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**INTELLECTUAL PROPERTY AND THE
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Intellectual Property and the Preferential Option for the Poor

Thomas C. Berg[†]

I. Introduction: Intellectual Property Disputes, the Situation of the Poor, and Catholic Responses

Intellectual property, once a relative backwater of the law, is now the locus of furious action. By the late 1990s intangible as opposed to physical assets made up 85 percent of the market value of Fortune 500 companies, as compared with 40 percent fifteen years earlier.¹ Moreover, the legal protections of patents and copyrights, once relatively technical and specialized matters, have become central to broad and international questions of politics, morality, and social justice. Intellectual property (“IP”) lies at the heart of debates whether globalization is working to help poor nations or imposes new costs on them while increasing wealthy nations’ relative advantages. The protests come not just from scruffy-haired activists marching on the Seattle streets or in front of the World Bank. Nobel-Prize winner and former World Bank official Joseph Stiglitz calls intellectual property “the most dramatic illustration of the conflict between international trade agreements and basic [human] values.”² Even economist Jagdish Bhagwati’s book *In Defense of Globalization*, which argues that multinational corporations “do good [overall] rather than harm,”³ says that corporate lobbying for strong IP rights has “[c]learly [been] unnecessarily harmful to the poor countries.”⁴

These issues mushroomed after the adoption of the 1993 TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights),⁵ which obliged signatory nations around the world to give significant protection to intellectual property, for the first time in the case of many nations. The problem is that it was the developed, wealthy nations who pushed for strong standardized IP protection worldwide, and to date these countries have reaped most of the benefits.⁶

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¹ See <http://www.lightyearsip.net/paips.shtml> (quoting Brookings Institution study).

² JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 129 (W.W. Norton, 2006).

³ JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 182 (Oxford U. Press, 2004).

⁴ *Id.* at 185.

⁵ General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (Dec. 15, 1993), 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

⁶ As one observer summarizes the dynamics:

Industrial country enterprises were the force behind this agreement. If the level of IP protection was as high in developing countries as in industrial countries, then developing country users would have to pay royalties on the IP that their national laws had allowed them to copy for free. A lot of money was at stake—the obligation the developing countries took on comes to about US\$60 billion per year.

The most prominent issue in the debate over globalized IP protections has been the supply of pharmaceuticals for AIDS and other epidemics in developing countries. As these diseases spread, drug prices remained far above beyond what developing nations could afford, partly because the drug companies' patents could block competition from manufacturers of generic drugs. For example, at the time that a year's supply of a combination of AIDS drugs cost more than \$10,000 in the United States under patent, Indian generic producers offered a similar combination for around \$300.⁷ Although other factors have contributed to the unavailability of essential medicines,⁸ for some medicines prices have clearly been part of the problem. Responding to the crises of disease and unaffordable drugs, nations like Brazil and South Africa began granting compulsory licenses to generic manufacturers, thus allowing those manufacturers to override patents on paying reasonable royalties to the patent holders.⁹ Ministers of the World Trade Organization ("WTO") affirmed such measures in the Doha Declaration of November 2001, emphasizing that the TRIPS Agreement allows nations "to protect public health" and "promote access to medicines for all," through the use of compulsory licenses and other means.¹⁰ But the Doha Declaration's application was slowed because it failed clearly to authorize signatory nations to issue compulsory licenses for production to be sold in other nations—usually the poorest nations lacking any domestic production capability. The problem arose because the Declaration purported simply to affirm the existing provisions of TRIPS, which permitted signatory nations to restrict patent rights,

There would be benefits for developing countries from this arrangement, industrial country negotiators contended. If developing countries enforced IPRs as the TRIPS Agreement specifies, they would attract considerable foreign investment. Furthermore, industrial country companies would have an incentive to create products aimed at problems, such as tropical diseases, that were of particular concern to developing countries. The agreement also promised assistance to put the new rules in place.

As to the WTO legalities, to pass and enforce the laws that create the US\$60 billion a year obligation is a bound obligation; however, the implementation assistance and the impact on investment and innovation are not. . . . [TRIPS] provides no mechanism to ensure the benefits for developing countries that the negotiators alleged would follow.

J. Michael Finger, *Introduction and Overview*, in POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 1, 4 (J. Michael Finger and Philip Schuler eds., World Bank and Oxford U. Press 2004), available at http://www.worldbank.org/research/Poor_Peoples_Knowledge.pdf [hereinafter POOR PEOPLE'S KNOWLEDGE].

⁷ Martin Khor, *Rethinking Intellectual Property Rights and TRIPS*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS 201, 204 (Peter Drahos and Ruth Mayne eds., Palgrave 2002) [hereinafter GLOBAL IPRS].

⁸ See, e.g., Laurie Garrett, *The Challenge of Global Health*, 86 FOREIGN AFFAIRS (January/February 2007) (noting problems in global-health infrastructure even when massive funding is provided to combat diseases), available at <http://www.foreignaffairs.org/20070101faessay86103/laurie-garrett/the-challenge-of-global-health.html>.

⁹ See Simone A. Rose, *On Purple Pills, Stem Cells, and Other Market Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property*, 48 HOW. L.J. 579, 591-92 (2005) (describing Brazilian and South African measures and drug manufacturers' legal challenge to them).

¹⁰ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, ¶4 (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [hereinafter Doha Declaration].

beyond “limited exceptions” to such rights, only when the use thereby authorized was, among other things, “predominantly for the supply of the domestic market of the [signatory Member].”¹¹

A 2003 decision of the TRIPS General Council permitted exports of generic drugs to the poorest nations under compulsory licenses in order to address the grave public-health problems.¹² But to many critics, that step was insufficient because the process it implements is too cumbersome and excludes some highly effective drugs.¹³ More recently, the application of TRIPS’s full IP-protection obligations to India, whose generic industry was the largest, has raised questions of whether sufficient supplies of low-cost drugs will continue to be produced.¹⁴ Finally, the TRIPS mechanisms for authorizing generic drugs have been sidestepped through bilateral agreements under which nations like the U.S. require their poorer trading partners to give stronger, “TRIPS-plus,” protection to intellectual property.¹⁵

On other issues too, IP rights have stirred up controversy concerning social justice and the disadvantaged. For example, it has been alleged that in the U.S. and elsewhere poor people’s access to educational materials, both in digital and printed form, has been or will be hampered by broad copyright protection that raises the cost of access to such materials.¹⁶ In addition, patents and licensing restrictions on crop seeds have been criticized for interfering with seed re-use and other longstanding practices of farmers,

¹¹ TRIPS Art. 31(f); *cf. id.* Art. 30 (permitting “limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”). The DOHA Declaration recognized that nations with little or no drug manufacturing capacities could have trouble “making effective use of compulsory licensing.” Doha Declaration, *supra* note 10, ¶6.

¹² General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 and Corr.1 (Aug. 30, 2003), available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

¹³ See, e.g., Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2888 (2006) (“The [2003 decision] imposed a bureaucratic structure for compulsory licensing. . . . There are potential and actual roadblocks to [its] effective implementation.”); Medecins Sans Frontieres, *A guide to the post-2005 world: TRIPS, R&D, and access to medicines* (Feb. 25, 2005), available at http://www.msf.org/msfinternational/invoke.cfm?objectId=88694E5B-0FED-434A-A21EDA1006002653&component=toolkit.article&method=full_html (“[T]he [approved] medicines list does not include the fixed-dose AIDS drug combinations which are recommended by WHO and are vital for scaling up AIDS treatment in developing countries.”).

¹⁴ See, e.g., Sierra Dean, Case Note, *India’s Controversial New Patent Regime: The End of Affordable Generics?*, 40 INT’L LAW. 725 (2006).

¹⁵ See, e.g., Margo A. Bagley, *Legal Movements in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS*, 17 EMORY INT’L L. REV. 781, 791-97 (2003).

¹⁶ See, e.g., Alan Story, *Don’t Ignore Copyright, the “Sleeping Giant” on the TRIPS and International Educational Agenda*, in GLOBAL IPRS, *supra* note 7, at 125, 134-37 (noting disputes over “the costs and inaccessibility of computer software and the highly restrictive conditions under which schools, universities, and individual users in the South (and the North) can obtain and use most of [it]”; Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTELL. PROP. L. 269, 301 (2003) (expressing concern that with shrinking scope of copyright fair-use doctrines and increase used of metering to charge for all uses of works, “[a]ccess to materials for the poor would be reduced [as] [l]ibraries have traditionally ensured access for the disenfranchised, yet pay-for-view may change all of this.”).

thus affecting in particular small farmers and those in poor societies.¹⁷ Finally come disputes over the traditional knowledge of indigenous people, whose expertise in natural medicines and cultural products has sometimes been exploited by developed-world corporations in what has been called “biopiracy.” In these instances, the corporations made use of such indigenous knowledge to obtain patents and reaped the rewards that resulted, while the indigenous people themselves received none of the rewards.¹⁸ These varying problems have been addressed, to varying degrees, through amendments to TRIPS and other trade agreements, through self-help by developing nations, and through initiatives by developed-world corporations, such as reducing drug prices and paying for the use of indigenous knowledge.

The defenders of intellectual property rights— both corporations benefiting from patents and copyrights and governments of the IP-generating developed nations, especially the United States—counter that strong IP protection benefits developing nations and the poor. In the words of a U.S. State Department undersecretary, strong IP protection “will not only encourage innovation, it will provide the level of confidence in an economy needed to attract foreign investment and spur technology transfer.”¹⁹ These arguments were among the justifications presented in the 1990s for including intellectual property in general international trade agreements for the first time.

The Catholic Church has weighed in on these issues, most clearly in favor of limiting patent rights over essential medicines. During the public controversy leading to the 2001 Doha declaration, both Pope John Paul II and the Vatican’s observer at the WTO emphasized the “social mortgage” on private property, including intellectual property,²⁰ and the requirement of social justice that essential human needs be met.²¹ Since then, Vatican officials have continued to urge greater access to generic drugs and have condemned regional and bilateral “TRIPS plus” agreements that “are more onerous

¹⁷ See Michael A. Gollin, *Answering the Call: Public Interest Intellectual Property Advisors*, 17 WASH. U. J. L. & POL’Y 187, 194-95 (2005); see also SETH SHULMAN, *OWNING THE FUTURE* 83-105 (1999).

¹⁸ For discussions of the examples of the problem and various solutions to it, see BIODIVERSITY AND TRADITIONAL KNOWLEDGE: EQUITABLE PARTNERSHIPS IN PRACTICE (Sarah A. Laird ed. 2002).

¹⁹ E. Anthony Wayne, *Why Protecting Intellectual Property Rights Matters* (January 2006), available at <http://usinfo.state.gov/products/pubs/intelprp/protecting.htm> (article by Assistant Secretary of State for Economic and Business Affairs). See *id.* (quoting WORLD BANK, *GLOBAL ECONOMIC PROSPECTS 2002: MAKING TRADE WORK FOR THE WORLD’S POOR* (2002) (“across the range of income levels, intellectual property rights are associated with greater trade and foreign direct investment flows, which in turn translate into faster rates of economic growth”).

²⁰ Pope John Paul II, Message of the Holy Father to the Group “Jubilee 2000 Debt Campaign” (Sept. 23, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/september/documents/hf_jp-ii_mes_23091999_jubilee-2000-debt-campaign_en.html [hereinafter Papal Jubilee Message]; Monsignor Diarmuid Martin, Intervention by His Excellency Mons. Diarmuid Martin to the Plenary Council of the World Trade Organization on Trade-Related Aspects of Intellectual Property Rights, ¶11 (June 20, 2001), available at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010620_wto_en.html [hereinafter Martin 2001 Address].

²¹ Papal Jubilee Message, *supra* note 20 (“The law of profit alone cannot be applied to that which is essential for the fight against hunger, disease, and poverty.”); Martin 2001 Address, *supra* note 20, ¶11.

for poor developing countries.”²² The Church’s responsible officials have argued that intellectual property is worthy of protection to “creat[e] incentives for innovation,” but that it must be tempered to “sprea[d] the benefits of the innovations as widely as possible,”²³ since “the very creative and innovative impetus” that IP rights provide “is there primarily *to serve the common good of the [entire] human community.*”²⁴ Bishops’ conferences and agencies in the U.S. and Latin America have also criticized regional and bilateral agreements in this hemisphere, calling for prohibiting patents on seeds and crops developed by rural farmers “without their consent and fair compensation,” and for limiting patents to “the minimum time [and scope] necessary to provide incentives for innovation.”²⁵

Intellectual property therefore presents fertile ground for exploring the contours of this symposium’s subject: the preferential option for the poor in Catholic social thought. To some extent, public debate over whether strong IP protections help or harm the poor parallels the debate among Catholic thinkers over whether strong private property rights, which aim to facilitate market transactions, help or harm the poor. In the last decade, the pro-market side of that debate has drawn encouragement from a number of passages in John Paul II’s encyclical *Centesimus Annus* that endorse the “free economy,” criticize the welfare state, and emphasize bringing the poor into the “circle of [economic] exchange.”²⁶ During the same years, however, the Pope and other Church leaders issued statements skeptical of broad IP rights.

This Article argues that the recent Catholic statements on intellectual property have been well founded: that whatever position one takes generally on property rights and the poor, the principle of preferential option for the poor calls for a degree of skepticism toward broad IP rights. Intellectual property, like other forms of property,

²² Monsignor Silvano Tomasi, Intervention by the Holy See at the 6th Ministerial Conference of WTO, Address of H.E. Mons. Silvano Tomasi (Dec. 18, 2005), *available at* http://www.vatican.va/roman_curia/secretariat_state/2005/documents/rc_seg-st_20051218_wto_en.html [hereinafter Tomasi 2005 Address].

²³ *Id.*

²⁴ Address of H.E. Msgr. Diarmuid Martin, Intervention by the Holy See at the World Trade Organization (Dec. 20, 2002), *available at* http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20021220_martin-wto_en.htm [emphasis in original] [hereinafter Martin 2002 Address].

²⁵ UNITED STATES CONF. OF CATHOLIC BISHOPS, RECOMMENDATIONS TO THE UNITED STATES TRADE REPRESENTATIVE ON THE NEGOTIATION OF THE CENTRAL AMERICAN FREE TRADE AGREEMENT (Oct. 2003), *available at* <http://www.usccb.org/sdwp/international/crs.htm> (statement by Catholic Relief Services, the relief arm of U.S. Conference of Catholic Bishops). Bishops from the Andean South American nations criticized a proposed U.S.-Andean free trade agreement on the ground that proposals for patenting seeds and extending pharmaceutical patents “may well endanger farmers’ access to the resources on which they depend, as well as access to medicines particularly by the poor and most vulnerable.” United States Conf. of Catholic Bishops, Statement by the Bishops of Colombia on the Free Trade with the United States (Sept. 13, 2004), *available at* <http://www.usccb.org/sdwp/international/LettertoUSTRonUS-AFTA11-28-05Ltr.pdf>.

²⁶ POPE JOHN PAUL II, CENTESIMUS ANNUS: ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM, ¶¶42, 48, 34, *in* HUMAN DIGNITY AND THE COMMON GOOD: THE GREAT PAPAL SOCIAL ENCYCLICALS FROM LEO XIII TO JOHN PAUL II 458, 493, 499, 486 (Richard W. Rousseau, S.J., ed., Greenwood Press 2002) [hereinafter CENTESIMUS ANNUS]. *See also infra* notes 62-64, 71-76 and accompanying text.

serves important purposes related to human dignity, productivity, and especially creativity. Therefore, Catholic teaching affirms intellectual property. But for a variety of reasons, limits on intellectual property are equally important: in particular, the full extension of IP rights may harm the poor, and certain limits on those rights are important to benefiting and empowering the poor.

Part II discusses the preferential option for the poor, and in particular the recent encyclicals' emphasis on empowering the poor to participate in creative and productive work. Part III applies these principles to intellectual property, arguing that the goals of empowerment support protection of IP rights, but also support significant limits on those rights. The Article concludes in Part IV with brief reflections on the preferential option for the poor in the light of this discussion of intellectual property.

II. The Preferential Option for the Poor

A. Solidarity with the Poor, the Common Good, and the Social Mortgage on Property

The notion of the preferential option mandates a fundamental concern for the poor and, where necessary, priority for their needs over the private property rights of others. The option for the poor shows in the witness of Scripture and “the whole tradition of the Church,” as Pope John Paul II put it.²⁷ But concern for the most deprived rests “above all” in “the very dignity of the human person, the indestructible image of God the Creator, which is identical in each one of us.”²⁸ Because of this equal God-given dignity, there is a basic level of well-being and goods to which all human beings are morally entitled, and for which they have a claim on others.

In the encyclical just quoted, *Sollicitudo Rei Socialis*, John Paul explains the purpose for recognizing this claim; he refers to those “who do not succeed in realizing their basic human vocation because they are deprived of essential goods.”²⁹ The concept of “vocation” describes God’s calling to all human beings to work, use their gifts to cultivate the earth and watch over it, and above all be faithful to God’s will and thereby share in the ultimate redemption of the world in Christ.³⁰ Certain basic material goods are “absolutely indispensable” if the human person is not only “to feed himself [and] grow,” but also to “communicate, associate with others, and attain the highest purposes to which he is called.”³¹

The doctrine of the preferential option for the poor, therefore, is not materialistic. It values goods because, and insofar as, they enable humans to pursue their calling to the

²⁷ POPE JOHN PAUL II, *SOLLICITUDO REI SOCIALIS: ON THE SOCIAL TEACHING OF THE CHURCH*, ¶ 42, in *HUMAN DIGNITY AND THE COMMON GOOD*, *supra* note 26, at 387, 419 [hereinafter *SOLLICITUDO REI SOCIALIS*].

²⁸ *Id.* ¶47, at 424.

²⁹ *Id.* ¶28, at 406.

³⁰ *See id.* ¶¶ 29-31, at 406-10.

³¹ PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* §171, at 75 (Engl. Trans. USCCB, 2004) [hereinafter *COMPENDIUM*].

fullest extent in economic, social, political, and ultimately spiritual dimensions. But the doctrine is also realistic in recognizing that in the vast majority of cases, the pursuit of human vocation requires a minimum level of material goods.

As a result, although private property is an important component of human dignity, it is instrumental to more fundamental goals and is therefore under a “social mortgage” to essential human needs. The right to private property itself stems from the dignity of human beings. It recognizes the value of their work, applying their intelligence, in transforming the earth “and making it a fitting home.”³² Private property rights also support various forms of human freedom: they “confer on everyone a sphere wholly necessary for the autonomy of the person and the family,” and “by stimulating [the] exercise of responsibility” they “constitute[e] one of the conditions for civil liberty.”³³ But the same foundation of equal human dignity that grounds private property rights also limits them.

Private property is ultimately subordinate to the universal destination of material goods: the idea that “the goods of this world are originally meant for all,”³⁴ which John Paul II calls “the first principle of [the social] order.”³⁵ “[T]he original source of all that is good is the very act of God, who created both the earth and man, . . . [and] gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone.”³⁶ From this stems a person’s ultimate right to the use of goods “necessary for his full development,” as the *Compendium of Social Doctrine* puts it.³⁷ As John Paul II concluded, the right to private property, although “valid and necessary,” “is under a ‘social mortgage,’ which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods.”³⁸

The universal destination of goods, in turn, relates closely to the Church’s emphasis on achieving and maintaining the common good, which the Pastoral Constitution *Gaudium et Spes* defines as “the sum total of social conditions which allow social groups and their individual members relatively thorough and ready access to their own fulfillment.”³⁹ The common good in turn implicates the virtue of “solidarity,” which John Paul II defines as the “firm and persevering determination to commit oneself to the common good, . . . because we are all really responsible for all.”⁴⁰ Catholic social

³² CENTESIMUS ANNUS, *supra* note 26, ¶31, at 483.

³³ PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: GAUDIUM ET SPES, ¶71 (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (hereinafter GAUDIUM ET SPES); COMPENDIUM, *supra* note 31, ¶ 176, at 77.

³⁴ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶42, at 419.

³⁵ POPE JOHN PAUL II, LABOREM EXERCENS: ON HUMAN WORK, ¶14, in HUMAN DIGNITY AND THE COMMON GOOD, *supra* note 26, at 340. Pope John Paul II elaborated that “the right to private property is subordinated to the right to common use, to the fact that goods are meant for everyone.” *Id.* ¶14, at 340.

³⁶ CENTESIMUS ANNUS, *supra* note 26, ¶31, at 483.

³⁷ COMPENDIUM, *supra* note 31, §172, at 75.

³⁸ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶42, at 420.

³⁹ GAUDIUM ET SPES, *supra* note 33, ¶26. See COMPENDIUM, *supra* note 31, §171, at 75 (describing the universal destination of goods as an “immediate” implication of the common good).

⁴⁰ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶38, at 415.

thought advances the radical proposition that because human beings can only find fulfillment “‘with’ others and ‘for’ others,”⁴¹ a responsibility therefore rests on individuals and society together to seek the well-being of others, “unceasingly” and in every “expression of social life—from the family to intermediate social groups, associations, enterprises of an economic nature, cities, regions, States, up to the community of peoples and nations.”⁴² Obviously, these different organizations have different purposes and different loci of concern for others; each has “its own common good.”⁴³ But the basic well-being of the poor ranks as an “immediate” priority.⁴⁴ If the common good consists in conditions that allow people and groups “thorough and ready access” to their own fulfillment,⁴⁵ then high priority must go to the needs of people who currently cannot “succeed in realizing their basic human vocation because they are deprived of essential goods.”⁴⁶ Solidarity with those in great need requires that a person, in appropriate ways and in the place he finds himself, give up his “desire for profit [and] thirst for power” and “lose [him]self” for the sake of the other instead of exploiting him.⁴⁷

These bracing, radical demands apply to each individual with respect to the poor and disadvantaged who are in some way within the individual’s proximity or reach (neighborhood, church, community, or some more far-flung network). But the demands of solidarity and the common good govern legal rules and state institutions as well as private, voluntary initiatives. It is true, as market-oriented interpreters of the Catholic social tradition emphasize, that state rules and solutions cannot substitute for individuals’ direct, personal connections with the poor: what Fr. Robert Sirico calls “the more difficult sacrifices of our time, energy and talents.”⁴⁸ Nevertheless, the preferential option for the poor clearly applies to government actions as well. Its importance demands, in John Paul II’s words, that it “must be translated at all levels into concrete actions, until it decisively attains a series of necessary reforms.”⁴⁹ Thus both “[o]ur daily life [and] our decisions in the political and economic fields must be marked by [the] realities” of the poor who lack “hope of a better future.”⁵⁰

The Vatican’s statements on intellectual property and development discussed above apply this framework. Intellectual property, like other forms of private property, is valuable but remains subject to the social mortgage for the satisfaction of essential human needs.⁵¹

⁴¹ COMPENDIUM, *supra* note 31, §165, at 73.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* §171, at 75

⁴⁵ GAUDIUM ET SPES, *supra* note 33, ¶26; see also COMPENDIUM, *supra* note 31, §164, at 75.

⁴⁶ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶28, at 406.

⁴⁷ *Id.* ¶¶37-38, at 415-16.

⁴⁸ The Pope Benedict XVI Fan Club, *available at* <http://ratzingerfanclub.blogspot.com/2005/06/interpretations-of-preferential-option.html> (last visited Feb. 16, 2007).

⁴⁹ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶43, at 420.

⁵⁰ *Id.* ¶42, at 419-20.

⁵¹ *See supra* notes 20-25 and accompanying text; Papal Jubilee Message, *supra* note 20; Martin 2001 Address, *supra* note 20; Martin 2002 Address, *supra* note 22; Tomasi Address, *supra* note 24.

B. How the Poor Should be Helped

This ultimate priority for human needs and common use of property, however, does not tell us the specific implications of the preferential option for the poor in real-world situations. The debate in Catholic social thought is precisely over how best to help the poor: through private control of resources or through their common use.

1. Empirical questions: markets and the poor. In many instances private property, exchanged in free markets, produces the greatest overall supply of goods and thus benefits the poor by increasing their share along with those of others. As John Paul II wrote, generally “the free market is the most efficient instrument for utilizing resources and effectively responding to needs.”⁵² But this theory that a rising tide lifts all boats will fail to work in some situations, perhaps many. Inevitably the preferential option for the poor has a component that is simply empirical and pragmatic. Catholic social thought looks to law, economics, political economy, sociology, and other disciplines for insight on the specific content of social policies in particular contexts. Choosing insights from within and among these disciplines often calls for judgments of prudence on which policy will best carry out the broad principles that Catholic social doctrine dictates.

2. Other foundational ideas. The importance of prudence, however, does not mean that Catholic social thought simply counsels society and individuals to help the poor by whatever methods work, with no further guidance on what that goal means or how to implement it. The most interesting and evocative aspect of Catholic social teaching is its general vision of how to assist the poor in ways most consistent with the shared dignity of all persons. The key elements of this vision, outlined most distinctly in recent encyclicals, by no means offer clear answers to all questions, but they do give shape and direction to the task of carrying out the preferential option for the poor. Some elements most relevant to issues concerning intellectual property include the following.

a. Work/vocation/creativity. One crucial theme is the importance of human work, especially its creative aspects. Indeed, in *Laborem Exercens* Pope John Paul II referred to work as “a key, probably the essential key, to the whole social question.”⁵³ Through work, people not only carry out God’s calling to cultivate the earth, they also “reflec[t] the very action of the Creator of the universe,”⁵⁴ and they “participat[e] in God’s activity,” “shar[ing] in the work of creation.”⁵⁵ Roberta Kwall, in a recent review of theological perspectives on creativity, describes these two themes in the Biblical creation accounts as the “mirroring” theme and the “command” theme.⁵⁶ The first of these themes emphasizes that “man’s capacity for artistic creation mirrors or imitates God’s creative capacity.” Indeed, the “image of God” language in the first creation story furnish[es] a

⁵² CENTESIMUS ANNUS, *supra* note 26, ¶34, at 486.

⁵³ LABOREM EXERCENS, *supra* note 35, ¶3, at 323.

⁵⁴ *Id.* ¶4, at 324.

⁵⁵ *Id.* ¶¶25, at 356, 357.

⁵⁶ Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1951-58 (2006).

path leading man to regard himself as a potential creator, thus underscoring an unprecedented parallel between God and humanity.”⁵⁷ The second theme emphasizes that man is “a spiritual being whose affirmative creative actions are undertaken in response to Divine command” to rule the earth.⁵⁸ “Such creativity embodies the concept of practical spirituality, which recognizes that a spiritual connection to God can be achieved even through the performance of ordinary tasks” in service to God.⁵⁹

The ideas of mirroring and participating in God’s creative activity have special meaning for intellectual property. God the Creator does not simply build but also designs. Manual work should not be denigrated, but the human activity of intellectual creation shares in a distinctive way in God’s activity in the world, and occupies a special place in the idea of vocation, or responding to God’s calling.

b. Participation and empowerment. With the emphasis on creativity and vocation goes an emphasis on participation and empowerment for all persons. In the words of the *Compendium of Social Doctrine*, every person should reach the point where he or she, “either as an individual or in association with others . . . contributes to the cultural, economic, political and social life of the civil community to which he belongs.”⁶⁰ Moreover, because all human beings should contribute to society, “it becomes absolutely necessary to encourage participation above all of the most disadvantaged.”⁶¹ In the economic sphere, John Paul II emphasizes in *Centesimus Annus*, the poor should be helped “to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources.”⁶² Education is particularly important because it arms needy people with “the basic knowledge which would enable them to express their creativity and develop their potential.”⁶³ There is a strong emphasis, especially in *Centesimus Annus*, on empowering the poor to become producers and creators, effective agents within the economic system.⁶⁴

Catholic thought’s focus on empowering the poor and encouraging their societal participation parallels in many ways the approach of influential Nobel-laureate economist Amartya Sen, who emphasizes that true development consists not in the income or utility levels that people possess, but in their “capabilities” or freedoms, that is, their “abilities to do valuable acts or reach valuable states of being.”⁶⁵ “Greater freedom,” in Sen’s approach, “enhances the ability of people to help themselves and also to influence the

⁵⁷ *Id.* at 1953; *id.* at 1952 (“the term ‘image of God’ in the first account of the Creation underscores ‘man’s striving and ability to become a creator’”) (quoting RABBI JOSEPH B. SOLOVEITCHIK, *THE LONELY MAN OF FAITH* 12 (Doubleday 1965)).

⁵⁸ Kwall, *supra* note 56, at 1954.

⁵⁹ *Id.* These themes are further explored in John Copeland Nagle, *Abraham Lincoln, Sonny Bono, and the Future of Intellectual Property Law*, BOOKS AND CULTURE (forthcoming) (copy on file with author).

⁶⁰ COMPENDIUM, *supra* note 31, §189, at 83 (citing Second Vatican Ecumenical Council, Pastoral Constitution *Gaudium et Spes*, 75: AAS 58 (1966)).

⁶¹ *Id.*

⁶² CENTESIMUS ANNUS, *supra* note 26, ¶34, at 486.

⁶³ *Id.* ¶33, at 485.

⁶⁴ *See id.* ¶42, at 493 (emphasizing the importance of “free human creativity in the economic sector”).

⁶⁵ Amartya Sen, *Capability and Well-Being*, in *QUALITY OF LIFE* (Amartya Sen and Martha Nussbaum eds., Clarendon Press 1993).

world,” thereby enabling them to act as effective “agent[s]” and “participant[s] in economic, social, and political actions.”⁶⁶ As Sen’s approach—which has become the basis for the United Nation’s yearly *Human Development Reports*—places capability above measures such as income and utility, Catholic social thought understands the freedom and dignity of the human person to precede “all economic and social ends” such as wealth maximization or trade liberalization.⁶⁷ Pope Paul VI’s encyclical *On the Development of Peoples* explains the connection between human dignity and freedom, capability, and agency: “Man is truly human only if he is the master of his own actions and the judge of their worth, only if he is the architect of his own progress. He must act according to his God-given nature, freely accepting its potentials and its claims upon him.”⁶⁸ Likewise, Sen’s focus on the virtues of “sympathy” and “commitment” toward those lacking freedom and capability⁶⁹ parallels the Catholic emphasis on the virtue of solidarity.⁷⁰

c. Subsidiarity. The focus on participation and empowerment is maintained structurally through subsidiarity—the principle that it is wrong “to assign to a greater and higher association what lesser and subordinate organizations can do.”⁷¹ In *Centesimus Annus*, John Paul II invokes subsidiarity to urge limits on the role of state intervention in the economic sphere even when it is intended to remedy poverty. He criticizes the welfare state—what he calls the “social assistance state”—for interfering excessively in the “lower order” communities of businesses and other private organizations that also constitute crucial elements of civil society.⁷² Direct state interventions, at least in their “excesses and abuses,” end up “depriving society of its responsibility” in two problematic ways. First, they lead to “a loss of human energies” and initiative, including among the needy themselves. Second, they spur a growth of public agencies that are “dominated more by bureaucratic ways of thinking than by concern for serving their clients” because they do not interact with them on an intimate and personal level.⁷³

Conversely, the encyclical, like Catholic documents, commends intermediate organizations that “develop as real communities of persons,” thereby avoiding the extremes of reducing the individual to either “producer and consumer of [market] goods” or “object of state administration.”⁷⁴ As the *Compendium* states, these “volunteer organizations and cooperative endeavors in the private-social sector . . . create new areas

⁶⁶ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 18-19 (Anchor Books 1999).

⁶⁷ Séverine Deneulin, *Amartya Sen’s Capability Approach to Development and Gaudium et Spes*, 3 *JOURNAL OF CATHOLIC SOCIAL THOUGHT* 355, 358 (2003)

⁶⁸ POPE PAUL VI, *POPULARUM PROGRESSIO*, in *HUMAN DIGNITY AND THE COMMON GOOD*, *supra* note 26, ¶34, at 275, 284.

⁶⁹ *See* SEN, *supra* note 66, at XX.

⁷⁰ Deneulin, *supra* note 67, at 359. But cf. *id.* at 359-60, 366-67 (arguing that Catholic thought differs from capability theory in emphasizing the common good and the constitutively social nature of persons).

⁷¹ POPE PIUS XI, *QUADRAGESIMO ANNO* AAS 23, ¶79 (1931).

⁷² *CENTESIMUS ANNUS*, *supra* note 26, ¶48, at 499.

⁷³ *Id.*

⁷⁴ *Id.* ¶49, at 500.

for the active presence and direct action of citizens.”⁷⁵ The state therefore generally “should not interfere in the internal life of [such an organization], depriving [it] of its functions, but rather should support in case of need and help to coordinate its activity with the activities of the rest of society.”⁷⁶

Of course, much of the Catholic debate over anti-poverty policy centers on these passages. Market proponents emphasize the encyclicals’ endorsement of the “free economy” and criticism of the “social assistance state.” The most important point in *Centesimus Annus*, for Michael Novak and Richard Neuhaus, is that modern market capitalism respects and facilitates human freedom and creativity in the economic sphere,⁷⁷ a freedom that must be extended to the poor.⁷⁸ Likewise, Novak emphasizes that “John Paul II was especially careful and detailed in setting limits to the overly ambitious states of the late twentieth century.”⁷⁹ Critics of the market, on the other hand, emphasize both the Pope’s continued condemnation of a “radical capitalistic ideology” that “blindly entrusts the solution [of poverty] to market forces” and his assertion that the market economy must be “circumscribed within a strong juridical framework which places it at the service of human freedom in its totality.”⁸⁰ Fr. Donal Dorr, for example, argues that “the Pope is not suggesting that Western social security systems be discontinued and that we go back to old-style private ‘charity’ towards the poor,” but is only urging that welfare-state institutions be “modified” so that “poor people can be empowered economically and in this way get out from under the dead hand of bureaucracy.”⁸¹

III. The Preferential Option and Intellectual Property

How do these highly disputed principles concerning the option for the poor and its implementation apply to intellectual property? That question is becoming increasingly important for Catholic social thought. Recent teaching recognizes that the “decisive factor” in productivity has shifted from land and capital to “know-how, technology and skill”: that “[t]he wealth of the industrialized nations is based much more on this kind of ownership than on natural resources.”⁸² But the poor continue to fall further behind the wealthy in access to such resources.⁸³ John Paul’s words from 1991 still ring true today: far too many people still “have no possibility of acquiring the basic knowledge which would enable them to express their creativity and develop their potential,” and “have no

⁷⁵ COMPENDIUM, *supra* note 31, §419, at 180. *See also id.* §185, at 81 (commending these organizational expressions “to which people spontaneously give life and which make it possible for them to achieve effective social growth.”).

⁷⁶ CENTESIMUS ANNUS, *supra* note 26, ¶48, at 499.

⁷⁷ MICHAEL NOVAK, THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM 125-32 (1993). *See also*

⁷⁸ RICHARD JOHN NEUHAUS, DOING WELL AND DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST 228-29 (1992).

⁷⁹ NOVAK, *supra* note 77, at 125.

⁸⁰ CENTESIMUS ANNUS, *supra* note 26, ¶42, at 493-94.

⁸¹ DONAL DORR, OPTION FOR THE POOR: A HUNDRED YEARS OF CATHOLIC SOCIAL TEACHING 347, 346 (Orbis Books rev. ed. 1992).

⁸² CENTESIMUS ANNUS, *supra* note 26, ¶32, at 484.

⁸³ *See, e.g.*, STIGLITZ, *supra* note 2, at 7-13 (discussing rise of both absolute poverty and income inequality during recent years of increased globalization).

way of entering the network of knowledge and intercommunication which would enable them to see their qualities appreciated and utilized.”⁸⁴ The *Compendium of Social Doctrine* recognizes that “because of the great disparities between countries regarding access to technical and scientific knowledge and to the most recent products of technology, the process of globalization ends up increasing rather than decreasing the inequalities between countries in terms of economic and social development.”⁸⁵

The statements from Church leaders specific to intellectual property emphasize these realities. In December 2005, for example, the Vatican’s observer to the WTO ministerial conference stated that “[t]he new goods derived from progress in science and technology are key to world trade integration. Improved technology and know-how transfer from the developed countries is necessary so that less-developed countries can catch up and gain international trade competitiveness.”⁸⁶ These statements endorse a variety of means of providing necessary goods and skills: voluntary low-cost licenses by producer corporations, monetary aid from philanthropic foundations, technical assistance from nongovernmental organizations and the WTO itself, and so forth.⁸⁷ The Church’s own efforts include, for example, teaming Indian generic drug manufacturers with Catholic pharmacies and health-care institutions—“the world’s largest [health-care] network,” with some 128,000 providers—to distribute AIDS drugs and other essential medicines in developing nations.⁸⁸ Many of these measures involve cooperation with government actions, both by developing and by developed nations.

Although the Vatican statements on IP suggest a preference for such voluntary measures, they also come down firmly in favor of limiting IP rights by the “social mortgage” in appropriate circumstances, most notably in disputes involving patents and the provision of essential medicines. Limits like compulsory licenses, one such statement says, serve as a “safeguard” that less developed nations can use when full IP rights fail to meet pressing needs.⁸⁹

This Part argues that the Church has been right to favor limiting intellectual property rights to help the poor, whatever one thinks about whether broad private property rights in general help the poor. Saying that IP should be limited is only a general proposition, of course, and the subject is complicated. Applying the general principles of the preferential option for the poor, the specific balance between private property and common use may well vary in the contexts of patent and copyright, the two major forms of intellectual property. The proper balance between IP protection and common use will likely vary among different industries and products, and almost

⁸⁴ CENTESIMUS ANNUS, *supra* note 26, ¶ 33, at 485.

⁸⁵ COMPENDIUM, *supra* note 31, §363, at 156.

⁸⁶ Tomasi 2005 Address, *supra* note 22.

⁸⁷ See, e.g., Martin 2001 Address, *supra* note 20, at ¶¶5-6; Note of the Holy See on the Preparation for the Doha Ministerial Conference, *Development Dimensions of the World Trade Organization*, §5 (Oct. 30, 2001), available at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20011030_doha-wto_en.html.

⁸⁸ M.S. Anand, *Local pharma firms team up with Vatican to push drugs*, ECONOMIC TIMES (INDIA), May 18, 2004), 2004 WLNR 7241245 (quoting drug industry sources).

⁸⁹ Martin 2001 Address, *supra* note 20, at ¶6.

certainly among various nations: the developed nations, where a sophisticated technological infrastructure exists that can be extended to the poor; the partially developed nations, where some such structure exists; and the least developed nations, where none exists. Flexibility for different societies with differing needs seems an indisputable corollary of the principle of subsidiarity. Indeed, although the TRIPS agreement, as clarified by measures like the Doha Declaration, offers a degree of flexibility, it is most vulnerable to legitimate criticism to the extent that it imposes a uniform regime of IP protection on all nations.⁹⁰ Finally, to affirm limits on intellectual property rights is not to deny the value and importance of those rights. The argument here is only that a degree of skepticism about IP rights, and an appreciation of the value of limits on those rights, fits with the general teachings on the option for the poor.

Part II argued that Catholic social thought does not just call generally for helping the poor or providing resources to them, but also enunciates a number of values concerning how to help the poor: values such as empowerment, participation, subsidiarity, and the importance of creative work in human lives. These themes overlap with a theory of copyright law laid out a decade ago by Professor Neil Netanel.⁹¹ Netanel argued that copyright has dual purposes: not only encouraging the production of creative expression through economic rewards, but also promoting a strong “democratic civil society” in which a wide range of citizens participate directly in producing and using creative expression, “free from reliance on state subsidy, elite patronage, and cultural hierarchy.”⁹²

Applying this framework, Netanel’s article, written at the dawn of the age of digital IP issues, criticized both those seeking to expand copyrights dramatically in the world of digital information and those seeking to restrict copyright dramatically. He criticized the latter, those he called copyright “minimalists,” for overlooking the fact that “a robust copyright” is important in maintaining the “autonomous, self-reliant authorship” crucial to a democratic society. Copyright provides a necessary support not only “for the creation and dissemination of [authors’] expression,” but also “for its independent and pluralist character.”⁹³ But Netanel also criticized the copyright expansionists—those who rely on premises of neoclassical economics to argue that copyright does not simply induce the creation of new expression but also “serves as a vehicle for directing investment in existing works,” and who thus advocate “broad proprietary rights that extend to every conceivable valued use” so that market pricing can direct resources in expressive works to their most highly valued uses.⁹⁴ The neoclassical expansionists, Netanel said, fail to see that “copyright, like many institutions of civil

⁹⁰ See, e.g., STIGLITZ, *supra* note 2, at 119 (arguing that “one-size-fits-all strategies do not work,” and “[t]he same is true of intellectual property regimes”). Recent scholarship emphasizes differences among industries as well, concluding that the optimal balance between IP and common use should vary based “on the type of creation at issue, on the nature of innovation in the particular industry in question, on the particular kind of invention (and inventor) at issue, and on the market context.” Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1066 (2005).

⁹¹ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

⁹² *Id.* at 288.

⁹³ *Id.* at 288-89.

⁹⁴ *Id.* at 286-87.

society, is in, but not entirely of, the market,” and its “primary goal is not allocative efficiency, but the support of a democratic culture.”⁹⁵ To extend proprietary rights into every identifiable valued use of expression would override copyright’s current limits that protect and encourage “transformative and educative uses of existing works.”⁹⁶ By limiting the ability of users to build upon or comment on existing works, or use them for nonprofit educational purposes, full proprietary rights “would unduly constrain the robust debate upon which democratic self-rule depends.”⁹⁷ Copyright, he concludes overall, is a “limited proprietary” entitlement that “deliberatively and selectively employs market institutions” to promote the broader goal of a democratic civil society.⁹⁸

Netanel’s approach to copyright parallels Catholic social thought in several respects: private property as an important but limited right, instrumental to broader human goals; civil society as a set of institutions operating in economic markets but not determined by them; and the need for law to encourage a robust structural pluralism that empowers individuals to engage in a diversity of activities that are “public” in the sense of other-regarding, but are not state-operated or controlled.⁹⁹ The parallels are not perfect for present purposes. Not only does Netanel’s theory address copyright alone, but the ends sought by Catholic theory are more comprehensive and substantive than those of Netanel’s “democratic civil society”: they encompass a range of goods, virtues, and states of being that are spiritual as well as political, artistic, and material. Moreover, although Netanel made some criticisms of the distributional effects of unlimited copyrights,¹⁰⁰ his chief concern was not with the effect on the poor or other marginalized groups. Putting the primary focus on the poor requires bringing in additional considerations. Nevertheless, the parallels between Catholic social thought and Netanel’s civil-society-oriented emphasis are significant enough that I will make use of his framework and some of his insights. This section, then, discusses how both intellectual property rights and their limits might encourage production and use of information in a way that empowers all to participate, including the poor.

A. Production Issues: Will Products Be Created—And Disseminated to the Poor?

The first function in Netanel’s framework, the production function, embodies the most basic premise of not only copyright but also patent law: that legal protection will encourage the production and dissemination of information. Both creative works and technological innovation share the public-good feature of information: once they become

⁹⁵ *Id.* at 288.

⁹⁶ Netanel, *supra* note 91, at 288.

⁹⁷ *Id.*

⁹⁸ *Id.* at 347.

⁹⁹ On the distinction between public and governmental or state-operated, *see, e.g.*, NEUHAUS, *supra* note 78, at 252-53 (“There are many tasks connected with the *res publicae* (public things) that are not the task of the state [such as education].”).

¹⁰⁰ *See* Netanel, *supra* note 91, at 295 (noting that “[e]xpanded control” by copyright holders over expression may mean that “for some people, access becomes prohibitively expensive”); *id.* at 323 (noting that the model of full property rights and market transactions “sharply limits” any use of copyright to achieve distributional goals); *id.* at 333 (noting that large media organizations, which would benefit most from an absolute market-pricing system, “show an inherent bias against minority tastes and in favor of expression that is likely to appeal to large audiences.”).

public, it is relatively easy and inexpensive for others to access them and make and disseminate further copies, at lower cost than that of the producer who must recoup his sunk development costs.¹⁰¹ If this free rider problem prevents the producer's recoupment, it will limit creation to persons "unconcerned with monetary remuneration," and in turn artistic creation and technological innovation will "likely be both underproduced and, no less importantly, underdisseminated."¹⁰² Thus the enforcement of legal rights to exclude copiers serves the purpose, in the words of the Constitution, of "promot[ing] the progress of science and the useful arts."¹⁰³

At the same time, however, intellectual property is and should be limited in important ways. Patents and copyrights are more qualified than are rights in tangible property; the Constitution permits intellectual property only under specified conditions for "limited time[s]."¹⁰⁴ A familiar reason for these greater limits on intellectual property stems from another public-good feature of information: its "nonrivalrous" nature, the fact that another's use of it, unlike with a physical good, does not interfere with the use by the owner.¹⁰⁵ As Jefferson put it, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the . . . improvement of his condition, seems to have been . . . designed by nature"¹⁰⁶ Similarly, while a tangible commons tends to be overused and depleted, the value of an information resource is often increased, and very seldom reduced, by shared use as people exchange information freely. As a result, once sufficient legal incentives exist to encourage the production of information, further legal exclusivity runs the risk of imposing unnecessary costs upon further beneficial exchanges and production of information.¹⁰⁷ Patents of overly broad scope may increase the costs of further innovation excessively by conferring market power on the patent holder.¹⁰⁸ But narrower

¹⁰¹ See *id.* at 292-93.

¹⁰² *Id.*

¹⁰³ U.S. CONST. art. I, §8, cl. 8.

¹⁰⁴ *Id.*

¹⁰⁵ For a clear and concise explication of this point, see Lemley, *supra* note 90, at 1050-52.

¹⁰⁶ Quoted in Lorelei Ritchie de Larena, *What Copyright Teaches Patent Law About "Fair Use" and Why Universities Are Ignoring the Lesson*, 84 OR. L. REV. 779, 782 (2005).

¹⁰⁷ This point is overlooked by Michael Novak in his defense of the patent system as adding "the fuel of interest to the fire of genius" to spark new inventions. MICHAEL NOVAK, *THE FIRE OF INVENTION: CIVIL SOCIETY AND THE FUTURE OF THE CORPORATION* 58 (Rowman & Littlefield, 1997) (quoting Abraham Lincoln, *Lecture on Discoveries and Inventions*, Jacksonville, Illinois (Feb. 11, 1859), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS: 1859-1865*, at 3, 11 (Library of America, 1989)). After making various arguments in defense of strong patents, Novak's book concludes with a story, adapted from St. Bernardino of Siena, about a magnificent horse whose knight-owner died and bequeathed it in common to the people of his town. See Appendix: The Legend of the Bay Steed, in NOVAK, *supra*, at 121-24. Because none of the townspeople owned the steed and had incentives to care for it, they worked it to death, reenacting the familiar tragedy of the commons. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Because Novak presents the fable without comment, he never confronts the fact that its moral—that common property tends to be overused and depleted—has relatively little application to intellectual property.

¹⁰⁸ See, e.g., Arti K. Rai, *Fostering Cumulative Innovation in the Biopharmaceutical Industry: The Role of Patents and Antitrust*, 16 BERK. TECH. L.J. 813, 823 (2001) ("in the area of biopharmaceuticals, broad patent rights provide the primary mechanism by which an anticompetitive situation might arise").

patents, issued in larger numbers, can create a so-called anti-commons of multiple rights that boost the cost of licensing transactions for further innovations.¹⁰⁹ Efforts to overcome such transaction costs are a current matter of interest among scholars.¹¹⁰ But on balance, the goal of producing information justifies only a limited property right.

There are longstanding debates over to what extent, if at all, copyrights and patents are necessary to encourage creation and innovation.¹¹¹ The question boils down to whether various non-legal advantages of the creator, such as lead time over imitators, will suffice to recoup investments even without legal rights to exclude. The empirical questions remain disputed.¹¹² To be sure, even commentators deeply skeptical of patents or copyrights have emphasized that eliminating either of these systems would be an unwarranted, radical move.¹¹³ But their arguments have directed attention to the costs of broad IP rights and cautioned against their extension.

Even more important than the production question, from the standpoint of the preferential option for the poor, is the dissemination question: how to ensure that those in great need receive the benefits of the information produced under a regime of broad intellectual property laws. It is not at all clear that those benefits will reach the neediest. As one commentator on TRIPS has put it,

¹⁰⁹ For a summary of the problem, see Dan L. Burk and Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1610-13 (2003) (“Aggregating such fragmented property rights entails high search and negotiation costs to locate and bargain with the many rights owners whose permissions are necessary to complete broader development.”); see generally Michael A. Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). Transaction costs can also be increased by multiple overly broad patents that overlap and create a patent “thicket.” See, e.g., Burk and Lemley, *supra*, at 1614-15.

¹¹⁰ See, e.g., Burk and Lemley, *supra* note 109, at 1610-15 (summarizing responses to both anti-commons and patent-thicket problems); Rose, *supra* note 9 (proposing use of compulsory licensing scheme where transaction costs inhibit licensing of pharmaceutical innovations).

¹¹¹ See, e.g., *infra* note 112 (contrasting the various arguments regarding the role of copyrights and patents in creation).

¹¹² On patents, *cf.*, e.g., Jonathan M. Barnett, *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251, 1272-75 (2004) (summarizing studies from 1973 through 2000 finding that “[e]xcept for pharmaceuticals and chemicals, industry participants believed that patents were generally not essential for the development or introduction of new products”), with F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 699-700 & nn. 4-6 (2001) (summarizing studies finding “that patent law can function as a public policy tool for promoting national economic growth”). On copyrights, *cf.*, e.g., Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (emphasizing lead time and other non-copyright advantages of creator), with Netanel, *supra* note 91, at 339-40 (arguing that minimal copyright protection will be insufficient to encourage creation and dissemination of “sustained works of authorship” such as books, films, and songs, “as opposed to simply conversations and bits of information”).

¹¹³ See, e.g., Staff of Senate Subcomm. on Patents, Trademarks & Copyrights, 85th Cong., An Econ. Review of the Patent System: Study No. 15, at 80 (Comm. Print 1958) (prepared by Fritz Machlup) (concluding from evidence that although it would be unwarranted to create a patent system now if one did not exist, it would also be irresponsible to eliminate the existing system); Breyer, *supra* note 112, at 322 (taking analogous position concerning copyright).

Developing countries account for only 4 percent of world research and development (R&D) expenditures It is evident, therefore, that the effects of strengthened IPRs in those countries will be qualitatively different from those in the technologically advanced countries. While in the latter stronger rights may lead to increased profits and more innovation, in the former the main effects will be felt in terms of the prices to be paid for protected goods and technologies.¹¹⁴

For poor societies, it is possible that strong IP rights will “retard diffusion of new products (because of high prices)” while doing little to promote “access by local firms to foreign technologies.”¹¹⁵

B. Structural/Empowerment Issues: Will Poor People Be Empowered to Create?

Questions of production and dissemination concern the size of the pie and, in the context of the preferential option, whether it will be distributed to the poor. But as discussed above, Catholic social thought emphasizes not so much providing things to the poor, but empowering the poor to become creators and producers themselves. This bears resemblance to what Professor Netanel, in the copyright context, calls the “structural” function – the role of IP in helping to ensure that creation and innovation develop from a diverse range of independent sources rather than from “state subsidy,” elite patronage,” or some other form of “hierarchical domination.”¹¹⁶ Will strong IP rights empower the poor, in particular, to exercise their God-given creativity, to enter the “circle of exchange” with their innovative gifts?¹¹⁷

Plainly, poor people are creators like all human beings. No approach to intellectual property should recognize this more than Catholic social thought, with its premise that humans carry the image of the creator God. Moreover, IP may play an especially important role in encouraging creation by people on the economic margins, because the rewards IP can secure may be especially crucial to them. Independently wealthy people can spend time writing books without the prospect of such rewards; the non-wealthy, and certainly the poor, cannot.¹¹⁸ The same might be said for patents in securing rewards for inventors of modest means. By freeing innovation and creativity from dependence on the state or on elite patronage, IP rights can assist creativity by those neither wealthy nor powerful.¹¹⁹

In recent years a number of groups and projects have sprung up to “mak[e] intellectual property laws work for” the poor in developing nations by helping them

¹¹⁴ Carlos M. Correa, *Pro-Competitive Measures Under TRIPS to Promote Technology Diffusion in Developing Countries*, in GLOBAL IPRS, *supra* note 7, at 40-41.

¹¹⁵ *Id.* at 42.

¹¹⁶ Netanel., *supra* note 91, at 287, 352.

¹¹⁷ CENTESIMUS ANNUS, *supra* note 26, ¶ 34, at 486.

¹¹⁸ See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540 (2005) (“By enhancing the prospect of monetary returns for creativity, copyright thus makes creativity and dissemination possible for some authors who could not otherwise afford to create and share their works.”).

¹¹⁹ Netanel, *supra* note 91, at 288.

protect and market their own creations.¹²⁰ Organizations like Public Interest Intellectual Property Advisors (PIIPA)¹²¹ and Light Years IP¹²² provide pro bono legal, business, and technical advice to help indigenous peoples secure legal rights—through patents, copyrights, trademarks, and licensing agreements—in their traditional medical knowledge, cultural expressions, and other products. A World Bank publication summarizing such efforts commends them on the ground that they are both “value driven and market accepting”:¹²³ they aim at preserving and encouraging traditional knowledge by helping it find markets for those willing to pay for it (and by working with fair-trade retailers to return the profits to the indigenous-group creators). There should be an emphasis, the World Bank publication argues, on “the knowledge poor people own, create, and sell rather than [on just] what they buy.”¹²⁴

Again, however, this positive judgment on IP rights has to be qualified. Although some level of IP protection certainly promotes the kind of creativity, empowerment, and participation that Catholic thought endorses, the same also holds true for certain limits on IP, which constitute the public domain or the information commons. Even to do more than simply give things to the poor—even to empower them and bring them into the “circle of exchange”—requires limits on IP, for several reasons.¹²⁵

First, the creativity in which poor people engage is likely to be in selected categories, primarily those with relatively low costs. This is particularly true of people in the poorest societies. As critics of the TRIPS agreement have pointed out, the least developed nations are not going to develop a significant pharmaceutical industry any time soon.¹²⁶ In such industries where R&D and start-up costs are both high, “the development of new inventions . . . will simply be out of reach for most developing countries.”¹²⁷ Thus, in these sectors—which are the ones patents tend to benefit the most—“[t]he patent system is unlikely to work as a significant incentive to local innovations, except in those [more advanced developing] countries where a substantial scientific and technological infrastructure exists.”¹²⁸

Again, then, those in the poorest societies will often feel the effect of IP rights predominantly in increased costs. Those costs can block not only their use of intellectual products created by others, but also their own creation of new intellectual products. Although IP rights can in some cases encourage technology transfer to developing societies, they can also inhibit it. The increased returns the IP holder can extract because of the right may also raise the cost beyond the ability of developing-country firms to

¹²⁰ Coenraad J. Visser, *Making Intellectual Property Laws Work for Traditional Knowledge*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 6, at 207.

¹²¹ Public Interest Intellectual Property Advisors, *available at* <http://www.piipa.org>; *see also* Gollin, *supra* note 17.

¹²² Light Years IP, *available at* <http://www.lightyearsip.net/index.shtml>.

¹²³ Finger, *Introduction and Overview*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 6, at 3.

¹²⁴ *Id.* at 4.

¹²⁵ CENTESIMUS ANNUS, *supra* note 26, ¶ 34, at 486.

¹²⁶ *See, e.g.*, Peter Drahos, *Introduction*, in GLOBAL IPRS, *supra* note 7, at 1, 2.

¹²⁷ Correa, *supra* note 114, at 41-42.

¹²⁸ *Id.* at 42.

pay.¹²⁹ It should be remembered that “[h]istorically, . . . [a] large part of [the technology transfer fueling industrialization] took place by firms imitating or copying the technology used by others”; most of the now-developed countries did not have strict intellectual property laws during their earlier stages of development and industrialization.¹³⁰ Even allowing for the pressure that increased globalization exerts in favor of IP rights, there remain reasons to give today’s developing nations flexibility to “tak[e] the same technology path as the [now-] developed countries [did].”¹³¹

These considerations are particularly strong with respect to the use of technology in poor societies. But they also apply to the poor in developed societies and to IP in general. As Molly Shaffer Van Houweling has pointed out, although “[c]opyright can help to fund creativity, . . . it can also add to the expense involved in using and building upon the work of others.”¹³² Public-domain materials, constituted by the limits on intellectual property, are cheaper than proprietary materials as components of further work. For example, the free copying of facts and general ideas, which lie outside copyright, helps various people to arrange and express those ideas and facts in new creative ways.¹³³ In Ruth Okediji’s words, “[I]t is precisely the limitations and exceptions to proprietary rights that stimulate competition in innovation and which can foster higher levels of innovative activity.”¹³⁴

Indeed, certain of the familiar limits on IP rights in American law, especially copyright, explicitly encourage new creativity by users. For example, an important factor in the copyright fair use defense is whether the defendant has made a “transformative use” of the copyrighted work, that is, building upon it to add “new meaning, expression, or message.”¹³⁵ The presence of such new creativity is an important, even if not conclusive, factor because it generally furthers “the goal of copyright, to promote science and the arts.”¹³⁶

Related to this, several exceptions to copyright law explicitly shelter uses of works for educational purposes—thus harmonizing with Catholic thought’s emphasis on endowing people in need with “the basic knowledge which would enable them to express their creativity and develop their potential.”¹³⁷ The Copyright Act exempts limited reproduction by libraries and archives¹³⁸ as well as public performances and displays in the course of classroom teaching or distance education.¹³⁹ Under the general fair-use defense, a key factor is whether a use “is for nonprofit educational purposes;” a core

¹²⁹ See Khor, *supra* note 7, at 205.

¹³⁰ *Id.* at 205-06 (noting, for example, that most Western European nations gave no patent protection to chemical or pharmaceutical substances until the last decades of the twentieth century).

¹³¹ *Id.* at 206.

¹³² Van Houweling, *supra* note 118, at 1542.

¹³³ See, e.g., Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819 (2003).

¹³⁴ *Id.* at 836.

¹³⁵ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)

¹³⁶ *Id.*

¹³⁷ CENTESIMUS ANNUS, *supra* note 26, ¶ 33, at 485.

¹³⁸ 17 U.S.C. § 108 (2005).

¹³⁹ 17 U.S.C. § 110(1),(2).

textual example of fair use is “teaching (including multiple copies for classroom use), scholarship, or research”¹⁴⁰ Education does not benefit only the poor, of course, but a strong educational system does tend to promote economic and social mobility.

More generally, as Professor Van Houweling has pointed out, the copyright exceptions tend to serve “people and groups who might not otherwise be able to afford their use of copyrighted works.”¹⁴¹ The noncommercial nature of a use is an important factor in the general fair-use calculus and a threshold requirement for most of the specific statutory exceptions. The latter include not only copying by libraries and archives,¹⁴² but noncommercial performances in general¹⁴³ and performances by religious groups,¹⁴⁴ agricultural organizations,¹⁴⁵ veterans’ and fraternal organizations,¹⁴⁶ and groups transmitting information to the blind or deaf.¹⁴⁷ Not all noncommercial uses benefit the poor. But these uses as a class tend to be “not particularly lucrative”¹⁴⁸ and thus to be beyond the reach of the poor, “[even though] they can serve important social purposes.”¹⁴⁹ As one of the leading academic treatments of the subject emphasizes, noncommercial uses are often deemed fair because “[w]here the defendant does not seek to earn profits, it may be argued that his willingness and ability to pay for the copyrighted resources he uses will not provide an accurate measure of the public interest served by his use.”¹⁵⁰

Importantly, these limits on intellectual property bear little resemblance to the “social assistance state” that John Paul II criticizes for undercutting the goal of empowerment.¹⁵¹ Far from generating significant bureaucracy or making users dependent on cash assistance, these limits either directly encourage new creativity or indirectly encourage it through education and similar activities.¹⁵² Moreover, many of

¹⁴⁰ 17 U.S.C. § 107.

¹⁴¹ Van Houweling, *supra* note 118, at 1543.

¹⁴² 17 U.S.C. § 108(a)(1) (requiring that the reproduction or distribution be made “without any purpose of direct or indirect commercial advantage”).

¹⁴³ 17 U.S.C. § 110(4) (exempting live performances with no commercial purpose, no admission fee, and no payment to performers). “The legislative history suggests that this provision was designed to benefit users who could not otherwise afford to perform copyrighted works.” Van Houweling, *supra* note 114, at 1542.

¹⁴⁴ 17 U.S.C. § 110(3).

¹⁴⁵ 17 U.S.C. § 110(6).

¹⁴⁶ 17 U.S.C. § 110(10).

¹⁴⁷ 17 U.S.C. § 110(8), (9).

¹⁴⁸ Van Houweling, *supra* note 118, at 1545.

¹⁴⁹ *Id.*

¹⁵⁰ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1631 (1982).

¹⁵¹ *Centesimus Annus*, *supra* note 26, ¶48, at 499.

¹⁵² It is true that fair use and other statutory exceptions must be interpreted and enforced by courts, and that compulsory-license provisions require tribunals to determine the appropriate royalty. Such arrangements might be criticized as an inefficient method of valuing uses compared with market pricing. But as the next section discusses, that concern seems less central to Catholic thought—especially in valuing uses by people with limited ability to pay—than are the concerns about distancing beneficiaries from providers and undermining beneficiaries’ own productive incentives. See *infra* section III-C. Typical IP limits do not raise these latter concerns.

the limits benefit voluntary charitable organizations of the sort commended by Catholic thought on subsidiary and civil society: educational institutions, libraries, religious groups, agricultural organizations, veterans' and fraternal organizations, and those assisting the blind or deaf. To apply Neil Netanel's terms, copyright's "limited proprietary entitlement" promotes an ideal of civil society "in, but not entirely of, the market."¹⁵³

Moreover, the alternatives and limitations to IP may fit particularly well with the Catholic notion of the common good, "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment"¹⁵⁴ This notion disavows individualism, since it emphasizes the importance of social conditions and the essential need of people to live in community "with [and] for others."¹⁵⁵ But it also disavows collectivism, in that social arrangements properly aim at the fulfillment not of society as an entity, but of the persons living in the society, including in subsidiary groups. The public domain evokes some of the same balance. It serves as a common resource, but one typically drawn on not by the society as a collective but by persons—new users, individually or in small groups—whose actions enhance both themselves and others through further creation and innovation.

Similarly, the process of creation through communal processes resonates with Catholic themes. Consider, for example, the development of software or mapping of genetic information through open-source methods under which people may share in information as long as they agree in turn to share it as appropriate.¹⁵⁶ Such methods require—and in turn nurture and grow—communities of people who share their improvements or research findings with each other and who develop communal norms judging the quality of the contributions and the terms for sharing them. An open-source project thus creates a kind of intermediate community, engaging in a creative enterprise and pursuing "its own common good" determined neither by state direction nor by market logic.¹⁵⁷ As such, open-source methods of creation, although by no means the only way of encouraging creativity and innovation, have a "surprising sympathy" with Catholic doctrine.¹⁵⁸

For all these reasons, "the public domain," in Professor Netanel's words, "is no less vital to a democratic civil society than is copyright's protection of original expression."¹⁵⁹ In terms of this Article's concerns, limitations and exceptions to IP laws are crucial to empowering the poor. But IP limitations currently have a somewhat vulnerable status. For one thing, as the next two sections will note, the copyright fair-use

¹⁵³ Netanel, *supra* note 91, at 288.

¹⁵⁴ GAUDIUM ET SPES, *supra* note 33, ¶ 28.

¹⁵⁵ COMPENDIUM, *supra* note 31, § 165, at 73.

¹⁵⁶ See, e.g., Marco Fioretti, *Free Software's surprising sympathy with Catholic doctrine*, NEWS FORGE Nov. 11, 2005, available at <http://www.newsforge.com/article.pl?sid=05/11/03/1643243&tid=31> (discussing how society needs information technology "that is truly available to its citizens", such as "programs that people can read, fix, adapt, and improve, not just operate").

¹⁵⁷ COMPENDIUM, *supra* note 31, § 165, at 73.

¹⁵⁸ Fioretti, *supra* note 156.

¹⁵⁹ Netanel, *supra* note 91, at 363.

defense has come under pressure, in judicial decisions and commentary, from theories that seek to make every use of information a market transaction.¹⁶⁰ Moreover, American patent law lacks most of the exceptions found in copyright law, including a fair-use defense, and its own exception for building on patented works -- the experimental-use exception -- is narrow.¹⁶¹ If empowerment of the poor demands significant limits on IP, those limits may need shoring up.

C. Allocative Efficiency

Both the production and structural-empowerment rationales point toward affirming the value of basic intellectual property rights, but also limiting those rights significantly. This leaves a third, and increasingly influential, rationale for broad IP rights. The argument is that full extension of intellectual property, like any other property right, promotes “allocative efficiency”: more importantly than providing incentives to create, intellectual property rights facilitate the movement of resources toward their most highly valued use through market transactions.¹⁶² Resting in neoclassical economic theory, these arguments assert in the context of copyright that the market pricing system, resting on the existence of broad, fully exchangeable property rights, will “signal consumer preferences [and] enable copyright owners to develop and market expressive works in ways that consumers want.”¹⁶³ In the context of patents, the classic argument is that broad patent rights efficiently direct investments in, and commercialization of, technological innovation.¹⁶⁴

This rationale is subject to the objection that it overlooks the transaction costs that strong IP rights can create.¹⁶⁵ But more importantly, the allocative-efficiency rationale has only limited and indirect application to the dissemination of resources and creative opportunities to the poor. Plainly, the amount that poor people can pay for such things is no accurate measure of the value they place on them. Thus, John Paul II recognizes that although “the free market is the most efficient instrument for utilizing resources and effectively responding to needs . . . this is true only for those needs which are . . . endowed with purchasing power, and for those resources which are ‘marketable’ insofar as they are capable of obtaining a satisfactory price.”¹⁶⁶ He continues: “[T]here are many human needs which find no place on the market,” and “[i]t is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish.”¹⁶⁷

¹⁶⁰ See *infra* sections III-C, III-D (discussing the impact of neoclassical economic theories on the copyright fair-use defense).

¹⁶¹ Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1194 (2000).

¹⁶² Netanel, *supra* note 91, at 309-10 (discussing this approach in the context of copyright).

¹⁶³ *Id.* at 309, 310.

¹⁶⁴ See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265 (1977).

¹⁶⁵ See *supra* notes 108-10 and accompanying text.

¹⁶⁶ CENTESIMUS ANNUS, *supra* note 26, ¶ 34, at 486.

¹⁶⁷ *Id.*; See *id.* ¶ 40, at 491-92 (“There are collective and qualitative needs which cannot be satisfied by market mechanisms. There are important human needs which escape its logic. There are goods which by their very nature cannot and must not be bought or sold.”).

The allocative-efficiency argument can only harmonize with the preferential option for the poor if one premises that the surplus produced by a more efficient resource allocation will be directed substantially toward assisting and empowering the poor. To this might be added the argument that the needs of the poor should be addressed through cash transfer payments rather than IP law provisions. As Professor Van Houweling puts the argument concerning copyright: “If the problem is that the rich have more expressive power than the poor, the logic would go, then the solution is to make the poor richer instead of possibly distorting incentives to create by changing the rules of copyright. This argument is an application of the general preference, articulated repeatedly in the law and economics literature, for redistribution through the tax and transfer system rather than through legal rules.”¹⁶⁸

This argument is subject to several objections, however. As Van Houweling points out, pursuing policy through intellectual property provisions makes perfect sense if the purpose is precisely to affect the behavior that IP law affects.¹⁶⁹ Poor people might use cash subsidies for any number of ends. But if we believe it particularly important not just that people have resources, but that they be encouraged to act as creators,¹⁷⁰ then adjusting to find the proper scope of IP rights and their limits is valuable because it serves the latter goal directly.¹⁷¹ This is to say nothing of whether cash transfers are as politically feasible as are alterations in IP rules.¹⁷²

D. Proper Limits and Adjustments to IP Rights

The foregoing analysis suggests several appropriate categories of limits or adjustments to intellectual property for the assistance and empowerment of the poor. Again, the appropriateness of such measures will doubtless vary among developed and developing nations, between patent and copyright, and even among various industries.

1. Limits for access to essential human needs. First, some tailored limits on IP rights may be appropriate simply to make fundamental human necessities—food, water, essential medicines—available to the poor. As we have already seen, numerous Catholic statements, from John Paul II’s encyclicals to other Vatican officials’ interventions, confirm that IP rights are limited by this social mortgage.¹⁷³ Although the primary focus

¹⁶⁸ Van Houweling, *supra* note 118, at 1576-77 (citations omitted).

¹⁶⁹ *Id.* at 1577.

¹⁷⁰ See *supra* notes 53-69 and accompanying text (discussing creativity in human work and the empowerment of all persons as crucial themes of Catholic Social Teaching).

¹⁷¹ See also Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 349-50 (2006) (“If our aim is to redistribute well-being, objectively defined, rather than just income as a means for actual preferences satisfaction, then redistributive legal rules are by their very nature better suited to the task than taxes and monetary transfers. Private law rules convey a message as to the things worth having and directly provide for the goods deemed necessary for people’s well-being. An income increase contains no such communication and only grants the financial means to attain the objective goods if individuals happen to desire them.”) (footnote omitted).

¹⁷² See Van Houweling, *supra* note 118, at 1578, n.202 (copyright reforms might “be less expensive and more politically feasible than cash transfers would be”).

¹⁷³ See, e.g., *supra* notes 20-25 and accompanying text.

of Catholic thought is to empower to exercise their own creativity and productivity, the simple provision of necessities serves this goal because life and health are pre-conditions for any further empowerment. The presumption of subsidiarity over state solutions¹⁷⁴ would first favor voluntary and cooperative measures to provide essential goods at reduced prices. For example, in an exercise of solidarity manufacturers should be willing to sacrifice profits to the extent possible, and in tandem, with assistance from government and non-governmental organizations. But when voluntary measures fail, government itself should act. Thus, the Vatican urged that drug companies “be open and flexible in an equitable manner to the granting of voluntary licenses for the import, production and distribution of basic drugs,” and that they “help [developing nations] to develop such production in ways that are consistent with their IP duties”—but that “[c]ompulsory licenses and other safeguards, as worded in TRIPS,” should remain as backstops when cooperation under an IP regime fails.¹⁷⁵

Determinations about when to institute such limits cannot follow from any simple principle, but must rest on prudential judgments born of experience. Nor could Catholic thought dictate which of numerous mechanisms for limiting rights is appropriate: shortened patent terms, compulsory licenses, fair-use provisions, or various means of conditioning the extent of patent rights on the holder’s willingness to offer lower prices to the poor. These choices likewise must rest on prudential judgments. But for drug patents and disease epidemics, limits like those authorized in the Doha Declaration seem plainly warranted—as observers like the generally pro-globalization Jagdish Bhagwati have concluded—because the costs on life-saving drugs imposed by patents and by the impediments to generic alternatives have far outweighed the benefits to the poor. For diseases (like malaria) limited to poor nations, patents have spurred little pharmaceutical research or production, because monetary demand confined to the poor nations is insufficient to generate returns in any event.¹⁷⁶ For diseases (like AIDS) found in both poor and developed nations, as Bhagwati observes, companies have found it remunerative to produce drugs, but they at first used patents to try to keep prices and returns in poorer countries as high as possible while inducing foundations and aid organizations “to give money to the poor countries to buy the drugs at [the higher] prices”¹⁷⁷ For both types of diseases, generic competition makes medicines more affordable—while the argument that higher prices encourage innovation “is undermined,” as Joseph Stiglitz observes, “by the fact that most drug companies spend far more on advertising than on research, [and] more on research for lifestyle drugs (e.g., drugs for hair growth or male impotence) than for disease-related drugs.”¹⁷⁸

Compulsory licenses should be less warranted in developed nations with substantial R&D infrastructures and social safety nets. It has been suggested, however,

¹⁷⁴ See *supra* notes 71-76 and accompanying text.

¹⁷⁵ Martin 2001 Address, *supra* note 20, ¶ 6.

¹⁷⁶ See BHAGWATI, *supra* note 3, at 184; STIGLITZ, *supra* note 2, at 122-23, n.44 (summarizing studies showing minimal percent of R&D and patents attributable to developing-world-only diseases); Chon, *supra* note 13, at 2892, n.342 (in 1996, only 0.5 percent of pharmaceutical patents related to tropical diseases such as malaria).

¹⁷⁷ BHAGWATI, *supra* note 3, at 185.

¹⁷⁸ STIGLITZ, *supra* note 2, at 122-23, n.44 (citing studies).

that even in America, compulsory licensing would be warranted for important medicines when a public-health emergency exists or when transaction costs prevent the licensing of the drugs at affordable prices.¹⁷⁹ Events such as the discussion about circumventing Bayer A.G.'s patent rights in the drug Cipro during the anthrax scare of fall 2001 show that the issue is not off the table in the United States.¹⁸⁰

2. Limitations for education and other noncommercial uses. Education is another appropriate case for limits on IP rights, as are other instances of noncommercial use. As I have already discussed, facilitating education harmonizes with its importance in Catholic thought as a means of empowering people.¹⁸¹ Moreover, the very fact that education and other goods are noncommercial indicates that they “cannot be satisfied by market mechanisms,” in John Paul’s words.¹⁸² Facilitating these uses harmonizes with subsidiarity and its commendation of activities and organizations that have a certain independence from both state directives and market logic.¹⁸³

Again, Catholic thought provides no exact guidance for the contours of educational or other fair uses. But the American copyright model of fair use for education and other noncommercial uses may warrant both bolstering itself and extension to other legal regimes. To take the second point first: It is unclear whether the international copyright regime under the TRIPS agreement authorizes the robust fair-use defense that may be necessary to promote public-interest goals; TRIPS may not even permit the U.S. fair-use defense to reach as far as it does.¹⁸⁴ Likewise, American patent law lacks any fair-use defense; but arguments have been made that some such defense analogous to that in copyright, protecting educational and other noncommercial uses, should be adopted.¹⁸⁵

Instead, however, fair-use exceptions face constricting pressures today, especially in the context of digital information. The argument that full property rights and market transactions optimize resource allocation threatens to shrink fair use solely to cases of market failure, where the costs of locating and negotiating with users make transactions impractical—which means, however, that when (as increasingly the case) uses can be metered digitally or through collective licensing mechanisms, fair use should drop out of the equation altogether. The more this approach gains force, the more it threatens to raise

¹⁷⁹ Rose, *supra* note 9, at 582.

¹⁸⁰ *Id.* at 587-91.

¹⁸¹ See *supra* notes 62-63 and accompanying text (emphasizing the importance of education in the empowerment of the poor).

¹⁸² CENTESIMUS ANNUS, *supra* note 26, ¶ 40, at 491.

¹⁸³ See *supra* notes 71-76, 151-53 and accompanying text.

¹⁸⁴ For an articulation and defense of an international fair-use standard, see Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L LAW 75 (2000). TRIPS article 13 states that member states’ limitations on copyrights should be confined “to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Cf. Okediji, *supra*, at 114-23 (arguing that U.S. fair use doctrine probably violates this provision), with Pamela Samuelson, *Implications of the Agreement on Trade-Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULTURAL ECON. 95, 100-03 (1999) (suggesting that TRIPS permits the U.S. doctrine).

¹⁸⁵ See O’Rourke, *supra* note 162; Ritchie de Larena, *supra* note 106.

the costs of materials used in education in developing societies.¹⁸⁶ In the United States, fair-use concerns arose from the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 (DMCA),¹⁸⁷ Those provisions prohibit anyone from circumventing technological restrictions on access to a digitally encrypted work;¹⁸⁸ they also prohibit the provision of devices that help someone circumvent restrictions even to make use of a work to which he has access, apparently without regard to whether the use is fair.¹⁸⁹ Although technological controls have not yet become widespread, the worry is that such controls, bolstered by the DMCA, can be used to block previously permissible uses of publicly accessible works—fair uses, disposition of individual copies a work as allowed by the “first sale” doctrine,¹⁹⁰ and so forth—unless the user pays a fee.¹⁹¹ As has already been noted, the shrinking of fair use or other copyright exceptions may especially affect access by the poor.¹⁹² For example, librarians have expressed concern that under the anti-circumvention provisions, and the broader trend of “pay for view” provision that they encourage, “[a]ccess to materials for the poor would be reduced. Libraries have traditionally ensured access for the disenfranchised, yet pay-for-view may change all of this.”¹⁹³

Exceptions for educational and noncommercial uses must not extend so far as to undermine the creative incentives that intellectual property offers. For example, sweeping educational exceptions could easily harm the production and distribution of materials primarily aimed at educational uses. Both U.S. copyright law and TRIPS take into account the effect of a limitation on the return the creator receives from the work.¹⁹⁴ Again, Catholic thought does not tell us where that line should be drawn; but for the reasons above, it does point to the value of having educational and noncommercial limitations on IP rights.

3. Limitations to encourage innovation. In addition to empowering the creativity and productivity of the poor in the long term through education, appropriate limits on IP rights can directly encourage creativity and innovation. As already noted, the American

¹⁸⁶ See Story, *supra* note 16, at 134-38 (discussing costs of proprietary computer software and books).

¹⁸⁷ 17 U.S.C. § 1201.

¹⁸⁸ *Id.* § 1201(a)(1).

¹⁸⁹ *Id.* § 1201(b)(1).

¹⁹⁰ 17 U.S.C. § 109(a) (providing that one who legitimately owns a particular copy of a work may “sell or otherwise dispose of” it).

¹⁹¹ Although the statute does not prohibit circumvention of controls on uses of already-accessible works—only the provision of devices that do so—the absence of devices to circumvent controls on use will, over time, make such uses more difficult.

¹⁹² See *supra* notes 141-50 and accompanying text.

¹⁹³ Gasaway, *supra* note 16, at 301 (describing various effects of pay-for-view on libraries and users). See *id.* (“While libraries and entities that fund these libraries could provide sufficient funding so that access to pay-for-view materials is not problematic for any user, the reality in times of increasing information and decreasing library budgets means that universal access is unlikely to occur. Therefore, it is very likely that some individuals will be able to fund directly their own access to this pay-for-view material, but many others will have to rely on whatever access a library can provide.”).

¹⁹⁴ 17 U.S.C. § 107(4) (considering “the effect of the use on the market for or value of the copyrighted work”); TRIPS arts. 13, 30 (stating that limitations must be confined to cases “which do not conflict with a normal exploitation of the [copyright or patent] and do not unreasonably prejudice the legitimate interests of the [IP right] holder”).

copyright fair-use provision, with its consideration of the “transformative” nature of a use, encourages further creation. So might the bolstering of the ability to use patented works to evaluate them or make significant improvements on them—either through a fair-use provision similar to that in U.S. copyright law, or through strengthened exceptions for “experimental use.” The latter exception is quite narrow in American case law, withholding protection not just from the user who “invents around” the patent and offers a competing improved product for sale, but from any user with “a commercial motive, regardless of how remote the infringement is from realization of that motive.”¹⁹⁵ By contrast, in European patent law “experimentation on an invention is allowed for commercial purposes as well” if they do not involve immediately offering a competing product: for example, “[f]inding out more information about a product,” its uses, or “its possible side-effects and other consequences of its use.”¹⁹⁶ If such flexibility is already available or becomes available through changes or clarifications in law, and is used by developing countries, it can help “create a favorable context for innovation.”¹⁹⁷

4. Limitations and other provisions for technology transfer. In between the ultimate goal of empowering the creativity of poor people and the immediate need to provide essentials such as food and life-saving medicines lies the task of transferring advanced but usable technology and helping poor societies to use it. Vatican statements on development and international trade emphasize this component, stating for example that “[t]he new goods derived from progress in science and technology are key to world trade integration. Improved technology and know-how transfer from the developed countries is necessary so the less-developed countries can catch up and gain international trade competitiveness.”¹⁹⁸ Insufficient technology transfer and implementation assistance by developed nations—and the lack of any enforceable obligations to provide them—have been major reasons why the TRIPS agreement has failed to provide developing nations with the benefits they were promised in return for increased IP protection.¹⁹⁹ Again, in encouraging technology transfer, Catholic thought would call for substantial reliance on IP-protected investment and on voluntary provision of technology and assistance for free or at low prices. But when these do not work to transfer important technologies, other measures such as compulsory licenses may be warranted²⁰⁰ and are not ruled out by Catholic thought.

5. Traditional knowledge. Finally comes the issue of traditional knowledge in poor societies, whose protection raises at least several complications. First, this issue

¹⁹⁵ O’Rourke, *supra* note 162, at 1194, n.70 (quoting *Roche Prod. v. Bolar Pharmaceutical Co.*, 733 F.2d 858, 858-63 (Fed. Cir. 1984) (“[T]he defense does not permit ‘unlicensed experiments conducted with a view to the adaptation of the patented invention to the experimenter’s business,’ as opposed to experiments conducted ‘for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry.’”))

¹⁹⁶ Correa, *supra* note 114, at 47.

¹⁹⁷ *Id.* at 46.

¹⁹⁸ Martin 2005 Address, *supra* note 24.

¹⁹⁹ See, e.g., Finger, in *POOR PEOPLE’S KNOWLEDGE*, *supra* note 6, at 4 (“[For developing nations] to pass and enforce [strengthened IP laws] is a bound obligation; however, the implementation assistance and the impact on investment and innovation are not . . . [TRIPS] provides no mechanism to ensure the benefits for developing countries that the [developing nations’] negotiators alleged would follow.”).

²⁰⁰ See Correa, *supra* note 114, at 43 (noting that the U.S. has relied on compulsory licenses for government uses “in many cases . . . in order to get access to critical technologies”).

exemplifies the fact that poor people are creators as well as users. Thus, while compensation for the use of their knowledge will increase the cost of use—thereby increasing the cost of inputs to potentially important products such as drugs drawn from traditional knowledge—compensation will also clearly benefit the poor. Assuming therefore that some compensation is generally appropriate, the second complication is that indigenous knowledge may not fit within the premise and parameters of modern intellectual property laws. Traditional artistic crafts or music can qualify as copyrightable expression, and some refinements of traditional useful processes or substances might qualify for protection under patent or industrial-property laws.²⁰¹ But in many instances, indigenous knowledge falls outside the IP categories familiar in developed nations. For example, indigenous knowledge may be too close to a simple product or process of nature rather than an artificial improvement; it may have developed from communal evolution rather than individual authorship or inventorship; it may have been passed down orally rather than fixed in a tangible form; or its duration may have exceeded the bounds of IP laws.²⁰² These problems stem largely from the disconnect between communal methods of creation and ownership and the individual-oriented focus of Western IP laws.²⁰³ If the needs of poor people around the world are to be taken seriously, more communal forms of property in indigenous societies deserve respect and protection. As the *Compendium* of Catholic social doctrine recognizes, such property “has such a profound impact on the economic, cultural, and political life of these peoples that it constitutes a fundamental element of their survival and well-being.”²⁰⁴ Such considerations have prompted the creation of distinctive forms of protection and compensation for indigenous knowledge under national laws, regional agreements, and the 1993 Convention on Biological Diversity.²⁰⁵

The third complication, however, is that indigenous people disagree among themselves on whether to open their traditional knowledge and culture to globalized markets: for example, on whether knowledge regarded as “sacred” can be made the subject of an economic exchange.²⁰⁶ This concern certainly calls for sensitive consideration of matters such as how to use such knowledge, how to negotiate with differing stakeholders in the indigenous group, and what benefits to provide the group in

²⁰¹ Such as the instances of successful IP protection cataloged by Public Interest Intellectual Property Advisors, *supra* note 121; and Light Years IP, *supra* note 122 (discussing the “intangible value” in IP assets of developing countries); See generally POOR PEOPLE’S KNOWLEDGE, *supra* note 6.

²⁰² For discussion of such problems, see, e.g., Paul N. Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 791-99 (1999).

²⁰³ *Id.* at 794 (“Intellectual property laws reflect a bias in favor of individuals who are said to own rights in the protected works In traditional societies, ownership refers to the rights of all members of the community in subject-matter originally acquired by ancestors which cannot be transferred unilaterally by any member of the group, including the head leader.”).

²⁰⁴ COMPENDIUM, *supra* note 31, § 180, at 78. Likewise, John Paul II emphasized that in economic development policy “there must be complete respect for the identity of each people, with its own historical and cultural characteristics.” SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶ 33, at 411.

²⁰⁵ Kuruk, *supra* note 202, at 788-849 (cataloging varieties of legal protection for folklore); Convention on Biological Diversity, available at <http://www.biodiv.org/default.shtml>.

²⁰⁶ See, e.g., Finger, *Introduction and Overview*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 6, at 26-27 (noting dispute between young and old members of tribe in India over commercial use of medicinal plant).

addition to or instead of compensation.²⁰⁷ In the end, however, Catholic thought comes down on the side of encouraging traditional societies to enter the global economy rather than remain isolated from it. John Paul II speaks of bringing the poor into the “circle of exchange.”²⁰⁸ Likewise, the *Compendium* argues for “an awareness of the fact that [traditional communal property] is destined to evolve. If actions were taken only to preserve its present form, there would be the risk of tying to the past and therefore compromising it.”²⁰⁹ One leading commentator on the preferential option for the poor, Fr. Donal Dorr, has suggested that John Paul II’s emphasis on encouraging human productivity may be too “anthropocentric” and insufficiently “ecocentric”: placing too much faith in “modern technology and scientific achievement” and their ability “to solve the major problems of development.”²¹⁰ But the Pope’s approach—which, as Dorr acknowledges, does assert important limits on humans’ freedom to dominate the earth²¹¹—seems realistic insofar as it recognizes global markets as a reality that cannot be avoided. As the World Bank’s publication on *Poor People’s Knowledge* puts it, “an intangible cultural asset will be preserved only if the lifestyle embodying it provides reasonable economic prospects,” and thus “commercialization of certain aspects of intangible cultural property can contribute to the preservation of cultural heritage as a whole.”²¹²

IV. Conclusion: What Does the Preferential Option Contribute to the Debate?

This symposium’s central question—how to interpret the preferential option for the poor—implicates the controversies among Catholic thinkers over what scope of private property rights and market transactions will best help and empower the poor. Since similar debates rage outside the Catholic tradition, the question arises whether Catholic thought offers any distinctive contribution to the controversy or simply replays it. I have argued that in the Catholic debate over how to help and empower the poor, both sides—market proponents and market skeptics—should support intellectual property rights but also support significant limitations on those rights. Lest I be accused of evading the symposium’s central questions, let me suggest, drawing on this discussion of intellectual property, several ways by which the Catholic doctrine of the preferential option can contribute to the analysis and alleviation of poverty.

The first contribution is simply to provide motivation. Catholic and other Christian thought about the role of faith in the world rests in powerful ideas and experiences concerning God’s love, which in the Christian view flows to each of us and then through us to others. This vision can motivate believers to make significant sacrifices in order to help and empower those in need: to practice solidarity by sacrificing

²⁰⁷ See, e.g., Kuruk, *supra* note 202, at 845-47, n. 553-58 (listing various means of compensation or other benefits).

²⁰⁸ CENTESIMUS ANNUS, *supra* note 26, ¶ 34, at 486.

²⁰⁹ COMPENDIUM, *supra* note 31, § 180, at 78.

²¹⁰ DORR, *supra* note 81, at 348.

²¹¹ *Id.* at 348-49 (quoting CENTESIMUS ANNUS, *supra* note 26, ¶ 37, at 489).

²¹² Finger, *Introduction and Overview*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 6, at 27; See *id.* at 4 (“no traditional craft skill can be sustained unless it has a viable market”).

profits, power, or comfort to serve others.²¹³ Catholic thought understands the “all-consuming desire” for profits and power at the expense of others as sin—a social sin, perpetuated by people locked into structures that push them to exploit²¹⁴—and thus it prescribes that solidarity with others can only come about through “conversion,” a “change of behavior or mentality” based on an awareness that every neighbor bears the “living image of God the Father.”²¹⁵ The power of religious vision to motivate sacrifice in the face of obstacles is shared by other religious groups; Christian and non-Christian, as well as the non-religious, can likewise practice sympathy, commitment, and solidarity. But the Catholic Church, with its deep roots among needy populations in both developed and developing nations,²¹⁶ occupies an especially important role in providing opportunities to work in tandem with and for the poor.

For Catholics, explication of the preferential option provides not only motivation but also guidance: a framework for thought about how to address the complex and seemingly intractable problems of poverty. This likewise is no small contribution, given the numbers of Catholics living, and occupying positions of responsibility, in both developed and developing nations.²¹⁷

But what guidance does the preferential option for the poor offer society as a whole? Catholic thought generally claims to be comprehensible and persuasive to people of good will outside the faith. Can it make such contributions here, and if so how? Let me suggest a few contributions, drawn from the analysis of intellectual property issues in this paper. First, Catholic thought insists that economic, social, and legal analysis must extend beyond questions of production and efficiency to questions of distribution and empowerment for all. This itself offers a distinctive—not unique, but distinctive—perspective on intellectual property, where scholarship and policy has tended to focus on how to maximize the production of information or allocate it efficiently. Second, on the question how to empower people, Catholic thought offers a distinctive emphasis on a civil society with roles not only for the state and the market, but also for intermediate organizations distinct from either. As I have argued, this vision harmonizes with an approach treating IP as an important, but “limited[,] proprietary entitlement” designed not just to foster production and dissemination of information and innovation, but also to nourish a diversity of sources of such production.²¹⁸

²¹³ See *supra* notes 40-50 and accompanying text (discussing Catholic social teachings calling for such sacrifices).

²¹⁴ SOLLICITUDO REI SOCIALIS, *supra* note 27, ¶¶ 36-37, at 413-14.

²¹⁵ *Id.*, ¶¶ 38, 40, at 415, 417.

²¹⁶ See PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY 89-92, 194-98 (2002) (describing projected growth in Catholicism in developing nations in between now and 2050).

²¹⁷ In 2000, the Catholic percentage of the population was 90 percent in Central America, 87 percent in South America, and 16 percent—and growing—in Africa. See *Chart: World Population of Catholics*, available at http://www.beliefnet.com/story/164/story_16421_1.html; see also John Thavis, *the numbers game: Stats give picture of John Paul's pontificate*, CATHOLIC NEWS SERVICE, May 5, 2006, <http://www.catholicnews.com/data/stories/cns/0602615.htm> (noting that Africa's population went from 12 percent Catholic to 17 percent from 1978 to 2004).

²¹⁸ Netanel, *supra* note 91, at 288, 347; see *supra* notes 91-99, 153 and accompanying text (describing overlaps between Netanel's copyright theory and Catholic social thought's themes).

Finally, Catholic thought insists that the very ideals and affirmations that ground private property rights—human dignity and creativity and the importance of empowerment for all people—also provide guidance on how those rights should be limited. That guidance of course leaves numerous questions unresolved: to apply John Paul II’s words, “[t]he Church has no models to present”²¹⁹ for specific doctrines of intellectual property law. But the Catholic vision for empowering the poor, I have argued, should orient us to appreciate the need both for recognizing intellectual property rights and for limiting them.

²¹⁹ CENTESIMUS ANNUS, *supra* note 26, ¶ 43, at 494.