

“The Right to Take Part in Cultural Life: Reconciling IPRs and Article 15 of the ICESCR”  
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The role of United Nations human rights bodies in responding to concern about the effects of stronger intellectual property rights worldwide has been mixed. Article 15 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) protects the rights of both authors and consumers. The Committee on Economic, Social, and Cultural Rights (Committee), however, the United Nations body charged with monitoring states’ compliance with their obligations under the ICESCR, has provided interpretive guidance only with respect to authors’ rights and postponed consideration of the participatory dimensions of Article 15.

The Committee has now embarked on discussions designed to produce interpretive guidance on the right to take part in cultural life under Article 15. Although the right to participate in cultural life has a variety of dimensions, its focus on the process of creation and innovation will make it an important contribution to ongoing discussions about whether and if so how states should limit intellectual property rights to protect the ability of individuals to access cultural goods. The Committee’s interpretation provides an opportunity to articulate a robust rhetorical and legal basis for the right to participate in culture that domestic advocates can use to their advantage in lobbying for exceptions to domestic intellectual property protections or pressuring states to take measures to guarantee access to cultural, medical, and scientific works. At the very least, however, it is important to prevent intellectual property incumbents from using the Committee’s process to strengthen intellectual property rights at the expense of individuals who seek to access material in our ever-shrinking public domain.

This paper provides a framework for evaluating two of the most critical issues that the Committee will need to address in this process with respect to intellectual property rights – the nature of state obligations and the way in which the Committee should evaluate the decisions states reach in resolving conflicts between rights.

Using the examples of Internet access, copyright terms, compulsory licensing, fair use, and anti-circumvention measures, the paper first identifies specific obligations that the right to take part in cultural life would impose on states with respect to domestic intellectual property regimes. The right may require, for example, that states take steps to increase the availability and accessibility of mobile phones as a potential avenue for bridging the digital divide. Because states are obligated to protect individuals’ rights from infringement by third parties, advocates may also be able to argue that allowing third parties to restrict access to cultural works through technological protection measures – where such access would otherwise be lawful – impermissibly restricts the right to take part in cultural life. Finally, although the ICESCR only obligates states to “take steps . . . to the maximum of [their] available resources, with a view to achieving progressively”

the rights protected by the treaty, states nonetheless have several important and immediately realizable obligations. For example, under the Committee's jurisprudence, deliberately retrogressive measures must be strictly justified. Advocates may be able to use this principle to challenge proposals to extend or strengthen intellectual property rights under domestic law.

The paper then examines whether it is possible to identify what the Committee has called the "minimum core content" of the right to take part in cultural life – the absolute essential minimum of the right that states need to ensure in order to avoid eviscerating the meaning of the right entirely. Cultural works present a difficult case in this respect because they can be both unique *and* fungible. In some circumstances, lack of access to a particular, unique work may constitute a violation of the right to participate in culture; in others, the harm is not lack of access to any particular work, but rather increasing incremental restrictions over time that limit the opportunities that are available to individuals to create and participate in culture and to exchange information. If it is not possible to quantify the amount of cultural material that individuals need to be able to access to take part in cultural life, the minimum core might be defined instead as requiring sufficient participation in the laws that affect cultural life. It may also be advisable, however, for the Committee to establish a flexible standard – such as "adequate" access – that could be applied in a variety of contexts, in order to ensure that it is able to evaluate the issue of access directly.

Finally, the paper identifies five different models that might be applied by the Committee in evaluating the decisions states make in resolving conflicts between rights. The balancing approach that has been adopted by the Committee thus far does not provide states with sufficient guidance about how to resolve conflicts between rights, but merely identifies the factors that states should consider in this process. The five models – prioritization, procedural justice, limitations, proportionality, and conflicts of law – represent a continuum in terms of the amount of authority that would be assumed by the Committee in evaluating state decisions. The first models place only minimal limits on state decision-making processes, while later models would require the Committee to engage in a substantive evaluation of the policies behind the state's decision. The choice of which model is most appropriate depends on the extent to which the Committee will be able to maintain a supervisory role over state conduct while also providing states with sufficient discretion in making policy decisions regarding how to implement rights.