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CURRENT PATENT LAWS CANNOT CLAIM THE BACKING OF HUMAN RIGHTS

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Intellectual Property and Human Rights

A Paradox

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9. Current patent laws cannot claim the backing of human rights

Wendy J. Gordon¹

1. INTRODUCTION

Many of the world's countries (one exception being the United States) has undertaken a commitment at the level of human rights to protect the interests of persons who author 'scientific . . . production[s]'.² This commit-

¹ This article is © 2010 by Wendy J. Gordon. Wendy Gordon is the Philip S. Beck Professor of Law at Boston University School of Law in the US. Very significant help toward this article was contributed by Keren Ben Shahaar, BU LLM 2007.

The initial draft of this chapter, then titled 'Patent and Human Rights: The Case of the Second to Invent', was prepared for the conference on The Human Rights Paradox in Intellectual Property Law organized by the Centre for Intellectual Property Law (CIER) at Utrecht University. Professor Gordon presented a revised draft at 'Tackling Global Health Issues Through Law & Policy', the Annual Symposium of *The American Journal of Law and Medicine* (Boston University, 2 February 2008.) She appreciates the feedback of the participants at both conferences.

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² Such a right is recognized in a number of international and regional human rights instruments. The most prominent document is the International Covenant on Economic, Social and Cultural Rights which recognizes in Article 15.1(c) the right of everyone 'to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author'. International Covenant on Economic, Social and Cultural Rights, Art. 15.1(c), 16 December 1996, 993 U.N.T.S 3 [hereinafter ICESCR], available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>.

The United States signed but did not ratify the ICESCR. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#bottom. Nearly identical language to that of the ICESCR is included in its declaratory predecessor, The Universal Declaration of Human Rights. See Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. GAOR, 3d Sess., 1st

ment³ is embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes in Article 15.1(c) the rights of everyone ‘to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’⁴

This chapter aims to clarify the relationship between the ‘interests of authors’, protected in Article 15.1(c) of the ICESCR, and national patent legislation. Specifically, it intends to dispel the notion that current patent laws are the manifestation of the human right commitment to authors under the ICESCR.

The claim that patent rights are human rights – the claim whose error⁵ this article seeks to reveal – has the potential for being used as a weapon to expand

plen. mtg., U.N. Doc A/810 (10 December 1948) [hereinafter UDHR]. (On the issue of whether the UDHR has attained the status of customary law, see, for example, Yu, Peter K. (2007), ‘Reconceptualizing Intellectual Property Interests in a Human Right Framework’, 40 *U.C. Davis L. Rev.* 1039 at 1060–1). Similarly, the human right of authors is recognized in Article 13.2 of The American Declaration of the Rights and Duties of Man of 1948, available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>; Article 14.1(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

³ The ICESCR is generally recognized as one of the building blocks of what is referred to as ‘the international bill of rights’, along with the UDHR and the International Covenant on Civil and Political Rights [ICCPR]. Strossen, Nadine (1992–93), ‘United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights’, 24 *U. Tol. L. Rev.* 203, 203. The ICESCR is probably more controversial than the other two components. The United States has ratified the ICCPR (although with strong limitations, see Strossen at id.), and has signed and not ratified the ICESCR. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#bottom.

⁴ Article 15.1 of the ICESCR, *supra* note 2, provides:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

⁵ That patent laws have significant differences from human rights under Article 15 can be seen, for example, in *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, E/CN.4/Sub.2/2001/13, 27 June 2001 – available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/Symbol/E.CN.4.Sub.2.2001.13.En?Opendocument>. The *Impact* document sees distinct differences between enacted intellectual-property law (‘more akin to a privilege’; can be ‘licensed or assigned’, id. at paragraph 14) and human rights (‘inalienable’, id.).

patent rights⁶ against the desires of impoverished peoples to manufacture or distribute inexpensive versions of patented drugs. When those peoples claim that their human right to health⁷ and to share in scientific progress⁸ mandates allowing them cheap access to patented medications,⁹ supporters of strong patent rights sometimes point to an imagined countervailing human right to patents. Thus, one pair of commentators went so far as to state that ‘expropriation of others’ [intellectual] property . . . is, ironically, one of the most “anti-human rights” actions governments could take’.¹⁰

This chapter contends that a fundamental disconnect exists between ICESCR Article 15.1(c) and current national laws on patent. I join Rochelle Dreyfuss in her contention that a human rights approach has little expression in national patent legal systems.¹¹ This chapter illustrates the extent to which

⁶ See, for example, Helfer, Lawrence (2007), ‘Toward A Human Rights Framework For Intellectual Property’, 40 *U.C. Davis L. Rev.* 971, 1015 (discussing the possibility of the ICESCR being used to expand intellectual-property rights).

⁷ UDHR, *supra* note 2, at Art. 25(1). (‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’); ICESCR, *supra* note 2, at Art. 12.1. (‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.)

⁸ ICESCR, *supra* note 2, at Art. 15.1(b).

⁹ Supporters of strong access rights include Balasubramaniam, Kumariah (2002), ‘Access to Medicines: Patents, Pieces and Public Policy – Consumer Perspectives’, in Drahos, Peter and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* 90, and Outterson, Kevin (2005), ‘Pharmaceutical Arbitrage: Balancing Access And Innovation in International Prescription Drug Markets’, 5 *Yale J Health Pol Law & Ethics* 193. For a general discussion see ‘Patent Versus Patients – five Years After the Doha Declaration’, Oxfam Briefing Paper 95 (November 2006) available at http://www.maketradeair.com/en/assets/english/doha5_101106.pdf; Mayne, Ruth (2002), ‘The Global NGO Campaign on Patents and Access to Medicines: an Oxfam Perspective’, in Drahos and Mayne (2002), *supra*, at 244; Chapman, Audrey R. (2001), ‘Approaching intellectual property as a human right: obligations related to Article 15(1)(c)’, 35(3) *Copyright Bull.* 4, 26 available at <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf>.

¹⁰ Giovanetti, Tom and Merrill Matthews (2005), ‘Intellectual Property Rights and Human Rights’, 34 *IPI Ideas*, September 2005, available at <http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullText/FF5BC1CE33A784E2862570880053B054>, quoted in Yu, *supra* note 2, at 1085 and n. 176.

¹¹ Dreyfuss, Rochelle C., ‘Patents and Human Rights: Where is the Paradox?’, Chapter 4 of this volume. I agree with Dreyfuss’ central point: that the human rights vision of ICESCR is not the basis on which ‘the world’s patent rights are structured. Instead, the perspective is purely utilitarian’. *Id.* at 80. This point is made clear in General Comment 17, Article 1: ‘Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost

the two paradigms are foreign to each other by examining a fundamental element of Article 15 – the nature of authorship. The chapter concludes that current laws' allocation of patent ownership bears an insufficient relationship to any plausible human right conception of who should count as a scientific author.

Commentators have argued that current patent and copyright laws award authors and inventors protections *in excess* of what the human rights obligation seems to require.¹² For example, I have argued that the natural rights theory of John Locke does not justify copyright's current reach.¹³ In addition, of course, many commentators point to the provisions in the ICESCR that give the public rights to health¹⁴ and to participate in culture and benefit from science,¹⁵ and to the free speech rights in the International Covenant on Civil and Political Rights,¹⁶ to demonstrate that any claim by an author or inventor

means by which States seek to provide incentives for inventiveness and creativity . . . for the benefit of society as a whole.' U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: 'The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph (1)(c) of the Covenant)', U.N. Doc. E/C.12/GC/2005/5 (21 November 2005) [hereinafter General Comment No. 17], available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf).

At one point, Dreyfuss's excellent paper for some reason (perhaps rhetorical) treats the notion of an author's human rights claim as if it might embody entitlement to 'all' benefits. *Id.* at 80. This is a bit of a straw man. For example, even a stalwart defender of property rights like philosopher Robert Nozick saw a natural-right justification for cutting off patent duration. Nozick, Robert (1974), *Anarchy, State and Utopia* (New York: Basic Books) at 178–82.

¹² See, for example, Yu, *supra* note 2 at 1077: '[S]ome attributes of intellectual property rights are protected in international or regional human rights instruments, while other attributes do not have any human rights basis at all.'

¹³ Gordon, Wendy J. (1993), 'A Property Right in Self-expression: Equality and Individualism in the Natural Law of Intellectual Property', 102 *Yale L.J.* 1533. See also, Shiffrin, Seana (2004), 'Lockean Arguments for Private Intellectual Property', in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* 138, 142 (while authors might deserve a right to reward, under a Lockean approach they would not deserve a full property right.)

¹⁴ ICESCR, *supra* note 2, at art. 12.1.

¹⁵ General Comment 17, *supra* note 11, paragraph 6 states that Article 15 of the ICESCR enumerates in paragraph 1, 'three rights covering different aspects of cultural participation', including authorial right, the right of the public to 'take part in cultural life', and the right of the public 'to enjoy the benefits of scientific progress and its applications'. See ICESCR, *supra* note 2, at Art. 15.1(a), 15.1(b).

¹⁶ ICCPR, Art. 19.2, 16 December 1966, 999 U.N.T.S. 171 ('Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice').

to a 'human right' benefit from her work must be *limited* by the countervailing human rights of the public.¹⁷ Along a similar line, as mentioned above, I have argued that the Lockean natural-rights approach mandates a strong right of access in the public as against the holders of copyrights and patents.¹⁸ But the point of the instant chapter is somewhat different from any of these contentions: here I argue that current patent laws are actually in discord with the most plausible notion of a scientist's human rights. The chapter thus takes fundamental issue with those commentators who cite the human rights of authors as support for strong patent protection.

This chapter seeks to highlight how erroneous such claims are; patent owners should not rely on the ICESCR human rights commitment to bolster their position. While many reasons might disqualify current patent laws from the backing of the ICESCR,¹⁹ this chapter highlights one: that current laws grant patents to people who are not 'authors' whom the human rights regime is designed to protect.

2. THE IMPORTANCE OF IDENTIFYING THE AUTHOR TO THE HUMAN RIGHTS SCHEME

The ICESCR in Article 15.1(c) speaks of the rights of 'authors'. The significance of correctly identifying the 'author' is evident in the language adopted by the Committee on Economic, Social and Cultural Rights (hereinafter the 'Committee'), which is the United Nations body responsible for monitoring

¹⁷ See, for example, Hestermeyer, Holger (2007), *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford: Oxford University Press) at 152–3 and *passim*; Yu (2007), *supra* note 2, at 1124; Drassinower, Abraham, 'Labour and Intersubjectivity: Notes on the Natural Law of Copyright', on page 4, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=275470.

¹⁸ Gordon, *A Property Right in Self-expression*, *supra* note 13, at 1561–2. Some of the Lockean concern for public access could be accommodated if copyright law imposed liability only in the presence of certain types of 'intent'. However, copyright law does not do so as a general matter. Copyright civil liability is strict. See Gordon, Wendy (2008), 'Moral Philosophy, Information, Technology, and Copyright: The Grokster Case', in Weckert and van den Hoven (eds), *Moral Philosophy and Information Technology* 270, 295 (Cambridge: Cambridge University Press).

¹⁹ For additional arguments suggesting that Article 15 does not enshrine patent law, see Hestermeyer, *supra* note 17, at 152–8; also see *id.* at 30 (which includes an argument similar to the point about 'authorship' made herein). For one list of proposed human-rights requirements against which a patent law might be measured, see Chapman, Audrey R. (2002), 'Core Obligations Related to ICESCR Article 15(1)(c)', in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, 305.

the implementation of the ICESCR by Member States. In its General Comment number 17, a document designed to give substantive meaning to the Covenant's provision recognizing the rights of authors, the Committee explained that 'only the "author", namely the creator . . . can be the beneficiary of the protection of Article 15, paragraph 1 (c)'.²⁰

It would therefore seem that for a patent system to even aspire to ICESCR backing,²¹ it would have to properly identify and give patents to those 'creators' whom the ICESCR subprovision is designed to protect. Yet this chapter will show that the various patent legal systems are in discord over this primary point among themselves, and take approaches inconsistent with how a 'creator' might be identified under a plausible human rights inquiry. The result is that whatever human rights claims might or might not be maintainable for scientists in some abstract realm, in the real world ICESCR Article 15.1(c) cannot appropriately be used to support strong patent enforcement.

3. SEARCHING FOR A PLAUSIBLE HUMAN-RIGHTS CONCEPTION OF AUTHORSHIP

Who, then, is the author protected under Article 15? The ICESCR uses the term 'author' to indicate a 'creator'²² of 'scientific, literary or artistic productions'.²³ The focus on the individual creator or groups of creators is dictated by the nature of human rights as derived from 'the inherent dignity and worth of all persons'²⁴ and specifically the nature of the 'rights of authors' as designed to 'safeguard[] the personal link between authors and their creations'.²⁵ Therefore a regime that does not give rights to 'creators' could not satisfy the subprovision's mandate.

²⁰ General Comment 17, *supra* note 11, at paragraph 7.

²¹ Even were patent laws to resolve the identification of authors satisfactorily, it is of course far from clear that strong patent laws would deserve ICESCR recognition as against public claims to health. To offer a brief reminder: Subprovision 15.1(b) 'recognize[s] the right of everyone . . . (b) to enjoy the benefits of scientific progress and its applications.' ICESCR, *supra* note 2, at Art. 15.1. As explained in one drafting history of the provision, '15 (1) (c) does not seem to have been written as an intentional limit on the rights of all [the public] to benefit.' Green, Maria, Int'l Anti-Poverty L. Ctr., Drafting History of the Article 15(1)(c) of the International Covenant, Paragraph 46, U.N. Doc. E/C.12/2000/15 (9 October 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088/\\$FILE/G0044899.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088/$FILE/G0044899.pdf).

²² The Comment uses the term 'creator'. General Comment 17, *supra* note 11.

²³ General Comment 17, *supra* note 11, paragraph 7.

²⁴ General Comment 17, *supra* note 11, paragraph 1.

²⁵ General Comment 17, *supra* note 11, paragraph 2. Note, however, that the role of the 'personal link' in patent can be questioned. The General Comment makes a

The term 'creator' is of course ambiguous. One ambiguity results from creators' need to draw on what came before. It is important to remember that human creators are not divinely capable of creating 'out of nothing'.²⁶ 'Creation' and 'making' are recognized as often resulting from acts of addition to the common heritage or remixing common-heritage elements. But still a host of issues remain.²⁷

Many nations distinguish between 'authors' and 'inventors'. An 'authorial' effort is usually thought to be one that is original, in the sense that some aspect (the aspect in which authorship is claimed) is not copied from predecessors. Under this view, anticipation does not erode authorship. As a United States Court of Appeals wrote, 'If by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author"'.²⁸ In examining who 'deserves' rewards such as property rights, philosopher Lawrence Becker has persuasively suggested that this approach to authorship is the ethically correct view: that priority in time is irrelevant to desert.²⁹

distinction between the 'moral' interests of creators (such as rights of attribution) and their 'material' interests (such as a right to remuneration). Patent law is linked more closely to the material than the dignitary, and 'personality' may be correspondingly less important, according to the authors of the Comment. They state, 'Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, but contribute to the enjoyment of the right to an adequate standard of living'. *Id.* at paragraph 15.

The implications of this are unclear. Nevertheless, to the extent that a right to material remuneration makes sense as a human right, it would have to be linked to actual authors rather than to persons who are not authors. For example, Peter Yu argues that a focus on the rights of the individual creator has the potential to 'encourage the development of an author-centered regime', rather than the current 'publisher centered' copyright regime. Yu, *supra* note 2, at 1131.

²⁶ See, for example, Litman, Jessica (1990), 'The Public Domain', 39 *Emory L.J.* 965, 1008 (arguing that while romantic ideas of authorship imagine that artists create 'out of nothing', in fact everything is created from utilizing an existing heritage); also see Zemer, Lior (2007), *The Idea of Authorship in Copyright* (London: Ashgate) (focusing on the public's contribution to authorship).

²⁷ See, for example, the important review of issues canvassed in Becker, Lawrence C. (1993), 'Deserving to Own Intellectual Property', 68 *Chi.-Kent L. Rev.* 609.

²⁸ *Sheldon v Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 54 (2nd Cir. 1936) (citing *Bleistein v Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903)). In the US, copyright is said to inhere in all authors, including authors who by coincidence create something identical to a pre-existing work of which they had no knowledge. However, since even 'subconscious copying' can give rise to liability and preclude ownership, the independent second author may face difficulties of proof, particularly if the prior work was publicly disseminated. See, for example, *Three Boys Music Corp. v Michael Bolton*, 212 F.3d 477 (9th Cir. 2000).

²⁹ '[T]emporal primacy alone seems a red herring.' Becker, *supra* note 27, at

Becker sets out a set of tentative but attractive desert-based arguments that suggest that an award of property rights should not depend on whether creators' subjectively-original productions happen to duplicate an existing work from which they did not copy.³⁰

By contrast, the notion of 'invention' seems to imply something new and significantly different from what has come before. Under this approach, a creator counts as an inventor only if he or she is the *first* person to make or create something. Subjective originality would be an insufficient basis on which to claim rights.

The ICESCR speaks not of 'inventors' but of scientific 'authors'.³¹ This may imply that a scientific author is anyone who independently makes or creates, in Becker's sense that even if her act of creation was later in time than someone else's, she is an 'author' if she did not copy the element she claims as the invention from the predecessor.³² This interpretation would give rights under the ICESCR to a host of authors, including independent inventors who were second in time. But some commentators would probably disregard the

618. Becker does, however, suggest that 'the antiquity of a thing' can sometimes 'revise [] our estimate of its singularity'. *Id.*

³⁰ Becker, *supra* note 27, at 622–3 (principle of non-preclusion: 'Surely it would be odd to accept a desert basis for one person that precluded other equally deserving people from getting a similar reward.'). 626–8. 'Honoring the non-preclusion principle would introduce significant changes into intellectual property law. For example, far from being excluded from rewards for their work, authors who can show their intellectual independence from patented products would be entitled to share the property rights in them.' *Id.* at 629.

³¹ At least one of the documents that preceded the ICESCR does speak of 'invention', however. Article 13 of the American Declaration on the Rights and Duties of Man, Organization of American States, 2 May 1948, OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948), provides as follows:

Article XIII. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

The passage of the Declaration may have played some role in the adoption of Article 27(2) of the UDHR, see Yu, *supra* note 2, at 1053–8, which Article in turn affected the language of the ICESCR.

³² A corollary of the second approach would be a rule that freed inventors from liability so long as their inventions did not result from copying. Two quite different but thoughtful philosophers have argued that a proper conception of rights would not impose liability on someone who independently invents. See Becker, *supra* note 27, at 628–9; Nozick, *supra* note 11, at 182.

linguistic and desert issues, and substitute for 'author' the notion of 'inventor'. If adopted, this interpretation would give rights under the ICESCR only to those persons who were first to invent.

So current law has two primary conceptions of who counts as a creator: subjective originality versus being objectively 'first'. As this essay will show, patent legal systems do not consistently follow *either* conception.

Given the centrality of the 'creator' to a human rights notion of a scientific authors' rights, the current legal systems' lack of consistency about *who* counts as a creator should be a shocking divergence from human rights. But if the divergence does not shock, that is because virtually everyone recognizes at some level what was pointed out by the Committee's General Comment 17: that the foundations for existing legal regimes like copyright and patent differ strongly from the foundations of an authorial right under the ICESCR, and that 'it is important not to equate' current intellectual-property rights to authors' human rights under subprovision 15(1)(c).³³ (In fact, the most accessible drafting history of Article 15 suggests that the subprovision's primary goal was not to secure authors a right to payment from persons benefiting from creative work, but rather to secure authors and scientists from governmental repression.³⁴)

³³ See General Comment 17, *supra* note 11, especially paragraph 2. As noted above, General Comment 17 distinguishes between on the one hand, 'human rights' that are 'fundamental, inalienable and universal', and, on the other hand 'intellectual property rights' which 'seek to provide incentives' and serve other purposes for the 'benefit of society as a whole'. As Rochelle Dreyfuss cogently argues in Chapter 4 of this volume, the history and structure of patent law makes it a poor fit for human rights. Also see, for example, Hestermeyer, *supra* note 18, at 153–8.

³⁴ Article 15(1)(c) may not even have been adopted with a focus on issues of copyright and patent. For those legal regimes, the primary conflict is among nongovernmental claimants, but 'the subtext to the entire discussion [of 15(a)(c)] was the issue of *government* control over science and art, and scientists and artists'. Green, *supra* note 21, paragraph 42 (emphasis added). Green writes:

The provision on authors' rights, judging from the exchanges between the USSR, Czechoslovakia, and Uruguay, became associated with protection for authors' freedom from state intervention. Any substantive issues to be worked out on the relation between the 'benefits' clause and the 'authors' clause never had a real chance for discussion. The final vote was straight down cold war faultlines, with the opposed roster holding Romania, Ukrainian Soviet Socialist Republic, USSR, Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, and Iraq

Green, *supra* note, paragraph 43. Also see the discussion in Yu, *supra* note 2, at 1067–70.

By focusing on the *specific* issue of *who* is entitled to rights, it will become clear that current patent laws cannot claim to be implementing the ICESCR provision that seeks to secure the 'material interests' of scientific authors.

4. DO PATENTS GO TO THE FIRST TO INVENT?

The vast majority of countries, the United States being probably the only exception, subscribe to the first to file system.³⁵ Under a first to file system, the patent is given to the first person to file a patent application, regardless of whether the filer was the first to conceive of the invention. Such a rule is motivated by the desire to enable the public to capture the benefit of prompt disclosure of new scientific findings and by bureaucratic considerations such as ease of administration. When nations make 'first to file' the test for inventorship it is possible that many persons who are the first to conceive of an invention, or even the first to reduce it to practice, will be denied patents.

The United States does not adopt the 'first to file' approach. Instead, it grants patent rights according to a 'first to invent' rule.³⁶ Does the US approach satisfy the ICESCR concern with linking the 'material interests' flowing from an invention to its true 'author'? On the surface, the 'first to invent' rule has the promise of being consistent with at least one plausible notion of authorship, namely, 'being first' to conceive or make something, and seems fairer to individual scientists than a 'first to file' rule.

When one takes a closer look, however, the United States system also fails to seek a true 'author'. For example, is the true 'author' the first to *conceive* an invention? Under US law, the first to conceive of a new invention may forfeit his rights if he is less than diligent in reducing his invention to practice.³⁷ Is the true 'author' the one who first reduces the invention to practice? Under US law, even if a person is first to both conceive a new invention *and* reduce it to practice, she may also forfeit her rights to another, if she 'with-

³⁵ Lemley, Mark A. and Colleen V. Chien (2003), 'Are the U.S. Patent Priority Rules Really Necessary?', 54 *Hastings L.J.* 1299, 1303.

³⁶ 35 USC § sec 102 (2006). Although it can be debated the extent to which the two systems result in different ownership awards, Lemley and Chien find 'that the first person to file is usually, but by no means always, also the first to invent. In over 40% of the cases, the first to invent is the last to file.' Lemley and Chien *supra* note 35, at 1300. Although even in the US first filers often win priority contests, Lemley and Chien conclude that 'the U.S. first to invent system has a significant effect on outcomes.' *Id.* at 1333.

³⁷ 35 USC § sec 102(g); see Mueller, Janice (2006), *An Introduction to Patent Law* (New York: Aspen Publishers) at 162–3.

holds h[er] invention from the public'.³⁸ The reasoning seems to be that as the public will not benefit from a concealed invention, the law is justified in stripping the first inventor of her right in favor of a subsequent inventor who disclosed his invention to the public. But both are inventors.

Public disclosure leads to a third area in which US law grants patents in ways that diverge from notions of 'authorship': a person who authors an invention, but who practices it publicly, or discloses it in a publication, after a year cannot claim patent protection in it.³⁹ This may make sense from a utilitarian perspective,⁴⁰ but the result is that an 'author' lacks rights.

A striking example of an authorial inventor not receiving a patent can be found in the decision of the PTO Board of Interference in the case of *Lassman v Brossi*.⁴¹ The Board held that when two inventors file a patent application on the same day, and it is impossible to establish priority based on the date of conception, neither of the inventors gets a patent. Such result does not seem to comport with a principle of authors' rights.

In addition, of course, both the 'first to file' and 'first to invent' systems often deny patent rights to independent inventors, even though, as Becker argues, even second inventors can be authorial creators in a very real and strong sense.⁴² That is the topic of the next section.

³⁸ *Mason v Hepburn*, 13 App.D.C. 86, 96 (D.C. Cir. 1898) (quoting with approval from a prior case). Such is the result today under 35 USC §102. That section reads in part: 'a person shall be entitled to a patent unless . . . before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed or concealed it' §102(g)(2).

³⁹ 35 U.S.C. § 102(b).

⁴⁰ I should take note here of a possible counter-argument. One might distinguish between two kinds of authorial inventors: those who do not apply for a patent because they expect to garner sufficient revenue and control without a patent (for example, by using trade secret law), and those who do not apply for a patent for other reasons, such as ignorance about legal requirements. It could be argued that the 'human rights' concerns of the first group are met even without the assistance of patent law, and therefore that this group's failure to qualify for patent protection does not create a divergence between human rights law and the current legal pattern. I take no position on such an argument.

But as for members of the second group, especially those whom a patentee may deprive of any ability to benefit from their invention, divergence between most human rights notions and patent practice seems clear.

⁴¹ *Lassman v Brossi*, 159 U.S.P.Q. 182, 185–6 (BD. Pat. INT'F. 1967).

⁴² See Becker, *supra* note 27, at 618 (arguing that notions of deservingness imply that a predecessor invention should not preclude a second but independent inventor from having title).

5. DO PATENTS GO TO ALL INDEPENDENT AUTHORS?

What of the second possible meaning for ‘author’, namely, independent creation? This essay has suggested that an author under a plausible and attractive human rights conception might be anyone who has added or remixed some elements *independently*, in ways he did not copy from others, even if he happens to duplicate a previous invention.

No patent system that I know of grants patents to second inventors simply because they invented independently. The US patent system, for example, employs a ‘winner takes all’ approach. While a first to file system seems to yield results that are arbitrary from a human-rights perspective, it might be argued that ‘the U.S. first to invent system is not particularly “fairer” than a first to file alternative, since [in any kind of winner-takes-all system,] regardless of who wins, the loser is an independent inventor who will likely have made substantial investment in developing its invention before learning of another party’s priority’.⁴³

Not only does only one inventor get a patent; the other independent inventor often gets sued. In the United States, there is no general ‘independent inventor’ defense. Admittedly, many other nations provide prior independent inventors some limited defenses, and even the United States has adopted a limited form of such a defense for one class of patents.⁴⁴ But that still does not give equal treatment to all independently authorial inventors.

The rejection of ‘independent creation’ as a sufficient basis for patent ownership may make sense in utilitarian or economic terms. Inventions are often made by many researchers near-simultaneously.⁴⁵ If all the independent researchers each received a patent, or even if independent inventors merely received a defense, the various independent inventors would compete with

⁴³ Lemley and Chien, *supra* note 35 at 1326 (discussing a possible implication of the closeness of reported invention dates in their data).

⁴⁴ The harshness of patent races is moderated in European countries. They typically recognize some prior users’ rights, granting those who independently develop an invention ‘a limited right to continue using it even after another party’s patent issues’. Lemley and Chien, *supra* note 35, at 1326. In the US, if two persons independently invent, and one person obtains a patent, the other is an infringer. The only exception is a narrow category of business-method patents. 35 U.S.C. § 273(b)(3) (2000).

⁴⁵ Lemley, Mark (2007), ‘Should Patent Infringement Require Proof of Copying?’, 105 *Mich. L. Rev.* 1525, 1528; Merges, Robert P. and Richard R. Nelson (1990), ‘On the Complex Economics of Patent Scope’, 90 *Colum. L. Rev.* 839, 884. The *locus classicus* of this observation is Merton, Robert K. (1973), *The Sociology of Science* (Chicago: University of Chicago Press), especially at 365.

each other and drive down the price of the invention or its products to a level that might provide insufficient incentive for new research to take place.⁴⁶ Therefore, a ‘winner take all race’ may be necessary for providing researchers sufficient incentives to create what the public needs. But this is a utilitarian or economic concern, and as General Comment 17 recognizes, that is quite a separate matter from what the ICESCR 15.1(c) seeks to protect.⁴⁷ In sum: a ‘winner takes all’ approach may be necessary for incentives, but it is inconsistent with rewarding all authors.

The conclusion seems clear. On either plausible conception of creator – being the ‘first’ to make or create, or being an ‘independent’ creator or maker – current patent laws do not fit.⁴⁸

6. ASSIGNEES AND CORPORATIONS AS OWNERS

In addition to the issues of first to file versus first to invent, and independent authorship versus initial inventorship, there is the issue of whether a corporation or assignee can claim the protection of human rights. It is likely that most patent rights are held by corporations, who may hold them by assignment from the actual, human creators.⁴⁹ Patent laws in the US require that the actual creator be granted patent rights, which she in turn may assign to her employer. The very fact that a right holder is merely an assignee, ipso facto prevents him from seeking human rights protection to its interests. At least that is so in the eyes of the Committee, which states that human rights are by nature ‘inalienable’;⁵⁰ if inalienable, they cannot be held by an assignee.

Perhaps based on the asserted inalienable nature of human rights, or perhaps for other reasons,⁵¹ General Comment 17 interprets the ICESCR to

⁴⁶ Samson Vermont has challenged this traditional economic argument, suggesting that giving a defense to second inventors might be compatible with incentive goals. Vermont, Samson (2006), ‘Independent Invention as a Defense to Patent Infringement’, 105 *Mich. L. Rev.* 475; compare Lemley (2007), *supra* note 45, at 1525.

⁴⁷ In emphasizing the nonutilitarian basis of the human rights document, I do not contend that the ICESCR is blind to the way the even private IP rights can assist the public.

⁴⁸ Nor does current copyright law fit, for quite different reasons. See, for example, Gordon, *A Property Right in Self-Expression*, *supra* note 13.

⁴⁹ There are conceptions of natural right that would allow one to delegate physical ‘creation’ and still claim ‘authorship’, as in the Lockean reference to the ‘turfs my servant has cut’. John Locke (1690), *Two Treatises of Government*, 307 (Laslett, Peter (ed.) (1967), Cambridge University Press). I do not enter that particular bramble.

⁵⁰ General Comment 17, *supra* note 11, paragraph 1.

⁵¹ One cannot be sure how far the Committee would extend the inalienability notion. For example, the Committee expressed the view that human rights should be

exclude legal entities such as corporations.⁵² Corporations' rights under positive existing law are of 'different nature [and] are not protected at the level of human rights'.⁵³ Yet, as mentioned, it appears that the majority of patents are held by corporations. This is further evidence that current patent holders have little valid claim to the backing of the ICESCR. The Committee even cites the fact that 'intellectual property regimes primarily protect business and corporate interests and investments'⁵⁴ as part of the reason for the Committee's conclusion that it is 'important not to equate intellectual property rights with the human right recognized in article 15'.⁵⁵

7. CONCLUSION

In the dispute over the enforcement of pharmaceutical patents, the ICESCR at first appears Janus-headed. On the one hand, it provides for 'the right of everyone' '[t]o enjoy the benefits of scientific progress and its applications'.⁵⁶ On the other hand, it provides for 'the right of everyone' '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.⁵⁷

Tension may arise between those provisions, or between those provisions and other human rights, like the right to health, within ICESCR and otherwise. But the actual patent laws of actual nations do not rise to a level that would require resolving any such tension. The nations of the world recognize as patent holders people who would not be entitled to human rights as authorial inventors; and the nations of the world refuse to recognize as patent holders people who would indeed be authorial inventors. The 'first to file' systems may be the most obvious offenders against a search for authors, but any

extended to allow communities and other groups to benefit from 'their collective cultural heritage'. General Comment 17, *supra* note 11, at paragraph 2; also see paragraph 9 ('knowledge, innovations, and practices of indigenous and local communities'). Presumably, under this interpretation, a community could have rights in creations originating before any of the inhabitants were born. This suggests a kind of alienability, or transfer among individuals, albeit one not mediated by a market.

⁵² Contrast this with the European Convention on Human Rights, which at protocol 1, Article I (the right to property), provides that 'Every natural *or legal* person is entitled to the peaceful enjoyment of his possessions.' (Emphasis added).

⁵³ General Comment 17, *supra* note 11, paragraph 7.

⁵⁴ General Comment 17, *supra* note 11, at paragraph 2.

⁵⁵ General Comment 17, *supra* note 12, paragraph 3 ('It is therefore important . . .') See also Hestermeyer, *supra* note 17, at 153–8.

⁵⁶ ICESCR, *supra* note 2, at Art. 15.1.(b).

⁵⁷ ICESCR, *supra* note 2, at Art. 15.1.(c).

system is suspect that denies patents to independent inventors. Given the crucial importance of ‘authorship’ to the ICESCR subprovision that grants ‘material’ rights to scientists, and given the relative *unimportance* of ‘authorship’ to national patent laws, it makes little sense for patent holders to claim a presumptive gloss of ‘human rights’ for their claims.

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