



2017

## Prioritising Human Development in African Intellectual Property Law

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### Recommended Citation

J. Janewa Osei-Tutu, Humanizing Intellectual Property: Moving beyond the Natural Rights Property Focus, 20 Vand. J. Ent. & Tech. L. 207, 258 (2017).

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# Prioritising Human Development in African Intellectual Property Law

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## Introduction

The World Trade Organization (WTO) incorporated intellectual property into the trade regime through the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS).<sup>1</sup> Since then, various commentators have questioned whether the WTO standards for intellectual property are suitable for developing countries.<sup>2</sup> Concerns relating to health and access to medicines have generated a dialogue about the appropriate balance between the interests of intellectual property producers and the users of goods that are protected by intellectual property rights.<sup>3</sup> Since most African nations are developing countries, the question of how the intellectual property standards, as harmonised through TRIPS, will affect developing countries is particularly salient for African nations.

The global intellectual property structure has been criticised for requiring developing nations to adopt intellectual property standards that are appropriate for industrialised countries.<sup>4</sup> Some commentators have observed that industrialised nations, such as the United States, developed their economies by borrowing from others, but that through the use of globalised intellectual property standards, they have effectively limited other nations from doing the same.<sup>5</sup> This article does not aim to revisit the question of the suitability of the existing intellectual property standards for developing countries. Nor does it seek to analyse whether, as a general proposition, intellectual property rights should be expanded or reduced in developing nations. Rather, the objective is to consider how, taking into consideration their existing international obligations, African countries can implement intellectual property laws that work for their citizens and that align with their development priorities.

Developing countries and least developed countries were given an additional five or 10 years respectively, before they had to implement their intellectual property obligations under TRIPS.<sup>6</sup> Now, more than 20 years since TRIPS came into force, many African nations have implemented intellectual property laws that meet the WTO requirements. As they work to achieve the Sustainable Development Goals (SDGs), which were adopted in 2015, African nations must consider how to adjust their intellectual property laws

\* This article draws on research from my forthcoming article, J. Janewa OseiTutu, "Intellectual Property for Human Development" (2016) 105 Ky. L.J.

<sup>1</sup> TRIPS took effect on January 1, 1995.

<sup>2</sup> Peter K. Yu, "The International Enclosure Movement" (2007) 82 Ind. L.J. 828, 855–857.

<sup>3</sup> Jeremy de Beer, Chidi Oguamanam and Tobias Schonwetter, "Innovation, Intellectual Property and Development Narratives in Africa" in Jeremy de Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter (eds), *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (Cape Town: Juta Academic, 2014), p.7.

<sup>4</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (2002), pp.22, 162.

<sup>5</sup> Llewellyn Joseph Gibbons, "Do as I Say (Not as I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations" (2011) 64 SMU L. Rev. 923, 936–937.

<sup>6</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 arts 66, 67. Developing countries were given a delayed implementation period of five years from the time TRIPS came into force. Least developed countries were given a delayed implementation period of 10 years, and they now have until 2021 to implement their intellectual property obligations. WTO, "Responding to Least Developed Countries' Special Needs in Intellectual Property", available at [https://www.wto.org/english/tratop\\_e/trips\\_e/ldc\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm) [Accessed October 27, 2016].

to suit their development needs.<sup>7</sup> African countries can contribute their own approaches to intellectual property so that the international intellectual property system evolves in a way that works for their developing economies. African nations could expressly state that human development is one of the objectives of their national intellectual property laws, and include similar language in any applicable regional instruments. This could help to ensure that African intellectual property laws and policies facilitate the critical objective of human development.

Human development is a flexible term that has evolved over the past 25 years.<sup>8</sup> However, it is most commonly defined as “enlarging people’s choices”.<sup>9</sup> Improving the health, education and living standards of the population consistently form part of this goal of enlarging people’s choices.<sup>10</sup> The UN Human Development Index (HDI) assesses economic gains, as well as health and educational outcomes in determining how well a nation is doing in terms of its progress towards improving the human condition. Thus, human development, as it is used here, includes economic development, as well as progress in the areas of health and education. This article will argue that African countries should explicitly invoke human development as an objective of their intellectual property laws. This will enable better accounting for human development and other national priorities within the framework of implementing global intellectual property standards, such as those advanced by TRIPS.

This article will begin by describing some of the intellectual property concerns that pertain to African nations and to other developing countries. This will be followed by a discussion about why human development should be a priority for African nations in the development and implementation of their intellectual property laws and policies. Finally, the article will conclude with some preliminary strategies for incorporating human development into national African intellectual property laws and policies.

## Human development and international intellectual property

Harmonised intellectual property standards have been a source of contention. Since the advent of the WTO, commentators have debated whether the intellectual property standards contained in TRIPS are beneficial for all nations. In particular, some commentators have observed that these standards may not be appropriate for developing countries. These minimum standards of protection include, for instance, a patent term of 20 years that must be available for all fields of technology.<sup>11</sup> In addition to other changes, TRIPS introduced minimum standards of protection for trademarks, geographical indications, integrated circuit topographies and copyright protection for databases.<sup>12</sup>

Among the predicted benefits of the WTO minimum standards to the developing countries was increased foreign direct investment, and therefore increased economic development. The effects of intellectual property rights in developing countries are not clear, with some empirical studies finding that stronger intellectual property protection does increase foreign direct investment and technology transfer.<sup>13</sup> However, this appears to depend on a variety of factors, including the level of technological development; the evidence of benefit to developing countries is mixed. Whether globally harmonised intellectual property standards are more beneficial for developed or developing countries remains to be seen and goes beyond

<sup>7</sup> Francis Gurry, “Intellectual Property for an Emerging Africa”, *WIPO Magazine*, November 2015.

<sup>8</sup> The United Nations Development Programme has been producing *Human Development Reports* since 1990.

<sup>9</sup> Sabina Alkire, “Background Paper for the 2010 Human Development Report” (2010) Oxford Poverty and Human Development Initiative, Working Paper No.36, p.36.

<sup>10</sup> Alkire, “Background Paper for the 2010 Human Development Report” (2010) Oxford Poverty and Human Development Initiative, Working Paper No.36, p.37.

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 arts 27(1), 33.

<sup>12</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 arts 10, 15, 22.

<sup>13</sup> Alexi Maxell and David Riker, “The Economic Implications of Strengthening Intellectual Property in Developing Countries” (2014) *J. Int’l Com. & Econ.*, p.8, available at [https://www.usitc.gov/publications/332/journals/vol\\_vi\\_article5.pdf](https://www.usitc.gov/publications/332/journals/vol_vi_article5.pdf) [Accessed October 27, 2016]; Anja Breitwieser and Neil Foster, “Intellectual Property Rights, Innovation and Technology Transfer: A Survey” (2012) Vienna Institute for International Economic Studies, Working Paper No. 88, pp.38–40, available at <http://wiiw.ac.at/intellectual-property-rights-innovation-and-technology-transfer-a-survey-dlp-2646.pdf> [Accessed October 27, 2016].

the scope of this article. Nonetheless, developing countries have the flexibility to devise intellectual property law with a view to prioritising the needs of their citizens.<sup>14</sup>

Advocates for human development and human rights have made inroads towards making global intellectual property bodies incorporate human development interests.<sup>15</sup> This has largely been due to various critiques of the effect of harmonised standards on developing countries. The main points of criticism, as it pertains to human development, can be categorised as relating to access and to exploitation. These two issues are briefly described below.

### *Access concerns*

#### Medicines

The effect of intellectual property rights on public health and access to medicines are among the main concerns about the international harmonisation of intellectual property standards for developing countries. For example, the health crisis relating to HIV and AIDS generated questions about the potential for increased costs and the limited availability of patented medicines for those consumers in developing countries who could not afford the high prices. When the South African Government decided to revise its laws to make the medications available to its citizens at a low cost, the pharmaceutical industry attempted to pressure the South African Government not to pursue that course of action.<sup>16</sup> In response to some of the access concerns, the WTO membership issued the Doha Declaration on the TRIPS Agreement and Public Health 2001.<sup>17</sup> This statement by the member states aimed to clarify that TRIPS cannot, and should not, interfere with member's attempt to protect and promote public health.<sup>18</sup>

#### Food and Agriculture

Another area that has generated criticism is in the area of food and agriculture. Large multinational companies, such as Monsanto, have been involved in litigation with farmers regarding the use of the offspring of their patented glyphosate-resistant seeds.<sup>19</sup> From a development perspective, this raises concerns about traditional farming practices of harvesting and reusing seeds.<sup>20</sup> From the perspective of patent law, the farmer cannot plant the second-generation genetically modified seed, but must pay for new seeds.<sup>21</sup> Beyond the technical analysis of patent law, these decisions have implications for farmers, and as the amount of genetically modified crops increases, there may be human development implications as it relates to access to food.<sup>22</sup>

#### Educational materials

Finally, some commentators have identified development concerns regarding copyrighted materials and education.<sup>23</sup> This is a less salient issue, in part because there are exceptions for fair use, as well as specific

<sup>14</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 art.1.1.

<sup>15</sup> This includes recognition of the right to health, the right to education and the right to culture.

<sup>16</sup> Henri E. Cauvin, "Trial in AIDS Drug Lawsuit Opens in Pretoria", *New York Times*, March 6, 2001.

<sup>17</sup> Doha Declaration on the TRIPS Agreement and Public Health 2001, November 20, 2001, WT/MIN(01)/DEC/2.

<sup>18</sup> Doha Declaration on the TRIPS Agreement and Public Health 2001 art.4 provides: "We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."

<sup>19</sup> *Bowman v Monsanto Co* 133 S. Ct. 1761 (2013).

<sup>20</sup> Chidi Oguamanam, "Agro-Biodiversity and Food Security: Biotechnology and Traditional Agricultural Practices at the Periphery of International Intellectual Property Regime Complex" (2007) Mich. St. L. Rev. 215, 244–245.

<sup>21</sup> *Bowman v Monsanto Co* 133 S. Ct. 1761, 1764 (2013).

<sup>22</sup> Oguamanam, "Agro-Biodiversity and Food Security" (2007) Mich. St. L. Rev. 215, 244–245.

<sup>23</sup> Margaret Chon, "Intellectual Property from Below: Copyright and Capability for Education" (2007) 40 U.C. Davis L. Rev. 803, 821–823.

exceptions to copyright for educational uses.<sup>24</sup> However, the fair use exception allows a limited amount of the work to be reproduced, and it cannot interfere with the copyright owner's exploitation of the work.<sup>25</sup> In addition, materials that are online may be protected by technological measures that limit their availability.<sup>26</sup> Alternatively, the copyrighted works may be subject to notice and take down if there is an allegation of copyright infringement, thereby rendering them publicly inaccessible.<sup>27</sup>

### *Exploitation concerns*

The role of intellectual property in facilitating the exploitation of the culture and knowledge of African nations as well as other developing countries has also been a source of controversy. This section will briefly outline some examples of the problem. The article will first discuss the exploitation of culture, particularly as it relates to trademark and copyright law. Next, the discussion will turn to traditional knowledge, particularly in relation to patent law.

### Cultural works and names

A recent example of cultural exploitation of an African group involves the Maasai.<sup>28</sup> The Maasai are an indigenous group based in Kenya and Tanzania.<sup>29</sup> The Maasai wear certain distinctive and identifiable traditional clothing and colours.<sup>30</sup> The famous designer, Louis Vuitton, received some criticism when he launched a "Maasai" clothing line that used colours, designs and styles that were based on traditional Maasai dress.<sup>31</sup> The Maasai name has also been used by Land Rover, which makes automobiles, as well as by various other companies. These uses of the Maasai name and culture have occurred without the permission or collaboration of the Maasai.<sup>32</sup>

In response to such developments, a non-governmental organisation called Light Years IP has launched a Maasai Intellectual Property Initiative.<sup>33</sup> Among other things, their goal is to help the Maasai regain control over the Maasai cultural brand, and to generate income from the brand in way that is acceptable to the Maasai people.<sup>34</sup> This involves educating the Maasai about ways that they can use intellectual property laws to protect their interests.<sup>35</sup>

Instead of intellectual property laws facilitating this perceived cultural exploitation, intellectual property laws should work to improve the socio-economic condition of the Maasai, many of whom live in poverty. Clearly, this would be a use of intellectual property law that promotes human development. Trademark is one avenue that the Maasai could employ if they were to use their mark in commerce.<sup>36</sup> Scholars have

<sup>24</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 art.13; Berne Convention for the Protection of Literary and Artistic Works 1886 (Paris Act 1971) arts 9, 10.

<sup>25</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 art.13.

<sup>26</sup> WIPO Copyright Treaty 1996 art.11.

<sup>27</sup> Rebecca Alderfer Rock, "Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?" (2014) 86 Temp. L. Rev. 691, 692.

<sup>28</sup> Tania Phipps Rufus, "Companies Accused of Exploiting Cultural Identity of the Maasai", *The Guardian*, August 8, 2013.

<sup>29</sup> For more information about the Maasai, see the Maasai Association at <http://www.maasai-association.org/maasai.html> [Accessed October 27, 2016].

<sup>30</sup> During my time in Tanzania, it was quite evident when someone was dressed in traditional Maasai clothing. The clothing is distinctive not only from Western clothing, but also from other traditional African outfits.

<sup>31</sup> Tania Phipps Rufus, "Companies Accused of Exploiting Cultural Identity of the Maasai", *The Guardian*, August 8, 2013.

<sup>32</sup> Cordelia Hebblethwaite, "Brand Maasai, Why Nomads Might Trademark Their Name", available at <http://www.bbc.com/news/magazine-22617001> [Accessed October 17, 2016]: "Those companies may be using the Maasai brand in ways that really do enhance their business, so it's reasonable for the Maasai to say, 'Well, why aren't you coming to talk to us? Why aren't you asking [for] our permission? Why don't you engage with us?'"

<sup>33</sup> Meg Brindle and Ron Layton, "The Maasai Intellectual Property Initiative: Reclaiming the Maasai IP for Kenyan and Tanzanian Maasai", available at <http://lightyearsip.net/files/maasai-workbook.pdf> [Accessed October 17, 2016].

<sup>34</sup> Brindle and Layton, "The Maasai Intellectual Property Initiative", available at <http://lightyearsip.net/files/maasai-workbook.pdf> [Accessed October 17, 2016], p.7.

<sup>35</sup> Brindle and Layton, "The Maasai Intellectual Property Initiative", available at <http://lightyearsip.net/files/maasai-workbook.pdf> [Accessed October 17, 2016], pp.15–16.

<sup>36</sup> TRIPS art.15.1 states: "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark ...." Article 16.1 further states: "The owner of a registered trademark shall have the

also explored the use of geographical indications to promote and protect African goods, such as coffee and cocoa.<sup>37</sup>

## Traditional knowledge

For several years now, the World Intellectual Property Organization (WIPO) membership has discussed an international legal instrument to protect traditional knowledge and traditional cultural expressions.<sup>38</sup> Neither the efforts at WIPO nor the prior efforts at UNESCO have been successful.<sup>39</sup>

Traditional knowledge is knowledge that is passed down within an identifiable community from one generation to another.<sup>40</sup> Traditional cultural expressions also pertain to an identifiable community and continue within the community through intergenerational transmission.<sup>41</sup> Some examples of traditional knowledge include knowledge of the use of the hoodia cactus plant to stave off hunger. Traditional songs and dances, or fabrics, such as Ghanaian kente cloth or Maasai blankets, are examples of traditional cultural expressions.

Critics have noted that the international intellectual property laws are ineffective at preventing bio-piracy and cultural misappropriation.<sup>42</sup> Indeed, intellectual property laws have been tools in facilitating cultural misappropriation. Traditional knowledge and traditional cultural expressions do not easily fit within the current intellectual property framework. This is because the knowledge pertaining to the genetic materials or practices, and the cultural works cannot always receive protection under intellectual property law because the knowledge is not novel in the patent law sense and the cultural works may not meet the requirements for originality under copyright law.<sup>43</sup> Hence, researchers and institutions have been able to acquire genetic materials and make use of the know-how or culture of traditional and indigenous communities without their consent and without sharing the benefits.<sup>44</sup>

Commentators observe that the international intellectual property system has prioritised certain types of knowledge.<sup>45</sup> Intellectual property has expanded to protect information that benefits multinational corporations, while attempts to protect the knowledge generated by indigenous and local communities have been stalled. For example, TRIPS explicitly recognises protection for databases, and more recent agreements, such as the Trans-Pacific Partnership Agreement 2016, include provisions to protect pharmaceutical data.<sup>46</sup> Bilateral investment treaties that include intellectual property in the meaning of investment allow companies to sue countries for placing limits on their intellectual property.<sup>47</sup>

African countries and other developing countries may wish to protect their indigenous knowledge to generate wealth, and promote human development in their communities, but have been unable to secure international protection for this type of knowledge. From a human development perspective, it would

exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.”

<sup>37</sup> Chidi Oguamanam and Teshar Dagne, “Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa” in de Beer, Armstrong, Oguamanam and Schonwetter (eds), *Innovation & Intellectual Property* (2014), pp.99–101.

<sup>38</sup> J. Janewa Osei-Tutu, “A Sui Generis Regime for Traditional Knowledge” (2011) 15 Marq. Intell. Prop. L. Rev. 147.

<sup>39</sup> Daniel Wuger, “Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws” in J. Michael Finger and Phillip Shuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford: Oxford University Press, 2004), p.184.

<sup>40</sup> WIPO, “Traditional Knowledge”, available at <http://www.wipo.int/tk/en/tk/> [Accessed October 27, 2016].

<sup>41</sup> “Traditional cultural expressions (TCEs), also called ‘expressions of folklore’, may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.” WIPO, “Traditional Cultural Expressions”, available at <http://www.wipo.int/tk/en/folklore/> [Accessed October 27, 2016].

<sup>42</sup> Keith Aoki, “Neocolonialism, Anticommons, and Biopiracy in the (Not So Brave) New World Order of International Intellectual Property Protection” (1998) 6 Ind. J. Global Leg. Stud. 11, 47–49.

<sup>43</sup> Osei-Tutu, “A Sui Generis Regime for Traditional Knowledge” (2011) 15 Marq. Intell. Prop. L. Rev. 147, 164.

<sup>44</sup> For a discussion of the hoodia cactus, neem, and other controversies, see Olufunmilayo B. Arewa, “TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks” (2006) 10 Marq. Intell. Prop. L. Rev. 155, 171–178.

<sup>45</sup> Olufunmilayo B. Arewa, “Intellectual Property and Conceptions of Culture” (2012) 4 WIPO J. 10, 13.

<sup>46</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 art.10; Trans-Pacific Partnership Agreement 2016 art.18.50.

<sup>47</sup> Cynthia M. Ho, “Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions” (2014) 30 Berkeley Tech. L.J. 213, 216.

make sense to protect and promote traditional knowledge, whereas databases and pharmaceutical data have utility primarily for private commercial enterprises.

These are a few of the areas where international intellectual property law has not supported human development, but rather has generated concerns about the implications of globally harmonised intellectual property laws for developing countries. The next section will discuss why promoting human development should be an integral aspect of African intellectual property laws.

## Why prioritise human development in African intellectual property laws and policies?

According to certain studies, in 2010, intellectual property-intensive industries accounted for more than 27 million jobs in the United States and more than five trillion dollars in value added, or nearly 35 per cent of the US gross domestic product.<sup>48</sup> In other words, protecting intellectual property can be a source of wealth generation and economic development. However, it can also be a means for exclusion. The consequences for those who are excluded could include negative effects on health and education and a lower overall standard of living. Thus, intellectual property rights can have salutary and deleterious effects on human development.

### *Human development is critical for African countries*

Human development matters for every nation. However, it is a priority for African nations.<sup>49</sup> Human development is critical for African countries because many of them score low on the HDI, with many people subsisting on very low incomes.<sup>50</sup>

According to the United Nations Development Programme (UNDP), more than 40 per cent of the population in countries in sub-Saharan Africa live in extreme poverty.<sup>51</sup> Africa also has a youthful population, which means that it is a continent with a tremendous amount of potential.<sup>52</sup> The continent has more people under the age of 20 than any other place in the world. However, if the young people do not have opportunities to advance and improve their condition, this tremendous potential will be lost.<sup>53</sup> African innovations can help propel the continent forward. For these reasons, it is critical for African nations to ensure that their intellectual property laws facilitate human development.<sup>54</sup>

Human development can have different meanings. As discussed above, the term is used here as it is defined by the United Nations for the purposes of its *Human Development Report* and the HDI.<sup>55</sup> It is multi-faceted and includes progress in terms of health, education and economic wealth.<sup>56</sup> These objectives

<sup>48</sup> US Patent and Trademark Office, "Intellectual Property and the US Economy", available at [http://www.uspto.gov/sites/default/files/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf) [Accessed October 27, 2016].

<sup>49</sup> African Development Bank, *African Development Report 2015* (Abidjan: African Development Bank, 2015), p.214.

<sup>50</sup> African Development Bank, *African Development Report 2015* (2015), p.xxviii.

<sup>51</sup> United Nations Development Programme (UNDP), "About Sub-Saharan Africa", available at <http://www.africa.undp.org/content/rba/en/home/regioninfo.html> [Accessed October 27, 2016].

<sup>52</sup> Andrews Atta Asamoah, "Head to Head: Is Africa's Young Population a Risk or an Asset?", available at <http://www.bbc.com/news/world-africa-25869838> [Accessed October 27, 2016].

<sup>53</sup> Kingsley Ighobor, "Africa's Youth: A 'Ticking Time Bomb' or an Opportunity?", available at <http://www.un.org/africarenewal/magazine/may-2013/africa%E2%80%99s-youth-%E2%80%9Cticking-time-bomb%E2%80%9D-or-opportunity> [Accessed October 27, 2016].

<sup>54</sup> Organisations that work on African matters have already been engaging dialogue around this issue. For instance, in March 2014, the Economic Commission for Africa initiated an online conversation about Africa's youthful population, innovation and development. United Nations Economic Commission for Africa, "Youth and Innovation in Africa: Harnessing the Possibilities of Africa's Youth for the Transformation of the Continent: Summary Report of Online Discussion", available at <http://www.uneca.org/publications/youth-and-innovation-africa-harnessing-possibilities-africa%E2%80%99s-youth-transformation#> [Accessed October 27, 2016].

<sup>55</sup> UNDP, "Human Development Index", available at <http://hdr.undp.org/en/content/human-development-index-hdi> [Accessed October 27, 2016].

<sup>56</sup> The UNDP defines human development and the human development approach as "expanding the richness of human life, rather than simply the richness of the economy in which human beings live. It is an approach that is focused on people and their opportunities and choices". UNDP, "What Is Human Development?", available at <http://hdr.undp.org/en/humandev> [Accessed October 27, 2016]. Amartya Sen, a leading scholar in the development field, defines development as the freedom, which requires that people be free from poverty, tyranny and social deprivation. Amartya Sen, *Development as Freedom* (New York: Knopf, 1999), p.3.

are aligned with the patent and copyright goals of promoting innovation, progress and economic development.

There are several African countries that are ranked at the mid-level of the HDI. This includes nations such as Botswana, Gabon, South Africa, Congo and Ghana.<sup>57</sup> However, the African continent is home to many of the nations that are categorised as “low” in terms of human development. Near or at the bottom of the low category are African nations such as Gambia, Sierra Leone, Guinea, Burkina Faso, Burundi, Chad, Eritrea, Central African Republic and Niger. Advancing human development cannot be a peripheral goal for these countries. It must be a central objective, including in their intellectual property policy.

### *Human development: An overlooked objective of intellectual property*

The existence of a relationship between development and intellectual property is not a contentious point. The WIPO members have adopted a Development Agenda in recognition of the connection between intellectual property and development.<sup>58</sup> WIPO also recently hosted an international conference to discuss the role of intellectual property in economic, social and cultural development.<sup>59</sup> In addition, intellectual property scholars have analysed the role of intellectual property from a human development perspective.<sup>60</sup> However, academic analysis of the role of intellectual property as it relates to development has largely been about economic development.<sup>61</sup> The Trans-Pacific Partnership Agreement 2016 has a chapter on development, which recognises the relationship between science, technology, education and development while establishing a committee on development.<sup>62</sup>

International intellectual property law must place greater emphasis on human development, of which economic development is but one aspect.<sup>63</sup> This means explicitly accepting that national policies that promote human development are aligned with the goals of international intellectual property law. Despite the fact that there is a relationship between human development and intellectual property rights, human development concerns have been primarily accommodated in the international intellectual property regime by recognising flexibilities and exceptions to intellectual property protection in international trade agreements.<sup>64</sup> This is too narrow a conception of intellectual property.

For instance, when nations have attempted to implement national policies aimed at promoting human development in the area of health, it has led to WTO challenges on the basis that intellectual property rights were not being respected.<sup>65</sup> Interestingly, the nations that have attempted to defend policies designed to promote public health in the face of TRIPS intellectual property standards have been industrialised countries, such as Canada and Australia. Both of these nations rank highly on the HDI.<sup>66</sup> If Canada and Australia are unable to adequately regulate with much flexibility in areas of public concern without attracting litigation, the scenario would seem dire for less developed countries. The fact that these nations have been challenged to defend policies that limit intellectual property rights in order to promote human

<sup>57</sup> UNDP, “Human Development Index”, available at <http://hdr.undp.org/en/content/human-development-index-hdi> [Accessed October 27, 2016].

<sup>58</sup> “Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO”, August 27, 2004, WIPO Doc. WO/GA/31/11; WIPO, “Development Agenda for WIPO”, available at <http://www.wipo.int/ip-development/en/agenda/> [Accessed October 27, 2016].

<sup>59</sup> The WIPO Development Conference was held on April 7–8, 2016 in Geneva, Switzerland. Information about the conference is available at [http://www.wipo.int/meetings/en/2016/ip\\_development\\_conference.html](http://www.wipo.int/meetings/en/2016/ip_development_conference.html) [Accessed October 27, 2016].

<sup>60</sup> Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven: Yale University Press, 2012); Margaret Chon, “Intellectual Property ‘from Below’: Copyright and Capability for Education” (2007) 40 U.C. Davis L. Rev. 803; Peter K. Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio N.U. L. Rev. 465.

<sup>61</sup> William M. Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press, 2003); Maxell and Riker, “The Economic Implications of Strengthening Intellectual Property in Developing Countries” (2014) J. Int’l Com. & Econ.

<sup>62</sup> Trans-Pacific Partnership Agreement 2016 Ch.23.

<sup>63</sup> UNDP, *Human Development Report 2015* (New York: Oxford University Press, 2015), pp.1–3.

<sup>64</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 arts 7 and 8.

<sup>65</sup> “Canada—Patent Protection of Pharmaceutical Products”, Complaint by the European Communities and Their Member States, March 17, 2000, WT/DS114/R; Peter Martin, “Australia Faces \$50m Legal Bill in Cigarette Plain Packaging Fight with Philip Morris”, *Sydney Morning Herald*, July 28, 2015.

<sup>66</sup> In 2015, Australia was ranked second and Canada was ranked ninth.

development underscores the need for African nations to carefully craft their intellectual property laws and policies to incorporate human development as an express objective. In this way, African nations may help shift the understanding of the role of intellectual property rights as promoting human development rather than as potentially conflicting with human development objectives.

The Doha Declaration on the TRIPS Agreement and Public Health 2001 effectively recognises that intellectual property should promote some aspects of human development because it states that TRIPS obligations should be interpreted and implemented in a manner that supports public health.<sup>67</sup> Health is one measure of human development.<sup>68</sup> Health should not be accommodated by intellectual property law as “an exception” to protection. As I have argued elsewhere, even without using measures which provide “flexibility” to protect public health, intellectual property laws and policies should promote human development as the norm rather than as an exception to the norm.

The UN SDGs, which build on the earlier Millennium Development Goals (MDGs), are also relevant to global intellectual property law. The MDGs were adopted in 2000 when the world’s nations came together in 2000 to create a plan to eradicate global poverty.<sup>69</sup> They developed eight MDGs with a 15-year plan for global development. In addition to eradicating poverty, the participants committed to efforts to improve health and education and to develop a global partnership for development.

In September 2015, the world’s nations agreed upon post-2015 development goals.<sup>70</sup> Among the objectives of the SDGs are to end poverty, end hunger, promote food security and health, promote sustainable development and reduce inequality among countries. The SDGs build on the MDGs of advancing health, education, poverty eradication, and gender and income equality.<sup>71</sup>

The development goals are pertinent to global intellectual property law. SDG 9, for instance, aims to “build resilient infrastructure, promote sustainable industrialization and foster innovation”.<sup>72</sup> There are eight targets for SDG 9. Three of these targets appear to be directly related to intellectual property rights. These include the target of enhancing scientific research, promoting infrastructure development through technological and technical support, and supporting domestic technology development, research and innovation.<sup>73</sup> The Dakar Declaration on Intellectual Property for Africa, which was adopted in 2015, also emphasises the connection between development and intellectual property.<sup>74</sup>

The next section will provide some preliminary suggestions about ways to make human development an integral part of intellectual property law and policy in African countries.

<sup>67</sup> Doha Declaration on the TRIPS Agreement and Public Health 2001 art.4.

<sup>68</sup> The HDI “was created to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone. The index can also be used to question national policy choices, asking how two countries with the same level of gross national income per capita can end up with different human development outcomes. These contrasts can stimulate debate about government policy priorities.” UNDP, “Human Development Index”, available at <http://hdr.undp.org/en/content/human-development-index-hdi> [Accessed October 27, 2016].

<sup>69</sup> United Nations, *The Millennium Development Goals Report 2015* (2015), p.4.

<sup>70</sup> One hundred and ninety-three UN members came together to agree on these goals. These SDGs were unanimously adopted by the UN member states. UN Division of Sustainable Development, “Press Materials for Sustainable Development Summit”, available at [https://sustainabledevelopment.un.org/content/documents/8381Summit%20Daily%20wrap-up\\_26%20Sep\\_for%20Media.pdf](https://sustainabledevelopment.un.org/content/documents/8381Summit%20Daily%20wrap-up_26%20Sep_for%20Media.pdf) [Accessed October 27, 2016].

<sup>71</sup> UNDP, “Sustainable Development Goals”, available at <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda/> [Accessed October 27, 2016].

<sup>72</sup> UNDP, “Goal 9: Industry, Innovation, Infrastructure”, available at <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda/goal-9.html> [Accessed October 27, 2016].

<sup>73</sup> UNDP, “Goal 9: Build Resilient Infrastructure, Promote Sustainable Industrialization and Foster Innovation”, available at <http://www.un.org/sustainabledevelopment/infrastructure-industrialization/> [Accessed October 27, 2016].

<sup>74</sup> Adopted in Dakar, Senegal in November 2015, and recognising the SDGs, the AU Innovation Strategy states: “Recognizing the importance and relevance of Intellectual Property for innovation and creativity in the knowledge-based economy as highlighted in Pillar II of the Common African Position post-2015 development agenda related to [science, technology and innovation] as crucial contributory factors for socio-economic, scientific, technological, and cultural development of Africa.”

## Intellectual property that aligns with African human development goals

As I have argued elsewhere, improving the human condition is an end goal that should be a factor in intellectual property policy and interpretation of intellectual property obligations.<sup>75</sup> This is important for not only African countries, but also other developing regions, where human development is equally critical. What is suggested here, therefore, is that part of what is required is a departure from the conventional and predominant approach to evaluating intellectual laws and policies fixated largely, or solely, on the economic aspects of intellectual property protection.

### *Guided by the African Union innovation strategy*

The African Union (AU) has prepared an innovation strategy that was adopted by AU heads of state in 2014.<sup>76</sup> The AU is an important African organisation because, with the exception of Morocco, all African countries are members of the AU. The “AU Science, Technology and Innovation Strategy for Africa 2024” (AU Innovation Strategy) references development objectives.<sup>77</sup> The AU Innovation Strategy prioritises innovation and human development. In particular, the AU underscores the importance of achieving sustainable socio-economic growth, reducing poverty, achieving food security, promoting public health and protecting the environment.<sup>78</sup>

Given the levels of development in many African countries, it is not surprising that human development is one of the goals of the AU Innovation Strategy. As African nations become further integrated into the world economy, they can be creative in developing intellectual property laws that help meet their human development objectives. Under the WTO, African nations are bound to the same international intellectual property standards as industrialised countries.<sup>79</sup> However, given their levels of development, they may not wish to adopt the same approach to their intellectual property laws and policies as the industrialised nations.

AU member states, with the assistance of the New Partnership for Africa’s Development (NEPAD)<sup>80</sup> and the African Development Bank, will implement the AU Innovation Strategy as they work to advance innovation on the continent.<sup>81</sup> The goals that are set out in the AU Innovation Strategy can guide African nations in developing intellectual property laws that align with their national human development objectives.

### *Adopt express language in national laws*

In addition to making policy decisions that promote human development, African countries may wish to consider including explicit language in their national legislation to clarify the purpose of their intellectual property laws.

The US Constitution, for instance, contains language about patents and copyrights promoting progress.<sup>82</sup> This enables US courts, scholars and policy makers to refer back to the constitutional goal of promoting

<sup>75</sup> Janewa OseiTutu, “Intellectual Property for Human Development” (2016) 105 Ky. L.J. (forthcoming).

<sup>76</sup> African Union, “Science, Technology and Innovation Strategy for Africa 2024”, p.8, available at <http://hrst.au.int/en/sites/default/files/STISA-Published%20Book.pdf> [Accessed October 27, 2016].

<sup>77</sup> African Union, “Science, Technology and Innovation Strategy for Africa 2024”, p.6, available at <http://hrst.au.int/en/sites/default/files/STISA-Published%20Book.pdf> [Accessed October 27, 2016].

<sup>78</sup> African Union, “Science, Technology and Innovation Strategy for Africa 2024”, pp.20–23, available at <http://hrst.au.int/en/sites/default/files/STISA-Published%20Book.pdf> [Accessed October 27, 2016].

<sup>79</sup> Rochelle Cooper Dreyfuss and Andreas F. Lowenfeld, “Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together” (1997) 37 Va. J. Int’l L. 275, 277.

<sup>80</sup> NEPAD is the technical body of the African Union. See NEPAD, “About NEPAD”, available at <http://www.nepad.org/content/about-nepad#aboutourwork> [Accessed October 27, 2016].

<sup>81</sup> African Union, “Science, Technology and Innovation Strategy for Africa 2024”, pp.9–10, available at <http://hrst.au.int/en/sites/default/files/STISA-Published%20Book.pdf> [Accessed October 27, 2016].

<sup>82</sup> US Constitution art.1 s.8 cl.8.

progress.<sup>83</sup> One critique of the US approach is that there is a tendency to equate progress with wealth maximisation.<sup>84</sup> However, nations can promote human progress and economic development without prioritising individual wealth maximisation.

This article does not propose that African nations should adopt the kind of language found in the US Constitution into their constitutions, or their national intellectual property laws. However, African nations may find it beneficial to expressly state in their intellectual property legislation or in their founding documents that human development is one of the goals of their intellectual property laws.

This is consistent with what some African states are presently doing. For example, Kenya has language in its constitution indicating that its intellectual property laws should prioritise Kenya's national interests. It does not make any express linkage between intellectual property and human development, but it contains language that supports development-oriented intellectual property. Article 11(1) of the Constitution of Kenya 2010 mentions intellectual property rights, requiring the state to

“recognise the role of science and indigenous technologies in the development of the nation; and ... promote the intellectual property rights of the people of Kenya”.

The constitution also contains language that requires the government to protect Kenyan culture, as well as Kenyan traditional knowledge, and language that suggests an obligation to share the benefits arising from such knowledge.<sup>85</sup>

Language that expressly links human development to national intellectual property laws and policies may be useful for developing nations. First, it enables national courts to incorporate human development into their analyses of intellectual property disputes. Secondly, it would shift the understanding about the role of intellectual property laws from a wealth maximisation orientation to a human development orientation. Thirdly, if enough nations expressly state that human development is an objective of their intellectual property law, it could become state practice to implement the international intellectual property obligations in a manner that promotes human development. At a minimum, that practice—if widespread and sufficiently developed—could form the backbone of a claim to a regional practice in Africa. To the extent that this approach is taken on board by other developing countries, it could influence the development of international intellectual property law, providing a basis for TRIPS obligations to be interpreted in light of that subsequent African State practice.

## Conclusion

The AU Innovation Strategy emphasises human development. As African nations work to achieve the SDGs, they should be creative in ensuring that their intellectual property laws prioritise human development. The relationship between intellectual property laws and human development is not new. However, in international intellectual property disputes, human development objectives, such as improving health outcomes, have been overlooked in order to protect intellectual property rights.<sup>86</sup>

<sup>83</sup> Alina Ng, *Copyright and the Progress of the Science and the Useful Arts* (Cheltenham: Edward Elgar, 2011); J. Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford: Stanford University Press, 2015); Malla Pollack, “What Is Congress Supposed to Promote? Defining Progress in Article 1 Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause” (2002) 80 Neb. L. Rev. 754.

<sup>84</sup> Alfred C. Yen, “Restoring the Natural Law: Copyright as Labor and Possession” (1990) 51 Ohio St. L.J. 517, 551.

<sup>85</sup> Constitution of Kenya 2010 art.11 states:

- (1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
- (2) The State shall (a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) recognise the role of science and indigenous technologies in the development of the nation; and (c) promote the intellectual property rights of the people of Kenya.
- (3) Parliament shall enact legislation to (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.”

<sup>86</sup> E.g. “Canada—Patent Protection of Pharmaceutical Products”, Complaint by the European Communities and Their Member States, March 17, 2000, WT/DS114/R.

As African nations implement their innovation strategies with a view to promoting human development, they should consider including language in their national intellectual property laws or their founding documents, to clarify that promoting human development is an objective of their intellectual property laws. For example, the US Constitution expressly states that copyright and patent laws are promulgated to “promote progress”.<sup>87</sup> This language shapes the interpretation of American intellectual property law. Language such as that found in the Kenyan Constitution emphasises that Kenyan intellectual property law should prioritise Kenya’s national interests.<sup>88</sup> More specifically, African nations could adopt language in their domestic legislation or constitutions to emphasise that human development, which includes improved economic, health and educational outcomes, is an objective of their copyright, patent and trademark laws.

The African continent has a tremendous amount of potential. African nations, with their youthful populations and relatively high levels of poverty, are striving to promote human development. Intellectual property laws can contribute to this objective by prioritising human development and making development integral to African intellectual property laws and policies.

<sup>87</sup> US Constitution art.I s.8 cl.8.

<sup>88</sup> Constitution of Kenya 2010 art.11(1).