

Article

Protecting Rights Online

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I. INTRODUCTION

The access to knowledge or “A2K” movement, a set of alliances demanding more equitable distribution of and greater access to knowledge for the world’s populace, has gained enormous traction in recent years. Collaboration between A2K advocates and the human rights movement, another global movement concerned with distribution of and access to materials necessary to protect human health and welfare, has had a significant impact in areas such as the fight for access to medicines. Despite their shared goals, however, the A2K and human rights movements have historically focused on different issues with respect to online content. Human rights advocates have focused on abuses of state authority such as censorship, while those in the A2K movement have emphasized the risks of limits on state authority as a result of strengthened intellectual property protection worldwide.

In large part this reflects a disciplinary and a doctrinal divide. Those in the human rights movement are largely international lawyers, while the A2K movement is predominantly composed of cyberlaw and intellectual property

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lawyers and technologists. These doctrinal differences are exacerbated by the fact that the two bodies of law with which the movements are concerned—human rights law and intellectual property law—have “developed in virtual isolation from each other.”¹ Indeed, one of the central challenges in framing access to knowledge today is bridging the various legal regimes that affect access to knowledge—intellectual property, human rights, trade, consumer protection, and development, among others—and encouraging advocates in each of those disciplines to explore issues outside their respective doctrinal fields.

One of the primary reasons for the “human rights/A2K divide,” however, is history. Because of the specific historical moments in which they arose, the discourses of the A2K movement and the human rights movement have articulated the harms associated with regulation of online content—and thus the solutions that might be implemented to address these harms—in very different ways. As a result of its battle to resist the imposition of global patent rights and the resulting decrease in access to medicines, the A2K movement has tended to emphasize the importance of ensuring that states have sufficient policy space to take measures to protect public health and welfare. The human rights movement, in contrast, born of the reaction to the horrors of state abuses during the Second World War, has traditionally emphasized the importance of constraining state authority. As a result, the discourses of each movement have focused on different harms with respect to Internet regulation—A2K advocates on increasing intellectual property standards imposed by international treaties and human rights advocates on state censorship online.

This Article seeks to bridge this “human rights/A2K divide” in two ways. The second and third Parts explore the historical development of each movement and the way in which their histories have led them to view the harms associated with the regulation of online content—and thus the solutions that might address these harms—in very different ways. Part III also argues that the most promising avenues for collaboration will be with respect to issues on which state authority is limited because of international obligations or the absence of resources or commitment on the part of the state. Part IV then uses the example of Internet content regulation to develop a model of “flexible harmonization”—employing binding but imprecise international norms—that would provide opportunities for protecting rights online while ensuring states have the ability to implement their obligations in ways consistent with local needs and values.

The success of the alliance between human rights and A2K advocates in working to foster increased access to medicines indicates the tremendous potential of cross-movement work. Although it is important for each

1. Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 47 (2003). This isolation also results in diverging areas of expertise. See Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT’L ECON. L. 861, 881 (2002); cf. Deborah Cantrell, *Common Ground: The Case for Collaboration Between Anti-Poverty Advocates and Public Interest Intellectual Property Advocates* 10-12 (Colo. Law Legal Studies Research Paper Series, Working Paper No. 08-01, 2008) (comparing A2K and anti-poverty advocates).

movement to remain focused on its core agenda, collaboration offers significant benefits. There are important gains that can be realized from using the language and institutions of other regimes to accomplish advocacy goals.² In addition, the human rights experience indicates that the articulation and codification of norms will be most successful when supported by a broad, diverse, and unified coalition.³ Further cooperation between the movements could be of significant value in addressing the pressing issues we face at the intersection of access to knowledge and human rights online.

II. THE A2K AND HUMAN RIGHTS MOVEMENTS

The purpose of this Part is to briefly define and then outline the development of the A2K and human rights movements. This Part illustrates the way in which the historical contingencies against which each arose gave rise to discourses that have both fostered and hindered collaboration in specific areas. As the following Part will then argue, collaboration between the movements has been possible primarily when both the problem and solution are found in the need for increased authority of states to protect the economic, social, and cultural rights of their citizens.

A. Access to Knowledge

Broadly characterized, the A2K movement is a set of alliances that have emerged in the last few years, predominantly to challenge the global expansion of intellectual property rights.⁴ Those advocating the use of generic drugs to decrease the cost of medicines have aligned their efforts with others seeking increased flows of knowledge, including free software programmers and consumer protection advocates.⁵ Although it may not be clear for some time whether the diverse actors involved in mobilizing for increased access to knowledge have coalesced into what might be deemed a “social movement,”⁶

2. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 14 (2004).

3. See Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547, 584, 601 (2007) (discussing coalition building in connection with the Optional Protocol to the Convention on Torture and the campaign to ban landmines, among other initiatives).

4. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 806 (2007); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT 10 (2008), <http://www.ivir.nl/publicaties/hughenoltz/finalreport2008.pdf>. Kapczynski notes that these contestations have occurred in areas as diverse as “seeds, medicines, software, genetic material, and cultural goods” and that “this emerging mobilization is more akin to a network than a pyramid.” Kapczynski, *supra*, at 835. Shaver analyzes access to knowledge from a development perspective, emphasizing the extent to which individuals have “the ability to access, utilize, and contribute to knowledge.” Lea Bishop Shaver, *Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge*, 4 I/S: J.L. & POL’Y FOR INFO SOC’Y 235, 239 (2008).

5. See Kapczynski, *supra* note 4, at 806-08, 825-28.

6. See Tomiko Brown-Nagin, “*One of These Things Does Not Belong*”: *Intellectual Property and Collective Action Across Boundaries*, 117 YALE L.J. POCKET PART 280, 284 (2008), <http://thepocketpart.org/2008/06/01/brown-nagin.html> (arguing that what Kapczynski calls the “A2K mobilization” may not meet the definition of a social movement but positing that it might be considered a “fusion movement”). This Article uses the term “A2K movement” in a less technical sense, to refer to the coalitions of actors concerned with access to and distribution of knowledge and knowledge goods that arose primarily out of the resistance to the ways in which intellectual property laws limited the

each shares a common commitment to access to and equitable distribution of knowledge.

Many of those in the A2K movement working on issues of Internet regulation hail from a tradition of Internet libertarianism that resisted the imposition of any form of regulation on the web. In the early days of the Internet, the medium was thought of as a “virtual Wild West, an unregulated province of libertarians and cyber-anarchists”⁷ and ungovernable by traditional means.⁸ These regulatory skeptics argued that jurisdiction over content on the Internet cannot be allocated on the basis of territory because information on the Internet does not respect (and cannot be made to respect) territorial boundaries. First, information on the Internet crosses boundaries with ease, routing around blockages in any one part of the network.⁹ Second, the physical location of the source and recipient of the information can be difficult to identify.¹⁰

A central concern of the regulatory skeptics was that because of these features, any attempt by a state to regulate content would result in the illegitimate imposition of one state’s laws on another, leading to a kind of Internet race to the bottom in which companies and individuals would be required to conform their expression online to the world’s most restrictive set of laws to avoid incurring liability for content that may find its way into that jurisdiction.¹¹ The extraterritorial application of national law could significantly increase the cost of engaging in activity online, since individuals and businesses would not know which jurisdiction’s laws could potentially apply to their conduct.¹²

The position of the regulatory skeptics has been challenged by those who maintain that technological developments allow states to regulate the Internet in ways that are similar to “real-space” regulation.¹³ Internet content providers are increasingly able to tailor the content that they direct to users based on the users’ geographic locations.¹⁴ Geolocational tools add to the arsenal of nontechnological techniques already available to states for

ability of states to protect individual health.

7. Clyde Wayne Crews Jr. & Adam Thierer, *Introduction to WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION* xvii (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003).

8. See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1372 (1996).

9. See GIAMPIERO GIACOMELLO, NATIONAL GOVERNMENTS AND CONTROL OF THE INTERNET: A DIGITAL CHALLENGE 2 (2005).

10. See, e.g., Vinton G. Cerf, *Foreword to WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION*, *supra* note 7, at xii.

11. Crews & Thierer, *supra* note 7, at xxv; see also Cerf, *supra* note 10, at xii; Matthew Fagin, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 398, 408 (2003); Johnson & Post, *supra* note 8, at 1375.

12. See, e.g., Fagin, *supra* note 11, at 407.

13. Goldsmith and Wu argue, for example, that geolocational technologies allow the identification of the location of senders and recipients of information. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 7 (2006). These technologies can include asking users to select their location, relying on credit card information, or tracing the path that packets of information follow in reaching their destinations. *Id.* at 59-62.

14. The availability of such technologies formed the basis of a French court’s order to Yahoo! to prevent users in France from accessing Nazi memorabilia on Yahoo!’s website. *Id.* at 7-8 (discussing *UEJF v. Yahoo! Inc.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, available at <http://www.juriscom.net/jpt/visu.php?ID=300>).

controlling online content. Palfrey and Rogoyski have observed that in light of these developments, the “presumption in favor of a techno-libertarian approach to the regulation of Internet-based activity seems to have run its course.”¹⁵

The response of regulatory skeptics to increasing state regulation has been to argue that if any regulation is to occur, it must be voluntary and contractual, initiated by private parties, and insulated from the machineries of the state. Johnson, Crawford, and Palfrey, for example, have advanced a model of “peer production of governance” in which regulation would be carried out by end users determining on an individual basis what content they will and will not trust.¹⁶ Private regulation is viewed as more consistent with the architecture of the Internet and therefore less likely, when compared to state regulation, to undermine its potential as a medium for communication, creativity, and knowledge production.¹⁷ Private regulation has also been heralded as more flexible, able to adapt to rapid changes, and particularly appropriate for Internet content, since it “has the apparent benefit of avoiding state intervention in sensitive areas of basic rights.”¹⁸

This cyber-libertarian emphasis on private regulation has been paired with a discourse that emerged in response to the extension of intellectual property rights via the international trade regime. As the global expansion of patent rights caused increases in the price of essential medicines in developing countries, consumer protection organizations, AIDS activists, and many others joined forces to protest the harm to human health resulting from these price increases and to advocate for increased state authority to take measures to protect those within their jurisdictions.

The focus of these advocacy efforts was international treaties designed to impose minimum national standards in the area of intellectual property. The most well-known of these is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Purportedly as a way to foster increased ease of trade, TRIPS requires members of the World Trade Organization to strengthen national protections for intellectual property as a condition of participation in the trade regime.¹⁹ The detailed provisions of TRIPS, backed up by the threat of trade sanctions, have meant that states have far less discretion than previously in determining whether, and, if so, how, to implement intellectual property protections on the domestic level.²⁰ A2K

15. John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of “Harmful” Speech to the End-to-End Principle*, 21 WASH. U. J.L. & POL’Y 31, 53 (2006).

16. David R. Johnson, Susan P. Crawford & John G. Palfrey, Jr., *The Accountable Internet: Peer Production of Internet Governance*, 9 VA. J.L. & TECH. 9, ¶ 40 (2004), http://www.vjolt.net/vol9/issue3/v9i3_a09-Palfrey.pdf; see also John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 777-78 (1999) (advocating decentralized, market-based regulation that uses technology to rate and filter Internet content at the user level).

17. See Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 700 (2005); see also Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 KY. L.J. 885, 915 (2000).

18. MONROE E. PRICE & STEFAAN G. VERHULST, SELF-REGULATION AND THE INTERNET 9 (2005).

19. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

20. See, e.g., Helfer, *supra* note 2, at 2; Peter Drahos, *The Universality of Intellectual Property*

advocates argued that protecting patents in essential medicines allowed pharmaceutical companies to charge prices that individuals suffering from disease in developing countries could not afford.²¹ Critics also maintained that intellectual property rights have diverted research toward the needs of developed countries' healthcare markets.²² TRIPS allows states to create exceptions to intellectual property rights and issue compulsory licenses in some cases,²³ but these provisions have been criticized as ineffective in addressing the needs of developing states in ensuring access to medicines.²⁴

Advocates have also maintained that the international extension of copyright law has had significant consequences for education and culture.²⁵ For example, TRIPS and subsequent treaties regarding copyright standards require states to adopt laws that would prevent circumvention of technological measures (called digital rights management or technological protection measures) that physically prevent copies of works from being made, even where copyright law would not otherwise prohibit the making of such copies.²⁶ Increased copyright protections are perceived as limiting access to, among other things, educational materials such as textbooks and scientific publications necessary for the advancement of medical treatment. In the online context, copyright protections and the techniques designed to enforce copyright protections, such as digital rights management systems, have limited the ability of individuals to access digital content and thereby also their ability to take part in cultural life.

The international intellectual property treaties have been highly effective in achieving state compliance with the obligation to translate intellectual property protections into domestic law.²⁷ Indeed, the WIPO Copyright Treaty was the reason the United States enacted the Digital Millennium Copyright Act.²⁸ As of fall 2005, the obligations of the treaty were fully or partially implemented in fifty-two countries, and sixty-one had attempted to implement its anti-circumvention provisions.²⁹ Intellectual property rights holders continue to lobby for expanded international protections. A proposed broadcast treaty, narrowly defeated due to the lobbying efforts of a coalition

Rights: Origins and Development, <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/drahos.doc> (last visited Nov. 10, 2008).

21. See Amy Kapczynski et al., *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031, 1047 (2005).

22. See Chapman, *supra* note 1, at 877-78; Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights*, 6 MINN. J.L. SCI. & TECH. 191, 192-93, 200 (2004).

23. TRIPS, *supra* note 19, arts. 30-31.

24. Fanni (Faina) Weitsman, *TRIPS, Access to Medicines and the "North-South" Conflict After DOHA: The End or the Beginning?*, 6 ASPER REV. INT'L BUS. & TRADE L. 67, 90-92 (2006).

25. See Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 821-25 (2007).

26. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 414-16 (2006).

27. Helfer, *supra* note 2, at 23-24 ("Faced with the prospect of robust review and enforcement of intellectual property rules, WTO members not surprisingly devoted significant time and resources to transposing TRIPS commitments into their national legal systems.").

28. BENKLER, *supra* note 26, at 414.

29. Heather A. Sapp, *North American Anti-Circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada*, 10 COMP. L. REV. & TECH. J. 1, 3 (2005).

of nonprofit organizations, would have required states to enact domestic laws giving broadcasters exclusive rights in the material they transmit.³⁰

B. *Human Rights*

Although it has deep historical roots tracing back to the natural rights tradition, the law of state protection of aliens, and humanitarian law,³¹ what we know today as the modern human rights movement began to take form after the Second World War with the drafting of the Universal Declaration of Human Rights.³² Today, there is a great diversity of domestic and international nongovernmental organizations working on issues related to human rights. The phrase “human rights movement” is used here, however, to identify those organizations that primarily work with the norms and institutions of international human rights, as protected under customary international law and human rights treaties.

Much of the impetus for the Universal Declaration and this modern movement arose out of the horrors of the Second World War and the Holocaust.³³ Concern about the risks of state abuse was an important motivation in identifying rights held by individuals against the state, rights which were eventually codified in the International Covenant on Civil and Political Rights³⁴ and the International Covenant on Economic, Social and Cultural Rights.³⁵ Within this framework, “individual rights act as a bar against the despotic proclivities of the state.”³⁶ As a result, the state is not only the “primary guarantor of human rights,” it is also “the basic target for

30. See Press Release, Knowledge Ecology Int’l, Statement on Breakdown of Broadcast Treaty Negotiation (June 22, 2007), http://www.keionline.org/index.php?option=com_content&task=view&id=93; see also *WIPO Broadcast Treaty Talks Collapse*, BRIDGES WKLY. TRADE NEWS DIGEST, June 27, 2007, available at <http://ictsd.net/i/news/bridgesweekly/6516>. For a general discussion of the broadcast treaty, see Shyamkrishna Balganesch, *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303 (2008).

31. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 120-22 (Archon Books 1968) (1950).

32. Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 18-19 (2001); OPPENHEIM’S *INTERNATIONAL LAW* §§ 436-37 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

33. See, e.g., ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 89 (1987); 1947 U.N.Y.B. 523, U.N. Sales No. 1947.I.18.

34. International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

35. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

36. Mutua, *supra* note 3, at 550. Although human rights advocates have addressed private violence, including in the context of women’s human rights, these efforts have nonetheless employed a state-centric lens, analyzing the issue as one of the state’s responsibility to control private violence. See, e.g., MOLLY BEUTZ ET AL., *THE GOVERNMENT RESPONSE TO DOMESTIC VIOLENCE AGAINST REFUGEE AND IMMIGRANT WOMEN IN THE MINNEAPOLIS/ST. PAUL METROPOLITAN AREA: A HUMAN RIGHTS REPORT* 28-36 (2004); Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 326 (Rebecca J. Cook ed., 1994). The Draft Norms on the Responsibilities of Transnational Corporations are something of an exception in this respect since they articulate independent obligations of private actors. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).

international human rights law.”³⁷ From a human rights perspective, treaties and international institutions are thus important limits on the absolute power of states, preventing states from violating the rights of their citizens and requiring them to safeguard individual rights against violations by both state and private actors.

The human rights approach views harms to individuals in terms of state responsibility, focusing on direct and indirect violations by the state, the state’s obligation to prevent private actors from violating the rights of others, and the state’s obligation to fulfill rights, as well as the importance of ensuring state accountability.³⁸ First, from a human rights perspective, state regulation may result in both direct and indirect violations. In the context of Internet regulation, for example, violations might occur as a result of direct restrictions of rights that rely on information and communication technologies for their fulfillment, such as the right to freedom of expression or to take part in cultural life, or violations that occur because the information necessary for the fulfillment of other rights is unavailable, such as the right to health.³⁹ Direct harms can also include violations of the right to be free from discrimination.⁴⁰ Second, states are obligated to protect individuals from violations of their rights by private actors. From this perspective, private harms that the state fails to prevent or punish—for example, restrictions on the ability to take part in cultural life that result from the use of digital rights management systems—would be as much of a violation as actions taken by the state itself.⁴¹ Third, a human rights approach would require states to take steps to fulfill rights where these are not otherwise being fulfilled. In the context of online content, for example, the state may be required to take steps to ensure that individuals have access to the cultural goods they need for participation. Fourth, a human rights approach would emphasize the importance of ensuring the

37. Mutua, *supra* note 3, at 550; *see also* U.N. Comm’n on Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, ¶ 1, U.N. Doc. E/CN.4/2003/L.11/Add.3 (Apr. 22, 2003) (“[T]he promotion and protection of all human rights is first and foremost the responsibility of the State.”).

38. The jurisprudence of the Committee on Economic, Social, and Cultural Rights requires states to respect, protect, and fulfill rights. *See, e.g.*, ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 43(d), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). For a discussion of the importance of accountability structures in ensuring the fulfillment of rights, *see* Molly K. Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT’L L.J. 387 (2003).

39. [A] human rights approach views ICTs [information and communication technologies] not only as a means of exchanging and disseminating information, but as a tool to improve the enjoyment of human rights such as the freedom of expression, the right to education, the right to health, the right to food and other rights, seeking universal access by all to information and services.

Office of the High Comm’r for Human Rights [OHCHR], *Background Note on the Information Society and Human Rights*, at 2, U.N. Doc. WSIS/PC-3/CONTR/178-E (Oct. 27, 2003).

40. *Id.*

41. *Id.*; *see also* JANE BAILEY, THE FUTURE OF EQUALITY IN THE “AGE OF THE INTERNET”: TOWARD A PUBLICLY ACCOUNTABLE REGULATION OF INTERNET HATE PROPAGANDA 170 (2002) (“Just as unchecked regulation in public hands poses a threat to freedom, so too does unchecked regulation in private hands.”); U.N. Educ., Scientific & Cultural Org. [UNESCO], *Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It*, at 30 (Nov. 26, 1976), available at http://portal.unesco.org/en/ev.php-URL_ID=13097 (condemning obstacles to access to knowledge “whether they are of political or commercial origin”).

accountability of those with decisionmaking power to those affected by the decisions.⁴²

III. THE HUMAN RIGHTS / A2K DIVIDE

As a result of the specific historical moments in which they arose, the discourses of the A2K and human rights movements have focused on the same problem in some areas and diverged in others. Depending on the context, the movements have reached different conclusions about the nature of the problem, including the actors, institutions, and rules responsible for the problem, as well as appropriate solutions.⁴³ For example, with respect to access to medicines, the two movements have agreed along both dimensions. In the context of Internet regulation, however, the movements have reached very different conclusions. As a result, collaboration has been possible in the area of access to medicines, where both movements have agreed on the need for increased state discretion to protect rights. In the area of Internet regulation, however, the discourses of the two movements have reached different conclusions about both the nature of the problem and appropriate solutions.

A. *Overlapping and Diverging Discourses*

Historically, the discourse of the A2K movement has been focused on the importance of ensuring that states retain the policy space necessary to protect those within their jurisdiction. This emphasis originated with resistance to international treaties that established minimum intellectual property standards and required states to protect these standards under domestic law. The way that this process of harmonization⁴⁴ has harmed human health and limited access to lifesaving medicines has led those in the A2K movement to emphasize the importance of states' ability to exercise regulatory authority. Chon explains, for example, that those resisting intellectual property harmonization believe that "[t]he deep integration of legal regimes required by TRIPS will lead inevitably and repeatedly to the imposition of inappropriately high standards of intellectual property protection for developing countries. This, in turn, can result in the continual denial of certain basic human needs from being met"⁴⁵ This "classical view," as Chon describes it, posits that the appropriate response to the harms associated

42. For a more detailed elaboration of this principle, see Beutz, *supra* note 38.

43. My thanks to Larry Helfer for suggesting this framework.

44. TRIPS is not an entirely "harmonizing" treaty because it allows states to implement the minimum standards it establishes in different ways. See Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 429 (2000). Following the practice of others, however, this Article uses the term "harmonization" to indicate the establishment of common minimum standards. See, e.g., Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921, 921 (2007) ("The harmonization of basic intellectual property standards has operated to protect investment in innovation, limiting risks from unjustified 'free riding.'").

45. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2888 (2006).

with intellectual property globalization is increased state power and decreased international authority.⁴⁶

This “classical view” is repeated throughout the academic literature. Calling the international extension of intellectual property rights an “enclosure movement,” for example, Yu has argued that international treaties “enclose[] the *policy space* of individual countries in the name of international harmonization” and that as a result, states “are increasingly forced to adopt one-size-fits-all legal standards that ignore local needs, national interests, technological capabilities, institutional capacities, and public health conditions.”⁴⁷ In explaining her “substantive equality principle,” Chon argues that “a decision maker should explicitly consider and defer to a developing country’s stated policy of promoting education for development.”⁴⁸ Okediji similarly maintains that “the core task of facilitating national growth in a way that makes it possible to insulate domestic policy choices from powerful global institutions remains an enduring challenge for international IP policymaking.”⁴⁹

Advocacy groups have also emphasized the importance of strengthening state authority. 3D, an advocacy organization that works on issues at the intersection of trade, intellectual property, and human rights, argues that “[s]trict IP rules have had an adverse impact on the ability of many governments to fulfill their human rights obligations.”⁵⁰ The perspective that international regulation of intellectual property is harmful to individual rights and must be limited in favor of state authority also appears in the statements of international institutions. The World Intellectual Property Organization, for example, considers “a priority area” the task of advising states on how to use the flexibilities of TRIPS to protect public policy goals while complying with their international obligations.⁵¹

The movement’s emphasis on state authority does not mean, however, that it is anti-internationalist in its approach. Indeed, much of the A2K advocacy has focused on the use of international institutions, tools, and norms to foster increased access to knowledge. The recent proposal by Hugenholtz

46. *Id.* at 2849-50.

47. Peter K. Yu, *International Enclosure, The Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 3.

48. Chon, *supra* note 25, at 844; *see also* Denis Borges Barbosa, Margaret Chon & Andrés Moncayo von Hase, *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71, 73-74 (arguing in favor of rules that “maintain national policy space and flexibility for social welfare objectives in the context of post-TRIPS bilateral and regional treaties”).

49. Ruth L. Okediji, *IP Essentialism and the Authority of the Firm*, 117 YALE L.J. POCKET PART 274, 279 (2008); *see also, e.g.*, Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL’Y 315, 340 (1996) (“[T]he international system of intellectual property protection subverts the possibility of developing countries to freely pursue economic and social objectives within their specific social and cultural institutions.”); Sell, *supra* note 22, at 205 (“[T]he central question is what degree of discretion states have in limiting intellectual property rights to support smallholder agriculture.”).

50. 3D, POLICY BRIEF ON INTELLECTUAL PROPERTY, DEVELOPMENT AND HUMAN RIGHTS: HOW HUMAN RIGHTS CAN SUPPORT PROPOSALS FOR A WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) DEVELOPMENT AGENDA 2 (2006), http://www.3dthree.org/pdf_3D/3DPolBrief-WIPO-eng.pdf; *see also* 3D, IN-DEPTH STUDY SESSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS 2 (2005), http://www.3dthree.org/pdf_3D/3DIPHRStudySessreporteng.pdf.

51. World Intellectual Prop. Org. [WIPO], *Information on WIPO’s Development Cooperation Activities (January 2000-June 2005)*, ¶ 4, U.N. Doc. WIPO/EDS/INF/1 Rev. (Sept. 23, 2005).

and Okediji for an international instrument on limitations and exceptions to copyright, as well as the Treaty on Access to Knowledge (Draft A2K Treaty), a draft instrument representing a collaborative process among civil society organizations designed to identify issues of importance to the emerging A2K movement, both focus on using the international system to foster access to knowledge.⁵² 3D is engaging in critically important work to bridge the disciplinary divide between A2K and human rights, raising access to knowledge issues with international human rights bodies and educating human rights professionals about trade and human rights.⁵³ The movement's emphasis on state authority has been a direct result of the historical context in which it arose rather than an ideological choice. This context has shaped the way in which the movement conceptualizes harms at issue—and therefore also the solutions. Indeed, current efforts to use international regimes to foster increased access to knowledge continue to be aimed at increasing the flexibilities and “wobble room” available to states to take necessary measures to protect those within their jurisdiction.⁵⁴

Human rights norms and institutions, in contrast, have historically emphasized the importance of constraining state discretion through the granting of individual rights that can be enforced against the state. Many of the rights relevant to access to knowledge are rights that can be and often are violated by the state. Rights that protect access to knowledge include the rights to take part in cultural life, to enjoy the benefits of scientific progress, to receive protection of moral and material rights in one's own works,⁵⁵ to the freedom to receive and impart information, and to freedom of expression.⁵⁶ State censorship of online content, for example, violates the rights to receive and impart information, to freedom of expression, and to participate in cultural life. The problem, in this view, is state abuse of authority, and the response is to create mechanisms designed to pressure states to refrain from violating rights.

A human rights approach is not, however, uniformly suspicious of sovereignty; indeed, in many cases, advocates may not see “sovereignty as a stone wall blocking the spread of desired principles and norms,” but instead “recognize its fragility and worry about weakening it further.”⁵⁷ Human rights law also recognizes and protects sovereignty through the principle of self-determination and control over resources. Further, human rights law also emphasizes the importance of state authority and the ability of states to protect individuals. Although framed in the language of state obligations, much of the jurisprudence on economic, social, and cultural rights emphasizes the importance of states being able to—indeed, being obligated to—take measures

52. HUGENHOLTZ & OKEDIJI, *supra* note 4; Treaty on Access to Knowledge (May 9, 2005) (draft), http://www.cptech.org/a2k/a2k_treaty_may9.pdf [hereinafter Draft A2K Treaty].

53. 3D, Activities, <http://www.3dthree.org/en/pages.php?IDcat=4> (last visited Oct. 29, 2008).

54. HUGENHOLTZ & OKEDIJI, *supra* note 4, at 11, 12-27. The proposal for an instrument on exceptions and limitations emphasizes that such an instrument would help “alleviate institutional weakness of states who need diffusion most (DC's and LDC's [developed countries and least developed countries])” and “constrain unilateral ratcheting up of global standards.” *Id.* at 4.

55. ICESCR, *supra* note 35, art. 15(1).

56. ICCPR, *supra* note 34, art. 19(2); *see also* OHCHR, *supra* note 39, at 2-3.

57. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 215 (1998).

necessary to protect the rights of their citizens, such as the rights to an adequate standard of living, to health, and to education, among many others.⁵⁸ For example, a state's failure to ensure that those within its jurisdiction have access to essential medicines violates the right to the highest attainable standard of health.⁵⁹ Because accessibility includes economic accessibility, essential drugs must be not only physically available but also affordable.⁶⁰ Thus, a state's failure to ensure that essential drugs remain affordable can violate its obligation to protect the right to the highest attainable standard of health.

Human rights institutions have also emphasized the obligations of states, acting within international institutions and individually, not to take actions that would impair the ability of other states to meet their obligations to protect rights.⁶¹ For example, states must "respect the enjoyment of the right to health in other countries, . . . prevent third parties from violating the right in other countries," and "ensure that their actions as members of international organizations take due account of the right to health."⁶² Taken together, the emphasis on state obligations to protect rights and to avoid interfering with the actions of other states to achieve that end overlaps considerably with the priorities of the A2K movement.

There are several areas of particular concern to the human rights perspective, however. For example, human rights law tends to emphasize the importance of regulating private harms. During a 1995 labor dispute in Canada between Telus, one of Canada's largest Internet service providers, and the Telecommunications Workers Union, Telus blocked subscribers' access to a union website designed to disseminate information about the dispute.⁶³ Private actors may also engage in discriminatory behavior online. The U.N. High Commissioner for Human Rights, for example, has expressed concern about websites that "promote racial or religious hatred . . . [or] gender bias—including highly abusive content relating to women."⁶⁴ The state's failure to take action to prevent violations from occurring, whether by pursuing sanctions or enacting prospective regulation, can lead to state responsibility for those violations.

A human rights perspective would also be concerned about protecting users' right to privacy with respect to information collected by both state and nonstate actors.⁶⁵ Internet content and service providers collect massive amounts of personal information about Internet users that could be used in ways that might violate user privacy. In a well-publicized scandal from

58. OHCHR, *supra* note 39, at 3-4.

59. ECOSOC, *supra* note 38, ¶ 43(d).

60. *Id.* ¶ 12(b).

61. *Id.* ¶ 39.

62. *Id.*

63. OpenNet Initiative, Bulletin 010, Telus Blocks Consumer Access to Labour Union Web Site and Filters an Additional 766 Unrelated Sites (Aug. 2, 2005), <http://www.opennetinitiative.net/bulletins/010>; see also BENKLER, *supra* note 26, at 398.

64. OHCHR, *supra* note 39, at 3.

65. *Id.*; see also Jonathan Zittrain & John Palfrey, *Internet Filtering: The Politics and Mechanisms of Control*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 29, 49 (Ronald Deibert et al. eds., 2008) (discussing the privacy concerns associated with Internet filtering and surveillance).

August 2005, for example, AOL published a set of Internet search queries that had been run by 650,000 AOL users over a three-month period.⁶⁶ With respect to privacy, the High Commissioner for Human Rights specifically recommends the introduction of measures that protect “against unauthorized intrusion of privacy through new and powerful systems of surveillance and personal data collection using ICTs [information and communication technologies].”⁶⁷

Although private regulation might address many of these concerns, there are two primary difficulties associated with this approach from a human rights perspective. First, private regulation would not address violations committed by the state. Self-regulation accomplished via choices that individuals make in terms of the persons with whom they engage online would not address harms that occur because they are unable to get online or are punished for what they say once there. Second, private regulation is vulnerable to distortions caused by inadequate valuation of information or differential market power.⁶⁸ The additional burden on members of the Telecommunications Workers Union to find alternative ways to communicate with one another after Telus blocked access to the union’s website would have a chilling effect on union organizing. This is not to say there is no role for self-regulation; rather, it is just that there are some harms that may not be adequately addressed within a regulatory system that relies solely on self-regulation of participants.

Finally, human rights and A2K advocates both emphasize the importance of accountability. For example, Internet filtering is often accomplished by Internet content or service providers working for or with states.⁶⁹ States also co-opt service providers into enforcing copyright laws by imposing liability on those providers for infringing material they host or convey.⁷⁰ Instead of regulating directly, the state establishes liability rules that empower others to police on its behalf.⁷¹ Private actors, however, do not necessarily operate within an established regulatory framework and may overregulate in an attempt to insulate themselves from liability.⁷² Accountability is also at risk in the way in which laws are enacted. In many states, intellectual property laws are established through “closed, secretive

66. Electronic Frontier Found., AOL’s Massive Data Leak, <http://www.eff.org/Privacy/AOL> (last visited Dec. 4, 2008); see also Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. TIMES, Aug. 9, 2006, at A1.

67. OHCHR, *supra* note 39, at 3.

68. Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279, 284 (2004); see also BENKLER, *supra* note 26, at 446 (discussing click-wrap licenses).

69. See, e.g., Robert Faris & Nart Villeneuve, *Measuring Global Internet Filtering*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, *supra* note 65, at 5; Palfrey & Rogoyski, *supra* note 15, at 53.

70. E.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

71. James Boyle, *A Closed Mind About the World of Open Systems*, FIN. TIMES, Aug. 8, 2006, at 13. There has been significant criticism of the trend toward privatization in other contexts as well. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005). But see Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383 (2006).

72. Boyle, *supra* note 71; see also GIACOMELLO, *supra* note 9, at 179 (noting that Internet companies have been “even more active and even less accountable” than the government when it comes to the collection of information).

international negotiations dominated by industry—and are then brought to national legislatures as *faits accomplis*, without democratic deliberation.”⁷³ As the Center for International Environmental Law explains, “[c]ombined with the technical, arcane nature of the intellectual property legal specialty, this has helped corporate interests to avoid public scrutiny and expand their control over developments in applications such as electronic information, biotechnology or pharmaceuticals.”⁷⁴

Thus, there is both overlap and divergence in the discourses of the two movements. Human rights and A2K advocates are both concerned when state authority to act is limited by international institutions, and both emphasize the importance of carving out policy space to protect necessary state discretion. Both are also increasingly concerned about the need for accountability and transparency in the creation of laws and regulations that affect access to knowledge. The discourses of the movements tend to diverge, however, in areas where the primary harm at stake is state action violating the rights of their citizens.

B. *Collaboration on Access to Medicines*

Because of their common concern with limits on state authority to protect the economic, social, and cultural rights of their citizens, the human rights and A2K movements have been quite successful in collaborating on the issue of access to medicines. In this context, the movements both identified the harm as resulting from increases in the price of essential medicines that states were required to implement as a result of intellectual property treaties. The solution that flowed from this harm was to increase state authority to take measures necessary to protect health.

Framing the issue of drug prices as one of both access and human rights played an important role in efforts to achieve agreement on the World Trade Organization’s Declaration on the TRIPS Agreement and Public Health, called the “Doha Declaration,” a statement that affirmed the policy space available to member states to take measures necessary to protect human health and welfare. The Doha Declaration states that “the TRIPS Agreement does not and should not prevent members from taking measures to protect public health” and affirms state flexibilities in implementing the obligations imposed by TRIPS.⁷⁵

Efforts to obtain agreement on this Declaration gained impetus from a lawsuit brought by the Pharmaceutical Manufacturers Association of South Africa against the government of South Africa.⁷⁶ The plaintiffs claimed that the South African government had violated the TRIPS agreement with the

73. CTR. FOR INT’L ENVTL. LAW, THE 1999 WTO REVIEW OF LIFE PATENTING UNDER TRIPS 1 (1998), <http://www.ciel.org/Publications/WTOReviewofLPunderTRIPS.pdf>.

74. *Id.*

75. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002); see also Susan K. Sell, *TRIPS and the Access to Medicines Campaign*, 20 WIS. INT’L L.J. 481, 513-14 (2002); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 865-66 (2007).

76. David Barnard, *In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries*, 12 KENNEDY INST. OF ETHICS J. 159, 163 (2002).

passage of a 1997 law that would have allowed measures to increase access to generic versions of patented drugs.⁷⁷ Organizations such as the Treatment Action Campaign and Doctors Without Borders collaborated on publicity campaigns against the efforts of the pharmaceutical companies, which subsequently began offering discounts.⁷⁸ A later lawsuit brought by the Treatment Action Campaign before the Constitutional Court of South Africa seeking access for pregnant women to Nevirapine, a drug that inhibits mother-to-child transmission of HIV, relied significantly on human rights arguments.⁷⁹

A2K and human rights organizations have also collaborated to organize conferences and meetings about access to medicines and intellectual property rights. For example, Doctors Without Borders, Health Action International, and the Consumer Project on Technology collaborated to organize international meetings in 1999 on strategies to increase access to AIDS drugs.⁸⁰ The second of those meetings, the Amsterdam Conference on Increasing Access to Essential Drugs in a Globalized Economy, produced a statement, called the Amsterdam Statement, which focused on the creation of a working group at the World Trade Organization that would consider the effect of TRIPS on access to medicines.⁸¹

Human rights institutions have also emphasized the importance of access to medicines as a human rights issue. A report by the High Commissioner for Human Rights on the effect of TRIPS on human rights focuses on the human rights impact of medical research, access to medicines, and the right to health.⁸² The Committee on Economic, Social, and Cultural Rights, the body created by the International Covenant on Economic, Social and Cultural Rights to monitor state compliance with that Covenant, has also identified access to healthcare as an area of concern.⁸³ The Sub-Commission on the Promotion and Protection of Human Rights has articulated technology transfer, traditional knowledge, food security, and access to medicines as areas in which human rights and intellectual property may come into conflict.⁸⁴ Human rights institutions have also explicitly recognized that TRIPS limits the authority of states in ways that may harm human rights.⁸⁵

77. *Id.* at 162-64.

78. *Id.* at 165; *see also* Jon Jeter, *Trial Opens in South Africa AIDS Drug Suit*, WASH. POST FOREIGN SERVICE, Mar. 6, 2001, at A01.

79. *See* Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC), ¶ 26 (S. Afr.) (discussing the parties' arguments relying on the jurisprudence of the Committee on Economic, Social, and Cultural Rights).

80. Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 34-35 (2002).

81. *Id.* at 33-34.

82. OHCHR, *Report of the High Commissioner for Human Rights on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter *Report on Impact of TRIPS*].

83. U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization*, ¶ 4, U.N. Doc. E/C.12/1999/9 (Nov. 26, 1999).

84. OHCHR, Sub-Comm'n for the Promotion and Prot. of Human Rights, Res. 2000/7, *Intellectual Property Rights and Human Rights*, ¶ 11, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000). *See generally* David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property*

Access to medicines presented a good opportunity for collaboration because of the overlap in the advocacy agendas of the two movements on this issue. For human rights advocates, state actions on the international level had resulted in clear and concrete harms to individuals and prevented states from taking measures to protect individual rights. For A2K advocates, lack of access to medicines was a result of limits imposed on state authority to protect human health and welfare. Further, the issue presented an extremely compelling case that captured the attention of the public in ways that facilitated widespread mobilization.⁸⁶ Access to medicines thus presented a situation in which the discourses of the two movements articulated both the same harm and the same solution: increased state authority to protect health.

C. *Different Approaches to Online Harms*

In the context of the regulation of content on the Internet, however, there has been far less collaboration.⁸⁷ State regulation of online speech, an issue of significant concern for human rights advocates, has been slow to capture the attention of the A2K movement. Conversely, the human rights movement has missed entirely issues central to access to knowledge, such as the cumulative impact of restrictions on the free flow of knowledge. In large part, their diverging agendas are a reflection of the very different harms and solutions identified by each movement as central to the issue of protecting individuals in the online context. Human rights advocates, focused on state violations, have difficulty articulating as harms systemic failures that do not appear attributable to a particular violator, such as the state.⁸⁸ Because of its historical emphasis on the harms of intellectual property treaties limiting state policy space, the access to knowledge discourse has tended to focus on issues of capacity rather than violations by the state.

Protection: The Genesis and Application of Sub-Commission Resolution 2000/7, 5 MINN. INTELL. PROP. REV. 1 (2003).

85. See, e.g., *Report on Impact of TRIPS*, *supra* note 82, ¶ 24.

86. See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 351 (2003) ("When the effects of TRIPS implementation cannot be measured in loss of human lives, the HR narrative loses much of its intuitive moral appeal and political force.").

87. This Article focuses primarily on the regulation of Internet content and does not address regulation of the physical (e.g., cables, wireless connections), logical (e.g., protocols such as TCP/IP), or application (e.g., web browsers) aspects of the Internet. Different regulatory responses may be called for with regard to activity on other layers of the Internet. See generally Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815 (2004). It also does not address the debate over domain name regulation and the creation of ICANN, the Internet Corporation for Assigned Names and Numbers. See MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* (2002). Although beyond the scope of this Article, regulation of other layers or of the domain name system do raise issues that are and should be of concern to both human rights and A2K advocates, including the way in which the capacity limitations of the Internet infrastructure can affect individual health and welfare. See *infra* notes 130-131 and accompanying text for a discussion of the digital divide as a possible area of collaboration between the movements.

88. See Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 67-68 (2004) (discussing the importance to human rights advocacy of presenting a clear narrative about a violation caused by a particular violator).

Censorship. Over three dozen states do or seek to regulate the Internet,⁸⁹ and there are many legitimate reasons for them to do so: to protect those within their jurisdictions from harmful content, such as fraud, child pornography, and other criminal or illicit acts; to uphold community standards; to protect national security; or to safeguard the national Internet infrastructure.⁹⁰ Others control online content for political reasons. China, for example, limits content that departs from the position of the Chinese Communist Party or criticizes China's human rights record.⁹¹ Some countries, such as Cuba and North Korea, control Internet content by limiting access to the Internet altogether.⁹² Moreover, the ways in which states are controlling and filtering the Internet are increasing in sophistication.⁹³

The human rights movement's work in the context of access to knowledge has largely focused on state censorship online. To the extent that human rights organizations such as Human Rights Watch and Amnesty International have devoted resources to Internet issues, for example, they have focused on censorship. Both organizations have published reports on Internet censorship⁹⁴ and have devoted significant attention to online expression and censorship issues.⁹⁵ International human rights bodies have focused even more narrowly on the Internet solely as a medium for speech. A search for the term "Internet" in databases containing the reports of bodies charged with receiving state reports and monitoring state compliance with human rights treaty obligations reveals that the term is mentioned only as a medium for speech or the publication of government information.⁹⁶ Other international authorities

89. Jonathan Zittrain & John Palfrey, *Introduction to ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING*, *supra* note 65, at 1, 2; *see also, e.g.*, Rebecca MacKinnon, *China, the Internet & Human Rights*, RConversation, July 20, 2006, http://rconversation.blogs.com/rconversation/2006/07/china_the_inter.html.

90. *See, e.g.*, GIACOMELLO, *supra* note 9, at 5; GOLDSMITH & WU, *supra* note 13, at 7; Faris & Villeneuve, *supra* note 69, at 9. Control of information spaces within borders may be "an act of defensiveness, for the protection of domestic producers, sometimes creative and supportive of valuable aspects of national identity, territorial integrity, national security, and the strengthening of citizenship." MONROE E. PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER* 19 (2002). A state may also seek to control information in order to "influence or alter media space and media structures outside its own borders." *Id.*

91. *See* OPENNET INITIATIVE, *INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY* (2005), available at <http://opennet.net/studies/china>; *see also* HUMAN RIGHTS WATCH, *RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP* (2006).

92. *See* Christopher Cox, *Establishing Global Internet Freedom: Tear Down this Firewall*, in *WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION*, *supra* note 7, at 3, 3-5.

93. In the 2006 presidential elections in Belarus, for example, the websites of certain opposition and media outlets were "unavailable" in times of political sensitivity; the block, however, appeared as a temporary anomaly indistinguishable from a failed connection. OPENNET INITIATIVE, *THE INTERNET AND ELECTIONS: THE 2006 PRESIDENTIAL ELECTION IN BELARUS (AND ITS IMPLICATIONS)* 3 (2006).

94. *See* HUMAN RIGHTS WATCH, *supra* note 91; Amnesty International, Campaign "Irrepressible," <http://irrepressible.info> (last visited Nov. 10, 2008).

95. Searches of the websites of Amnesty International and Human Rights Watch for reports about the Internet and human rights yield pages of results. As of August 29, 2008, Amnesty's site yielded 432 reports and press releases about free expression and online censorship; the pages of results from a similar search on Human Rights Watch's website are available at <http://hrw.org/doc/?t=internet>.

96. *See, e.g.*, U.N. Human Rights Comm., *Robert W. Gauthier v. Canada, Views*, ¶ 11.4, U.N. Doc. CCPR/C/65/D/633/1995 (May 5, 1999) (noting that government decisions are posted on the Internet); U.N. Human Rights Comm., *Ernst Zündel v. Canada, Decision on Admissibility*, ¶ 2.1, U.N. Doc. CCPR/C/78/D/953/2000 (July 29, 2003) (describing a prior suit against the complainant for hate speech on the Internet).

have focused on the issue of online hate speech. In a report discussing information and communication technologies, for example, the United Nations Secretary-General identified the digital divide and the use of the Internet to spread hate speech as the two most important challenges to human rights arising from information and communication technologies.⁹⁷

Those advocating for greater freedom online, in contrast, have not tended to emphasize the consequences of state censorship and freedom of expression. Johnson, Crawford, and Palfrey, for example, “acknowledge the threat of non-trivial overblocking” by states, but “hope . . . that adequate competition and the world’s diversity will mitigate this threat.”⁹⁸ Palfrey has identified the absence of filtering in the Internet governance agenda, arguing that “[t]he Internet governance debate could profitably take up the issue of filtering on the net” and that “[t]he blocking and surveillance of citizens’ activity on the Internet—by virtue of the network’s architecture, an issue of international dimensions—calls for discussion at a multi-lateral level.”⁹⁹ The lack of emphasis on censorship does not necessarily reflect trust in state authority; rather, it is a result of the emphasis within the A2K discourse on the need for greater state discretion to protect human welfare combined with cyber-libertarian skepticism about regulation more generally.

This is not to say, however, that discussion of filtering and censorship has been absent from the A2K movement. The OpenNet Initiative has been particularly active on issues of filtering, including the issue of censorship. (Filtering refers generally to state surveillance and blocking of content online, while censorship is more narrowly focused on filtering and other state activities that violate the right of free expression.) A recent book by the OpenNet Initiative provides an excellent evaluation of content control online that also analyzes filtering as, in part, implicating human rights concerns.¹⁰⁰ Although focused more on filtering than censorship, the Electronic Frontier Foundation and scholars such as Palfrey and Zittrain have also done important work on state control of the Internet, and speech and freedom of expression have been of central concern to Jack Balkin and other scholars.¹⁰¹

Nonetheless, the issue of censorship—particularly censorship as an issue distinct from content filtering—has remained at the margins of discussions about access to knowledge. For example, the lack of attention to censorship within the A2K movement is reflected in its absence from the Draft A2K Treaty. The Draft Treaty was written by civil society groups as a way of

97. The Secretary-General, *Preliminary Report of the Secretary General on Globalization and Its Impact on the Full Enjoyment of All Human Rights*, ¶¶ 26-28, U.N. Doc. A/55/342 (Aug. 31, 2000). The “digital divide” refers to inequalities in the global distribution of access to information and communication technologies.

98. Johnson, Crawford & Palfrey, *supra* note 16, ¶ 69.

99. John G. Palfrey, Jr., *Local Nets: Filtering and the Internet Governance Problem* 13 (Aug. 31, 2005) (unpublished manuscript), <http://cyber.law.harvard.edu/home/uploads/502/13-LocalNetsFiltering.pdf>.

100. ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, *supra* note 65; see also Mary Rundle & Malcolm Birdling, *Filtering and the International System: A Question of Commitment*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, *supra* note 65, at 73, 77-87.

101. See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

defining the range of issues that might be encompassed within the framework of access to knowledge.¹⁰² One of the main objectives of the Treaty was to articulate maximum standards for the scope of intellectual property that could be protected under domestic law.¹⁰³ Although the Treaty's focus is far broader than Internet regulation, many of its provisions relate to online content, including the rights and duties of Internet service providers, digital rights management, and technological protection measures. Despite the relatively extensive coverage of issues related to intellectual property and access to digital content, there is no mention in the Draft Treaty of the ways in which states might hinder access, whether through censorship or other forms of content control.

The issue of censorship was also largely absent from documents produced by the World Summit on the Information Society (WSIS), a two-stage conference organized by the United Nations that became a central focus of advocacy by those within the A2K movement.¹⁰⁴ Notably absent from the discussions at WSIS between states and civil society organizations was any mention of censorship or human rights. Although the Geneva Declaration, one of the outcome documents of WSIS, affirms the importance of human rights,¹⁰⁵ it does so in broad terms, while at the same time reaffirming that “[p]olicy authority for Internet-related public policy issues is the sovereign right of States.”¹⁰⁶ According to the Geneva Declaration, international and intergovernmental organizations, rather than playing a role in monitoring state compliance with human rights standards, should instead play a “facilitating role,” particularly with respect to the “development of . . . technical standards and relevant policies.”¹⁰⁷ The lack of serious attention to the issue of filtering was particularly apparent in the decision to hold the second phase of WSIS in Tunisia, a country that engages in Internet censorship.¹⁰⁸ Indeed, the Tunisian government blocked access to sites “critical of the summit’s proceedings or mentioning human rights” during the conference.¹⁰⁹

The lack of attention to censorship continued at the Internet Governance Forum, the multi-stakeholder policy dialogue created after the conclusion of

102. Peter Drahos, *Access to Knowledge: Time for a Treaty?*, BRIDGES, Apr. 2005, at 14, 15.

103. See, e.g., Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1013-14 (2007); Karsten Gerloff, *Access to Knowledge in a Network Society* 102 (Aug. 3, 2006) (unpublished master’s thesis, Universität Lüneburg), available at <http://nearlyfreespeech.org/downloads/a2k.netsoc.pdf>.

104. See World Summit on the Info. Soc’y [WSIS], G.A. Res. 56/183, U.N. Doc. A/RES/56/183 (Jan. 31, 2002). WSIS was created in part to counter the perceived regulatory dominance enjoyed by the United States due to its control of the root domain and ICANN. See Wolfgang Kleinwächter, *Beyond ICANN vs. ITU: Will WSIS Open New Territory for Internet Governance?*, in INTERNET GOVERNANCE: A GRAND COLLABORATION 31, 38-40 (Don MacLean ed., 2004).

105. WSIS, Geneva 2003-Tunis 2005, *Declaration of Principles*, ¶¶ 21-50, U.N. Doc. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003).

106. *Id.* ¶ 49(a).

107. *Id.* ¶ 49(d)-(e).

108. Travis D. Shahan, Comment, *The World Summit on the Information Society and the Future of Internet Governance*, 10 COMP. L. REV. & TECH. J. 325, 346-47 (2006).

109. Zittrain & Palfrey, *supra* note 89, at 1; see also Shahan, *supra* note 108, at 346 (noting that the Tunisian government blocked a Swiss news site “in response to the site’s coverage of the Swiss president’s speech at the summit in which he criticized the Tunisian government’s censorship practices”).

the WSIS.¹¹⁰ Although there was some discussion of censorship at the inaugural meeting of the Internet Governance Forum, that discussion focused primarily on the conduct of companies such as Google and Yahoo! that have been accused of collaborating with states to censor online speech.¹¹¹ Reporters Without Borders attended that meeting explicitly in order to “remind participants that free expression must be at the centre of any model of Internet governance.”¹¹² This meeting was also marred by acts of censorship when a Greek blogger was arrested a few days before the meeting for linking to criticism of the Greek government.¹¹³ One observer notes that at the second meeting of the Internet Governance Forum,

[C]ritical discussion of human rights concerns was discouraged, and main session organizers walked on egg-shells to avoid offending China or businesses who assist in the repression of Internet freedom and democracy. IGF [Internet Governance Forum] participants have repeatedly been warned that if they raise such critical concerns, repressive governments and companies will pull-out of participation in the forum¹¹⁴

During the preparation for both the first and second IGF meetings, governments with poor human rights records vetoed calls for more extensive discussion of human rights.¹¹⁵

Capacity. Human rights advocates, in turn, have missed the issue of capacity, one that is central to the A2K movement. Capacity, in this sense, refers to the resources individuals have available to them to fulfill their basic human needs and draws on the understanding of human capabilities in the works of Martha Nussbaum and Amartya Sen.¹¹⁶ In the context of the Internet, capacity refers to the ability of individuals to take advantage of new ways of communicating and creating knowledge,¹¹⁷ which can affect a variety of rights, including the right to education.¹¹⁸ The extension of intellectual property rights and, in particular, the limits placed on whether, in what modalities, and how frequently users can share works in digital form, has significant consequences for a variety of human rights.¹¹⁹

110. See WSIS, Geneva 2003-Tunis 2005, *Tunis Agenda for the Information Society*, ¶ 70, U.N. Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E (Nov. 15, 2005).

111. Robin Gross, *IP Justice Report from 2006 Internet Governance Forum (IGF)* (Nov. 15, 2006), http://ipjustice.org/2006/11/15/igf_athens_report (commenting on conference held in Athens from October 30, 2006 to November 2, 2006).

112. Press Release, Reporters Without Borders, Reporters Without Borders Will Go to IGF Venue in Athens To Put Free Expression on Agenda (Oct. 27, 2006), http://www.rsf.org/article.php3?id_article=19481.

113. Gross, *supra* note 111.

114. *IP Justice Report on 2007 Internet Governance Forum (IGF)* (Nov. 19, 2007), <http://ipjustice.org/wp/2007/11/19/2007-igf-rio-wrap-up>.

115. *Id.*

116. See generally MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2001); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000).

117. See BENKLER, *supra* note 26, at 2-7; Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 276-81 (2006).

118. See, e.g., Chon, *supra* note 45, at 2831; Chon, *supra* note 25, at 813.

119. Domestic intellectual property regimes generally extend far beyond what is necessary to protect the moral and material rights of authors, as those rights have been interpreted by the Committee on Economic, Social, and Cultural Rights. See 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 or She Is the Author*, U.N. Doc. E/C.12/GC/17 (2005).

Human rights bodies have largely failed to address issues of capacity, and the effects of limits on capacity, for individual rights. The United Nations Educational, Scientific, and Cultural Organization recently commissioned a report focusing on the effect of emerging technologies on a variety of human rights and fundamental freedoms,¹²⁰ and the High Commissioner for Human Rights has issued a statement discussing, among other things, the role of the information society in fulfilling international human rights, such as the rights to education and to an adequate standard of living.¹²¹ Other than these efforts, however, there has been little focus on the consequences for human rights of limits on the ability to use, create, and share cultural information online. For example, none of the contributions submitted in connection with the General Day of Discussion held by the Committee on Economic, Social, and Cultural Rights concerning the meaning of Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights gave significant attention to the impact of intellectual property rights on the right to participate in cultural life.¹²² Nor have advocates recognized the human rights consequences of issues such as net neutrality and technological design.¹²³

Human rights advocates have failed to attend to the harms associated with increasing intellectual property restrictions principally because of the difficulty of articulating cumulative harms within a human rights framework. Some types of human rights harms occur when individuals do not have access to a particular good, such as works of important cultural value, works that are necessary preconditions for the individual's desired speech, or goods such as medicines. Other types of harms, however, result not from denial of access to a particular good, but from the way in which increasing incremental restrictions over time limit the opportunities available to individuals to exercise their rights. For example, the opportunities available to individuals to express themselves, to create and participate in culture, and to exchange information, are limited when there is less material freely available for individuals to access, use, and reuse.

Such cumulative harms, however, can be difficult to express in human rights terms. When the protection of human rights requires access to particular goods, restrictions on access can easily be challenged as violations. Where the harm is not lack of access to particular works but decreased access overall, the human rights argument falters. In these situations, it is difficult—if not impossible—to tell whether the creative works that are available are adequate substitutes, or whether the outcomes for human flourishing would have been

120. MARY RUNDLE & CHRIS CONLEY, GENEVA NET DIALOGUE, THE ETHICAL IMPLICATIONS OF EMERGING TECHNOLOGIES: A SURVEY (2007), <http://unesdoc.unesco.org/images/0014/001499/149992e.pdf>.

121. OHCHR, *supra* note 39.

122. See OHCHR, Committee on Economic, Social, and Cultural Rights—Day of General Discussion—Written Contributions, <http://www2.ohchr.org/english/bodies/cescr/discussion090508/WrittenContr.htm>.

123. Generativity, for example, which Zittrain defines as “a system’s capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences,” JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 70 (2008), can hamper a state’s ability to engage in online censorship and control. See *id.* at 106 (“With generative devices like PCs, the regulator must settle for either much leakier enforcement or much more resource-intensive measures that target the individual . . .”).

the same had more creative works been available. Unless the restriction itself is understood as a violation, or there are no adequate and sufficient substitutes, it will often be extremely difficult to make a connection between the harm and a particular rights violation. Indeed, this is precisely why it was possible to view denial of essential medicines as a human rights violation—there was no adequate or sufficient alternative. Thus, although the shrinking of the public domain via increased intellectual property rights will have significant long-term consequences for human flourishing, it can be challenging to articulate as a rights violation.

Further, as Roth has argued, it can be difficult for human rights organizations to challenge violations that are not associated with a clear violation and a clear violator because so much of their work depends on being able to tell a clear, compelling story.¹²⁴ Cumulative violations lack both violation and violator and therefore do not present a very easy story for human rights organizations to tell. Capacity harms thus tend to be overlooked because of the difficulty of articulating such harms in human rights terms.

D. *Possibilities for Future Collaboration*

The collaboration between human rights and A2K advocates in connection with access to medicines, and the lack of such collaboration in connection with Internet regulation, provides important insights regarding the possibilities for future cross-movement work. To be successful, future collaboration between the movements should focus on those areas in which both movements share concern—namely, instances in which the state is unable or unwilling to protect the human rights of those within its jurisdiction, either because of lack of resources or commitment or as a result of the state's international obligations. Collaboration in other areas, such as those involving abuse of state authority, might be pursued after the movements have established a history of cooperation based on these common areas of concern.

There are several different issue areas that would be of common concern to the movements. For example, Yu describes a proposal by the Hong Kong government designed to increase protections available to digital works that would allow copyright owners to compel Internet service providers to disclose the names of their clients.¹²⁵ Internet filtering to protect copyrighted materials has also been increasing in Europe, following models established in the United States.¹²⁶ In these situations, states are engaging in actions that have the potential to violate individual rights in order to comply with their international obligations to protect digital works. Human rights advocates and A2K advocates alike would seek to broaden the practical and legal policy space available to states to choose methods of complying with their obligations that are less harmful to individual rights.

124. Roth, *supra* note 88, at 67-68.

125. Yu, *supra* note 47, at 30.

126. Sangamitra Ramachander, *Internet Filtering in Europe*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, *supra* note 65, at 186, 191; *see also* Faris & Villeneuve, *supra* note 69, at 9 (noting, however, that protecting intellectual property was not a major objective of the countries surveyed in 2006).

Human rights and A2K advocates may also be able to collaborate on the issue of censorship by focusing on the responsibility of private actors. The Global Network Initiative—launched in late October 2008, just as this Article was being finalized—is a coalition of human rights and A2K organizations, corporations, technology leaders, and others who seek to provide a framework for resisting efforts by governments to enlist companies in acts of censorship.¹²⁷ As an area of collaboration, corporate responsibility has the potential to resonate with constituencies of both movements. Within the human rights movement, those working on issues of corporate responsibility are somewhat unique in their focus on the activities of nonstate actors. Strategies designed to persuade corporations to take responsibility for their actions are also consistent with the emphasis on private regulation of many within the A2K movement. Thus, although the coalition also indicates that it will engage with states directly on the issue of censorship,¹²⁸ focusing on the responsibilities of nonstate actors would appear to offer a very productive area for future collaboration.

Other areas of collaboration might focus on the effect of restricted state authority on a range of economic, social, and cultural rights. For example, lack of access to healthcare information and to an informed healthcare provider is a significant factor contributing to preventable disease and death.¹²⁹ The state's ability to ensure access to healthcare information is hampered in several ways. Copyright restrictions can impede access by health professionals to scientific and medical journals. In addition, the government—either because of a lack of political will or insufficient resources or both—might fail to provide basic information about healthcare to primary caregivers. Human rights and A2K advocates would find common ground in advocating to increase both the state's authority to take measures necessary to ensure copyright does not unduly restrict the provision of critical healthcare information and the state's provision of healthcare information to the public.

Additional avenues of collaboration might include access to educational, scientific, and legal materials, including the equitable distribution of technology necessary to ensure such access.¹³⁰ Educational materials might be

127. See Press Release, Global Network Initiative, Diverse Coalition Launches New Effort To Respond to Government Censorship and Threats to Privacy (Oct. 28, 2008), http://www.globalnetworkinitiative.org/newsandevents/Diverse_Coalition_Launches_New_Effort_To_Respond_to_Government_Censorship_and_Threats_to_Privacy.php.

128. See Global Network Initiative, Principles on Freedom of Expression and Privacy 3, <http://www.globalnetworkinitiative.org/principles/index.php> (last visited Dec. 4, 2008).

129. HEALTHCARE INFO. FOR ALL BY 2015, FOUNDATION DOCUMENT 1 (2007), available at <http://www.hifa2015.org/publications>.

130. Although of interest to both movements, traditional knowledge may be somewhat more difficult for the movements to address from a common perspective. In the context of traditional knowledge, what is needed is protection of such knowledge from access, not greater access, thus introducing a difficult tension into arguments about indigenous rights within the A2K movement. See Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 8 (observing that “those who are sympathetic to the plight of less developed countries [and] often consider themselves low-protectionists” find themselves, with respect to traditional knowledge, “on the side of high-protectionists, along with Big Pharma and multinational agrochemical conglomerates”). A2K advocates and intellectual property scholars also disagree about whether traditional forms of intellectual property protection are the most appropriate means for ensuring such access. See Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 79 (2003) (contrasting the approaches of exclusive rights, public domain, and moral rights as means for protecting traditional

unavailable both because of copyright laws and because of the state's lack of resources and commitment necessary to ensure access. Access to information and communication technologies is a central issue of concern for A2K advocates; human rights advocates might emphasize the way in which such access can be considered an underlying determinant of many economic, social, and cultural rights.¹³¹ Access to legal information would be of interest to both movements given the overlap of their respective substantive areas of expertise. Access to legal materials is a critical component in ensuring participation in political processes, an issue of central concern for human rights advocates. A2K advocates, in turn, would be interested in this issue because of the way in which states are using copyright laws to restrict access to legal authority.¹³²

There is a significant need for the perspectives of both human rights and access to knowledge in formulating Internet governance policies. To the extent that advocates from both movements would seek to coordinate their strategies with respect to rights online, the key to doing so is developing a regulatory strategy that is flexible enough to support increased state authority where needed, but also strong enough to provide limits on that authority where state authority might result in human rights violations. The next Part describes a model that seeks to achieve precisely this goal.

IV. FLEXIBLE HARMONIZATION

The specific historical contingencies in which each movement arose have resulted in discourses that emphasize very different concerns in the context of Internet regulation. If future collaborative efforts in this area are to be successful, the movements need to be able to agree on a strategy that addresses both of their concerns. Flexible harmonization provides such a strategy. This Part will describe the approach of flexible harmonization, identify the conditions under which such a model would be most appropriate, and then apply this framework to two recent initiatives in the context of Internet governance.

A. *Theoretical Framework*

A model of "flexible harmonization" focuses on harmonizing, or standardizing, national practice, but doing so via imprecise norms that provide a basis for domestic advocates to pressure their governments while allowing states to implement their international obligations in ways that are consistent with local needs and values. By employing imprecise norms, flexible harmonization seeks to achieve consistency but not uniformity in state behavior. As a result, it presents a different approach to harmonization, one

knowledge).

131. Those aspects of a right that are necessary for the right to be meaningfully realized must be protected together with the right itself. *See, e.g.*, ECOSOC, *supra* note 38, ¶ 11.

132. James Grimmelman, Copyright, Technology, and Access to the Law: An Opinionated Primer (June 19, 2008), <http://james.grimmelman.net/essays/CopyrightTechnologyAccess> (describing, among other examples, a dispute in which the Oregon state government is seeking to prevent distribution of its statutes by an online legal publisher).

that is compatible with hybridity or diversity of both norms and regulatory authority.¹³³

As a model, flexible harmonization seeks to achieve these goals by employing strong but imprecise norms. The literature on institutional design has identified three dimensions for measuring the characteristics of international institutions—obligation, precision, and delegation.¹³⁴ Specifically,

Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often domestic law as well. *Precision* means that the rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.¹³⁵

Viewed within this framework, flexible harmonization imposes strong obligations via imprecise norms, pairing binding international obligations with norms that are ambiguous enough to ensure some amount of variation in implementation. Obligation is ensured through a commitment by states to binding international norms. These norms, however, are imprecise in that they do not specify what states must do to comply with their obligations, leaving instead a range of discretion for states to interpret what is required under the terms of a treaty.¹³⁶ In terms of delegation, the statements of the international bodies charged with interpretation and application of rules and resolution of disputes are often nonbinding or compliance with their decisions subject to independent ratification before states are bound.¹³⁷

Obligation provides a number of important benefits. First, a common public commitment to certain norms provides a baseline for domestic advocates to measure progress and pressure state and nonstate actors to increase protection for rights, thus allowing enforcement to occur through incremental and episodic interactions on the domestic and international level.¹³⁸ For example, Rodríguez-Garavito explains that Nike's commitment

133. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1162 (2007) (noting that communities seek to resolve conflicts between various sources of legal authority “either by reimposing the primacy of territorially-based (and often nation-state based) authority or by seeking universal harmonization”).

134. See, e.g., Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401-06 (2000); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 583-86, 590 (2005).

135. Abbott et al., *supra* note 134, at 401.

136. “A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation.” *Id.* at 412. Raustiala has noted that some scholars have included both nonbinding norms and imprecise but binding norms under the rubric of “soft” law, but persuasively argues that there are many reasons to distinguish between these two different forms of obligation. Raustiala, *supra* note 134, at 588-89.

137. See Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 94.

138. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (discussing the enforcement of international law through interactions provoked by norm-entrepreneurs). A model of enforcement via incremental and episodic interactions is similar to the “institutional” model in the context of lawyer regulation that relies on culture and institutional

to corporate codes of conduct provided workers at the Kukdong factory and their cross-border allies with a foundation for pressuring Nike to reform its labor practices.¹³⁹ By providing a means for assessing progress, norms also help to guard against the risk that processes and institutions will create their own legitimacy.¹⁴⁰

Second, norms offer a foundation for distinguishing between legitimate and illegitimate conduct in the context of control of information and communication technologies. Some of the difficulty in challenging Internet censorship stems from the perceived inability to distinguish between legitimate and illegitimate state control of the Internet.¹⁴¹ Indeed, China has relied on the perceived absence of normative clarity to argue that its actions are equivalent to all other filtering activities, maintaining that “[i]f you study the main international practices in this regard you will find that China is basically in compliance with the international norm.”¹⁴² Strong norms would provide a basis for distinguishing between actions that violate human rights, such as censorship, and those that further public welfare, such as the regulation of fraud or child pornography online.¹⁴³

Third, public obligation to common norms may help limit the risk that the discourse of state authority will be used opportunistically by states that may not always have the interests of their constituents in mind. For example, states have taken up calls for increased freedom from international control in connection with debates about the integration of a development perspective into the work of the World Intellectual Property Organization. A representative of a group of African states stressed that “any IP regime should include provisions that respect[] the national political space of each

constraints rather than disciplinary proceedings for regulating attorney conduct. See Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 138-42 (2005).

139. César A. Rodríguez-Garavito, *Nike’s Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas*, in LAW AND GLOBALIZATION FROM BELOW: TOWARD A COSMOPOLITAN LEGALITY 64, 79-80, 83 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); see also Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in DISABILITY RIGHTS LAW & POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 3, 18 (Mary Lou Breslin & Silvia Yee eds., 2002).

140. See Ruth L. Okediji, *The Institutions of Intellectual Property: New Trends in an Old Debate*, 98 AM. SOC’Y INT’L L. PROC. 219, 221 (2004) (cautioning that participation by many actors can give processes a “vener of legitimacy” that they may not warrant given the substantive terms on which they are based).

141. Jack Goldsmith & Timothy Wu, *Digital Borders: National Boundaries Have Survived in the Virtual World—and Allowed National Laws To Exert Control over the Internet*, LEGAL AFF., Jan.-Feb. 2006, at 40, 45, available at http://www.legalaffairs.org/issues/January-February-2006/feature_goldsmith_janfeb06.msp (“Technologies of control designed to serve legitimate and desired ends can rarely be limited to those ends, and will often be co-opted for illegitimate purposes.”).

142. Joseph Kahn, *China Says Web Controls Follow the West’s Lead*, N.Y. TIMES, Feb. 15, 2006, at A6.

143. Standards may be particularly important when regulatory activities have cross-jurisdictional consequences. For example, Google’s Global Privacy Counsel has called for international standards on privacy protection, arguing that “new threats to individual privacy emerge everyday and, without global standards, solutions to these problems will continue to be fragmented and ineffectual.” Peter Fleischer, Global Privacy Counsel, *Call for Global Privacy Standards*, Google Public Policy Blog, Sept. 14, 2007, <http://googlepublicpolicy.blogspot.com/2007/09/call-for-global-privacy-standards.html>.

country.”¹⁴⁴ Other proposals requested the inclusion in treaties of provisions to “safeguard . . . national implementation of intellectual property rules” and “flexibilities and ‘policy space’ for the pursuit of public policies,” or asked “that norm-setting activities provide developing countries with policy space commensurate with their national development needs and requirements.”¹⁴⁵ The strategic use of particular issues as a way of achieving other, unrelated goals in state-to-state negotiations is not uncommon; as Dutfield notes, developing countries may have advocated on behalf of greater protection of traditional knowledge within the TRIPS regime in order to gain leverage with respect to TRIPS implementation.¹⁴⁶ Binding obligations may reduce the likelihood that states will use arguments about their need for increased authority in opportunistic ways.

Binding obligations are likely to be most effective when framed imprecisely. Detailed and precise norms were, in part, a primary failing of TRIPS; by imposing detailed norms, TRIPS unduly limited states’ ability to implement these norms in ways that were consistent with local needs and values.¹⁴⁷ Imprecise norms, in contrast, constrain state conduct but leave room for differing decisions with respect to implementation. Imprecision thus serves a function similar to the “margin of appreciation,” a methodological doctrine used predominantly by the European Court of Human Rights to indicate the “margin of appreciation” states enjoy “in determining the steps to be taken to ensure compliance with the [European] Convention [on Human Rights].”¹⁴⁸ As a matter of regulatory design, imprecise norms are also more palatable for states than highly detailed norms and thus have a better chance of success in achieving state consensus.

Binding but imprecise obligations can be complemented by nonbinding statements that provide additional content. Although binding and nonbinding norms may be used antagonistically in situations of distributive conflict,¹⁴⁹

144. WIPO, Provisional Comm. on Proposals Related to a WIPO Dev. Agenda, June 11-15, 2007, *Revised Draft Report*, ¶ 19, U.N. Doc. PCDA/4/3 Prov.2 (Aug. 20, 2007).

145. WIPO, Provisional Comm. on Proposals Related to a WIPO Dev. Agenda, Feb. 20-24, 2006, *Proposals by Clusters Submitted for a WIPO Development Agenda*, annex I, pt. B, ¶¶ 18, 20, U.N. Doc. PCDA/1/6 (July 3, 2006).

146. See Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 274 (2001) (suggesting that developing countries may have introduced new intellectual property standards for traditional knowledge “to undermine an unpopular agreement and, more specifically in this case, to deflate pressures for compliance”).

147. Many of the flexibilities that were provided to states under TRIPS were quite narrow and, in many cases, practically unavailable. Even those states with the resources to take advantage of such flexibilities are subject to considerable political pressure by other states not to do so. See Kevin Outtersson, *Should Access to Medicines and TRIPS Flexibilities Be Limited to Specific Diseases?*, 34 AM. J.L. & MED. 279, 282 (2008) (noting that the U.S. Trade Representative placed Thailand on its “priority watch list” based on, among other things, Thailand’s decision to issue compulsory licenses for certain essential drugs); see also Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 FLA. J. INT’L L. 155, 165 (2002) (discussing the United States’ application of pressure on South Africa to repeal legislation it had enacted empowering the Minister of Health to employ compulsory licensing and parallel imports to ensure the provision of affordable AIDS drugs).

148. See *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189, 216-17. See generally Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 910 (2005) (noting that the margin of appreciation is used when norms “provide limited conduct-guidance and preserve a significant ‘zone of legality’ within which states are free to operate”).

149. See Gregory C. Shaffer & Mark A. Pollack, *How Hard and Soft Law Interact in*

nonbinding norms are nonetheless an important way of providing additional content when sovereignty concerns make agreement on specific binding norms difficult. Norms that are legally binding are perceived to have greater efficacy, signal seriousness about the state's commitment to the norms in question, provide opportunities for domestic debate about the nature of the commitment, and may have greater domestic consequences.¹⁵⁰ Nonbinding norms, in contrast, are easier to achieve in the context of uncertainty and are preferred by states when there is a need for flexibility; in addition, because they minimize state concerns about legal compliance, a nonbinding framework may allow states to reach agreement on details they would otherwise not adopt.¹⁵¹ Thus, nonbinding norms provide a basis for building political consensus and working toward agreement on norms while offering advocates a basis for measuring the activities of state and nonstate actors alike with respect to online conduct.

A framework of binding but imprecise obligations supplemented with precise but nonbinding norms is similar to the "framework convention-protocol" approach of the environmental movement. Several environmental regimes begin with a framework convention containing binding but flexible standards and then introduce more precise rules over time through protocols or annexes.¹⁵² Often, these more precise rules are only possible later in time when the sovereignty concerns of states are reduced and uncertainty about the state of scientific research less acute.¹⁵³ As Thoms explains, the primary advantage of such "incremental policymaking" is flexibility; states can adapt strategies specific to the conditions existing in their countries, agree to an international regime before scientific certainty is established, and revise the structure of the regime as needed.¹⁵⁴ Although imprecise norms are easier to negotiate because they "can be articulated in a manner that preserves the

International Regulatory Governance: Alternatives, Complements and Antagonists 31 (Soc'y of Int'l Econ. Law, Working Paper No. 45/08, 2008), available at <http://ssrn.com/abstract=1156867>. The strategic use of binding and nonbinding norms described by Shaffer and Pollack is certainly a possibility in the context of Internet governance, where regulatory authority is likely to be fragmented among different regimes and states will likely disagree about the distributional effects of intellectual property rules. The extent of the risk that states would use nonbinding norms to soften binding obligations would have to be judged on a case-by-case basis, however, and does not necessarily counsel abandoning entirely the use of nonbinding norms as a means for providing additional norm specificity.

150. Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 592-93 (2005); Raustiala, *supra* note 134, at 596-98; *see also* Degener & Quinn, *supra* note 139, at 17-18 (arguing that a new treaty on disability rights would be more effective than the current "toothless tiger" of existing soft law standards).

151. Raustiala, *supra* note 134, at 591-93, 610; *see also* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 501 (1999).

152. *See* Daniel Bodansky, *Rules vs. Standards in International Environmental Law*, 98 AM. SOC'Y INT'L L. PROC. 275, 278 (2004) [hereinafter Bodansky, *Rules vs. Standards*]; Helfer, *supra* note 137, at 83-84. *See generally* World Health Org., Tobacco Free Initiative, *Framework Convention on Tobacco Control: The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1 (1999) (prepared by Daniel Bodansky) [hereinafter Bodansky, *Framework Convention*].

153. *See* Bodansky, *Rules vs. Standards*, *supra* note 152, at 277-78; Helfer, *supra* note 137, at 83-84.

154. Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795, 807-08 (2003); *see also* Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health*, 96 GEO. L.J. 331, 386, 389-90 (2008).

positions of all sides, rather than creating clear winners and losers,”¹⁵⁵ the initial commitment nonetheless “creates a set of norms that generate their own independent momentum, laying the foundation for strong rules in the future.”¹⁵⁶ This approach also provides a “one-way ratchet,” ensuring that minimum standards are protected while allowing countries to provide greater protection over time.¹⁵⁷

Although the approach of flexible harmonization shares these advantages with the framework convention-protocol approach, it differs in three ways. First, flexible harmonization does not necessarily require that imprecise norms be embodied initially in a framework convention setting forth principles, minimum standards, and regime-constitutive procedures; rather, it also envisions the creation of treaties containing specific (albeit imprecise) obligations. Second, norms may be imprecise not only because they establish standards instead of rules, but also because they are ambiguous or lack definition.¹⁵⁸ Third, precision can be provided either through protocols or annexes that become part of the official regime or through subsequent interpretations and nonbinding guidance and recommendations issued by international authorities.

Binding but imprecise obligations may or may not be combined with the creation of bodies or institutions that are charged with monitoring and providing technical assistance with respect to state compliance with and implementation of those obligations.¹⁵⁹ Such an institution, however, need not be vested with coercive power over state parties to be effective; rather, monitoring bodies can promote enforcement in a variety of noncoercive ways. In the environmental context, for example, the creation of a committee to hear issues related to and complaints about state compliance in connection with the Montreal Protocol was highly effective despite the lack of coercive authority. The committee “has no direct levers over non-compliant states” but rather employs an administrative approach to noncompliance, relying on “facilitation and whatever political pressure emerges from open, transparent discussion of compliance difficulties.”¹⁶⁰ In addition, the committee had funds available to assist states with technical issues related to implementation; the provision of those funds enhanced compliance by serving as a form of aid conditionality.¹⁶¹

The bodies created by human rights treaties to receive state reports on their compliance with the terms of the treaty serve a similar function. Although these institutions do not have the ability to sanction or reward states based on their records of compliance other than by publishing conclusions regarding the state’s compliance, the very act of a state reporting to a

155. Bodansky, *Rules vs. Standards*, *supra* note 152, at 278.

156. Thoms, *supra* note 154, at 807-08; *see also* Gostin, *supra* note 154, at 389.

157. Thoms, *supra* note 154, at 808. Drahos notes, however, adding norms might exacerbate the crowding problem, making it more difficult for states to understand and utilize the flexibilities they already possess. Drahos, *supra* note 102, at 16.

158. *See infra* notes 191-197 and accompanying text.

159. *Cf.* Raustiala, *supra* note 134, at 612 (“[S]ome studies (as well as theory and common sense) suggest that pledges [i.e., nonbinding principles] work better when they are tied to strong structures of review.”).

160. Raustiala, *supra* note 44, at 419.

161. *Id.* at 420.

committee fosters greater transparency, provides human rights organizations with an opportunity to expose and challenge state actions and decisions, and forces the state to provide reasons for its conduct.¹⁶² Binding but imprecise norms, supplemented by subsequent nonbinding interpretation, could be usefully complemented by a monitoring body employing such administrative techniques to foster compliance by states.

B. *Limits of Flexible Harmonization*

Despite the advantages of flexible harmonization, imprecise norms pose some risks. For example, broadly drafted standards can be used by states or international institutions in politically expedient ways to mask inaction.¹⁶³ Imprecise norms are also inherently indeterminate. As a result, their meanings might change in ways that advocates do not anticipate and that are unhelpful to protecting rights online. For example, during the drafting of General Comment No. 17 on the obligation to protect the material and moral interests of authors, several advocates and academics working on A2K issues expressed concern that the language of the text could be used to support arguments for strong intellectual property rights.¹⁶⁴ Finally, imprecise norms exert less compliance pull and outcomes may be more likely determined by power than by principle where norms are weak.¹⁶⁵ Given these risks, flexible harmonization is most appropriately employed when three criteria are met—when agreement on norms is difficult to achieve because of sovereignty concerns, when there is a great need for flexibility, and when the norms in question have an established pedigree. Each of these three conditions is met in the context of Internet regulation: sovereignty concerns are high, making agreement on norms unlikely; there is a great need for flexibility; and the norms on which the regulation might draw—international human rights—are accompanied by a range of interpretive guidance that can be used to limit the risk of norm-shifting.

First, because of the risk that states might use imprecise norms as a cover for failures to act, flexible harmonization should be limited to those situations in which the possibility of achieving agreement on more precise norms is low, such as when sovereignty concerns are strong.¹⁶⁶ States will be

162. See generally Andrew Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 175, 176-86 (Philip Alston & James Crawford eds., 2000).

163. Helfer, *supra* note 2, at 57. Imprecise standards may, for example, represent nothing more than states' agreement to do what they would have done anyway. Raustiala, *supra* note 134, at 602.

164. Isabelle Scherer, *The Committee on Economic, Social, and Cultural Rights: Civil Society Groups Fear a Rushed General Comment on "Intellectual Property,"* Intellectual Property Watch, Nov. 4, 2004, <http://www.ip-watch.org/weblog/index.php?p=4>.

165. See Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109, 129 (2006).

166. Abbott et al., *supra* note 134, at 407; see also Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 613 (1984) ("Indeed, to a considerable extent, it is [the rights'] chameleon-like quality that has facilitated the degree of consensus support they have received. Thus, states have been able to vote in favor of the relevant resolutions without thereby committing themselves to any precise normative formulation or to any specific measures for the effective realization of the norm."). Many of the reasons states might prefer imprecise commitments are the same reasons they might prefer nonbinding commitments. See Raustiala, *supra* note 134, at 591-93.

reluctant to commit themselves to an agreement that is perceived to remove the flexibility they would need to respond to problems affecting core areas of sovereignty.¹⁶⁷ Genugten, for example, argues that documents such as International Labour Organization Convention 169 failed to achieve sufficient consensus because the norms it would have imposed were too specific in critical areas of national concern.¹⁶⁸ Sovereignty concerns are particularly important in the context of the Internet; because of their different national priorities, countries will perceive threats differently.¹⁶⁹ In such situations, imprecise norms can serve as a stepping stone, providing baseline protection and offering advocates a way to increase determinacy over time through nonbinding elaboration of norms and domestic implementation. Imprecise norms may be less critical, however, when the subject matter of an instrument is narrow because of the more limited scope of the commitment required of states.

Second, imprecise norms are important when there is a need for flexibility to ensure consistency with local needs and values.¹⁷⁰ This flexibility is critical in the area of Internet regulation. Yu argues, for example, that India may want to provide stronger protection for its software and movie industries yet retain the ability to provide less protection in the area of patented chemicals and drugs.¹⁷¹ States may need to introduce certain exceptions and limitations in some industries and not in others, or in different ways or at different times. The need for flexibility is particularly urgent in the context of the Internet because states are unlikely to agree on what constitutes harmful content online.¹⁷² In addition, it would be both impossible and undesirable to develop universal standards on speech, and the attempted imposition of such norms would be viewed as illegitimate.¹⁷³ Imprecise norms would help ensure culturally appropriate implementation, guard against overreaching in the area of speech, and provide flexibility for variation based on domestic needs.

Framing norms at a higher level of generality will also ensure that the norms will be able to evolve over time to meet new challenges. Melish notes, for example, that the drafting committee of the Disability Rights Treaty avoided overly precise wording “to ensure that the Convention’s text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development.”¹⁷⁴ States need

167. Sovereignty concerns are also cited as a reason nonbinding norms are easier to adopt than binding norms. See Shaffer & Pollack, *supra* note 149, at 11.

168. Willem van Genugten et al., *Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victims' Rights*, 37 NETH. Y.B. INT'L L. 109, 127-28 (2006).

169. See GIACOMELLO, *supra* note 9, at 21.

170. See Abbott et al., *supra* note 134, at 407.

171. Yu, *supra* note 130, at 9.

172. See, e.g., GIACOMELLO, *supra* note 9, at 177; PRICE & VERHULST, *supra* note 18, at 37; Viktor Mayer-Schönberger, *The Shape of Governance: Analyzing the World of Internet Regulation*, 43 VA. J. INT'L L. 605, 628 (2003).

173. See, e.g., GOLDSMITH & WU, *supra* note 13, at 150; Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1018 (1998); Justin Hughes, *Of World Music and Sovereign States, Professors and the Formation of Legal Norms*, 35 LOY. U. CHI. L.J. 155, 168-69 (2003).

174. Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and*

to be able to respond to a rapidly changing technological environment and encourage innovation.¹⁷⁵

Third, flexible harmonization works best when the norms in question have an established pedigree. Using norms that are established and already accompanied by interpretation, such as human rights norms, can limit the risk that norms will shift in response to interest-group pressures. International human rights norms have been limited and refined over the last half-decade by a wide variety of sources: decisions and interpretative statements issued by the bodies charged with monitoring and receiving state reports on their compliance with human rights treaties; statements by human rights institutions such as the Human Rights Council; declarations by regional human rights institutions; and domestic constitutions and judicial decisions. The availability of a variety of sources helps minimize the possibility that norms will be used in ways counterproductive to the goals of the A2K and human rights movements.

C. *Application*

A model of flexible harmonization will help foster collaboration between A2K and human rights advocates on issues of online content regulation by addressing the concerns of both. This Section applies the insights of this model to two recent efforts to establish regulatory frameworks for Internet governance—the Internet Governance Forum and the Draft A2K Treaty. In the words of a well-known fairy tale, these efforts are respectively “too hard” and “too soft.”¹⁷⁶ The Internet Governance Forum, which focuses on creating international spaces that allow states to coordinate regulatory activity, is “too soft” and should seek to incorporate international human rights standards into its work. The Draft A2K Treaty, in contrast, is “too hard”—it replicates the error of TRIPS by imposing overdetermined norms and selectively protecting individual rights.

1. *Internet Governance Forum*

The insights of a model of flexible harmonization might be usefully employed in the context of the Internet Governance Forum (IGF), a state-focused initiative that arose out of conferences organized by the United Nations on the nature of the information society. With limited resources and uncertain political support, the practical future of this forum as a real force for change in the context of Internet governance is far from clear. Nonetheless, the current limitations of the IGF as a forum for protecting rights provide an

Why the U.S. Should Ratify, HUMAN RIGHTS BRIEF, Winter 2007, at 37, 45.

175. Perritt, *supra* note 17, at 939-40 (arguing that traditional public law institutions such as treaties may be viewed as “inflexible and unduly influenced by states without a stake in the robust development of electronic commerce and political dialogue in the Internet and other new technologies”).

176. *The Story of the Three Bears*, in ENGLISH FAIRY TALES 93, 95 (Joseph Jacobs ed., Dover Publications 1967) (1890) (“Then the little old Woman sate down in the chair of the Great, Huge Bear, and that was too hard for her. And then she sate down in the chair of the Middle Bear, and that was too soft for her. And then she sat down in the chair of the Little, Small, Wee Bear, and that was neither too hard, nor too soft, but just right.”).

important illustration of the need for strong standards to provide meaningful limits on state authority.

The IGF is a “multi-stakeholder policy dialogue” called for by government delegates to the World Summit on the Information Society.¹⁷⁷ Created as an international forum that possesses no independent regulatory authority but which creates a space for states to interact, the mandate of the IGF includes facilitating discussion of key public policy issues, interfacing with international organizations, and promoting the exchange of information and best practices.¹⁷⁸ The IGF offers states a space in which they may communicate about issues relating to the information society, coordinate their individual regulatory activities, and cooperate with respect to actions that require cross-border coordination, such as technology transfer.

Human rights and A2K advocates have been engaging in some initial collaboration in connection with the IGF. For example, a group of organizations, including Amnesty International and Witness, formed a Human Rights Caucus after the initial meeting of the World Summit on the Information Society in order to put human rights issues on the agenda and raise awareness about how human rights relate to information and communication technologies.¹⁷⁹ The agenda of the Caucus, which has continued to be active in connection with the IGF, emphasizes not only freedom of expression, privacy, and rule of law, but also barriers imposed by copyright law, market dominance, digital rights management, and the digital divide.¹⁸⁰ In addition, human rights organizations participated in the November 2007 meeting of the IGF and, in this capacity, emphasized the importance of limiting the actions that states can engage in with respect to controlling online content and protecting individuals from the actions of private actors.¹⁸¹

The efforts of the Caucus to obtain recognition of human rights principles by the state participants in the IGF have met with limited success. Human rights was included as an explicit part of the session on “Openness,” which was described in the agenda as encompassing the role of governments in protecting freedom of expression and the relationship between national regulation and the establishment of borders online.¹⁸² However, much of the

177. WSIS, *supra* note 110, ¶ 72. See *supra* note 104 and accompanying text for a description of WSIS.

178. WSIS, *supra* note 110, ¶ 72. See generally Shahan, *supra* note 108, at 353; Kristin Delaney, Note, *World Wide Web: Using Internet Governance Structures To Address Intellectual Property and International Development*, 32 BROOK. J. INT’L L. 603, 617 (2007) (noting that the IGF has no enforcement power).

179. WSIS, Post-WSIS Human Rights Caucus, <http://www.iris.sgdg.org/actions/smsi/hr-wsis> (last visited Oct. 29, 2008).

180. WSIS Civil Soc’y Human Rights Caucus, *Contribution to the Internet Governance Forum in Athens, 30.9-2.11, 2006*, at 2-3 (Aug. 1, 2006), http://www.intgovforum.org/Substantive_1st_IGF/HR_Athens.doc [hereinafter *Contribution*]; see also WSIS Civil Soc’y Human Rights Caucus, *Human Rights and Internet Governance: Statement by the WSIS Civil Society Human Rights Caucus to the IGF Open Consultations* (Feb. 16-17, 2006), <http://www.iris.sgdg.org/actions/smsi/hr-wsis/hris-igf160206.pdf> [hereinafter *Statement by Caucus*].

181. Internet Governance Forum, Second IGF Meeting, Rio de Janeiro, Braz., Nov. 12-15, 2007, *Transcript of Openness Session*, ¶ 11 (Nov. 14, 2007), http://www.intgovforum.org/Rio_Meeting/IGF2-Openness-14NOV07.txt [hereinafter *Transcript of Openness Session*].

182. Internet Governance Forum, Second IGF Meeting, Rio de Janeiro, Braz., Nov. 12-15,

discussion at the 2007 meeting regarding human rights framed these as issues of states' rights, not limits on state authority. For example, in a background paper summarizing the contributions of participants in consultations held in advance of the meeting, the IGF Secretariat noted the importance of capacity building—the transfer of knowledge and resources to developing states—because “access to education and knowledge was a recognized human right.”¹⁸³

The Caucus and its members have been active in critiquing the IGF for not taking human rights more seriously. One of the participants in the November IGF emphasized that “a human rights-based approach means more, I think, than paying lip service to a right like freedom of expression.”¹⁸⁴ The Caucus has also argued for the inclusion of more human rights experts in the governing structures of the IGF and protested the lack of human rights themes at the Athens meeting of the IGF in 2006.¹⁸⁵ The Caucus has also emphasized the way in which framing the issue as solely about Internet governance tends to conjure up a “lawless zone escaping international human rights protection and diluting responsibility and accountability of States towards their citizens.”¹⁸⁶

The organization and efforts of the Human Rights Caucus are critically important first steps in bridging the human rights/A2K divide with respect to online content. Yet if these efforts are to be successful, they must be paired with meaningful limits on state authority. In other words, what is missing from the IGF in terms of the design framework discussed above is *obligation*. There are several ways in which obligations might be incorporated into the work of the IGF.

First, the IGF should incorporate binding norms by issuing a statement reaffirming states' existing international human rights obligations. Reaffirming existing obligations would ensure that international human rights obligations are explicitly a part of the conversation at the IGF, demonstrate the IGF's commitment to human rights principles, and establish a foundation for additional discussion of human rights online within the context of the IGF. Ensuring the IGF's public commitment to human rights norms would also guard against the risk that the existence of the IGF would be seen as itself sufficient progress regardless of specific outcomes by providing a standard for measuring its progress.

Adopting a resolution reaffirming existing standards instead of attempting to articulate new ones would be less threatening and thus more

2007, *Draft Programme Outline for the Second Meeting of the Internet Governance Forum*, at 7 (June 13, 2007), http://www.intgovforum.org/Rio_Meeting/DraftProgramme.13.06.2007.rtf. See *infra* text accompanying notes 234-243 for a discussion of the risks of framing issues as state as opposed to individual rights.

183. Internet Governance Forum, Second IGF Meeting, Rio de Janeiro, Braz., Nov. 12-15, 2007, *Synthesis Paper*, ¶ 5 (Sept. 24, 2007) (prepared by IGF Secretariat), http://www.intgovforum.org/cms/Rio_Meeting/IGF.SynthesisPaper.24.09.2007.rtf.

184. *Transcript of Openness Session*, *supra* note 181, ¶ 85; see also *Contribution*, *supra* note 180, at 2 (“As stressed time and again by the HR Caucus, the IGF must ensure that its discussions take into account the respect for human right standards and that its decisions are taken in view of protecting and promoting these standards.”).

185. *Id.* at 1-2.

186. *Statement by Caucus*, *supra* note 180, at 1.

politically feasible than attempting to achieve agreement on new standards.¹⁸⁷ International human rights norms already provide a set of legally binding standards that protect individual rights with respect to information and communication technologies, including but not limited to the rights to freedom of expression, to exchange and receive information, to participate in culture, and to the protection of the material and moral interests in one's works.¹⁸⁸ A statement by the IGF reaffirming states' preexisting commitments might model itself on the Background Note on the Information Society and Human Rights, in which the High Commissioner reaffirmed the applicability of norms protected under international law with respect to the information society.¹⁸⁹

Relying on human rights norms to constrain state conduct also addresses the concern on the part of many within the A2K movement that overly detailed obligations in the area of Internet regulation will stifle innovation. Although many human rights norms establish clear and well-defined norms, such as the prohibition on genocide¹⁹⁰ or the obligations owed to individuals subject to criminal charges,¹⁹¹ other norms are more imprecise because they either establish standards instead of norms or otherwise leave significant areas of discretion to the state. The imprecision of human rights norms should be sufficient to guard against undue centralization.

Many human rights norms are imprecise because they establish standards instead of rules.¹⁹² For example, Article 12 of the International Covenant on Civil and Political Rights (ICCPR) protects the right of everyone to liberty of movement and provides that this right may not be restricted except when "necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others."¹⁹³ Article 17 provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."¹⁹⁴ These norms are imprecise because they allow states leeway in interpreting what constitutes public order or arbitrary conduct.

Other human rights norms are imprecise because their terms are ambiguous or lack definition.¹⁹⁵ For example, while Article 19 of the ICCPR requires states to protect freedom of expression, it does not define protected expression. It may be fairly easy to classify situations on the far ends of the spectrum—to condemn the arrest of a dissident for political discussion or to sanction a state's decision to remove child pornography. It is far more difficult

187. See Mutua, *supra* note 3, at 619 (arguing that the Guiding Principles drafted by the Special Rapporteur on Refugees, IDPs, and Asylum Seekers were effective because states did not see them as imposing new obligations).

188. See *supra* notes 39-72 and accompanying text.

189. OHCHR, *supra* note 39, at 2.

190. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

191. ICCPR, *supra* note 34, art. 14(3)(a)-(g).

192. See, e.g., Abbott et al., *supra* note 134, at 415 (noting the relationship between standards and precision); Raustiala, *supra* note 134, at 589 (same).

193. ICCPR, *supra* note 34, art. 12.

194. *Id.* art. 17.

195. Abbott et al., *supra* note 134, at 415.

to evaluate a French court's decision to require Yahoo! to prevent users in France from accessing anti-Semitic material on its sites,¹⁹⁶ or the Pakistani Supreme Court's decision to block sites displaying cartoons depicting Muhammad in wake of the controversy over publication of those cartoons by a Danish newspaper.¹⁹⁷ When such ambiguity is present, there is a range of permissible action in which states can engage without violating their international obligations. As a result, although there is still a risk that international standards will lead to some measure of increased centralization, this risk is low.¹⁹⁸

Second, the IGF should develop a set of nonbinding standards with regard to control of online activities. Although there have been efforts to define such a set of principles with respect to harmful content and privacy protection, these efforts have been regional in nature and limited in scope.¹⁹⁹ A nonbinding document providing additional guidance about the range of permissible regulation would better enable monitoring by decreasing ambiguity about what constitutes compliance and encouraging social disapproval of violators.²⁰⁰ A statement of nonbinding principles might draw on the jurisprudence of the Committee on Economic, Social, and Cultural Rights to interpret rights with reference to principles of availability, accessibility, and acceptability.²⁰¹ Such an elaboration of the content of these rights would provide much-needed guidance on, for example, the balance between authors' and consumers' rights²⁰² and the scope and limitations of rights such as the right to take part in cultural life.²⁰³

196. See *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

197. See OPENNET INITIATIVE, COUNTRY PROFILES: PAKISTAN (May 10, 2007), <http://opennet.net/research/profiles/pakistan>; Mike Nizza, *In Pakistan, a Fight To Stay Connected on the Web*, *The Lede*, Nov. 5, 2007, <http://thelede.blogs.nytimes.com/2007/11/05/in-pakistan-a-fight-to-stay-connected-on-the-web>.

198. Indeed, human rights standards can just as easily be used to prevent centralization. Human rights norms could be used to prohibit acts that would result in undue centralization where centralization would harm rights to freedom of expression and to participation in culture.

199. See, e.g., Mary Rundle, *Beyond Internet Governance: The Emerging International Framework for Governing the Networked World* 4-5 (Berkman Ctr. for Internet & Soc'y, Research Publication No. 2005-16, 2005), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2005_Rundle_BeyondInternetGovernance.pdf (describing efforts by the Council of Europe and the Organization for Economic Cooperation and Development).

200. See, e.g., Henry H. Perritt, Jr., *The Internet Is Changing International Law*, 73 CHI.-KENT L. REV. 997, 1034-35 (1998); Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 146 n.234 (2004). The U.N. High Commissioner for Human Rights has emphasized the importance of “[i]dentifying and monitoring permissible limitations to the right to freedom of opinion and expression at the international level.” OHCHR, *supra* note 39, at 3.

201. See generally ECOSOC, *supra* note 38. The principle of availability might require that information and creative works online not be unreasonably hindered by state filtering. The principle of accessibility might require that information be accessible physically, economically, and without discrimination. Physical accessibility might also require that efforts be made to ensure that the physical infrastructure necessary to access the Internet be available to individuals without regard to geography. Economic accessibility might require that access to the Internet and to creative works not be limited on the basis of resources, and, in particular, that copyright laws not make information prohibitively expensive. Accessibility without discrimination would require that the state make efforts to ensure that, for example, individuals with disabilities have reasonable means for accessing the Internet.

202. See, e.g., Helfer, *supra* note 103, at 989-97; Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1079-122 (2007).

203. See, e.g., Elsa Stamatopoulou, Remarks at Carnegie Council Program Series on the Ethics

There is already support within the IGF for the creation of a document articulating nonbinding principles. The IGF's Dynamic Coalition on Freedom of Expression and Freedom of the Media, which includes Amnesty International and IP Justice, has called for a "catalogue of principles on how to guarantee freedom of expression in an international business environment."²⁰⁴ Brazil and Italy have advocated the creation of an Internet Bill of Rights that would "frame and enforce fundamental rights in the Internet environment."²⁰⁵ Scholars have also voiced support for the articulation of best practices,²⁰⁶ and the High Commissioner has called for guidance on how to achieve the balance between intellectual property rights and human rights.²⁰⁷ A set of nonbinding principles would provide further evidence of the IGF's collective commitment to individual rights that was called for during the IGF's Openness Session.²⁰⁸

Third, the IGF could establish an expert body to monitor state progress with respect to these nonbinding principles. While there is unlikely to be the political will necessary to create a body with the authority to compel compliance (and the establishment of such a body might impose more uniformity than is necessarily helpful, as the experience with TRIPS has shown), a monitoring body with a more limited mandate would nonetheless generate pressure on states.

A monitoring body within the IGF would be able to play several important roles. The process of monitoring can foster buy-in on the part of states and serve as a focal point for advocacy. As Raustiala emphasizes in evaluating the revision of ozone-related regulations in connection with the Montreal Protocol, an "ongoing process of performance review and technical assessment" can "promote[] relatively thorough implementation, learning, compliance, and effectiveness."²⁰⁹ Such a body may also be able to play an

of Preserving Cultural and Natural Heritages: Why Cultural Rights Now? (Sept. 23, 2004), <http://www.cceia.org/resources/transcripts/5006.html>.

204. Internet Governance Forum, Second IGF Meeting, Rio de Janeiro, Braz., Nov. 12-15, 2007, *Transcript of Reporting Back—Morning Session*, ¶ 16 (Nov. 14, 2007), http://www.intgovforum.org/Rio_Meeting/IGF2-ReportingBack-Morning-14NOV07.txt [hereinafter *Transcript of Reporting Back Session II*]. Gross has argued that the IGF's Dynamic Coalitions, "loosely-based multi-stakeholder groups with a common interest in working together on a particular Internet policy issue," would provide an excellent forum to develop nonbinding norms and "set the policy debate." Gross, *supra* note 111.

205. Joint Declaration on Internet Rights by Gilberto Gil, Minister of Culture of Braz., and Luigi Vimercati, Undersec'y for Commc'ns of Italy (Nov. 13, 2007), *available at* <http://ipjustice.org/IGF/Nov2007-Joint-Declaration-Brazil-Italy.pdf>. In the opening session at the November IGF, the Italian delegate explained:

[A] bill of rights is needed, a jointly agreed definition of these rights, consistent rules to ensure freedom and access to Internet, together with forms of self-regulation, all of these to guarantee the rights of single individuals and social groups, particularly the most vulnerable ones. Absence of rules doesn't necessarily mean a freer Internet.

Internet Governance Forum, Second IGF Meeting, Rio de Janeiro, Braz., Nov. 12-15, 2007, *Transcript of Opening Session*, ¶ 22 (Nov. 12, 2007) (Statement of Luigi Vimercati, Undersec'y for Commc'ns of Italy), http://www.intgovforum.org/Rio_Meeting/IGF_opening_Session.txt.

206. Palfrey, *supra* note 99, at 14 (recommending that states "establish a set of principles and best practices related to Internet filtering and the transparency related to filtering regimes").

207. *Report on Impact of TRIPS*, *supra* note 82, ¶ 23.

208. *Transcript of Openness Session*, *supra* note 181, ¶ 13 (recording a human rights lawyer's argument that "we need to decide really how we use the Internet Governance Forum to collectively commit to these human rights standards as the essential basis of the Internet").

209. Raustiala, *supra* note 44, at 417. As Kapczynski observes, law and legal institutions are

important role in bringing state abuses to light and in further developing the body of law regarding human rights and information and communication technologies.²¹⁰ Some support for such a proposal has already been voiced; the IGF's Dynamic Coalition on Freedom of Expression and Freedom of the Media has called for the appointment of a Special Rapporteur on freedom of expression.²¹¹

The mandate of such a body might be challenged by states on the ground that nonbinding principles do not require compliance and therefore monitoring would be illegitimate. The standards, however, can be framed as aspirational—a move critical to ensuring state buy-in—and the purpose of the monitoring body would be to measure the extent to which states have achieved these goals. That is, the body should be charged not with identifying “violations” but with observing state progress and providing technical assistance to support states in achieving the objectives of the nonbinding standards. Over time, the monitoring body may find ways of making the aspirational standards more concrete and immediate through interpretive guidance.

The independence of such a body, however, would be crucial. An internal IGF body would be subject to significant pressure from states to avoid addressing certain topics or criticizing particular states—thus facing many of the same types of challenges that have hindered the efforts of the U.N. Committee on Human Rights and now the new U.N. Human Rights Council.²¹² To ensure its legitimacy and ability to intervene effectively with states, the body must remain independent of the IGF's governing structures and the methods of appointment of its members must be insulated from political negotiations.

Although the IGF provides a forum for “bottom-up” lawmaking that can certainly do much in and of itself to protect rights, such fora are most successful when accompanied by strong norms. In the examples of “bottom-up” lawmaking that Levit provides, for example, standards such as the Kyoto Protocol, the Voluntary Principles on Security and Human Rights, or the United Nations Global Compact²¹³ play an important role by providing a baseline for measurement and offering a foundation for distinguishing illegitimate from legitimate activities. Affirmation of existing norms relevant to Internet regulation and articulation of nonbinding principles, particularly if paired with a monitoring body, are important steps toward ensuring an appropriate balance between state discretion and meaningful limits on state authority.

reflexive—they are not only shaped by those who participate but also have their own constitutive effects by fostering the creation of constituencies. Kapczynski, *supra* note 4, at 881.

210. This entity could also take the lead in cooperating more effectively with human rights bodies charged with monitoring state obligations by providing them with technical expertise and pressuring states to comply with their recommendations. *See Transcript of Openness Session, supra* note 181, ¶ 2 (noting the importance of communicating with U.N. human rights bodies).

211. *Transcript of Reporting Back Session II, supra* note 204, ¶ 16.

212. *See, e.g.,* Peggy Hicks, *How to Put U.N. Rights Council Back on Track*, FORWARD, Nov. 3, 2006, <http://www.forward.com/articles/how-to-put-un-rights-council-back-on-track>.

213. *See* Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 404-09 (2007) (describing “bottom-up” lawmaking).

2. Draft A2K Treaty

A treaty on access to knowledge was first proposed as part of discussions about the World Intellectual Property Organization's Development Agenda.²¹⁴ Civil society organizations began suggesting issues that could be protected by such a treaty, and a coalition of "medical researchers, educators, archivists, disabled people, and librarians from industrialized and developing nations" began to form.²¹⁵ The discussion that ensued yielded a variety of suggestions about the kinds of access such a treaty should protect, ranging from exceptions and limitations on copyright to research funding.²¹⁶ The drafting of the Treaty was thus a constitutive process, bringing together advocates from a variety of different fields and providing an important opportunity for these constituencies to identify and discuss what issues should have central importance in A2K advocacy efforts. The Draft A2K Treaty is the result of this process, a document that Kapczynski observes is "less a completed proposal than a protean campaign platform."²¹⁷

It is clear that any future framework agreement on access to knowledge would look quite different from the Draft A2K Treaty, an instrument that was drafted by civil society instead of states and was more a tool of mobilization than legalization. Recent discussions about international strategies for promoting access to knowledge have also focused on other proposals, such as the proposed instrument on exceptions and limitations to copyright. Nonetheless, an analysis of the Draft A2K Treaty can provide important insights with respect to possible future efforts to establish a framework agreement on access to knowledge.²¹⁸ Specifically, there are two primary features that distinguish the Draft A2K Treaty, each of which presents particular challenges under a model of flexible harmonization—norm specificity and individual rights.

Norm specificity. The Draft A2K Treaty mirrors TRIPS in the specificity of the obligations and institutions it would create.²¹⁹ Although the Treaty states that "[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice,"²²⁰ the detail of the obligations encompassed by the treaty belies this commitment. For example, Article 3-1 specifies nine different types of

214. A proposal submitted by Argentina and Brazil to WIPO in 2004 called for the establishment of "an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries" and noted that "[s]uch a regime could take the form of a Treaty on Access to Knowledge and Technology." WIPO, Secretariat, *Annex to Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, at 3, U.N. Doc. WO/GA/31/11/Annex (Aug. 27, 2004).

215. Helfer, *supra* note 103, at 1012.

216. Drahos, *supra* note 102, at 16.

217. Kapczynski, *supra* note 4, at 806.

218. A framework agreement on access to knowledge could serve several critical functions in protecting individual rights; as Drahos argues, such an agreement "would at least offer developing countries some longer term vision of their development interests, as well as an opportunity to build a coalition around the issue of knowledge and development." Drahos, *supra* note 102, at 16.

219. See Abbott et al., *supra* note 134, at 406 (describing TRIPS as having high levels of obligation, precision, and delegation).

220. Draft A2K Treaty, *supra* note 52, art. 1-2.

exceptions and limitations that states must guarantee under national law.²²¹ Article 3-4 provides that works purchased by a library can be lent to others without charge, and Article 3-5 limits exclusive rights of copyright owners with respect to certain actions by Internet service providers.²²² Provisions regarding distance education specify that, among other things, educational institutions must be allowed to record and retain copies of distance-learning transmissions,²²³ and Article 3-6 describes the specific circumstances in which states can limit legal prohibitions on circumvention of technological measures designed to prevent copying.²²⁴

In connection with the drafting of the Treaty, Drahos argued that the precision of these norms would undermine prospects for the Treaty's passage, maintaining that in the context of intellectual property, detailed rules "typically create winners and losers and so veto coalitions are more or less certain to form."²²⁵ Instead, he recommended that the Treaty contain "a few general principles built around the rights to health and education and the commitment to open source innovation" that would "essentially be declarative in nature, drawing on the existing human rights framework and restating principles already widely accepted."²²⁶ Such general principles or imprecise norms are more likely to enjoy the support needed from states for passage and ratification. Imprecise norms would also better protect needed flexibility on the part of states to implement their international obligations in ways that are consistent with local needs and values. Detailed provisions may not be very useful if states do not adopt them because of the significant commitments they entail or if such provisions foreclose solutions that are context-specific or necessary to meet challenges in a rapidly evolving technological area.

The specificity with which the provisions were drafted is understandable, however. First, the Treaty was and is much more of an initial draft than a finished international instrument. Because it was prepared by civil society groups, rather than negotiated by states, the norms it imposes are naturally more precise than the terms that might have emerged after extensive discussion and compromise. Second, detailed norms were thought necessary to counter the pressure applied to states to forego taking advantage even of the flexibilities permitted under the international treaties to which they are a party. In addition, the drafters of the A2K Treaty may have designed the provisions of the treaty to mirror those of TRIPS, rather than the more imprecise norms of international human rights treaties, because of the perceived strength of the former *vis-à-vis* the latter.²²⁷ TRIPS has resulted in high levels of enforcement, while human rights treaties often appear to be honored more often in breach than in practice.²²⁸

221. *Id.* art. 3-1.

222. *Id.* arts. 3-4, 3-5.

223. *Id.* art. 3-2(e).

224. *Id.* art. 3-6(b), (e).

225. Drahos, *supra* note 102, at 16.

226. *Id.*

227. Gerloff, for example, argues that the drafters recognized that creating a new framework would be futile and therefore framed the Draft A2K Treaty as building off TRIPS. Gerloff, *supra* note 103, at 102.

228. See Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate*

Despite these very real pressures, however, imprecise standards are not necessarily unenforceable, merely differently enforceable. Indeed, there are few areas of international law that can boast the ability to back up state commitments as effectively as the trade regime. In the absence of such enforcement mechanisms, human rights law must necessarily depend on other processes for enforcement. Enforcement of human rights norms occurs, for example, when the articulation of norms fosters interactions that result in state internalization of norms, or when international standards are used by domestic advocates to pressure states to implement changes on the domestic level.²²⁹

Even imprecise norms that initially convey little “bite” can be strengthened and elaborated over time. In advocating for more generally drafted principles in the Treaty, for example, Drahos recommended that those principles be paired with more precise recommendations in a nonbinding annex. As he explains, general principles and recommendations can “evolve into more specific and enforceable obligations” over time.²³⁰ Imprecise norms can provide an important foundation for later, more precise articulations of international obligations. In addition, although counterintuitive, obligations framed with less precision may be more effective if they are more likely to garner the political support necessary to ensure the instrument’s passage. Precise norms were possible in the trade context only because of the benefit states obtained by ratification; states are unlikely to have the same incentives in the context of access to knowledge. Relying on imprecise norms in a framework agreement on access to knowledge might make it appear less threatening and thus bolster its chances for obtaining the necessary political support.

This does not mean that imprecise norms are necessary in every context involving access to knowledge. Where the scope of the instrument is narrower, more precision may be possible because the commitment required of states is limited. For example, the proposed instrument on exceptions and limitations may be able to articulate norms with more precision than the Draft A2K Treaty because it explicitly addresses only exceptions and limitations to copyright norms.²³¹ The Draft A2K Treaty, in contrast, addresses a broad variety of purposes.²³² The breadth of the obligations imposed, ranging from

Responsibility by Amending the Alien Tort Claims Act, 48 CATH. U. L. REV. 881, 935 (1999).

229. For a discussion of the enforcement of international human rights standards, see, for example, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); and Koh, *supra* note 138, at 2646.

230. Drahos, *supra* note 102, at 16; see also SISULE F. MUSUNGU, *RETHINKING INNOVATION, DEVELOPMENT AND INTELLECTUAL PROPERTY IN THE UN: WIPO AND BEYOND* 15 (2005), <http://www.quino.org/geneva/pdf/economic/Issues/TRIPS53.pdf> (arguing that Drahos’s proposal for a framework treaty would lead to negotiations and discussions that would “keep the issues on the agenda for a long time and . . . galvanise public opinion”).

231. See HUGENHOLTZ & OKEDIJI, *supra* note 4.

232. Draft A2K Treaty, *supra* note 52, pmb1. (including, among others, “private misappropriation of social and public knowledge resources, . . . the need to protect and expand the knowledge commons, . . . anticompetitive practices, . . . technological measures that restrict access to knowledge goods, . . . new incentives to create and share knowledge resources without restrictions on

copyright to patent to the creation of a knowledge commons, would make the Draft A2K Treaty more costly for states in sovereignty terms.²³³

Individual rights. Although the Draft A2K Treaty emphasizes the need for balanced protection and may have been intended to protect individual rights,²³⁴ it is not framed in terms of individual rights.²³⁵ Most of the provisions are aimed at limiting the exclusive economic rights granted to copyright owners; however, these limits are not framed in terms of the rights of users or consumers to access information or knowledge.

The Draft A2K Treaty recognizes only three individual rights: the right of persons with disabilities to access knowledge, the right of individuals to information held by public bodies, and the right of authors and performers to protection from unfair contracts.²³⁶ The Treaty makes no mention of rights to freedom of expression or to take part in cultural life, rights of central relevance to access to knowledge, and it contains little to no discussion of the obligations states have toward their citizens. Indeed, other rights are framed explicitly in terms of the rights of states. Article 3-12, for example, provides that member states agree that “[t]he needs and concerns of the developing countries should be taken into consideration with a view to giving them easier and less costly access to education, science, technology, and culture.”²³⁷ Article 1-1 describes the objectives of the Draft Treaty as “to protect and enhance [expand] access to knowledge, and to facilitate the transfer of technology to developing countries,” with no mention of the ultimate beneficiaries of such access or technology.²³⁸

Identifying only a few individual rights may pose the risk of doing more harm than good. For example, referencing only a few individual rights may provide a basis for states to justify limits on unenumerated rights. Melish explains, for example, that one of the reasons the drafters of the Convention on the Rights of Persons with Disabilities did not specify every abuse experienced by individuals with disabilities or proscribe detailed accessibility standards was to “avoid the negative inference that anything not expressly included in a detailed provision was intended to be excluded.”²³⁹ Including only the three identified rights might lead to the conclusion that no other rights are implicated by access to knowledge, including rights central to access to knowledge such as freedom of expression and the right to take part in cultural life.

access, . . . public support for knowledge resources, . . . [and] the transfer of technology to developing countries”).

233. The proposal for an instrument on exceptions and limitations also recommends that the instrument be nonbinding as a way of increasing its feasibility. See HUGENHOLTZ & OKEDIJI, *supra* note 4, at 45.

234. Helfer, *supra* note 103, at 1013.

235. The draft treaty’s lack of focus on individual rights distinguishes it from human rights treaties. See ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 47 (2007) (observing that the Framework Convention of the Council of Europe “falls short of being a human rights treaty” because “[s]tate obligations are limited to the measures that are to promote and protect cultural heritage rather than its agents, i.e. individuals or groups”).

236. Draft A2K Treaty, *supra* note 52, arts. 3-3, 5-5, 8-2.

237. *Id.* art. 3-12(a)(iii).

238. *Id.* art. 1-1.

239. Melish, *supra* note 174, at 45.

Narrowly drafted rights can also foster the impression that only those aspects of the rights specified are protected. The rights included in the Draft Treaty are far narrower than their counterparts in international human rights documents. For example, although the right to receive and impart information is protected by Article 19 of the International Covenant on Civil and Political Rights, Article 5-5 of the Draft Treaty protects only the right to information held by public bodies.²⁴⁰ There is a risk that narrower provisions will be interpreted as giving content to the broader right, thus limiting the content to the specified instances.

Finally, the Draft Treaty's emphasis on states' rights, as opposed to individual rights, is less likely to result in the benefits of the treaty being passed on to those within the states' borders. Although providing a state with increased access to information and technology can result in states providing these benefits to those within their jurisdiction, there is no guarantee that this will occur or that it will occur with respect to the most vulnerable portions of the population. Articulating the obligations states have to other states is critical in ensuring technology transfer; nonetheless, pairing these obligations with obligations of states to their citizens would provide a better foundation for ensuring that the benefits of technology transfer are passed on to their intended beneficiaries and that such benefits are distributed equitably.

Instead of focusing on selected individual rights, a framework agreement such as the Draft A2K Treaty might reaffirm states' obligations to protect individual rights under existing human rights treaties and customary international law in general, as well as with specific regard to freedom of expression and the rights to receive and impart information and to take part in cultural life. This would make clear that the treaty does not purport to specify the entirety of state obligations with respect to online content and that states continue to be bound by their existing commitments. In addition, the treaty might include a savings clause specifying that none of its provisions may be interpreted to allow noncompliance with any aspect of a state's existing obligations, including obligations under international human rights law.

Further, by reaffirming states' existing obligations to protect rights online under international human rights law, such an instrument would locate its principles of access within the broader human rights regime and would acknowledge that these rights are interdependent and indivisible.²⁴¹ Access to knowledge is both a good in and of itself and a precondition for the realization of a variety of other rights. Protecting the right to access knowledge requires protection of the underlying determinants that govern whether an individual will be able to realize that right, such as health, food, and shelter. Affirming the array of rights guaranteed under human rights treaties better ensures that access will be understood not only in terms of what is protected, but also in terms of the conditions that are necessary to ensure it can be meaningfully realized.

240. Draft A2K Treaty, *supra* note 52, art. 5-5.

241. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, at 20, U.N. Doc. A/CONF.157/24 (Part I) (July 12, 1993).

Affirming the array of rights protected under human rights law also guards against differential valuation of rights. For example, although both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were drafted and opened for ratification at the same time, their separate framing has fostered the perception that civil and political rights are prior to and therefore more important than economic, social, and cultural rights.²⁴² It would be unhelpful to foster the impression that, for example, the right to information held by public bodies is more important to access to knowledge than the right to take part in the creation of culture. Emphasizing the array of rights implicated by access to knowledge will help avoid undervaluing the importance of any specific subset of rights or the preconditions for accessing knowledge.

Finally, it may also be advisable to avoid articulating any new individual rights with respect to access to knowledge unless and until there is greater consensus on both the nature and the range of the rights affected.²⁴³ For example, to the extent that the right of authors and performers to be free from unfair contracts is a new and independent right, it may not be advisable to articulate this right without greater normative clarity. It is far better to delay recognition of new rights until there is an opportunity to generate the political will necessary to articulate a set of interconnected, indivisible treaty principles governing the spectrum of rights regarding access to knowledge.

V. CONCLUSION

The human rights and A2K movements have great potential to complement and strengthen one another, and their collaborative efforts in the context of access to medicines demonstrate the benefits that can be realized through cross-movement work. Nonetheless, the ways in which each movement has developed and the historical forces to which each responded have caused their discourses to emphasize different harms and thus different solutions in the context of Internet regulation.

Given the movements' common concern with areas in which states are unwilling or unable to take the steps necessary to protect human health and welfare, future efforts to foster cross-movement work might focus on issues such as access to health information, educational materials, information and communication technologies, or legal authority. Each of these instances presents opportunities for the movements to emphasize their respective strengths but in ways that complement the strategies of the other. To the extent, however, that the movements would seek to engage in collaboration on the issue of Internet regulation, a model of flexible harmonization might provide a common strategy that would respond to both of their needs—one that provides international supervision to guard against state abuses but guarantees enough discretion in implementation to allow states to resolve conflicts between rights and achieve other public policy goals. Although there are risks associated with the adoption of imprecise norms, refocusing future

242. Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 38-39 (2006).

243. See, e.g., Alston, *supra* note 166, at 619-20.

regulatory efforts along the lines suggested by a model of flexible harmonization will be more politically feasible than top-down efforts while at the same time providing domestic rights advocates with benchmarks that can be used to press for reform.

Because it responds to the concerns of both the human rights and A2K movements, a model of flexible harmonization might also be a strategy for increasing collaboration between the movements in other areas where cooperation would otherwise be difficult. For example, the diverging discourses of the human rights and A2K movements might make it initially difficult to collaborate on the issue of access to cultural materials necessary to ensure the right to take part in cultural life, a right protected under Article 15 of the International Covenant on Economic, Social and Cultural Rights. For A2K advocates, access to cultural goods is crucially important, as incremental intellectual property restrictions limit, over time, what is available in the public domain. From a human rights perspective, however, access to cultural materials is a “capacity” harm; although lack of access may also result from abuses of state authority, much of this harm is not associated with any particular violator.

Adopting the approach of flexible harmonization in this context would focus on binding but imprecise standards backed up by nonbinding interpretations. Binding but imprecise norms in this area already exist—for example, Article 15(1)(a) protects the right “[t]o take part in cultural life.”²⁴⁴ A2K and human rights advocates could collaborate on efforts to obtain nonbinding interpretations on the international and domestic levels regarding what obligations this imposes on states, including with respect to the ways in which states structure their domestic intellectual property regimes. Such interpretations would satisfy the concerns of both human rights advocates and A2K advocates, pointing to concrete measures states could take to bolster individual capacity to take part in cultural life.

With respect to Internet regulation, the insights of a model of flexible harmonization counsel revision of the strategies adopted at the Internet Governance Forum and in connection with the Draft A2K Treaty. Both represent important steps toward fostering increased access to knowledge and by themselves have been important catalysts for change. Future regulatory efforts, whether in the form of an international agreement or continued state cooperation in international fora, should be undertaken in a way that not only protects the ability of states to implement obligations consistent with their national and cultural priorities but also provides a space for the political consensus necessary for continued protection of rights online.

The Internet is, in many ways, the face of globalization. It is a medium that resists the imposition of borders. It presents significant potential for regulatory spillover. It is being regulated in many ways by nonstate actors. It presents considerable opportunity for human flourishing. These are precisely the challenges that face the international system in responding to regulatory challenges of globalization. Perhaps we will never be able to balance the risks

244. ICESCR, *supra* note 35, art. 15(1)(a).

of different modes of regulation exactly right.²⁴⁵ Nonetheless, the nature of the rights at stake in the context of Internet regulation compels us to try.

245. James Boyle is pessimistic about the extent to which it is ever possible to balance open and closed regulatory approaches. He maintains that we will systematically get the balance between open and closed wrong, in part because it is difficult to understand the kind of “property that cannot be exhausted by overuse (think of a piece of software) and that can grow in value the more it is used by others (think of a communications standard).” Boyle, *supra* note 71.