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HUMAN DEVELOPMENT AS AN INTELLECTUAL PROPERTY METRIC

J. JANEWA OSEI-TUTU[†]

INTRODUCTION

The need to balance the interests of the creator against the interests of the public is a recurring theme in international intellectual property (“IP”) law. This is reflected in the access to medicines, access to food, and access to knowledge movements, among others. The access to medicines movement has been relatively effective, with civil society insisting that patented medications to treat serious illnesses, such as HIV and cancer, should be made available and affordable to those who need them. Questions about IP’s impact on development also arise with respect to food and education. For instance, should farmers be prohibited from the traditional farming practice of collecting seeds and replanting them if the seed is a genetically modified patented product? If piracy increases literacy, should some piracy be tolerated?

The question of whether to encourage greater protection or greater access may be framed as a distinction between the public interest and private interests. To some extent, this appears to align with the debate about the natural rights and utilitarian approaches to IP. The natural rights argument is based on the premise that creators enjoy some natural entitlement to IP protection.¹ Under the utilitarian view, the protection is not a natural entitlement but rather it is designed to serve a particular

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¹ Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 270 (2014).

purpose, such as stimulating innovation.² International IP law is neither clearly utilitarian nor natural rights based. On closer examination, concerns about excessive IP protection are about something more than the dichotomy between public and private interests.

The critique of global IP rights is about a system that has come to be perceived as one that prioritizes corporate goals at the expense of human interests. In the international arena, the concerns have centered on human development issues, such as health and education. This is due to the failure of the current model to promote IP laws and policies that further human progress. The World Trade Organization Agreement on Trade-Related Intellectual Property Rights (“TRIPS Agreement”) speaks of balancing the interests of users and producers of IP protected goods.³ Part of the problem may be due to a lack of clarity about how this balance should be determined. It is argued here that the balancing should contemplate factors that relate to the improvement of the human condition.

The United Nations (“UN”) Human Development Index is based on such factors. Human development, as defined by the United Nations, is determined by assessing various components of human progress, including economic growth, health, and literacy.⁴ It may not be immediately apparent how these human development factors are relevant to IP law. However, some scholars have already made the connection between human flourishing, human development, and IP protection. Human

² *Id.* at 268.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

⁴ The term “human development” is used in this Essay in the way it has been adopted by the United Nations Development Programme (“UNDP”) in its implementation of its human development index. This Essay recognizes that some may dispute this characterization of development and that it may have its limitations. However, for the purposes of this Essay, UN terminology is used. It does so on the basis that the UN is an international organization with broad membership that has used the human development index as a measure for over two decades. *See generally Human Development Index (HDI)*, UNITED NATIONS DEV. PROGRAMME, <http://hdr.undp.org/en/content/human-development-index-hdi> (last visited Dec. 21, 2016) (“The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and having a decent standard of living. The HDI is the geometric mean of normalized indices for each of the three dimensions.”) [hereinafter *Human Development Index*].

development is critical for societal progress. It is an implicit objective of IP law and policy because IP rights regulate innovation, creativity, and the production of goods that promote human flourishing.

This Essay argues that human development should be adopted as a metric for IP because it is a useful and relevant metric, and one that can be invoked under both the natural rights and utilitarian frameworks. Metric, as used here, refers to a method for measuring the effects of IP laws.

Part I of this Essay will provide a brief overview of some of the reasons for the dissatisfaction with current IP law before making the connection between IP and human development in Part II. Part III explains how human development can be adapted as a metric for IP under both utilitarian and natural rights frameworks, while Part IV offers some examples of how a human development metric could apply to IP law. This project does not purport to comprehensively answer the question of how best to integrate human development as a metric into IP law. However, it will offer some preliminary suggestions about how this metric could apply to some traditional frameworks for IP in light of the core goals of the global regime and the explicit objectives of the TRIPS Agreement.

I. PEOPLE OR PROFITS?

International IP law has been rife with disagreement about the utility of high IP standards for all nations. This conversation has largely been the result of resistance to the harmonization of enforceable global IP standards through the World Trade Organization (“WTO”) agreement on IP.⁵

A. *The WTO Standards*

The 1994 TRIPS Agreement required all WTO signatories to adopt certain minimum standards of IP protection.⁶ Since most

⁵ See Peter K. Yu, *TRIPS and its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 385 (2006); see also Cynthia M. Ho, *Global Access to Medicine: The Influence of Competing Patent Perspectives*, 35 FORDHAM INT’L L.J. 1, 18–19 (2011).

⁶ TRIPS Agreement, *supra* note 3, art. 1. (“Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”); see also J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection*

of the world's nations are members of the WTO, the majority of the countries in the world are required to implement these obligations into domestic law.⁷ The TRIPS Agreement is distinct from international IP agreements that predated it.⁸ This is due to the WTO enforcement mechanism that enables countries to litigate at the WTO to secure compliance with the TRIPS Agreement.⁹ More recent international agreements, such as the Anti-Counterfeiting Trade Agreement and the Trans Pacific Partnership, build on the standards contained in the TRIPS Agreement.¹⁰

In addition to the enforcement mechanism, the TRIPS Agreement made substantive changes to global intellectual property rules. For instance, in the area of patent law, the TRIPS Agreement not only standardized minimum terms of protection, but also prohibited WTO member states from excluding certain technologies from protection.¹¹ This meant that countries, such as India, had to change their laws to provide patent protection for pharmaceutical drugs.¹² The TRIPS

Under the TRIPS Component of the WTO Agreement, 29 INT'L LAWYER 345, 352-53 (1995).

⁷ The WTO has 164 member states as of July 29, 2016. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated July 29, 2016). The TRIPS Agreement is mandatory for all WTO members. Marrakesh Agreement Establishing the World Trade Organization art. II, ¶2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] ("The agreements and associated legal instruments included in Annexes 1, 2, and 3 . . . are integral parts of this Agreement, binding on all Members.").

⁸ See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (revised in Paris July 24, 1971, and in 1979) [hereinafter Berne Convention].

⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

¹⁰ See *Anti-Counterfeiting Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/acta> (last visited Dec. 21, 2016); see also *Trans-Pacific Partnership*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Dec. 21, 2016) [hereinafter TPP]. The TPP was signed in Auckland, NZ in February 2016, but it is not yet in force.

¹¹ TRIPS Agreement, *supra* note 3, art. 27. In the copyright field, for instance, TRIPS primarily incorporated the Berne Convention. There were some additional changes as well, but since most nations were already Berne signatories, the impact of TRIPS was not as significant. See *id.* art. 9.

¹² Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1576 (2009) ("In 2005, in order to comply with the requirements of TRIPS, the Indian government introduced product patents on pharmaceuticals. For the previous three

Agreement also incorporated by reference much of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).¹³ As a result, although the Berne Convention copyright provisions were not new, they became part of the IP standards that could be enforced through the WTO. The TRIPS Agreement also expressly required copyright protection for computer source code and databases, and it was the first major international agreement to provide protection for geographical indications.¹⁴

Despite the fact that the TRIPS Agreement has been in force for more than twenty years, it continues to generate criticism. There is a substantial amount of legal scholarship about the need to find the appropriate balance between the interests of the users and producers of IP protected goods.¹⁵ Scholars and commentators have also critiqued the WTO agreements, arguing that one size does not fit all.¹⁶ In particular, commentators have characterized the WTO standards as relevant for highly industrialized countries, but inappropriate for developing and less developed countries.¹⁷

decades, such patents had been forbidden, allowing India to develop one of the most robust generic pharmaceutical industries in the world.”).

¹³ TRIPS Agreement, *supra* note 3, art. 9; *see generally* Berne Convention, *supra* note 8.

¹⁴ TRIPS Agreement, *supra* note 3, arts. 10, 22, 23.

¹⁵ Keith E. Maskus & Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279, 304–05 (2004); Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 L. & POL’Y 315, 316–18 (1996); Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 146–47 (2009); Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 981 (2009); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1224 (2009); Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 817–18 (2007).

¹⁶ Yu, *supra* note 15, at 981 (footnote omitted) (“Although the TRIPS Agreement’s one-size-fits-all—or, more precisely, super-size-fits all—approach is highly problematic, the Agreement, in its defense, includes a number of flexibilities to facilitate development and to protect the public interest.”).

¹⁷ Gana, *supra* note 15, at 316–17; Dinwoodie, *supra* note 15, at 1224–25.

B. *Balancing Competing Interests*

IP protection can limit the ability of individuals other than the right holder to make, use, or reproduce a protected product without permission.¹⁸ This exclusivity allows companies to recover their investments in their products, but it also enables them to limit access to their products due to pricing or other measures.¹⁹ Commentators responded to these global limitations on use and access to IP protected goods by arguing that there is a need to “balance” the international IP regime. The access to medicines and access to knowledge movements, for instance, developed in response to the standards contained in the TRIPS Agreement.²⁰

The classic example presented in discussions about the need to balance access with protection is that of an African country facing a serious health crisis, like high HIV rates, and a population that cannot afford to pay what the pharmaceutical companies would like to charge.²¹ Developing country demands may be perceived as requests for charity and quickly dismissed. Pharmaceutical industry advocates turn to reward theory to explain the need for incentives and cost recovery, without which companies would not produce these life-saving medications.²²

However, access to goods protected by IP rights is not only a developing country problem. While the average income in a developing country is much lower than in an industrialized nation,²³ access affects citizens of all nations.²⁴ The issues

¹⁸ See, e.g., TRIPS Agreement, *supra* note 3, art. 28.

¹⁹ The primary critique relating to prices and access has been with respect to pharmaceutical products. Technology is also used to limit access, particularly to copyrighted works.

²⁰ See Ruth Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 U. PA. J. INT'L L. 191, 193 (2014).

²¹ Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha “Solution”*, 3 CHL. J. INT'L L. 47, 47 (2002); Tiisetso Motsoeneng, *South Africa Slams Big Pharma in Generic Drugs Row*, REUTERS (Jan. 17, 2014, 6:57 AM), <http://www.reuters.com/article/us-safrica-pharma-idUSBREA0G0N720140117>.

²² Frederick M. Abbott, *The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health*, in NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES 27, 33 (Pedro Roffe et al. eds., 2006).

²³ According to the U.S. Census Bureau, the average household income in the United States in 2014 was \$53,567 per year. See Carmen DeNavas-Walt & Bernadette D. Proctor, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, 5 (Sept. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/b05/demo/p60-252.pdf>. According to the

related to exclusivity and the corresponding high prices for medicines to treat serious illnesses, such as cancer, have been reported in the media as a matter of increasing concern for consumers, as well as medical providers in industrialized nations such as the United States.²⁵ Arguments for access to medicines, food, technology, and knowledge are not requests for charity. Rather, they highlight questions about the objectives of IP protection and the appropriate methods for assessing whether these objectives are being fulfilled. Human development as a metric can help to assess the role of IP in this regard.

To be clear, utilizing human development as an IP metric does not necessarily lead to less IP protection. Critics of the current system have not only made arguments for greater access, they have also advocated expanding the use and scope of IP law to promote the interests of certain communities.²⁶ For example, commentators have recommended using geographical indications to protect the products of indigenous and traditional communities.²⁷ Moreover, traditional knowledge proponents

World Bank, the gross national income per capita in Haiti is less than \$900.00 per year. See *Haiti*, THE WORLD BANK OPEN DATA, <http://data.worldbank.org/country/haiti?view=chart> (last visited Dec. 21, 2016).

²⁴ Canada, for instance, found itself defending its policy in favor of access to low cost drugs. See generally Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WTO Doc. WT/DS114/R (adopted Mar. 17, 2000) [hereinafter Panel Report—*Canada*].

²⁵ Andrew Pollack, *Cancer Doctors Offer a Way To Compare Medicines, Including by Cost*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/23/business/cancer-doctors-offer-way-to-compare-medicines-including-by-cost.html> (quoting Dr. Richard Schilsky, chief medical officer of the oncology society, “the price of new cancer drugs now averaged about \$10,000 a month, and some cost \$30,000 a month, which can mean prohibitive co-payments even for some patients with good insurance”).

²⁶ Generally, intergenerational knowledge and cultural traditions cannot be adequately protected using classic IP law. See Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 164 (2006). As such, the contours of IP law would have to be altered in order to protect traditional knowledge. See, e.g., WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/igc> (last visited Dec. 21, 2016).

²⁷ Tesh Dagne, *Protecting Traditional Knowledge in International Intellectual Property Law: Imperatives for Protection and Choice of Modalities*, 14 J. MARSHALL REV. INTELL. PROP. L. 25, 48 (2014); Daniel Gervais, *Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications*, 15 ILSA J. INT'L & COMP. L. 551, 558 (2009). But see, Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 187 (2006).

have sought to expand existing IP rules to accommodate knowledge and cultural traditions that have been handed down within a community from one generation to another.²⁸ This expansion, rather than contraction, of IP would have the potential to promote human development and to empower certain communities by giving them a means to protect and leverage their cultural heritage.²⁹

The tensions in global IP law have also been characterized as reflecting a dichotomy between the global North and the global South, public versus private interests, and protection versus access.³⁰ However, most commentators will agree that the central issues cannot be so neatly categorized.³¹ Developed and developing countries share similar concerns about promoting the health and education of their populations, promoting the public interest as well as the private interest, and providing both protection and access.³² International disputes about IP demonstrate that industrialized countries, such as Australia and Canada, and developing nations, such as India and Brazil, share a common interest in promoting human development.³³ These nations have all been involved in WTO disputes about the balance between IP rights and public health issues.

²⁸ Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE WES. RES. J. INT'L L. 233, 241 (2001).

²⁹ See Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 50–52 (1998).

³⁰ Sykes, *supra* note 21, at 50 (“This ‘North-South’ divide on the scope of intellectual property rights was the source of many heated disputes in years past, with developed nations regularly accusing the developing world of ‘piracy.’”).

³¹ Okediji, *supra* note 20, at 204.

³² Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 21–22 (2004) (noting that the TRIPS tendency towards the expansion of IP rights has a disproportional effect on developing countries, but that it affects developed countries as well).

³³ All of these countries have been engaged in disputes relating to IP protection and some domestic policy objective that promotes some aspect of human development. See, e.g., Panel Report, *Canada*, *supra* note 24; Request for Consultation by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WTO Doc. WT/DS408/1 (May 19, 2010); Request for Consultation by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/1 (Mar. 15, 2012).

Indeed, much of the dissatisfaction about global IP standards relates to the effect of these standards on various aspects of human development.³⁴ Although there is a variety of IP owners, most U.S. IP rights are held by corporations.³⁵ These entities are the primary beneficiaries of globalized IP standards.³⁶ Such standards may benefit legal persons, but IP laws are intricately related to human development. This is because human progress, whether it is characterized as freedom,³⁷ individual autonomy,³⁸ culture,³⁹ scientific innovation, belonging,⁴⁰ or wealth generation, is at the core of IP law.⁴¹ The next section will elaborate on human development as a relevant metric for global IP.

³⁴ *Washington Declaration on Intellectual Property and the Public Interest*, INFOJUSTICE.ORG, <http://infojustice.org/washington-declaration-html> (last visited Jan. 17, 2017).

³⁵ U.S. PAT. AND TRADEMARK OFF., ELECTRONIC INFO. PRODUCTS DIVISION, ALL TECHNOLOGIES REPORT, JANUARY 1, 1991–DECEMBER 31, 2015 (Mar. 2016), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/all_tech.pdf; U.S. PAT. AND TRADEMARK OFF., ELECTRONIC INFO. PRODUCTS DIVISION, ALL PATENTS, ALL TYPES REPORT, JANUARY 1, 1991–DECEMBER 31, 2015 (Mar. 2016) <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/apat.pdf> (finding, as of December 31, 2015, U.S. corporations owned 1,874,482 U.S. patents and foreign corporations owned 1, 866,768 patents at the time the patent was granted; U.S. individuals owned 321,123 and foreign individuals owned 125,200 patents at the time of grant).

³⁶ See SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 96–99 (2003). Transnational corporations are the primary applicants for IP protection. See *Who Filed the Most PCT Applications in 2015*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_pct_2015.pdf (last visited Jan. 17, 2017); *Who Filed the Most Madrid Applications in 2015?*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_madrid_2015.pdf (last visited Jan. 17, 2017); *Who Accounted for the Most Hague Design Filings in 2015*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_hague_2015.pdf (last visited Jan. 17, 2017).

³⁷ See, AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (2d. ed. 2001). Amartya Sen defines development as the freedom, which requires that people be free from poverty, tyranny, and social deprivation.

³⁸ ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 117 (2011).

³⁹ MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 31 (2012). (“I suggest that intellectual property law must adopt broader social and cultural analysis. The fundamental failure in the economic story of intellectual property has to do with information’s role in cultural life and human flourishing.”).

⁴⁰ See generally Elizabeth Rosenblatt, *Belonging as Intellectual Creation*, MISSOURI L.J. (forthcoming 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495970.

⁴¹ See JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 14 (2015) (discussing the reasons why people create and the value that innovators place on their IP); see generally, Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article 1, Section 8*,

II. DEVELOPMENT-ORIENTED INTELLECTUAL PROPERTY

This proposal to use human development as a metric for IP relates to the work of other IP scholars, who have argued that IP laws should promote human flourishing. These IP scholars draw on the human flourishing and human capability models developed by Amartya Sen and Martha Nussbaum.⁴² This concept of human flourishing is about the freedom of individuals to live the kind of lives they choose.

Madhavi Sunder, for instance, argues that IP aims to enrich the cultural domain, which, in turn, promotes human flourishing.⁴³ Margaret Chon suggests that rather than focusing narrowly on innovation and creativity, we could expand the focus of IP to include global public goods like equality, education, food security, and health.⁴⁴ The relationship between human flourishing and IP rights has gained traction. Brett Frischmann, for instance, has made the connection between welfare economics arguments and human flourishing.⁴⁵

The argument here builds upon the existing literature but can also be distinguished in two ways. First, this Essay proposes to adopt human development as a metric for IP law, instead of focusing on the concept of human flourishing alone, although human flourishing is an important aspect of human

Clause 8 of the United States Constitution, or Introducing the Progress Clause, 80 NEB. L. REV. 754 (2001) (providing an interpretation of progress); ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF THE SCIENCE AND THE USEFUL ARTS (2011) (offering an interpretation of progress in the copyright law).

⁴² See SUNDER, *supra* note 39, at 7; Margaret Chon, *supra* note 15, at 817–18.

⁴³ SUNDER, *supra* note 39, at 31.

⁴⁴ Margaret Chon, *Intellectual Property Equality*, 9 SEATTLE J. FOR SOC. JUST. 259, 267 (2010) (“Rather than the myopic focus on intellectual property’s capacity to encourage innovation or creativity, is there another way to speak in intellectual property? Can we broaden its focus to include the production of other global public goods such as equality, education, health, food security, climate change and other areas deeply implicated in a ‘development as freedom’ model, where human capacity for flourishing requires basic freedoms such as the ability to read, to eat, to be free from disease, and so on? These freedoms are the prerequisites of a functioning knowledge society that formal intellectual property regimes already assume.”).

⁴⁵ Brett M. Frischmann, *Capabilities, Spillovers and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property* 19 (Cardozo Legal Studies, Working Paper No. 442, 2014). (“One critically important capability enabled by intellectual property laws is appropriation of benefits through participation in the stream of markets for intellectual goods (recall the supply chain noted earlier). We cannot ignore the positive role of private property and corresponding first party effects. To put it another way, the private rights features of the intellectual property semi-commons support important capabilities.”).

development.⁴⁶ Second, human development as a metric implies that development is not a by-product, but rather a core objective of IP law and policy. This is not an argument for more or less IP protection but an argument for IP laws and policies that promote human progress. As this Essay explains in Part IV, human development as a metric could lead to stronger IP protection in some instances, and weaker IP protection in others.⁴⁷

A. *Drawing on International Norms*

While there are various factors that can be taken into account in evaluating human development, there are some that have already been adopted by the UN to determine whether to classify a country as a “developing” country. The UN is an international organization comprised of 193 member states.⁴⁸ Thus, most of the world’s nations are members of the UN. The UN standards are a helpful starting point because they are widely accepted and have been in place for more than two decades.⁴⁹ These international norms can help inform international IP law and policy.

The UN assesses human development by evaluating the economic, educational, and health status of a population.⁵⁰ In many ways, these are the factors that overlap with the balancing that takes places in international IP law. For example, the human development factors mirror competing IP interests, such as the need to balance protection with access to food, health, and

⁴⁶ *About Human Development*, UNITED NATIONS DEV. PROGRAMME: HUMAN DEV. REPORTS, <http://hdr.undp.org/en/humandev> (last visited Dec. 21, 2016). (“The human development approach, developed by the economist Mahbub Ul Haq, is anchored in the Nobel laureate Amartya Sen’s work on human capabilities, often framed in terms of whether people are able to ‘be’ and ‘do’ desirable things in life. Examples include[:] *Beings*: well fed, sheltered, healthy[, and] *Doings*: work, education, voting, participating in community life. Freedom of choice is central to the approach: someone choosing to be hungry (during a religious fast say) is quite different to someone who is hungry because they cannot afford to buy food.”).

⁴⁷ See *infra* Part IV.

⁴⁸ *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/index.html> (last visited Jan. 17, 2017).

⁴⁹ See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2015: WORK FOR HUMAN DEVELOPMENT Chapter 2 (2015), <http://report.hdr.undp.org>.

⁵⁰ See *Human Development Index*, *supra* note 4 (“The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living. The HDI is the geometric mean of normalized indices for each of the three dimensions.”).

education. Thus, it is an attractive option to adapt this existing tool for use in evaluating and implementing international IP laws and policies.

Furthermore, a brief review of the international IP agreements reveals that the relationship between development and IP is neither new, nor unusual. International institutions that regulate or promote IP have repeatedly faced the question of development.⁵¹ The challenge of integrating development objectives into the international IP agenda started several decades ago and continues today.⁵²

At the WTO, development has been an issue from the time the IP provisions were negotiated.⁵³ When the TRIPS Agreement was negotiated, the WTO member states recognized that developing and least-developed countries would face challenges in revising their laws and making the necessary institutional changes that would allow them to implement their TRIPS Agreement obligations. Thus, these countries were given a delayed period of time to implement the TRIPS Agreement.⁵⁴ Furthermore, exceptions from IP agreements for developing countries did not start with the WTO, but in fact preceded it. For example, the Berne Convention for the Protection of Literary and Artistic Works contained special provisions for developing countries.⁵⁵

The concern for development continues to be reflected in the 2007 WIPO Development Agenda.⁵⁶ The WIPO Development Agenda sets out a number of goals, which are organized into six clusters. For example, under the first cluster—technical assistance and capacity building—WIPO would provide technical assistance that is “development-oriented” and dedicate resources

⁵¹ See Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N. U. L. REV. 465, 470 (2009) (providing an analysis of the institutional history).

⁵² The recently concluded *Trans Pacific Partnership*, for instance, which contains a chapter on IP, also contains a chapter on development. The development objectives of the TPP apply to the agreement in general. See TPP, *supra* note 10, chapter 18.

⁵³ See Reichman, *supra* note 6, at 345; Yu, *supra* note 51, at 467. For a fuller discussion of the relationship between trade, IP, and development, see J. Osei-Tutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1 (2016-2017).

⁵⁴ TRIPS Agreement, *supra* note 3, arts. 65, 66.

⁵⁵ Berne Convention, *supra* note 8, art. 14.

⁵⁶ See generally *Development Agenda for WIPO*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-development/en/agenda> (last visited Jan. 17, 2017).

to technical assistance for promoting a “development-oriented IP culture.”⁵⁷ Among many other things, WIPO would promote a fair balance between IP protection and the public interest, and would assist member states to strengthen capacity for protecting domestic creations.⁵⁸ WIPO would also support efforts at enriching the public domain and engage in “norm-setting” that would take into account the flexibilities in international IP agreements that allow nations to develop IP laws that meet their domestic objectives.⁵⁹

The need for special treatment for developing countries may be an indication that high levels of IP protection should only be adopted after nations have achieved a certain level of development. As some commentators have observed, the United States did not respect IP rights when it was a new country in the early stages of its development.⁶⁰ Instead, the U.S. freely copied European artistic works and innovations as part of its development strategy.⁶¹ This Essay does not suggest that IP laws have no role to play in the development process or that IP protection and human development are mutually exclusive.⁶² To the contrary, human development is an implicit objective of IP protection. If IP laws and policies are crafted with a view to promoting human development, then these rules could facilitate economic, educational, and health progress at both an individual and societal level.

Furthermore, since IP rights, patents and copyrights in particular, are generally understood to stimulate innovation and creativity, it is natural to find references to development in international IP agreements. Innovation, meaning developing new ways of doing things,⁶³ is often said to lead to economic

⁵⁷ *Id.* Cluster A, ¶¶ 1, 3.

⁵⁸ *Id.* Cluster A, ¶¶ 10, 11.

⁵⁹ *Id.* Cluster B, ¶¶ 16, 17.

⁶⁰ Llewellyn Joseph Gibbons, *Do as I Say (Not as I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not so Long Past of the Developed Nations*, 64 SMU L. REV. 923, 937 (2011).

⁶¹ *Id.*

⁶² Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2842 (2006).

⁶³ *Innovation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/innovation> (last visited Dec. 21, 2016); The OECD Oslo Manual, for example, defines four different types of innovations: product, process, organizational, and marketing. The OECD had thirty-four member countries at the time of writing. OECD & EUROSTAT, OSLO MANUAL: GUIDELINES FOR COLLECTING AND INTERPRETING

development.⁶⁴ Yet, economic development is only one aspect of human development. Human progress is more adequately measured by taking into account the various factors that affect quality of life. The Human Development Index (“HDI”) gives a more complete indication of human progress because it takes economic development into account, but it also incorporates health and education as indicators of human flourishing.⁶⁵

Consider human development in the context of the pharmaceutical industry, which provides the classic example of the need for incentives and rewards. The pharmaceutical industry contends that companies must invest substantial amounts of money in research and development, and that without the time limited market exclusivity that enables them to recover their costs, they will not invest in innovative activity.⁶⁶ Leaving aside the question of whether patents truly spur innovation, the contribution to human progress may be much greater than what could be reflected in any dollar amount.

The value in pharmaceutical innovations can be seen in at least three important ways. First, medicines, if they are made available to those who need them, can improve or save lives, thereby improving the human condition. Second, the disclosure of the innovation to the public allows others to build upon it and to innovate further. Third, the innovator⁶⁷ may enjoy some financial benefit, social prestige, or personal satisfaction from obtaining IP protection. The individual rewards, as well as the contribution to society, are aspects of human development.

INNOVATION DATA 16–17 (3d ed. 2005), <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>.

⁶⁴ See OECD, INNOVATION AND GROWTH: RATIONALE FOR AN INNOVATION STRATEGY 6 (2007), <http://www.oecd.org/science/inno/39374789.pdf>.

⁶⁵ See *Human Development Index*, *supra* note 4.

⁶⁶ Various scholars have challenged the assumption that pharmaceutical companies invest in R&D for life-saving medicines. As some commentators have pointed out, often a lot of money is spent on “lifestyle” drugs and marketing. See Abbott, *supra* note 22, at 36.

⁶⁷ The innovator may not be the owner of the IP. However, under U.S. patent law, for instance, the inventor must be named in the patent application. See 35 U.S.C. § 115 (2012); 35 U.S.C. § 118 (2012).

B. *Why Human Development?*

One might query the language of development instead of human flourishing in light of the established discussions about the relationship between intellectual property and human flourishing. In addition, scholars have already proposed a human rights framework for IP, so why not use the language of human rights instead of human development?

Human development is a preferable metric for a few reasons. Human flourishing, human rights, and human development are closely related. However, human flourishing can encompass many things, and it can be rather personal in nature, which makes it less measurable. However, it would be possible to identify and measure the relationship between specific aspects of human flourishing and IP laws. Indeed, the HDI could be characterized as measuring certain concrete aspects of human flourishing.

Advancing human rights is an important part of human development and human flourishing. However, a human development metric is not about assessing compliance with human rights as such. Human development, as used here, is a reference to the indicators of human development rather than to a substantive human right to development.⁶⁸ There is a

⁶⁸ G.A. Res. 41/128, art. 1.1, 1986 Declaration on the Right to Development (Dec. 4, 1986) (“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”). Though the right to development has not achieved the status of the rights contained in the UDHR, the right is also recognized in the African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights, and re-affirmed in the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, the Millennium Declaration, the 2002 Monterrey Consensus, and the 2007 Declaration on the Rights of Indigenous Peoples, among others. See, e.g., Org. of African Unity, *African Charter on Human and Peoples’ Rights* art. 22, June 27, 1981, 1520 U.N.T.S. 217; League of Arab States, *Arab Charter on Human Rights*, May 22, 2004, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005), <http://hrlibrary.umn.edu/instree/loas2005.html>; U.N. Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶¶ 10–11, U.N. Doc. A/CONF.157/23 (June 25, 1993); G.A. Res. A/RES/55/2, ¶ 6, United Nations Millennium Declaration (Sept. 8, 2000); International Conference on Financing for Development, *Monterrey Consensus*, U.N. Doc. A/CONF.198/11, annex (March 22, 2002); G.A. Res. A/RES/61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

Declaration on the Right to Development, which raises interesting implications for the human rights framework for IP.⁶⁹ Yet, human development, as distinct from human rights, can be adopted as a metric, even if one does not accept a human right to development.

The human rights basis for IP protection is found in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷⁰ as well as in the Universal Declaration of Human Rights.⁷¹ This is not surprising in light of the relationship between IP rights and our economic, social, and cultural interests.⁷² For example, copyright protection may enable artists to earn income from their creative works. Artistic works, such as songs, art, films, and video games, become part of our social and cultural fabric. As a result, such works also become a source of cultural and social connection with other people.⁷³ Innovations, such as the telephone, the computer, medications, and forms of transportation, to name a few, affect people socially, economically, and culturally. Cost effective transportation, for example, can impact the ability to seek and locate work or to connect with family and friends who do not live nearby.⁷⁴ In sum, innovative and creative works affect our economic, social and cultural progress and development as human beings.

⁶⁹ G.A. Res. 41/128, *supra* note 68, annex; Gana, *supra* note 15, at 317–18.

⁷⁰ International Covenant on Economic, Social and Cultural Rights art. 15(1)(c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁷¹ See G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁷² *But see* MERGES, *supra* note 38, at 117, 120 (arguing that IP is “a basic liberty” and that “[t]reating IP as part of the ‘basic system of liberties’ sidesteps distributional considerations[, as b]asic political rights are prior to distributional concerns in Rawls’s theory.”); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. From an international human rights perspective, the basic political liberties are found in the International Covenant on Civil and Political Rights.

⁷³ For example, it is common for people to connect by discussing movies that they have recently seen.

⁷⁴ See, e.g., Peter S. Goodman, *Unemployment Problem Includes Public Transportation That Separates Poor from Jobs*, HUFFINGTON POST (July 11, 2012, 7:16 AM), http://www.huffingtonpost.com/2012/07/11/unemployment-problem-public-transportation_n_1660344.html.

Finally, human development has a universal appeal, even for countries that do not accept all the human rights enumerated in the various international human rights instruments.⁷⁵ For example, the United States is a signatory to the ICESCR but has not ratified it.⁷⁶ This is the major international human rights agreement that recognizes, among other things, a right to food and housing, a right to the highest standard of mental and physical health, and a right to education.⁷⁷ These social and cultural rights are positive obligations that states are supposed to implement over time.⁷⁸ There is a strong connection between human development and the goals of the ICESCR.⁷⁹

By comparison, the civil and political rights, which are characterized as negative rights,⁸⁰ such as the right to the presumption of innocence,⁸¹ the right to trial without undue delay,⁸² the right to privacy, the right to freedom of religion,⁸³ and the right to expression,⁸⁴ among others, are part of U.S. law.⁸⁵ The U.S. has signed and ratified the *International Convention on Civil and Political Rights* (ICCPR),⁸⁶ which is the international agreement that sets out the civil and political rights that are essential to a free and democratic society.⁸⁷

⁷⁵ For instance, the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, but has ratified the International Covenant on Civil and Political Rights. See *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://indicators.ohchr.org> (last visited Jan. 3, 2017). The United States signed the ICESCR in 1977 and ratified the agreement in 1992. This means that the U.S. is a party to the agreement and has incorporated the obligations into domestic law.

⁷⁶ ICESCR, *supra* note 70, art. 15(1)(c). The U.S. signed the ICESCR in 1977, but has not ratified the agreement.

⁷⁷ ICESCR, *supra* note 70, arts. 11–13. It is one of the three agreements that constitutes the International Bill of Rights.

⁷⁸ ICESCR, *supra* note 70, art. 2(1); Comm. on Econ., Soc. and Cultural Rights, *CESCR General Comment No. 3: The Nature of States Parties' Obligations*, ¶¶ 1–2, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *CESCR General Comment No. 3*].

⁷⁹ *CESCR General Comment No. 3*, *supra* note 78, ¶¶ 1–2.

⁸⁰ These rights are considered negative rights insofar as they require governments to refrain from interfering with the individual freedoms.

⁸¹ ICCPR, *supra* note 72, arts. 14(2), 17.

⁸² ICCPR, *supra* note 72, art. 14(3)(c).

⁸³ ICCPR, *supra* note 72, art. 18.

⁸⁴ ICCPR, *supra* note 72, art. 19.

⁸⁵ These rights are already enshrined in the U.S. Constitution. See, e.g., U.S. CONST. amends. I, II, V, VI.

⁸⁶ ICCPR, *supra* note 72, art. 17.

⁸⁷ ICESCR, *supra* note 70, arts. 6–15. The U.S. signed the ICESCR in 1977, but it has not ratified the agreement.

Countries, such as the U.S., that have implemented the civil and political rights, but have not fully endorsed the economic, social, and cultural rights, may nonetheless strive to promote human development. The U.S. does not recognize a formal right to education as a natural entitlement, but still places value on education and literacy and would agree that education plays a key role in advancing human development.⁸⁸

Human development may be an imperfect metric, but it is no worse, and arguably better, than some of the current tools that we use to measure innovation.⁸⁹ For instance, the amount of patent, trademark, and copyright activity is often used as a proxy for innovative activity and progress.⁹⁰ These statistics are not necessarily indicative of human progress or innovation. For example, sometimes patenting activity could reflect attempts to stifle innovation.⁹¹

C. *The Human Development Factors*

The HDI is not a tool that was designed for the purpose of evaluating IP policies. However, the factors that are used to create the national human development rankings can help to give an indication of the effect that IP laws are having on human progress. Since the HDI values economic indicators as well as noneconomic indicators, this would not displace the economic model, but would expand upon it.⁹²

⁸⁸ The U.S. has a system of public primary education, which makes some basic level of education available to all citizens. This is not true of all countries, some of which charge a fee for primary school education. See U.S. Dep't of State, *Girls' Education*, <http://www.state.gov/s/gwi/c62293.htm> (last visited Jan. 3, 2017) (stating "Girls' education is one of the most leveraged development investments a country can make.").

⁸⁹ Paul Streeten, *Human Development: Means and Ends*, 84 AM. ECON. REV. 232, 232, 234–36 (1994) (discussing the strengths and weaknesses of the HDI).

⁹⁰ See Press Release, World Intell. Prop. Org., *Global Innovation Index 2015: Switzerland, UK, Sweden, Netherlands, USA Are Leaders* (Sept. 17, 2015), http://www.wipo.int/pressroom/en/articles/2015/article_0010.html [hereinafter WIPO Press Release].

⁹¹ Guiseppe Colangelo, *Avoiding the Tragedy of the Anti-Commons: Collective Rights Organizations, Patent Pools and the Role of Antitrust* 24–27 (LE Lab, Working Paper No. IP-01-2004); Mark D. Janis, *Aggregation and Dissemination Issues in Patent Pools* 1 (U. Iowa Legal Studies Research Series No. 05-14, April, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=715045.

⁹² See UNDP, *supra* note 4; Denis Borges Barbosa et al., *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71, 76–78 (2007).

These human development factors are based on the evaluative tools developed by the UN.⁹³ The UN Development Programme has been issuing its Human Development Report since 1990.⁹⁴ Human development, as defined by the UN, has clear standards that have been used over several years and are well recognized. The HDI measures economic development, but it also incorporates human flourishing.⁹⁵ It was created “to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone.”⁹⁶

The UN ranks countries on the HDI by assessing various factors and creating a national score. In assessing human development, the HDI measures health, education, and standard of living.⁹⁷ The health rating is measured by life expectancy at birth; the education rating is determined based on the levels of education attained; and the standard of living rating is based on the gross national income per capita.⁹⁸ Admittedly, the HDI is not a perfect model. However, this tool, or something similar, could be employed to help make global IP more responsive to

⁹³ U.N. Charter art. 1, ¶ 1 (stating that the United Nations is a global intergovernmental organization that was established at the end of World War II with the goal of maintaining peace and security and promoting human rights and the rule of law); *About the UN*, UNITED NATIONS, <http://www.un.org/en/about-un/index.html> (last visited Jan. 17, 2017).

⁹⁴ *Dialogue: 25th Anniversary Special Articles*, UNITED NATIONS DEV. PROGRAMME: HUMAN DEV. REPORTS, <http://hdr.undp.org/en/25-years> (last visited Jan. 17, 2017); U.N. Charter art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development . . .”).

⁹⁵ *About Human Development*, UNITED NATIONS DEV. PROGRAMME: HUMAN DEV. REPORTS, <http://hdr.undp.org/en/humandev> (last visited Jan. 17, 2017) (“The human development approach, developed by the economist Mahbub Ul Haq, is anchored in the Nobel laureate Amartya Sen’s work on human capabilities, often framed in terms of whether people are able to ‘be’ and ‘do’ desirable things in life.”).

⁹⁶ *Human Development Index*, *supra* note 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

human development needs. The factors that are measured by the HDI could be adapted for use as metrics in developing IP laws and policies.⁹⁹

III. HUMAN DEVELOPMENT ACROSS FRAMEWORKS

Human development as a metric can be applied to both utilitarian and natural rights frameworks for IP. It is a relevant IP metric because it captures much of what IP law, as it relates to human beings, seeks to accomplish. We protect innovative and creative works to advance the human condition. This could be characterized as an instrumentalist approach to IP law. Yet, it does not require a choice between natural rights and utilitarian theories, as it could be adapted to either.

The discussion about the appropriate levels of protection and access implicate academic disputes about the rationales for IP.¹⁰⁰ IP scholars disagree about whether IP rights are best justified on the basis of natural rights theories, utilitarian theories, or some combination thereof.¹⁰¹

Both natural rights and utilitarianism are concerned with improving the human condition. In one instance, the concern is for the broader societal welfare. In the other, the focus is on the benefit to the individual. We recognize the individual creator because we value the creator as a human being, but we also value the creator's contributions to humanity. Under the personality theory, for instance, the creator's work is considered an extension of his or her personality and should be protected in

⁹⁹ *Id.* (stating the HDI can be used to evaluate national policy choices, facilitating the analysis regarding how two countries with the same level of gross national income per capita can end up with different human development outcomes).

¹⁰⁰ The term intellectual property ("IP"), as used here, refers to patents, trademarks, and copyrights. Even though the different types of protection can be quite distinct with respect to their purpose and their legal effect, they have some commonality, and this Essay will use the term IP for the purpose of simplicity.

¹⁰¹ There are other theories of IP that are neither classic utilitarian or natural rights theories. Other theories may include, for example, consequentialist social justice theories and other models. See, e.g., Seana Valentine Shiffrin, *Intellectual Property*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653–58 (Robert E. Goodin et al. eds., 2d ed. 2007). However, for the purpose of this Essay, the focus will be on natural rights and utilitarian theories of IP.

order to protect her dignity.¹⁰² From a utilitarian perspective, we aim to stimulate innovation because we believe these innovations will promote progress.¹⁰³

These distinct theoretical approaches to IP protection, which this Essay will discuss in greater detail, can affect the development and interpretation of IP laws. The advantage of human development as a metric is that it moves human interests to the center of global IP law. Since the goal of improving the human condition is an objective that appears to be shared by countries at all stages of development, it can also be utilized across cultural frameworks.¹⁰⁴

This approach is not intended to apply in private disputes between individuals. Rather, it could be used, as is the HDI, in the development of national laws and policies. It is also a metric that could be employed in the interpretation and analysis of international IP obligations, such as those found in the WTO TRIPS Agreement and subsequent agreements that build on these standards.

From a comparative law perspective, national approaches can support both utilitarian and natural rights theories for IP. The constitutional “progress clause” in the United States helps to shape U.S. copyright and patent law by identifying the IP goal of promoting progress, but not all countries have this kind of constitutional language. Arguably, this gives American copyright and patent law greater clarity of purpose than some other nations, since the purposes of IP laws are not always stated, nor are the objectives always evident. Nonetheless, when seeking the purposes of IP in the global context, there must be

¹⁰² See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); see also Justin Hughes, *A Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 329 (1988).

¹⁰³ See Gregory N. Mandel, *Proxy Signals: Capturing Private Information for Public Benefit*, 90 WASH. U. L. REV. 1, 9 (2012).

¹⁰⁴ See Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 388 (2002); Nicole LaViolette, *The Principal International Human Rights Instruments to Which Canada Has Not yet Adhered*, 24 WINDSOR Y.B. ACCESS JUST. 267, 268 (2006); Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 761 (1998); Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 98–99 (2006); Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. MIAMI INTER-AM. L. REV. 1, 37–39 (2006).

broader consideration and acceptance of the norms of multiple perspectives. This is consistent with the approach of finding common ground that facilitates the development of international law to the extent the practices of states become custom or “general principles of law” derived from many nations.¹⁰⁵

For example, in Canada, which is a nation of mixed English and French legal traditions, the purpose of copyright law has not been particularly clear.¹⁰⁶ This may reflect a more malleable approach of leaving the objectives of IP to legislation, without elevating such objectives to constitutional stature. The Canadian Constitution merely gives the federal government the exclusive legislative authority with respect to patents and copyrights, but makes no reference to any identifiable goals for Canada’s copyright and patent laws.¹⁰⁷ Rather, the Canadian Constitution provides that the exercise of all federal legislative power is for the purpose of the “Peace, Order, and good Government of Canada.”¹⁰⁸

In the absence of constitutional guidance, the courts have elaborated on the history and basis for IP law in Canada.¹⁰⁹ For example, in *Theberge*, the Supreme Court of Canada discussed the English and continental European civil law traditions, which diverge from one another.¹¹⁰ Both are reflected in the Canadian law.¹¹¹ The Supreme Court of Canada concluded that Canadian copyright law has been primarily concerned with economic

¹⁰⁵ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations . . .”).

¹⁰⁶ Daniel Gervais, *The Purpose of Copyright Law in Canada*, 2 U. OTTAWA L. & TECH. J. 315, 318 (2005) (“COPYRIGHT LAW should be based on an assessment of the types and levels of protection that best further its underlying policy objective(s)—assuming one can identify such objective(s). Unfortunately, until 2002, Canadian courts, practitioners and scholars had very little to rely on. The Act itself does not state its purpose, nor are there clear statements in the legislative history.”).

¹⁰⁷ Constitution Act, 1867, 30 & 31 Vict., c 3, s. 91 (22), (23) (U.K.), *reprinted in* R.S.C. 1985, app. II, no 5 (Can.).

¹⁰⁸ *Id.*

¹⁰⁹ *See* *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 345–46 (Can.); *see also* *Harvard College v. Canada*, [2002] 4 S.C.R. 45, 48–49 (Can.).

¹¹⁰ *See generally* *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336.

¹¹¹ *Id.*

rights, though it recognizes moral rights as well.¹¹² The Court characterized moral rights as reflecting a more “elevated” relationship between the artist and her work.¹¹³ Moral rights in Canada derive from the French tradition, which treats the artist’s work as an extension of his or her personality and therefore “possessing a dignity which is deserving of protection.”¹¹⁴

This language reflects a natural rights justification for the law. At the same time, the purpose of the law, while not clearly utilitarian, is still instrumentalist.¹¹⁵ At the same time, a concern for human development is evident from the Canadian IP policies designed to encourage national cultural heritage of the country and public health.¹¹⁶ Arguably, the Canadian system combines natural rights and utilitarian traditions, while furthering human development.

Multilateral international agreements are another source of information about how the international community views IP rights. However, it is not apparent from the language of agreements, such as the TRIPS Agreement, the Berne Convention, or the Paris Convention, that there is any international preference for natural rights or utilitarian justifications for IP.¹¹⁷ It is not possible to engage in a detailed review of the institutional history of international IP in this brief Essay, but a historical analysis will reveal a combination of approaches, as one might expect from agreements involving multiple countries.

¹¹² *Id.* at 347–48.

¹¹³ *Id.* at 348.

¹¹⁴ *Id.*

¹¹⁵ Gervais, *supra* note 106, at 317 (“Simply put, the economic purpose of copyright law is instrumentalist in nature, namely, to ensure the orderly production and distribution of, and access to, works of art and intellect.”).

¹¹⁶ See, e.g., Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WTO Doc. WT/DS114/R (adopted April 7, 2000); DEP’T OF CANADIAN HERITAGE, GOV’T OF CAN., <https://www.canada.ca/en/canadian-heritage.html> (last visited Jan. 3, 2017).

¹¹⁷ See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Regina A. Loughran, *The United States Position on Revising the Paris Convention: Quid Pro Quo or Denunciation*, 5 FORDHAM INT’L L.J. 411, 411–13 (1981); see also Berne Convention, *supra* note 8.

The next part of this Essay elaborates on some of the ways a human development metric could be applied under utilitarian and natural rights frameworks.

IV. APPLYING HUMAN DEVELOPMENT

A. *Human Development as a Measurable Objective*

The predominant theoretical justification for IP protection in the United States is utilitarian.¹¹⁸ This is largely based on an understanding that the U.S. Constitution grants Congress the authority to develop copyright and patent laws to promote the progress of science and the useful arts.¹¹⁹ Utilitarian theorists tend to express concern for the public interest. If the primary goal is to promote progress, then one must create policy that meets this objective. In patent and copyright law, the utilitarian goals are generally understood as stimulating innovation and creativity for the purpose of enriching the public domain.¹²⁰ However, this is not the only way to interpret the utilitarian goals of patent and copyright laws.

One of the criticisms of IP utilitarianism, which is a consequentialist approach, is that it has been largely limited to economic efficiency as an indicator of progress.¹²¹ Yet, consequentialist approaches to IP can include other objectives.¹²² Under a consequentialist approach, human development can be used as a metric to determine whether IP laws are serving their progress goals. From a utilitarian perspective, human development becomes a measurable proxy for progress. Thus, patent or copyright laws would be developed to increase protection or access by evaluating their effect on human progress.

¹¹⁸ U.S. CONST. art. I, § 8, cl. 8; Mark Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1340 (2015).

¹¹⁹ U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

¹²⁰ The meaning of progress and innovation may differ from one society to another.

¹²¹ Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 539 (1990).

¹²² See, e.g., Cynthia M. Ho, *Do Patents Promote the Progress of Justice? Reflections on Varied Visions of Justice*, 36 LOY. U. CHI. L.J. 469, 469 (2005).

Adopting human development as a proxy for progress under the utilitarian framework would mean evaluating IP laws on their ability to improve health, educational, and economic outcomes in a particular society. IP policy would be developed, and the laws revised, with a view to improving the human development indicators. For instance, the utilitarian goals of progress, efficiency, and a rich public domain, could be expressed in human development terms as access to science and technology, cultural goods, education, or health.¹²³ For those whose primary concern is economic efficiency, human development should be attractive because gains in the area of human development lead to increased productivity.¹²⁴ A healthy, well-educated population is likely to be more productive and innovative than a population that suffers from poor health and has low literacy rates.

One way to evaluate access to education is to assess literacy rates. In one study of literacy, the authors looked at the effect of copyright piracy on literacy rates in an African country.¹²⁵ The study reached the conclusion that the rate of literacy in that nation rose with increased copyright piracy.¹²⁶ This kind of analysis could also implicate health and longevity. For example, if the literary materials were comprised of copyrighted text or pictures explaining how to reduce the transmission of a deadly and highly contagious virus, such as Ebola, a nation would have good reason to ensure that the materials were widely reproduced and distributed.¹²⁷

¹²³ See Elliot Harmon, *Tell Congress: It's Time To Move FASTR*, ELECTRONIC FRONTIER FOUNDATION (Mar. 9, 2016), <https://www.eff.org/deeplinks/2016/03/tell-congress-its-time-move-fastr> (calling for Congress to ratify the Fair Access to Science and Technology Research Act).

¹²⁴ Streeten, *supra* note 89, at 232 ("There are six reasons why we should promote human development and poverty eradication. First, and above all, it is an end itself, that needs no further justification. Second, it is a means to higher productivity. A well-nourished, healthy, educated, skilled, alert labor force is the most important productive asset. This has been widely recognized, though it is odd that Hondas, beer, and television sets are often accepted without questioning as final consumption goods, while nutrition, education, and health services have to be justified on grounds of productivity.").

¹²⁵ Simplice Asongu & Antonio R. Andrés, *The Impact of Software Piracy on Inclusive Human Development: Evidence from Africa 2* (African Governance & Dev. Inst., Working Paper No. 15/055, 2015).

¹²⁶ *Id.*

¹²⁷ See Ebola Virus Disease: Fact Sheet, WORLD HEALTH ORG.: MEDIA CENTRE, <http://www.who.int/mediacentre/factsheets/fs103/en> (last updated Jan. 2016).

Of course, this should not lead to the conclusion that there should be no copyright protection. It would be necessary to also consider, as a relevant human development factor, the economic impact on the authors of the literary work.¹²⁸ Though the results of the study may leave many questions unanswered, such studies provide some insight into how copyright protection affects human development. With this knowledge, national IP policy could be developed with a view to encouraging development in the areas that are most critical for a particular nation. This could mean, for instance, expanding fair use for certain kinds of works.

Communications technology is another example of an area where the relationship between development and IP is particularly evident. In developing countries, modern technology has significantly affected communications. Cell phone communication is the norm in countries, such as Ghana or Tanzania, where the infrastructure makes it more difficult to use land-based communication, particularly in rural areas. The ubiquity of cell phones and the decreasing cost of the technology has made it possible for people at all economic levels to own cell phones.

Third party cell phone applications that facilitate low-cost communication have had a dramatic impact on developing countries' citizens who need to communicate with their relatives who are overseas. With applications, such as WhatsApp or Viber, one can send photographs and text or voice messages, as well as make phone calls at little to no cost.¹²⁹ A WhatsApp call from Ghana to the United States is free, as compared to using a landline that might otherwise be prohibitively expensive.¹³⁰ Arguably, this technology promotes human development insofar as it facilitates global communication and human connection across borders. In addition to allowing individuals to share information and maintain emotional bonds with relatives in

¹²⁸ Economic growth is a factor used in calculating human development.

¹²⁹ See *Simple. Secure. Reliable Messaging.*, WHATSAPP, <https://www.whatsapp.com> (last visited Jan. 3, 2017); Parmy Olson, *Facebook Closes \$19 Billion WhatsApp Deal*, FORBES (Oct. 6, 2014, 1:25 PM), <http://onforb.es/1ElfW3Y>; *Viber for Windows 10*, VIBER, <http://www.viber.com/en> (last visited Jan. 3, 2017).

¹³⁰ See *Frequently Asked Questions*, WHATSAPP, <https://www.whatsapp.com/faq> (last visited Jan. 3, 2017). WhatsApp is free for the first year and then subject to an annual charge of 99 cents.

other countries, it gives family members an inexpensive way to send requests for financial support and to communicate other needs.¹³¹

The IP that protects and encourages such technologies promotes human development in many ways.¹³² The cost to the consumer is low, and the technology increases the ability of the user to communicate with family members in a manner that allows the user to gain access to financial resources, to inquire about job prospects, to strengthen emotional connections, and to improve health outcomes by requesting assistance in order to obtain medical care.

B. *Human Development as a Guiding Value*

This Essay argues that IP laws and policies could be measured against a stated goal of improving human development. But how does this apply under a natural rights model in which there is no stated outcome to evaluate? Even though natural rights theories do not focus on the consequences of the law in the same way as utilitarian theories, there is still a need to balance conflicting rights.¹³³ Rather than serving as a proxy for progress, human development would serve as a guiding value to determine how and when rights should be circumscribed.

Natural rights theorists express the view that patent and copyright protection should reward the creator or innovator for his or her efforts.¹³⁴ Individuals who believe in a natural entitlement to IP rights tend to support more expansive IP protection.¹³⁵ If the primary goal of IP policy is to protect

¹³¹ See Claire Provost, *Migrants' Billions Put Aid in the Shade*, GUARDIAN (Jan. 30 2013, 1:35 PM), <http://www.theguardian.com/global-development/2013/jan/30/migrants-billions-overshadow-aid>; see generally REMITTANCE MARKETS IN AFRICA (Sanket Mohapatra & Dilip Ratha eds., 2011).

¹³² Note that the role of intellectual property protection was rather limited in the case of WhatsApp. Facebook purchased WhatsApp in 2014 for \$19 million dollars. Given the limited IP involved, some observers questioned why Facebook was paying so much money for WhatsApp without obtaining additional IP protection.

¹³³ See Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1586–87 (1993).

¹³⁴ See MERGES, *supra* note 38, at 19; Hughes, *supra* note 102, at 329.

¹³⁵ Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 289 (2014) (“There was a significant relationship between participants’ responses concerning the basis for intellectual property rights and their IP Strength

creators, then it would make initial sense to ensure that their rights are as strong as possible. This is because natural rights theories prioritize the rights of the creator, rather than focusing on the public benefit that results from the IP protection. That said, while advocates of natural rights to IP protection tend to prioritize the rights of creators, they also recognize that such rights are not absolute.¹³⁶

In this context, human development remains relevant as a tool for balancing conflicting interests.¹³⁷ It can also be used as the guiding value, for example, to determine how much protection a particular author or innovator should enjoy by asking whether the relevant IP laws promote the author's human development.¹³⁸

Human rights law is essential to this discussion because it is a natural rights framework that pertains to both IP rights and human development.¹³⁹ Under international human rights law, some scholars have argued that there is a human right to IP protection.¹⁴⁰ The Universal Declaration of Human Rights¹⁴¹ and the ICESCR recognize a human right to the "moral and material interests resulting from any scientific, literary or artistic works of which he is the author."¹⁴² Although there is some debate

ratings. Respondents who perceived a natural rights basis for intellectual property had significantly higher IP Strength scores . . . than those who supported an incentive basis . . . or those who supported an expressive basis . . . each pursuant to independent samples t-tests.”)

¹³⁶ MERGES, *supra* note 38, at 19 (“[S]ociety too has a legitimate interest—but not a coequal right—in the results of individual initiative.”).

¹³⁷ World Conference on Human Rights, *supra* note 68, ¶ 5. (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”).

¹³⁸ Oguamanam, *supra* note 15, at 146–47 (2009); MERGES, *supra* note 38, at 65.

¹³⁹ Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 286 (2007) (“Natural or human rights ideas first developed in the modern West. A full-fledged natural rights theory is evident in John Locke’s *Second Treatise of Government*, published in 1689 in support of the so-called Glorious Revolution. The American and French Revolutions first used such ideas to construct new political orders.”).

¹⁴⁰ There is some disagreement among commentators about whether one can claim a human right to IP protection.

¹⁴¹ UDHR, *supra* note 71, art. 27.

¹⁴² ICESCR, *supra* note 70, art. 15.

among commentators about whether there is a human right to IP protection per se, this language in the human rights instruments is suggestive of patent and copyright protection.¹⁴³

The natural rights IP model is based on the work of philosophers such as Locke, Kant, and Rousseau, among others.¹⁴⁴ The goal here is not to regurgitate the work that has already been done on Locke's approach to property and its applicability to IP rights.¹⁴⁵ Rather, this Essay assumes that the right to IP protection is one natural right that a human being might enjoy, among others.¹⁴⁶ These natural rights are based on the inherent dignity that we each enjoy by virtue of being human.¹⁴⁷

Natural rights must be balanced against one another so that they can be circumscribed as necessary.¹⁴⁸ In international human rights law, all rights are equal because they are indivisible, interdependent, and interrelated.¹⁴⁹ In addition to a right to the fruits of one's labor, human persons enjoy many other rights, including the right to life, which is the most fundamental right.¹⁵⁰ Without good health, a good education, and the financial means to meet one's basic needs of food and shelter, the quality of life is diminished. The UN human development

¹⁴³ See Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975–76 (2007).

¹⁴⁴ See MERGES, *supra* note 38, at 18–19; see generally Hughes, *supra* note 102.

¹⁴⁵ See Shiffrin, *supra* note 101, at 653; MERGES, *supra* note 38, at 117; Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 971 (2007).

¹⁴⁶ This Essay assumes, for the sake of argument, that there is a human right to IP protection. It is not, however, arguing that such a right exists, nor that it should be recognized.

¹⁴⁷ UDHR, *supra* note 71, pmb1.

¹⁴⁸ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE XI (1991) (explaining that the right to do whatever I want with my property "promotes unrealistic expectations and ignores both social costs and the rights of others.").

¹⁴⁹ CESCR General Comment 3, *supra* note 78, ¶ 8 ("[T]he Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question.").

¹⁵⁰ UDHR, *supra* note 71, art. 3 ("Everyone has the right to life, liberty and security of person.").

metrics—economic growth, education, and health—can be used to guide the decisions about IP law and policy from a natural rights perspective.¹⁵¹

For example, if a human right to patent or copyright protection interferes with other natural rights, such as the right to life or the right to education, human development could be used to guide the decision-making process about which right should prevail. Using human development as a guiding value would mean prioritizing the right that advances the established factors that the UN uses to create the HDI. This is not to suggest that human development must be the guiding value for a natural rights framework, but only that it could be adapted to a natural rights framework, just as well as to a utilitarian framework.

The story behind the popular song, “The Lion Sleeps Tonight,” is, perhaps, illustrative. The author of this song, used in Disney’s *The Lion King* movie and recorded by several different artists, lived and died in poverty.¹⁵² The song generated millions of dollars in revenue, which should have enabled the South African author, Mr. Linda, and his family to live comfortably. However, Mr. Linda and his family did not fully understand the law, and they did not take the necessary steps to ensure that he would be properly remunerated for his work. The implications for the author and his family were quite significant. The family lived in poverty, and one of the author’s children, unable to afford her medications, died from HIV.¹⁵³ The users of the work were able to enjoy his music, and others in the music industry profited from his work, but the author did not. Yet, if anyone should have enjoyed some natural entitlement arising from the creative work in accordance with natural rights theory, it was the author. From a human development perspective, there would be a strong argument that the relevant laws should have ensured better protection for such authors.

¹⁵¹ Frischmann, *supra* note 45, at 18–19 (discussing natural flourishing influence on the HDI).

¹⁵² Sharon LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, N.Y. TIMES (March 22, 2006), <http://www.nytimes.com/2006/03/22/international/africa/22lion.html>.

¹⁵³ *Id.*

Traditional knowledge communities may also benefit from natural rights approaches to IP. These communities seek to protect works that have been passed down within their communities from one generation to the next. Most intergenerational works are not adequately protected by modern IP laws because they are unable to meet the requirements for novelty in patent law or originality in copyright law. A natural right to the fruits of one's labor, or to the moral and material interests arising from one's creative work, could encompass the works of some of these communities, even if the current IP model does not recognize such rights.¹⁵⁴

With respect to traditional knowledge and traditional cultural expressions, there is an argument for expanding the current regime, particularly if such expansion will promote human development.¹⁵⁵ Protecting intergenerational knowledge or cultural works of an indigenous rural community could help the community to generate resources. This could, in turn, improve the health and educational opportunities for such communities.

The luxury brand Louis Vuitton, for instance, created a "Masai" fashion line that reproduced traditional Maasai clothing, without involving the Maasai in any way.¹⁵⁶ As a result, the Maasai, who are indigenous people of Kenya and Tanzania, are learning about ways to use IP law to protect and promote their culture and their name.¹⁵⁷ Should the Maasai be successful, they could prevent designers like Louis Vuitton from profiting from their name and their culture without consulting them.

If the Maasai were to enjoy some natural entitlement to their name and their cultural products, this might enhance their ability to control their cultural resources. To the extent that this would advance their human development, there would be a good argument that the law should evolve to recognize their rights to

¹⁵⁴ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 17, E/C.12/GC/17, ¶ 8 (Jan. 12, 2006).

¹⁵⁵ Oguamanam, *supra* note 15, at 148.

¹⁵⁶ Tania Phipps-Rufus, *Companies Accused of Exploiting Cultural Identity of Kenya's Maasai*, THE GUARDIAN (Aug. 8, 2013 5:08 PM), <http://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai>.

¹⁵⁷ See generally *The Maasai Cultural Brand*, LIGHT YEARS IP <http://lightyearsip.net/the-masai> (last visited Jan. 3, 2017) (discussing how the Maasai people formed a group with the help of Light Years IP in 2009 to protect its cultural brand through IP protection).

the moral and material interests in their cultural products. In addition, this approach could provide a basis for limiting any IP claims that corporations may assert with respect to the Maasai name or designs.¹⁵⁸

CONCLUSION

International IP debates have often been framed as protection versus access, and profits over people. A related line of inquiry asks whether copyright and patent laws should primarily serve the interests of the individual right holder or the public. To some extent, this question of whether to prioritize the individual or prioritize society aligns with the natural rights versus utilitarian dichotomy. Regardless of which framework is preferred, there is a need for useful evaluative tools in order to develop effective IP laws and policies on a global scale.

This Essay proposes the use of human development as a metric, which could be adopted under either a utilitarian or natural rights framework for IP law. From a natural rights perspective, human development can be employed as a guiding value to resolve conflicting interests. From a utilitarian perspective, the human development factors can be incorporated into the evaluation of the progress goals of intellectual property law.

Human development can be measured by using the United Nations HDI, which has been in use for over two decades, or a similar methodology. The HDI assesses economic development, as well as social and cultural development. It does not displace the economic model, but rather expands upon it by taking other factors, such as health and literacy, into account when assessing societal progress.

This is an appropriate metric because many of the critiques of globalized IP standards, such as those contained in the WTO TRIPS Agreement, are centered on human development concerns relating to health and education. Furthermore, human

¹⁵⁸ This Essay recognizes that there are limitations to protecting fashion designs under the current law.

development is an implicit objective of patent and copyright law and policy because these laws regulate innovation, creativity, and the production of goods that promote human flourishing.¹⁵⁹

¹⁵⁹ As discussed in the case of the Maasai, for instance, this human development assessment is equally applicable to trademark contexts, even though trademarks do not regulate the production of innovative and creative works.