the IP narrative within the UN system and institutions, and in the contexts of several relevant subject matters and disciplines.

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42 WHO, *Network for Monitoring the Impact of Globalization and TRIPS on Access to Medicines* (2002) (Meeting Report, 19–21 February 2001, Bangkok, Thailand) at 20, online: World Health Organization http://apps.who.int/medicinedocs/en/d/Js2284e/.

43 *Ibid* at 21.

44 Helfer, "Framework," above note 12 at 987.

45 See Chidi Oguamanam, *Intellectual Property in Global Governance:A Development Question* (London: Routledge, 2012) at 101.

46 See Helfer, "Framework," above note 12 at 979.

C. UNIDIRECTIONAL OVERTURE AND QUESTIONABLE PRIMACY OF HUMAN RIGHTS

HRs instruments such as the *UDHR* and the CESCR accommodate IPRs. However, HRs' rapprochement "has not been reciprocated in the international intellectual property system. No references to 'human rights' appear in multilateral treaties such as the Paris, Berne, and Rome Conventions, nor do they appear in the more recently adopted TRIPS Agreement."[47] What we have is a unilateral effort at provoking an interdisciplinary conversation between HRs and IP. In other words, there is "a visible imbalance insofar as the language of human rights has not penetrated intellectual property rights institutions, while the language of intellectual property rights is regularly addressed in human rights institutions."[48]

IP's indifference to HRs is unsurprising for several reasons. First, the inchoate nature and lack of textual precision on the details of HRs, especially under the CESCR, is not well-matched to a texted-based statutory regime like IP. Perhaps most important, even though HRs and IP are both underpinned by *rights* jurisprudence, the principal justifications for the invocation of *rights* in IP are hardly rooted in "deontological claims" on the fundamental and inalienable attributes of HRs.[49] Instead, rights claims in IP are largely driven by "economic and instrumental benefits."[50] Thirdly, HRs' overture to IP can easily be perceived as an "affirmative strategy" by the global South to use HRs for *subsidized* access to intellectual products of the industrialized world.

The foregoing review demonstrates a new consciousness and active rapprochement but reluctant disciplinary engagement between HRs and IP. So far, the outcome of the HRs-IP interface is hard to measure in any concrete way. First, given the ubiquitous manifestations of HRs considerations in diverse degrees across equally diverse sites of IP discourse, precision in identifying HRs-driven changes in IP discourse may be elusive. Secondly, the nascent status of the conversation suggests that any form of assessment may be premature.

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47 Cullet, above note 12 at 414 [footnote omitted].

48 Helfer, "Framework," above note 12 at 980.

49 *Ibid*.

50 *Ibid* at 981; see also Yu, "Reconceptualizing," above note 12; Laurence R Helfer, "Regime Shifting in the International Intellectual Property System" (2009) 7:1 Perspectives on Politics 39; see generally Graeme B Dinwoodie, "The International Intellectual Property Law System: New Actors, New Institutions, New Sources" (2004) 98 Am Soc'y Int'l L Proc 213.

Nonetheless, it is evident that pressures from the WHO, the UN HRs system, and elsewhere have resulted in a more tempered approach to IP law and policy. IP's supposed negative impact on public health has emboldened a trend in the decentralization of forums in which IP issues are raised outside the traditional ones. From biodiversity, indigenous peoples' rights, A2K, to broader development discourse — each with elements of HRs considerations — "the international intellectual property system has morphed . . . into a 'conglomerate regime' or a 'regime complex'"[51] resulting in a chessboard approach to norm creation in the IP arena.

Without underemphasizing the modest impact of HRs overture on IP, suggestions of primacy of HRs over IP by the UN HRs system or allegations of *TRIPS* violations of HRs have yet to be rigorously scrutinized through the principles of customary international law. Alluding to that gap, Helfer argues that the efforts by the UN HRs system "fail to provide a detailed textual analysis of a human rights framework for intellectual property and how that framework interfaces with existing intellectual property protection standards in national and international law."[52] Rather, he argues that Resolution 2000/7 set "an ambitious new agenda for reviewing intellectual property issues within the U.N. human rights system" based on the "principle of human right primacy" over IP.[53]

The CESCR assumed responsibility for championing the principle of HRs primacy over IP. This was evident in its first interpretative foray into the HRs-IP interface through General Comment 17 issued in 2005: the right of everyone to benefit from "the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author."[54] This provision is perhaps the most direct link in treaty jurisprudence between HRs and IP.

The significance of *GC17* cannot be overstated in regard both to the CESCR's previous work in areas relevant to HRs and IP, and its influence on emerging HRs frameworks for IP.

According to *GC17*:

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51 Helfer, "Framework," above note 12 at 987.

52 *Ibid* at 986.

53 See CESCR, *General Comment No 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She is the Author*, 35th Sess, UN Doc E/C 12/GC/17 (2005) at para 47 [*GC17*]. The same provision takes its life from Article 27(2) of the *UDHR*, above note 10.

54 *Ibid* at para 1.

- Article 15(1)(c) rights derive their force from "inherent dignity and worth of all persons."[55] As such, they are basically HRs, and are apart from and transcend general IPRs.[56] Modalities for protection of those rights need not equate to the ones obtainable under copyright, patent, and other IP forms in so far as they secure the moral and material interest of authors.[57] While IPRs are mostly alienable, temporary, and limited in time and scope, HRs "are timeless expressions of fundamental entitlements of the human person."[58]
- References to moral and material interests[59] speak respectively to: a) recognition of moral rights of authors in their works as an expression and extension of their personality; b) commensurate remuneration, which supports an adequate standard of living of creators. Such recompense need not necessary be in tandem with what obtains in conventional IP, such as statutory copyright or patent accommodations.[60]
- Rights under Article 15(1)(c) are subject to balancing in relation to other rights pursuant to indivisibility and interrelatedness of HRs. Thus, "the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration."[61]
- Article 15(1)(c) (which includes IPRs such as copyright, patent, plant breeder rights, etc.) ought not constrain states' abilities to discharge their core obligations in relation to the rights to "food, health and education," rights to participate "in cultural life and to enjoy the benefits of scientific progress."[62]
- Yet on the principles of interrelatedness of HRs and core obligations, *GC17* notes:

> Ultimately, intellectual property is a social product and has a social function. States parties have a duty to prevent unreasonably high costs for

55 *Ibid* at para 3.
56 *Ibid* at para 10.
57 *Ibid* at para 2.
58 *Ibid* at paras 12–16.
59 One-off payments or alternative remuneration schemes for creators of intellectual work as opposed to conventional royalties are feasible under this interpretation.
60 See *GC17*, above note 53 at para 35.
61 *Ibid*.
62 *Ibid*.

> access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights.[63]

Like all HRs, Article 15(1)(c) rights are subject to three levels of obligations for their implementation by states, namely: a) to respect, i.e., to avoid direct or indirect interference with authors' freedom to enjoy their rights; b) to protect, i.e., to initiate positive measures to stop third parties from interfering with those rights; and, c) to fulfill, i.e., to proactively adopt diverse measures to facilitate optimal realization of the rights.

GC17 is the first major effort in the ongoing attempt to map an HRs' framework for IP. It is not only animated by the principle of primacy of HRs over IP as set by the sub-commission, but also by the 2001 CESCR's statement of key HRs principles for IP. In addition, it highlights the principle of indivisibility and interdependence of HRs. On that premise, Article 15(1)(c) rights are linked with the rest of the *ICESCR*, but more emphatically with other Article 15 rights, including rights to take part in cultural life and to enjoy the benefits of scientific progress, and freedoms associated with scientific research and creativity. The relationship between these rights and Article 15(1)(c) "is at the same time mutually reinforcing and reciprocally limitative."[64]

GC17 opened up space for incorporation of group rights generally, and the rights of indigenous and local communities within the intersection of HRs and IP.[65] Counterintuitively, it excludes corporations from making HRs claims over Article 15(1)(1)(c).[66]

Further, the tendency to cast Article 15(1)(c) rights both in terms of scope and the nature of rights[67] opens a window to accommodate TK in the

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63 *Ibid* at para 4.

64 *Ibid* at paras 7 & 8.

65 *Ibid*, noting that "under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However . . . their entitlements, because of their different nature, are not protected at the level of human rights" at para 7.

66 *Ibid* at paras 1 and 3.

67 Cullet, above note 12 at 430.

context of HRs.[68] *GC17* recognizes a broad construction of "authors" to include rights holders in virtually all regimes of IP, including copyright, patent, and plant breeders' rights.[69] Yet, it warns that the nature of IP under the HRs rubric of Article 15 and the entire *ICESCR* is neither absolute, nor fundamental. Rather, it is unequivocally qualified.[70]

Audrey Chapman observes that "[t]o be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must therefore facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level."[71] In *GC17*, we glimpse the nuances of HRs' framework for IP, at least in their preliminary conceptualization.

Since the release of *GC17* in 2005, the CESCR has issued only one more GC that bears direct relevance to IP as a component of Article 15. That is *GC21* titled *The Right of Everyone to Take Part in Cultural Life* (article 15, paragraph 1(a)).[72] Like *GC17*, it applies (with appropriate modifications) the 2001 principles in enunciating the right to take part in cultural life. For instance, on the basis of indivisibility and interrelatedness, the rights are linked to the provisions of Article 15, other HRs categories (including the rights to education, self-determination, and adequate standard of living) as well as all the *ICESCR* rights.[73] It elaborately provides for indigenous peoples as part of categories for special protection. As well, it recognizes the communal or group-oriented nature of indigenous peoples' rights.[74]

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68 See Rochelle Cooper Dreyfuss, "Patents and Human Rights: Where Is the Paradox?" in Grosheide, above note 6 at 72. Analysts of Article 15(1)(c) tend to isolate patent from its ambit; compare Peter K Yu, "Ten Common Questions About Intellectual Property and Human Rights" (2007) 23:4 Ga St U L Rev 709 [Yu, "Ten Questions"].

69 See *GC17*, above note 53 at paras 1–4.

70 Audrey R Chapman, "The Human Rights Implications of Intellectual Property Protection" (2002) 5:4 J Int'l Econ L 861 at 868 [Chapman, "Implications"].

71 CESCR, *General Comment No 21*, *The Right of Everyone to Take Part in Cultural Life*, 43rd Sess, Un Doc E/C.12/GC/21 (2009) [*GC21*].

72 *Ibid* at para 2.

73 *Ibid*, see for example, paras 3, 7, and 36.

74 They are also known as rights in intellectual creations; see below note 81.

D. ARTICLE 15 RIGHTS[75] AND CONVENTIONAL HUMAN RIGHTS CATEGORIES

Article 15 of the *ICESCR* demonstrates direct connection between HRs and IP.[76] It is, however, far from being the only article to do so. Arguably, only a fraction of the *ICESCR* articles can be distanced from IP, especially as the expansion of IP is felt in every area of life. Keeping our focus on core HRs, specifically the right to adequate food (art 11),[77] the right to education (art 13),[78] the right to the highest attainable standard of health (art 12),[79] the CESCR has already issued GCs on these rights in 1999 and 2000.

A review of the GCs on these core HRs shows that the CESCR shied away from making a direct link between them and IP. This approach is perhaps in strict compliance with the text of the *ICESCR*. Interestingly, issues around access to health, food, and A2K, with emphasis on information technologies and educational materials have been the touchstone of the HRs-IP interface.[80] These GCs predate the 2001 principles. Since those principles were meant for development, interpretation, and implementation of contemporary IP regimes, it is hard to justify the exclusion of core HRs from the understanding of extant IP regimes.[81]

The failure of the CESCR to directly raise IP concerns in its GCs on the core HRs most relevant to IP is a fundamental flaw in the current rapprochement between the two regimes. The narrow analytical confines which focus the HRs framework for IP on Article 15 of the *ICESCR* are far from helpful. Admittedly, direct reference to IP is missing in the *ICESCR* provisions for these core rights. Also, GCs on Article 15(1)(c), and Article 15(1)(a) indicate that the comments are applicable to the *ICESCR* as a whole. As well, the two

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75 See Yu, "Ten Questions," above note 68 at 711.

76 CESCR, *General Comment No 12, The Right to Adequate Food*, 20th Sess, UN Doc E/C.12/1999/5 (1999), art 11 [*GC12*].

77 CESCR, *General Comment No 13, The Right to Education*, 21st Sess, UN Doc E/C.12/1999/10 (1999), art 13 [*GC13*].

78 CESCR, *General Comment No 14*, (2000), *The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (2000), art 12 [*GC14*].

79 See, generally, Laurence R Helfer & Graeme W Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (New York: Cambridge, 2011); Grosheide, above note 6.

80 Indeed, these core HRs regimes are among the critical animators of contemporary intellectual property law and policy-making.

81 See, for example, *GC17*, above note 53 at para 35; *GC21*, above note 71 at para 2.

Article 15 GCs make references to aspects of those core HRs,[82] but they are bereft of direction and clarity on the dynamics of contemporary IP.

HRs are dynamic, evolving, and even contingent.[83] The CESCR elaboration of 2001 principles and its recent focus on Article 15 are responsive to the contingent nature of the contemporary challenges which IP poses for HRs. Those challenges are also increasingly raised at the sites of core HRs. Therefore, it is expected that any attempt to invoke the GCs, especially those relevant to key HRs identified above, after 2001 ought to take into account the 2001 principles in order to accommodate IPRs and specific HRs issue linkages.

There is a decade between the first GC on a core HR (right to food) and the very last one on Article 15(1)(b) issued in 2009. The 1999 *GC12* (right to adequate food (art.11))[84] states that the right is violated when a party adopts legislation or policies, including international agreements, which are inconsistent with its pre-existing legal obligation on the right to food.[85] In 2000, the CESCR shied away from even making reference to IP under *GC14* (right to highest attainable standard of health (article 12)).[86] Similar to the provision of *GC12*, there is a violation when states undertake legal obligations capable of undermining the right to health.[87] The overall tenor and features of *GC14* brings it closer to the language of the 2001 principles.[88] This is perhaps because of the closeness in time of the two and the general consciousness of IP at the CESCR at that time. More important, it also shows a progressive shift by CESCR to engage HRs intersection with IP.

The ramifications of *TRIPS* and the WTO system on HRs raise difficult challenges for less developed states given that *TRIPS* predates some rel-

82 See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2d ed (Ithaca, NY: Cornell University Press, 2003) at 1 (cited in Yu, "Ten Questions," above note 68 at 718 and n 27).

83 *GC12*, above note 76.

84 *Ibid* at para 19.

85 *GC14*, above note 78.

86 *Ibid* at para 50.

87 *Ibid* at para 27: for example, the accommodation of indigenous knowledge in HRs-IP narrative.

88 See Chapman, "Implications," above note 70. Respect for state sovereignty is often the alibi for weak international enforcement of human rights. However, Chapman rightly notes that "[s]omewhat ironically, the same scrupulous concerns . . . do not seem to concern the member nations of the WTO" at 866.

evant GCs.[89] Less developed states have blamed their food insecurity, public health crises, and lack of access to medicine, new information technologies, and educational resources on the WTO-*TRIPS* system.[90] Put differently, depending on their specific experiences, there is a basis to plead a conflict between IP rules as an integral part of the new global trade system and the HRs obligations of states under the CESCR. Yet, for some reason, the CESCR has shied away from giving this proposition legal imprimatur, lending credence to Helfer's observation that the thesis of HRs primacy over IP has yet to attain normative validity under customary international law.

However, recognizing the CESCR's determination to engage the HRs-IP intersection through its GCs since 2001 and the evolutionary rapidity of that discourse, it is not clear how best it could upgrade its pre-2001 GCs in which IPRs are implicated to the post 2001 module. Nonetheless, it is obvious that the new tempo and interest in HRs-IP interface by the CESCR creates some sense of inconsistency in its earlier work.

E. INTELLECTUAL PROPERTY AS HUMAN RIGHTS: SEDUCTION OF STRANGE BEDFELLOWS

Analysts struggle with the question of whether IP is an HR.[91] A more pointed question is whether the recognition of IP as a HR pursuant to Article 15 of the *ICESCR* extends to IP the same fundamental status as other HRs.[92] From the foregoing analysis of the GCs, it is clear that even though rights arising from "scientific, literary or artistic production" (author/creators' rights)[93] are recognized as HRs, they do not enjoy such fundamental status as other HRs categories. This position seems to infringe the principle of indivisibility of HRs. Yet, because of the simultaneous location of authors' rights within economic (material) and non-economic (moral) interests, it is hard

89 See Jerome H Reichman, "Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?" (2009) 46:4 Hous L Rev 1115.

90 See Robert L Ostergard Jr, "Intellectual Property: A Universal Human Right?" (1999) 21:1 Hum Rts Q 156; see also Yu, "Ten Questions," above note 68 at 713.

91 *Ibid*.

92 *Ibid*. Yu refers to these as "the right to the protection of moral and material interests in intellectual creations," which is the same as the *ICESCR* text reference to right in "scientific, literary and artistic production" at 711.

93 See Cullet, above note 12 at 407–9; see also Chapman, "Implications," above note 70 at 867–68; Audrey R Chapman, "Core Obligations Related to ICESCR Article 15(1)(c)" in Audrey R Chapman & Sage Russell, eds, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (New York: Intersentia, 2002) at 314.

to conceive of them with the full complement of fundamental HRs for many reasons outside the scope of the present analysis.

Commentators on the drafting history of the *UDHR* argue that the rights arising from intellectual creations — IPRs — were not intended to have equal status as fundamental HRs.[94] This is borne out by *GC17* which clearly states that the realization of Article 15(1)(c) rights is dependent on the enjoyment of other guaranteed HRs. The HRs-IP intersection is an amorphous and often paradoxical relationship, the untangling of which is a complex exercise. But the direct nesting of IPRs in crucial HRs instruments, no matter how weakly conceived, is a warrant to broach the subject of IP's HRs status even within the confines of the *ICESCR*'s textual prescriptions.[95]

The attraction of the HRs narrative is now such that even opposing stakeholders in both the HRs and IP enterprise are willing to explore the moral authority of HRs to advance their interests. Specifically, indigenous and local community advocates have always linked cultural production to self-determination, which is at the core of indigenous rights in international law.[96] Given the open-ended nature of self-determination, indigenous peoples' rights claims to the protection of their knowledge constitutes a matter of self-determination and consequently of HRs.[97] The urgency of such protection increases with the recent expansion of IPRs and rampant appropriation of TK.

At the same time, corporations are also hedging their bets on HRs to IPRs, and are not willing to be excluded from the narrative. IP-based industries would not hesitate to "invoke the authors' rights and property rights provisions in human rights treaties to further augment existing standards of protection."[98] As we have noted, *GC17* excludes corporations from Article 15(1)(c) of the *ICESCR*. Yet, the same GC clearly recognizes indigenous communal or group rights within the ambit of Article 15(1)(c).

In regard to indigenous claims, the first question, then, is what is the normative framework for identifying non-HRs aspects of indigenous know-

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94 Compare Yu, "Ten Questions," above note 68 at 716, suggesting that accommodation IP in HRs instrument seem to settle the question of HR status of IP.

95 See Rosemary J Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6:1 Ind J Global Legal Stud 59.

96 See Darrell A Posey & Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: IDRC, 1996).

97 Helfer, "Framework," above note 12 at 976.

98 *Ibid* at 976.

ledge and IP? It is tempting to gloss over indigenous rights claims with little constructive scrutiny. That scrutiny is important because unbridled triggering of the HRs' alarm on the IP sanctuary can drown the urgency for more serious attention to real HRs components of IP, even of indigenous knowledge and broader indigenous contexts.

Second, and perhaps more important, the attraction of the doctrine of HRs' primacy in ongoing attempts to map the HRs-IP interface is a potential ladder for proponents of stronger IP protection to step into HRs' moral high ground. Easily, "the rhetoric of human rights [is deployed] to bolster arguments for or against revising intellectual property protection standards in treaties and in national laws."[99] Similarly, when IP latches onto the HRs anchor, it is easy to weaken the traditional leverage to moderate IPRs on public interest grounds. Helfer notes, for example, that "[i]f the moral and material interests of authors and creators are fundamental rights, 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."[100]

Third, still on indigenous knowledge, an uncritical HRs capture could potentially cut short the needed conversation around the limits of rights, the feasibility of TK's immemorial status, and the nature of appropriate scrutiny for objectionable traditional cultural practices. One of the major hurdles for proponents of fixing the gap between conventional IP and TK is to account for some of the IPRs' inherent public-oriented mechanisms such as term limits, a concept not supported in indigenous circles. When TK is *located*, unquestionably, on the HRs landscape for IP purposes, the gulf between it and conventional IP may increase. This is because HRs' inherent moral edge limits the leverage for negotiating public interest compromises.

Fourth, how would weaker stakeholders, such as indigenous and local communities, fare in what an analyst calls the "'human rights ratchet' of intellectual property protection?"[101] HRs' ratchet of IP has a tendency to escalate extant disequilibrium in the IP system and "would ultimately backfire on those who seek to use the human rights forum to enrich the public

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99 *Ibid* at 994.

100 See Yu, "Ten Question," above note 68 at 738 [footnote omitted]; see generally Yu, "Reconceptualizing," above note 12, on the notion of human rights ratchet.

101 *Ibid* at 1125.

domain and to set maximum limits of intellectual property protection."[102] According to Rochelle Dreyfuss, allowing HRs to shape IP discourse can be counterproductive as it fuels adversarial struggle for rights that pitches one group against the other in the nature of a zero sum game.[103] Without caution, framing IPRs as HRs is akin to bestriding an unruly horse, with no guarantee of desired destination. As the most vulnerable of the human family, indigenous and local communities have the direst need for HRs protection. Yet, they are least empowered to engage in the zero sum game of HRs ratchet of IP.

F. HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS: REFLECTIONS ON THE NATURE OF ENGAGEMENT

As new developments continue to bring IP and HRs into contact,[104] preliminary literature on HRs-IP interface focuses largely on characterizing the nature of the relationship. Three prominent but hardly exhaustive schools of thought shape the discourse. The first suggests that HRs and IP are in "fundamental conflict."[105] The second perceives the two regimes as complementary and mutually supportive.[106] The third (which is located at the intersection of the first two) adopts an instrumental approach. It is prescriptive in nature and proposes that HRs can serve the objective of moderating expansive IP systems as insurance for safeguarding multifarious public-oriented considerations in IP.[107]

Clearly, the conflict approach is most popular. It derives momentum from the institutional fillip provided by the UN HRs system. There is some sense that the conflict narrative is self-evidently justified by the empirical reality of the negative and sobering impacts of *TRIPS*. From a jurisprudential perspective, the conflict approach is borne out by the conflicted disciplinary

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102 See Dreyfuss, above note 68 at 89–90.

103 See Peter K Yu, "Intellectual Property and Human Rights in the Nonmultilateral Era" (2012) 64:4 Fla Law Rev 1045, focusing on the Anti-Counterfeiting Trade Agreement (ACTA) as one of the developments that warrant increased conversation over the HRs implications of IP.

104 See Helfer, "Conflicts," above note 5 at 48 [footnote omitted].

105 *Ibid*.

106 See Christophe Geiger, "Fundamental Rights, a Safeguard for the Challenge of Intellectual Property?" (2004) 35 International Review of Intellectual Property and Competition Law 268 at 277.

107 See Cullet, above note 12 at 415 [footnote omitted].

orientations of HRs and IP. Without undermining their fluidity, the former are within the realm of public law, whereas IP is *essentially* a private right and a subject of private law; albeit with strong public interest content. While HRs are publicly protected rights inuring from human dignity, IP consists *largely* of private rights animated by utilitarian material considerations for both creators and the public. Thus, the inherently conflicted conceptual orientation of the public and private law binary lends credence to the thesis of conflict.

According to the complementary approach, even though HRs and IP are located within the public and private law arenas respectively, they share a largely reconcilable objective: the promotion and protection of human well-being. According to Philippe Cullet, "intellectual property protection must serve the objective of human well-being, which is primarily given legal expression through human rights."[108] This view dovetails with the third approach, which conceives of the two regimes as instruments for achieving shared objectives. However, the emphasis of this approach is in the deployment of HRs considerations to moderate IP. According to Okediji, "human rights can be used instrumentally to deflect the moral appeal of certain affirmative rights of intellectual property holders, e.g. by justifying compulsory licenses for public health, or requiring national exceptions to copyright laws in the interests of freedom of expression."[109]

What is the nature of the contact between HRs and IP? So far, we have noted an intense conversation across the two. However, that conversation has barely begun, and it has yet to acquire a distinct identity. Nor have the two areas metamorphosed into a cohesive field of study. The language of HRs is being foisted upon IP, but the latter is reluctant to engage. Even though they are located under law's broad ambit, both HRs and IP do not easily lend themselves to precision in disciplinary classification. There are multiple layers involved in deconstructing the two from a disciplinary analysis. For example, HRs and IP are subcategories within the umbrella discipline of law even though they have morphed into separate specialities, each having its own language and research tools, methodologies, and idiosyncrasies. Yet, as indicated above, both HRs and IP are nested within more established broader legal categories, i.e., public and private law respectively.

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108 Above note 12 at 415.

109 As quoted in Grosheide, above note 6 at 22–23.

As HRs and IP each continue to expand drawing in subject matters from diverse disciplines, the bases for their contact will only intensify. Not many themes underscore or unmask the multidisciplinary character of IP better than its interface with HRs. Buffeted by the demands of diverse disciplines, IP has yet to respond to its now obligatory multidisciplinarity. Yet, as a preliminary outcome, one major effect of multidisciplinarity in IP is gradual jurisdictional disaggregation or decentralization of IP regulatory and policy-making sites at least at the global level.

Notwithstanding the pre-eminence of the conflict approach, the co-existence thesis has greater prospects for HRs-IP rapprochement. First, quite unlike the coexistence approach's focus on problem resolution, which is an important objective of interdisciplinarity, the conflict approach freezes appetite for solution. Even then, resolutions emanating from the conflict narrative are less rigorous and are easily found in the doctrine of HRs supremacy. Second, a coexistence option not only highlights the fact of historic neglect of HRs in conventional IP, it also nuances the theme of commonality of objectives for the two disciplines. Third, as a consequence, the first and second conditions warrant the need for both HRs and IP to engage in a purposive rapprochement via an interdisciplinary experience to bridge their historical gap. Compared to HRs, the challenges of both interdisciplinarity and mutidisciplinarity are new to IP. However, HRs' recent engagement with IP provides the circumstance and opportunity for IP to bridge its long-standing indifference towards engaging other disciplines.