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## Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property

### Keywords

Intellectual Property Law, International Trade, World Trade Organization

# Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property

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## I. INTRODUCTION

The recently concluded round of multilateral trade negotiations accomplished some significant changes in the multilateral trading system.<sup>1</sup> As with its predecessor agreements, the Uruguay Round agreement is expected to boost the world economy as a result of a negotiated reduction in tariffs. Under the new agreement, nations made commitments to reduce

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1. The Uruguay Round of multilateral trade negotiations is the eighth round of world trade negotiations since the inception of the multilateral trading system established by the General Agreement on Tariffs and Trade (GATT) in 1947. As part of the institutional framework established by the Bretton Woods system after World War II, the primary purpose of the GATT was to limit government measures which distorted international trade flows. This goal was important for both political and economic reasons. Restrictive or unfair trade policies by nations, it was felt, increased the incidence of protective measures by other sovereign nations which in turn led to retaliatory practices with widespread repercussions. Economic conflict also engendered political hostilities which had devastating effects on the world economy. The GATT system was thus the result of what the victor nations of World War II felt was advantageous for worldwide economic and political stability. Today, good trade relationships between sovereign nations is still closely linked with political cooperation. See *A Gift From the Cold War: Bretton Woods Revisited*, THE ECONOMIST, July 9, 1994, at 4, 4.

tariff rates,<sup>2</sup> agreed on clearer rules to govern unfair trade practices,<sup>3</sup> and established a unified dispute resolution system.<sup>4</sup> Most significantly, the Uruguay Round established a new international institution, the World Trade Organization (WTO), to administer and oversee the new body of trade rules.<sup>5</sup> Nations ratifying the WTO Charter automatically become subject to the three annexed agreements<sup>6</sup> which constitute the new GATT. By offering a "single package" GATT agreement, the WTO Charter ensures that countries wishing to join the multilateral trading system will be bound by all the agreements, thus eliminating to a large extent, the problem of free riding.<sup>7</sup>

As a whole, the "new GATT" is not as much "new" as it is "improved." There is a clear commitment under the WTO charter to continue to follow and uphold prior GATT decisions, practices, and proce-

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2. The Uruguay Round, it is projected, will reduce tariffs by 24% and 38% for developed and developing countries respectively. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXT 6* (3RD ED. 1995).

3. The Uruguay round initially was not expected to deal with the Antidumping code established under the Tokyo Round in 1979. However, dissatisfaction with the 1979 Code led to a new compromise code, the Uruguay Round Antidumping Agreement. See AGREEMENT ON IMPLEMENTATION OF ART. VI OF GATT 1994; URUGUAY ROUND AGREEMENT ACT, PUB. L. No. 103-465, 108 STAT. 4809 (1994). See also JACKSON, *supra* note 2, at 685.

4. Dispute resolution in international trade is regulated generally by GATT Art. XXIII. See 61 Stat. A3, 1366, T.I.A.S. 1700, 55-61 U.N.T.S. Under the Uruguay round, a Dispute Settlement Understanding was negotiated. See AGREEMENT ESTABLISHING THE MULTINATIONAL TRADE ORGANIZATION (WORLD TRADE ORGANIZATION) [hereinafter WTO CHARTER], THE FINAL ACT OF THE MULTINATIONAL TRADE NEGOTIATIONS (THE URUGUAY ROUND), PART II, ANNEX 2, SEC. 26.1, 26.2 [hereinafter *Uruguay Round*]. The Understanding significantly changes the difficult and frustrating dispute resolution process under the old GATT system. To reflect the new resolve for strong and effective rules for dispute resolution, Art. III of the WTO Agreement provides that the administration of the Rules and Procedures Governing the Settlement of Disputes is one of the primary purposes of the Organization. See *Uruguay Round*, Part II, Annex 2, Sec.3. Further, the Dispute Settlement Understanding clearly states that dispute settlement is a core part of the new GATT system. *Id.* at Part II, Art. III, Sec. 3.

5. The WTO is a full fledged international institution with legal personality. It is responsible for the coordination and administration of all the texts which make up the Uruguay Round Agreement. The Charter establishes a Secretariat to be headed by a Director-General who will be assisted by several Assistant Director-Generals. The Charter establishes a budget and gives the WTO authority to work with other international institutions, including non-governmental organizations, to promote the aims and objectives of the GATT. See *id.* at Art. V-VIII.

6. There are four annexes to the WTO Charter, but only three are mandatory for all contracting parties. The first annex consists of the multilateral agreements made up of GATT 1994, the General Agreement on Trade in Services and the agreement on Trade Related Aspects of Intellectual Property Rights. The second annex is the Dispute Settlement Rules and the third annex the Trade Policy Review Mechanism. See WTO Charter, *supra* note 4.

7. The problem of free riding had been a consistent complaint under the old GATT, particularly because ratification of side agreements was not required of all the contracting parties. Since the most favored nation (MFN) principle required the extension of concessions to all other GATT contracting parties, some countries were able to gain benefits without attendant costs in concessions. See JACKSON ET AL., *supra* note 2, at 383-384.

dures.<sup>8</sup> Old rules have been strengthened and new commitments have been secured to ensure that the world economy benefits from the fruits which free trade promises. Only months after its implementation, the Uruguay Round is already beginning to have its intended effect: world trade is expected to grow 8.9 percent in 1995 and continue into 1996 at 7.8 percent.<sup>9</sup>

Beyond the institutional changes which the Uruguay Round accomplished, and even beyond the economic benefits which the new multilateral agreement offers most countries, the single most important accomplishment of the Uruguay Round is the extension of trade rules to new subject matters. Prior to the Round, the multilateral trade system dealt primarily with trade in manufactured goods. Under the auspices of the Uruguay Round, two additional subject matters were added to the jurisdiction of the multilateral trading system: intellectual property and trade in services. These two new areas resulted in an agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>10</sup> and the General Agreement on Trade in Services (GATS),<sup>11</sup> both of which were negotiated as part of the Uruguay Round. These three agreements, the GATT, GATS, and TRIPS form the core of the new multilateral trading system to be administered by the WTO.

This article examines the implications of the TRIPS agreement in the context of intellectual property issues in Third World countries.<sup>12</sup> It focuses specifically on the impact of the new internationalization of intellectual property on creativity in Third World countries. The broad thesis is that the nature of protection of intellectual goods proceeds apace with the rate and development of capitalist relations in a society. Rather than focusing on the use of TRIPS as a means of combatting international piracy,<sup>13</sup> or as a tool to secure foreign compliance with minimum stan-

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8. See WTO Charter, *supra* note 4, at Art. XVI:1.

9. See *Economy: Slower OECD Growth May Affect Developing Nations*, Inter Press Service, June 20, 1995, available in LEXIS, NEWS Library, Curnws File.

10. TRIPS Agreement, 33 I.L.M. 81 (1994).

11. General Agreement for Trade in Services (GATS), Dec. 15, 1993, 33 I.L.M. 44 (1994).

12. Although aware that the term "Third World" is no longer deemed appropriate for use, I opted to use this term because the alternative term, "developing countries," typically denotes sovereign states and is not necessarily inclusive of indigenous peoples. The subjects of this paper include indigenous groups, such as Native Americans and Aborigines, pre-modern societies, such as Israel in Biblical times, as well as developing countries such as China and Brazil. The common denominator among those subjects is the existence of traditional organizational norms upon which the larger suprastructure of the modern state is superimposed.

13. It is no secret that the main impetus behind the TRIPS agreement is to secure enforcement of U.S. intellectual property rights abroad. Very early on in the Uruguay negotiations, intellectual property was identified as a "high priority" for the United States. The number of articles on this issue are voluminous. For a good overview, see, e.g., Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991); Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 COMP. & HIGH

dards of intellectual property protection,<sup>14</sup> this article instead examines the implications of TRIPS as a form of *passive* coercion; that is, the requirement that Third World societies establish particular forms of protection for intellectual goods as a condition to membership in the new multilateral trading system. This requirement must be met despite the fact that these forms may be both incompatible with cultural institutions within these societies and invalid under local law and custom. The TRIPS agreement thus raises a significant point of conflict between developing country governments and traditional societies which are constituents of these countries. The conflict is one which implicates the discipline of international law and human rights because the TRIPS agreement, in this regard, impinges upon the freedom of a collective to observe, develop and preserve the underlying values of its society as expressed through law. The state has conflicting obligations to these societies and to the international community under the TRIPS agreement. The article then examines what contemporary forms of intellectual property protection suggest about creativity in the Third World. Finally, the article examines the relationship between the "global model" of intellectual property protection and the underlying values and norms expressed in the protection of creativity in the Third World.

The central claim is that all forms of creative expression—mechanical, literary, or artistic—are value driven. The nature and variety of goods produced in any society is, initially, a function of needs as the popular adage "necessity is the mother of invention" attests. More important, however, the laws which protect these inventions — laws which define what is to be protected and how that protection is to be effected — reflect the underlying values of a society. Intellectual property law, like other law "is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. *Law is the principle institution through which a society can assert its values.*"<sup>15</sup>

Further, the selection of what goods to protect and the nature of such protection is shaped by values and needs in accordance with a society's perceptions of what constitutes "the good life." Nowhere is this more reflected than in the Anglo-American philosophy of copyright protection which seeks to balance private reward and encouragement of creative activity with public benefit of access to a goodly supply of literary works. In Macauley's celebrated 1841 speech in the English House of

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TECH. L. J. 335 (1992).

14. For articles discussing enforcement, see Note, Willard A. Stanbuck, *International Intellectual Property Protection: An Integrated Solution To The Inadequate Protection Problem*, 29 VA. J. INT'L L. 517 (1989); R. Michael Gadbow, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223 (1989).

15. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 5 (1975) (emphasis added).

Commons, the need for copyright was expressed as a matter of value and perceptions of what is needed for a good life:

The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures . . . but it is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of renumeration is by means of copyright.<sup>16</sup>

In the United States, Thomas Jefferson's famed letter to Isaac McPherson on the protection of intellectual property reveals a similar understanding of the incidents of the good life and society. In his attempt to balance the competing values implicated by a proprietary theory of intellectual property protection, Jefferson noted:

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature [w]hen she made them like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot in nature be subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done according to the will and convenience of society. . . .<sup>17</sup>

The idea that copyright, as well as other forms of exclusive privileges, was a necessary part of the good society reflects values such as liberty, property, private enterprise, accumulation of capital and rapid consumption; in a word, values that nurture capitalism. In the celebrated *Slaughter-House* cases<sup>18</sup> a majority of the court justified a monopoly privilege on the grounds that in Great Britain and the United States, these governments,

. . . representing the people . . . have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges - privileges denied to other citizens — privileges which come within any just definition of the word monopoly . . . ; the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to suc-

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16. MACAULEY, COPYRIGHT, 195, 197 (Trevelyan ed. 1879), *quoted in* Zechariah Chafee, *Reflections on Copyright Law*, 45 COLUMBIA L. REV. 503, 507 (1945).

17. Reproduced in F.D. Prager, *A History of Intellectual Property From 1545 to 1787*, 26 J. PATENT OFFICE SOC. 711, 759, 760 (1944).

18. 16 Wall (83 U.S.) 36, (1872).

cess in that way.<sup>19</sup>

These values resonate in American legal history, and continue to be reinforced by modern courts. To fully understand how deeply entrenched in the Western European and American vision of the good life intellectual property is, and how the forms of protection reflect this, particularly in the area of copyright, it is important to understand the profound intellectual, social and political influence and transformation brought about by literacy in Europe.<sup>20</sup>

In Gibben's *The History of The Rise and Fall of The Roman Empire*,<sup>21</sup> the importance of literacy was described in the following way,

... the use of letters is the principal circumstance that distinguishes a civilized people from a herd of savages incapable of knowledge or reflection. Without that artificial help, the human memory soon dissipates or corrupts the ideas entrusted to her charge; and the nobler faculties of the mind, no longer supplied with models or with materials, gradually forget their powers; the judgment becomes feeble and lethargic, the imagination languid or irregular. Fully to apprehend this important truth, let us attempt, in an improved society, to calculate the immense distance between the man of learning and illiterate peasant. The former, by reading and reflection, multiplies his own experience, and lives in distant ages and remote countries; whilst the latter, rooted to a single spot, and confined to a few years of existence, surpasses, but very little, his fellow-labourer the ox in the exercise of his mental faculties. The same, and even a greater, difference will be found between nations than between individuals; and we may safely pronounce, that without some species of writing, no people has ever preserved the faithful annals of their history, ever made considerable progress in the abstract sciences, or ever possessed, in any tolerable degree of perfection, the useable and agreeable arts of life.<sup>22</sup>

The powerful appeal of literacy, and the vision of the good life it wrought, was felt all over the world as European expansionism took place in Asia, in Africa, and in the Americas. The legitimization of this vision of the good life found a home in Darwin's writings on evolution. Races and cultures were repeatedly classified in a hierarchical fashion, setting the stage for the series of historical events such as slavery and colonialism. Historians Vail and White explain the intellectual setting in the following:

From the mid-1850s onwards, however, an important shift of emphasis in writings about race began to occur. By then it was becoming clear that ethnology's preoccupation with finding physical differences

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19. *Id.* at 66.

20. See generally, LEROY VAIL AND LANDEG WHITE, *POWER AND THE PRAISE POEM, SOUTHERN AFRICAN VOICES IN HISTORY* (1993).

21. EDWARD GIBBENS, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (Womersley ed. 1994).

22. *Id.* at 235.



between the races not only encouraged notions of polygenesis offensive to faithful christians but, equally damaging, the study was yielding conclusions of highly doubtful scientific validity. As a consequence, racial theorists began to combine in a new synthesis earlier romantic preoccupations with the uniqueness of individual national cultures with the contemporary pride in technological progress arising from literacy and education. The earlier racism based on calibration thus yielded to a new racism based on cultural distinctions perceived as determined by and linked to racial identity; that races with a common origin could possess fundamentally different cultures and ways of thinking was soon explained in terms of one of the major organizing ideas of the last half of the nineteenth century, evolutionism. The findings of the new science of archeology had transformed the Western perception of humankind's position in Time from [B]iblical brevity to geological expansiveness. Human history thus could be thought of as a gradual evolutionary development through a set of stages. By being situated within the matrix of evolutionism, the old static hierarchy of races was given both a temporal dimension and a history. Some races were different from others because they had experienced greater cultural evolution from human-kind's common origin than the others. Important cultural distinctions between races arose from their occupying different places along the path of dynamic evolutionary development, with technological advances — such as Gutenberg's invention of movable type — central to the accumulated differences.<sup>23</sup>

This intellectual mood was reflected in some literature which, in linking invention to culture, yielded to the temptation to classify in hierarchical fashion:

The Mediterranean race is the most mechanical of all, the blue-eyed and the brown-eyed variety must each settle for itself shall bear the palm. The Semite is much less so. The mongolian is, perhaps, more ingenious with his hands. The Africans and Papuans are more mechanical than the brown Polynesians; the Eskimo than the red Indians; and the Australians are the least clever of all. In each several division of humanity there are smaller centres of invention, owing both to natural ingenuity and to natural resources. In the higher walks of language, art, social structures, literature, science and philosophy, the peoples of Europe and Asia will need a new distribution for each classic concept. The Hebrew has never been excelled for sublime conceptions on religious topics, the Egyptian invented chronicles, the Greek perfected harmony and portraiture in art, the Romans laid the foundations for jurisprudence.<sup>24</sup>

The modern debate over intellectual property protection in developing countries has failed to take account of cultural differences which affect the understanding of what constitutes property or what may right-

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23. VAIL & WHITE, *supra* note 20, at 3.

24. OTIS T. MASON, *THE ORIGINS OF INVENTION: A STUDY OF INDUSTRY AMONG PRIMITIVE PEOPLES* 31 (1st ed. 1895) (1966).

fully be the subject of private ownership. While avoiding the ethnological categorizations of the nineteenth century literature, it is important for the modern debate to link intellectual property laws to the social realities of societies in developing countries. Not only may this yield more effective approaches to securing enforcement of intellectual property rights in developing countries, it also presents the possibility that western based intellectual property laws may have some real impact on industrial innovative activity in these countries, thus contributing to the economic welfare of the Third World. However, as this article argues, culture may influence what is created but it is those values, rooted in a conception of a good society, that determine how and what kind of intellectual property laws societies enact.

## II. INTERNATIONALIZATION AND THE INTERNATIONAL DIMENSIONS OF INTELLECTUAL PROPERTY PROTECTION

Central to Anglo-American intellectual property law<sup>25</sup> is the conviction that a system which rewards creativity by granting monopolies over the use, possession, and disposition of the objects of intellectual endeavor is a necessary prerequisite for creativity and innovation.<sup>26</sup> At the heart of

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25. The constitutional authority for intellectual property law in the United States is premised on the principle of national progress. Art. 1, § 8, cl. 8 of the U.S. Constitution gives Congress legislative power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8. Out of this mandate, several forms of protection were crafted for the different expressions of creativity. Patents protect "new and useful" inventions, 35 U.S.C. 101 (1981); copyright protects "original works of authorship" primarily of a literary and artistic nature, 17 U.S.C. 102(a) (1994); and trademarks secure a monopoly right to use a mark or appellation which identifies a product or a service (e.g. Exxon or Coca-Cola), 15 U.S.C. 1051 (1991); and trade secrets protects information such as a "formula, pattern, compilation, program, device, method, technique or process," Uniform Trade Secrets Act 1(4) (1985), that has acquired independent market value and which the owner has made reasonable efforts to keep secret. *Id.*

26. Creativity and innovation are usually used interchangeably in intellectual property literature. I use the terms distinctly because in the last few years they have come to reflect different strands of philosophies underlying intellectual property, particularly in the field of copyright. Creativity, like all esoteric terms, is difficult to define succinctly. Simply defined as the act of making something, creativity is, in one sense, the direct object of continental intellectual property systems. Under French copyright law, for example, the authors right ("droit d'auteur") was conceptualized as a natural right, protecting the very essence of the personality of the creator and existing independent of a positive grant through statutory law. As a result, the French copyright system protects a wide variety of rights which include "personality" rights, i.e., rights which inhere in the very nature of creating. These rights are referred to as moral rights and they come in three basic forms: the right to disclose the work to the world (right of publication), the right to be recognized as author (right of paternity), and the right to prevent unauthorized changes in the work (the right of integrity). For a general overview of moral rights in the context of the Berne Convention, see SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 5-6 (1987). The philosophy behind these rights is, in one regard, theological; Just as God created man and thus man is both a reflection and the embodiment of God (See *Genesis* 1: 26,27), so also the work of a human creator reflects the personality of that creator and

the matter is a long-held economic theory that explains human behavior as a series of responses to incentives.<sup>27</sup> Underlying this theory is the assumption that rational human beings make choices which will maximize their individual welfare.<sup>28</sup> Property rights, including intellectual property

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embodies a part of that creator as well. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property In Revolutionary France and America*, 64 TUL. L. REV. 991 (1990) (arguing that the differences between the French and American copyright philosophies have been overstated).

A creativity element (Schöpfungshöhe) also exists in German copyright law. Unlike its French counterpart however, Schöpfungshöhe is not linked to individuality. Rather, it is a practical requirement that "A work must . . . rise above craftsmanship, above the average, . . ." to reflect a "minimum level of intellectual-creative achievement" which is the "quantitative aspect" of individuality. Gerhard Schricker, *Farewell to the "Level of Creativity" (Schöpfungshöhe) in German Copyright Law?* in 26 INT'L. REV. OF IND. PROP. & COPYRIGHT L. 41, 42 (1995). Schöpfungshöhe is thus deployed to help determine the satisfaction of the requirement, under German law, that a copyrightable work be a "personal intellectual creation." *Id.*

Innovation, on the other hand reflects more of the utilitarian vision of Anglo-American intellectual property systems. In both England and the United States, intellectual property was regarded solely as a creation of statute. See AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* (photo. reprint 1973) (1960). While a natural rights theory had existed in England prior to the passage of the Statute of Anne in 1709, the House of Lords decidedly quashed this notion in the case of *Donaldson v. Beckett*, 98 Eng. Rep. 257 (1774), deciding that the copyright was a creation of statute, and that the statutory grant superseded any prior conception of the right. In this philosophical framework, intellectual property is a means to an end. The costs of maintaining a monopoly system would be well worth the advancement in science and the useful arts, and would contribute to public welfare by encouraging dissemination of new knowledge and inventions. See Roger E. Meiners & Robert J. Staaf, *Patents, Copyrights, and Trademarks: Property or Monopoly?* 13 Harv. J.L. & Pub. Pol'y 911, 912-913 (1991). As a result, the goal of the intellectual property system is to balance these interests in an efficient framework. See S.M. Besen & L.J. Raskind, 5 JOURNAL OF ECONOMIC PERSPECTIVES 1, 5 (1991). For an international perspective, see Gunnar W.G. Karnell, *The Berne Convention Between Authors' Rights and Copyright Economics- An International Dilemma*, 26(1) IIC 193 (1995).

Apart from a general theme of individuality versus utilitarianism, another dimension to distinguishing creativity from innovation is the commercial impetus that has come to be associated with innovation. The deployment of large sums of capital for research and development stems primarily from a desire to exploit a felt need in the market. See Stephen J. Kline and Nathan Rosenberg, *An Overview of Innovation*, in *THE POSITIVE SUM STRATEGY* (N. Rosenberg and R. Landau, eds., 1986) (explaining innovation as the result of the right combination of commercial opportunities and scientific discoveries/progress). The fear of free riding from competitors who have not invested the time and resources needed to invent and market a new product is thus another traditional justification for intellectual property monopolies, particularly the patent system. It would be helpful if one could bracket creativity as an element of copyright and innovation as the function of patents, but crossbreeds in new technologies, such as computer programs and digital technologies which currently are protected under Copyright law, make this unfeasible.

27. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* vii (1987); See also Comment, *An Economic View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 PEPP. L. REV. 127 (1993); Richard T. Rapp and Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. OF WORLD TRADE 75 (1990); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993).

28. For a leading work on economic analysis of law, including property law, see RICH-

rights,<sup>29</sup> by securing monopoly privileges, allow individuals to make welfare maximizing choices without the fear of free-riding by members of the public.<sup>30</sup> In theory, the aggregate sum of individual welfare accrues to the national economy, impacting the level of national wealth and ensuring the efficient functioning of the marketplace of goods and technology which are, ultimately, the embodiments of creativity and innovation. In order to capture the aggregate gain of individual welfare, the ultimate goal of the intellectual property system must be to "maximize the benefits from creating additional works minus the losses sustained from limiting public access to the works, plus the costs of administering copyright protection."<sup>31</sup> The role of the courts is to police the system, and the rights claimed within it, to execute this purpose and maintain this efficient balance.<sup>32</sup>

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ARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, CHAP. 3 (2d ed. 1977). See also, David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 674 (1994). More specifically on the economics of the intellectual property system, see William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

29. An important theme to understand for the purposes of this article is the process by which intellectual goods become "propertized" in Anglo-American law, and in the western world in general. While a full examination is not possible within the confines of this article, what is important to note here is that the denial of a natural perpetual right in literary works, for example, led advocates of international copyright to substitute the natural rights basis of their cause with a property theory (see CLARK, *supra* note 26, at 26) which was another powerful concept in western law and, indeed, in western political systems. As early as 1765, William Blackstone had singled out property as a fundamental feature of human existence in civil society. See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1766). This conception of property was, however, limited to physical objects to which rights attended to. Where incorporeal objects such as rents were concerned, the physicalist conception of property rectified the rights in order to fit them into the dominant frame of thought. In American legal history, the changing meaning of the term "property" is associated with the rise of the modern state in the nineteenth century. Property was "dephysicalized" during this period to conform to the needs of the industrial society. An expanded idea of property was necessary to embrace new alliances and interests created by modernization. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY*, 3 (1992). In 1964, Charles Reich published the leading article on the dephysicalization of property, identifying government created jobs, licenses and income as "new property." See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). In the *Minnesota Rate Case*, the U.S. Supreme Court held that expected earning power, anything with exchange-value, could constitute a form of property. See *Chicago, M. & St.P.Ry. v. Minnesota*, 134 U.S. 418 (1890). Finally, in the celebrated case of *International News Service v. Associated Press*, 248 U.S. 215 (1918), the U.S. Supreme Court recognized copyright as a form of property: "news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news therefore, . . . it must be recognized as quasi property." *Id.* at 236. By 1942, the notion that copyrightable subject matter was property was firmly entrenched in the American judiciary. See, e.g., *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949 (2d Cir. 1942).

30. See JACKSON ET AL., *supra* note 2.

31. Gunnar W.G. Karnell, *supra* note 26, at 193.

32. *Id.*

The economic incentive theory has permeated the recent discourse on international intellectual property,<sup>33</sup> as indeed has the utilitarian conception of intellectual property laws.<sup>34</sup> International intellectual property has become, primarily, the mechanism for redressing trade deficits and for maintaining a competitive edge in global markets.<sup>35</sup> While international intellectual property protection has always secured market shares for holders of intellectual property rights,<sup>36</sup> the transformation of industrial economies into information economies has increased the stakes in the global dimensions of intellectual property rights.<sup>37</sup> As a result, the emphasis in this era has not been on patent laws which often take the credit for the rapid pace of western industrialization<sup>38</sup> but rather copyright laws which protect the expression of knowledge.

In an economic era defined by global information technologies,<sup>39</sup> a monopoly right in the fruits of information is indispensable for the generation of new capital and invaluable for maintaining a global competitive edge. Intellectual property under the TRIPS agreement is a means to this end. The agreement is primarily a reflection of the vulnerability of information-based economies to the demands of the market for pirated and counterfeit goods.<sup>40</sup> It is also a reflection of values which are integral to

33. *Id.* See also, Eric Wolfhard, *International Trade in Intellectual Property: The Emerging GATT Regime*, 49 *TORONTO FACULTY OF LAW REVIEW* 107 (1991) (arguing that the distinction between trade policy and intellectual property is an artificial one, and that economic conditions beyond the control of individual nation-states create an interdependence between trade and intellectual property).

34. See Gutterman, *supra* note 27.

35. Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 *LOV. L.A. INT'L & COMP. L.J.* 301 (1992). See also, Eric Wolfhard, *supra*, note 33.

36. See, e.g., C.V. Vaitsos, *The Revision of the International Patent System: Legal Considerations for a Third World Position*, 4 *WORLD DEVELOPMENT* 85-86 (1976); see also C.V. Vaitsos, *Patents Revisited: Their Function in Developing Countries*, 19 *INDIAN ECONOMIC J.* (1972);

"The patent system in developing countries has a predominantly negative effect and is devoid of significant benefits for these countries; virtually all owned by large foreign corporations, patents are used as a vehicle for achieving monopoly privileges . . ." *Id.*

Similarly, a study prepared in 1957 for the U.S. Senate Judiciary Committee concluded that the provisions of the international patent system " . . . it is evident, have altered the complexion of the patent grant from one designed primarily to stimulate domestic industry to one in which the foreign patentee has an increased chance of producing where he chooses while retaining his patent monopoly." *Id.*

37. See Moebes, *supra* note 35. See also R. Michael Gadbaw, *supra* note 14.

38. "As one looks back over the history of the [United States] he cannot, I think, escape the conclusion that the [patent] system has been a powerful force in our growth from an insignificant agricultural and trading federation to the most powerful industrial nation on earth. It is a force too powerful in what it has done, and in what it can still do, to be tampered with lightly." H.A. TOUMLIN JR., *PATENTS AND THE PUBLIC INTEREST* (1939).

39. See CARNOY ET AL., *THE NEW GLOBAL ECONOMY IN THE INFORMATION AGE* 6 (1993) (pointing out that the new international division of labor is based on the capacity to generate new knowledge and to apply it rapidly).

40. This market is the result of a combination of forces which include technological dependency of Third World countries, pervasive poverty which keeps "genuine" goods out

western post-modern, capitalist societies; values such as individual ownership, autonomy, economic theories about incentives, all of which are born out of particularized historical events such as, for example, the industrial revolution.

By the late eighteenth century in the United States, the combination of market forces expressed through commercial treaties with Europe, and the legal foundation already in place in favor of property rights and individual autonomy, together created a social system primed for the recognition of rights in a new form of "property." Things such as good will were assigned social and economic value in society and it was only a question of time before protection was extended to other forms of intangible goods. Whether the emphasis was placed on "rights," or "liberty," or "property," the socio-economic ethos was eminently receptive to the idea of proprietary interests in the fruits of creative endeavor. The impetus behind the TRIPS, an American initiative, is thus not to encourage creativity and innovation, but rather to protect a particular conception of property privileges across national borders.<sup>41</sup> The agreement, simply put, promotes national economic interests and social values in the legitimizing form of treaty law.

By *situating* intellectual property at the core of international trade regulation, by *making* intellectual property the subject of international trade rules, and by *premising* membership and participation in the multilateral trade system on the adoption of a global model of intellectual property protection, intellectual property law has, for the first time, been "internationalized." That is, intellectual property has adopted a universal mode which all countries must adopt in order to benefit from the re-ordered basis of the international economy.

It is important, before proceeding further, to distinguish between what in this article will be referred to as the "internationalization of intellectual property," and the international aspects of intellectual property protection. "Internationalization" refers to the universal mode or "global model" of intellectual property law made mandatory by the provisions of the TRIPS agreement. Under this model countries who previously did not offer protection for intellectual property in the forms recognized in European and American legal systems must now enact substantive laws to conform to this model. In addition, some countries must create entirely new structures, ranging from courts to copyright and patent offices, to administer these new laws. Finally, these countries must develop an intellectual property jurisprudence substantially similar to what currently exists in the United States and Europe in order to nurture the success of their new intellectual property laws.

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of reach for the vast majority of the population in these countries, the relative ease and low cost of counterfeiting, and the penetration of European and American cultural goods in these societies.

41. For good reading on intellectual property in the international trade system, see Wolfhard, *supra* note 33; Gadbow, *supra* note 14; Leaffer, *supra* note 13.

The international aspects of intellectual property protection, on the other hand, addresses the scope of international *protection* of intellectual goods. The focus here is on the nondiscriminatory treatment of foreign works. The Berne Convention for the Protection of Literary and Artistic Works<sup>42</sup> and the Universal Copyright Convention<sup>43</sup> are the principal international instruments for the international protection of copyright. The Paris Convention for the Protection of Industrial Property<sup>44</sup> regulates the international protection of patents. Each of these treaties is administered by international institutions affiliated with the U.N system.<sup>45</sup>

Some major differences between the internationalization of intellectual property and the international protection of intellectual property must be kept in mind. First, the former establishes substantive rules for the protection of intellectual property while the latter simply delineates a minimum floor or scope of protection for intellectual property. Put differently, the TRIPS agreement prescribes both what must be protected and how, while the Berne, UCC, and Paris Act focus more on elements of protection. All of the agreements establish minimum standards of protection; the TRIPS however raises the floor and provides more substantive rules as well as procedures for enforcement and sanctions. Second, the former is premised solely on economic considerations, while the latter incorporates elements of the natural rights philosophy, recognizing inherent value in the act of creating.<sup>46</sup> Third, the former is a condition for participation in multilateral trade relationships while the latter is not conditioned on anything, but rather is the product of a certain level of real consensus.<sup>47</sup> Non-membership in any of the treaties does not necessarily

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42. Berne Convention for the Protection of Literary and Artistic Works, Sept.9, 1886, *revised*, Paris (July 24, 1971), *reprinted in* American Intellectual Property Law Association, *Worldwide Protection of Intellectual Property* (1984) [hereinafter Berne Convention].

43. The Universal Copyright Convention of September 6, 1952, revised in Paris, July 24, 1971. Reproduced in NORDEMANN ET AL., *INTERNATIONAL COPYRIGHT: COMMENTARY* (1990).

44. The Paris Convention for the Protection of Industrial Property 1883, *revised*, Stockholm (1967), *reprinted in* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, *WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY* (1984) [hereinafter PARIS CONVENTION].

45. The Berne Convention and the Paris Convention are both administered by the World Intellectual Property Organization (WIPO). WIPO is an intergovernmental organization, established in 1967 as a successor institution to the United International Bureaux for the Protection of Intellectual Property (BIRPI). It became one of the specialized agencies of the United Nations in 1974. The United Nations Economic and Social Council (UNESCO), a U.N. agency, is responsible for administering the Universal Copyright Convention (UCC).

46. The Berne Convention, for example, protects moral rights which the TRIPS expressly excludes. Moral rights are rights which protect the relationship between an author and the work. "Any author, whether he writes, paints or composes, embodies some part of himself — his thoughts, ideas, sentiments and feelings — in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law . . .;" "[T]he author then enjoys an exclusive right by the sole act of creating." See RICKETSON, *supra* note 26 at 456; Andre Lucas and Robert Plaisant, *France*, in NIMMER AND GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* 10 (1988).

47. At least as between members who participated in its formation. For a detailed history reflecting the negotiation and compromise that resulted in the Berne Convention, see

result in political ostracism<sup>48</sup> nor denial of material benefits;<sup>49</sup> the goals of the latter may be accomplished through bilateral agreements, thus making the multilateral agreement unnecessary if a country deems that a bilateral approach is more feasible or more prudent for its well being.<sup>50</sup> The institution which implements the former, i.e. the World Trade Organization, may make substantive "law" as a result of the dispute resolution system it is charged with utilizing.<sup>51</sup> The institutions<sup>52</sup> which implement the latter, on the other hand, do not have any formal dispute resolution mandate and do not have independent authority to make law in the judicial sense. These institutions may only be involved, if at all, in dispute settlement at the request of two contracting parties. For the treaties administered by the World Intellectual Property Organization,<sup>53</sup> explicit provision is made for the jurisdiction of the International Court of Justice over conflicts involving the interpretation or application of the treaties.<sup>54</sup>

Finally, another important difference between the internationalization of intellectual property and the international aspects of intellectual property lies in the structure of the institutions which administer these treaties. Significant differences exist, both in terms of their scope of responsibility, in their processes of dispute settlement, and in the binding nature of their decisions. As mentioned earlier, one of the key functions of the WTO is dispute resolution.<sup>55</sup> With particular regards to intellectual property disputes, a Council for the TRIPS agreement was established under the WTO Charter.<sup>56</sup> The TRIPS Council is responsible for monitoring the operation of the TRIPS agreement and compliance by con-

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RICKETSON, *supra* note 26, at 233.

48. The U.S. for example, refused to join the Berne Convention for many years without any significant problems. Even its recent accession in 1989 is questionable in terms of full compliance with minimum Berne standards. See RICKETSON, *supra* note 26, at 233; J.C. Ginsburg & J.M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUMBIA-VLA J. L. & ARTS 1 (1988).

49. Except of course, for whatever was lost by the fact of nonmembership.

50. The U.S. and many other countries favored a bilateral approach for many years preceding the Berne. See RICKETSON, *supra* note 26, at 25-30. Bilateral agreements on intellectual property are still used today, in addition to the multilateral agreements. See, e.g., Memorandum of Understanding On The Protection of Intellectual Property, Jan. 17, 1992, 34 I.L.M. 676. For an insightful overview of these agreements, see William Alford, *Perspective on China: Pressuring the Pirate*, L.A. TIMES, Jan. 12, 1992, at M5.

51. See GATT, *supra* note 4, at Art. XXIII.

52. The World Intellectual Property Organization (WIPO) and the United Nations Economic and Scientific Organization (UNESCO) respectively.

53. See, STATES PARTIES TO THE CONVENTION ESTABLISHING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION AND THE TREATIES ADMINISTERED BY WIPO AND STATE MEMBERS OF THE GOVERNING BODIES AND COMMITTEES OF WIPO (Status on May 1, 1993), *WIPO Document 423(E)*.

54. Art. 33 of the Paris Act of the Berne Convention makes acceptance of the jurisdiction of the International Court of Justice optional by means of a reservation to that effect by a member country at the time of ratification or accession to the Convention. See *Berne Convention*, *supra* note 42, at Art. 33(2).

55. See WTO Charter, *supra* note 4.

56. See *id.*



tracting parties.<sup>57</sup> Disputes arising under the agreement are governed by the central dispute resolution process of the WTO.<sup>58</sup> Very briefly, under this process, disputing countries are required to consult with each other with an intent on resolving the dispute. If after 60 days the dispute remains unresolved, a complaining party may request the establishment of a dispute resolution panel.<sup>59</sup> The panel hears oral arguments and reviews written submissions of both parties. A panel report containing detailed conclusions and the panel's legal analysis is submitted to the disputing parties for comments. The final panel report is then submitted to the dispute settlement body (DSB) and must be adopted by the body at the second meeting on which the report is placed on the agenda. Any party to the dispute may appeal to the appellate body.<sup>60</sup> The implementation of the panel or appellate report recommendations, whichever is adopted, is monitored by the DSB to ensure that the offending member complies with GATT rules. In the event of non-compliance the prevailing party is entitled either to compensation or to request authority to suspend concessions made to the offending party.<sup>61</sup>

This elaborate structure is duplicated in form or substance neither under the Paris or Berne Conventions nor under the UCC. The activities of the World Intellectual Property Organization are limited to the coordination and promotion of intellectual property protection in various countries. The "overall objectives of WIPO are to maintain and increase respect for intellectual property throughout the world, in order to favor industrial and cultural development. . . ."<sup>62</sup> The internationalization of intellectual property provides a more rigid framework and perhaps, consequently, promises more consistency and coherency under this new system.

In summary, the merger of intellectual property with the multilateral trading system has ushered in a new era for international aspects of intellectual property protection. The protection of intellectual property through trade accomplishes several important things:

1. easier international *monitoring* through the institutional apparatus of the World Trade Organization;
2. the increased *nationalization* of intellectual goods, by which private (individual) rights have essentially been transformed into public

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57. *Id.*

58. See Art. 64(1) of the TRIPS Agreement. See also WTO Charter, *supra* note 4.

59. Under the Dispute Settlement Understanding, the WTO Secretariat is responsible for recommending panel members. Where disputing parties do not agree with the recommendations, the GATT Director-General is authorized to appoint the panel in consultation with the Dispute Resolution Body (DSB) and other relevant committees or council. See JACKSON ET AL., *supra* note 2, at 342.

60. See Understanding on Rules and Procedures Governing The Settlement of Disputes, Annex 2, World Trade Organization Agreement.

61. See *id.* For more details, see JACKSON ET AL., *supra* note 2, at 340-346.

62. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, WIPO PUBLICATION, 40 (1988).

(state) rights;<sup>63</sup>

3. the *internationalization* of intellectual property, by which countries who desire to be a part of the liberal trading system are required to enact laws to comply with the TRIPS agreement and as a result

4. the *creation and establishment* of a global system of intellectual property protection.

### III. CREATIVITY IN THE THIRD WORLD

Nothing is more common than the assertion that men do not purposely invent in the lower civilisations, that they simply follow the leading strings and the mandates of nature. The savage, it is said, does not invent, he simply borrows his clothing from the animals, his house from the trees and caverns, his food from many sources. He is an out-and-out imitator. But [t]he race or people that did not lay at least one dressed stone on this stately edifice (of nature) cannot possibly have survived.<sup>64</sup>

This section will examine various fundamental differences in the philosophies underlying systems for protecting creative endeavor in the Third World. As mentioned earlier, the term "Third World" as employed in this article is inclusive of indigenous groups which have not attained formal statehood but who are recognized both in the national and international sphere as having a distinct political, cultural, and social identity within a formal state. Such groups include Native Americans and aboriginal groups, and other indigenous or "traditional" societies.

At the outset, this section does not examine the integration of developing countries into the international intellectual property system,<sup>65</sup> nor the concerns of developing countries about the intellectual property sys-

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63. Under the WTO only contracting parties (limited to sovereign states) may bring claims for dispute resolution. The multilateral trade system does not recognize private parties. As such states stand in the shoes of their citizens to press for redress over intellectual property infringement. This transformation of a private right is not new to the multilateral trade system, neither is it new in dealing with international intellectual property issues. Under U.S. trade laws for example, the United States Trade Representative is authorized to undertake a wide variety of measures against countries identified as denying adequate and effective protection of intellectual property. See Trade Act of 1974, 19 U.S.C.S. § 2242, § 2901 (1993). The legitimate reach of this power is questionable in a post-Uruguay round era.

64. Mason, *supra*, note 24 at 19, 23 (1895).

65. Most developing countries were subject to the principal intellectual property treaties (with the exception of the UCC) by virtue of their status as colonies of sovereign states who ratified these treaties. After attaining political independence most of these ex-colonies acceded to the treaties in their new status as independent sovereign entities. I have examined elsewhere the reasons surrounding developing country ratification of these treaties and the process of integrating these countries into the international system. See Ruth L. Gana, PROBLEMS AND PROSPECTS FOR INTERNATIONAL COPYRIGHT AT THE CLOSE OF THE TWENTIETH CENTURY: LESSONS FOR THE UNITED STATES (S.J.D. Dissertation, Harvard Law School (unpublished manuscript on file with the author)) (1995).

tem as a whole.<sup>66</sup> Rather, this section examines indigenous attitudes regarding creative ability and the forms of protection offered through the norms which underlie social, political, and legal organization in these societies. For effective discussion, two related and longstanding themes about creativity and its protection in the Third World are addressed. The first is a myth which holds that creative activity is non-existent in Third World countries. The second is an assumption, perhaps originating from the myth, that intellectual property laws do not exist in these countries.<sup>67</sup> I suggest that the real issue behind these two themes is that the attitudes and rules governing the protection and dissemination of the fruits of creative endeavor in Third World societies do not mirror those which exist in western industrial post-modern societies. Finally, this section questions another assumption that the chosen forms<sup>68</sup> of protection for intellectual property in these societies are objective or scientific models which inhere somehow in the nature of creativity and so must be adopted by all who wish to protect and encourage creative activity.

#### A. *Has Creativity Died in the Third World?*

As stated earlier, the prevailing wisdom of Anglo-American jurisprudence justifying intellectual property laws is that such laws are a neces-

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66. During the development era, a veritable amount of literature was produced by development economists, classical economists, political scientists, and scholars from other disciplines about the role of intellectual property laws in the development process. Development scholars argued endlessly about the negative effects of patents in particular, on economic development, and technology transfer. The major arguments centered on the effect of the patent grant on indigenous creativity. By granting a seventeen year monopoly on a process or machinery, independent inventors of the same product or machinery could not legally use or develop the machine or process. In addition, improvements to licensed technology were contractually assigned to the licensor as a precondition for, or term of the licensing agreement. Arguments also focused on the role of multinational corporations in hindering the exposure of local employees to technology utilized by the firm. These arguments, and the literature on technology transfer to the developing world, the phenomena of technological dependency and the effect of the international intellectual property system continue to abound today. See, e.g., CHARLES GOULET, *THE UNCERTAIN PROMISE, VALUE CONFLICTS IN TECHNOLOGY TRANSFER* (1977) (2 ed. 1989).; A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 63 DUKE L.J. 831 (1987).

67. See, e.g., Kirsten Peterson, *Recent Intellectual Property Trends In Developing Countries*, 33 HARVARD INTERNATIONAL LAW JOURNAL, 277 (1992); Brent W. Sadler, Note, *Intellectual Property Protection Through International Trade*, 14 HOUSTON JOURNAL OF INTERNATIONAL LAW 393 (1992); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L.R. 89 (1993); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L.R. 273 (1991). I think it would be a fair appraisal to say that much of the existing literature on intellectual property in developing countries assumes this fact, including literature by scholars from developing countries.

68. That is, patents, copyrights and trade secrets, together with the various requirements on which their validity is based, e.g. a copyright must be an "original expression," "fixed," 17 U.S.C.S. § 102(a) (1994); a patent must be a "new" idea, reduced to a working form, and the inventor must have been the first to invent it (at least under U.S. law) 35 U.S.C. § 101 (1981).

sary prerequisite for creativity.<sup>69</sup> The argument is not that creative activity will not take place at all without intellectual property laws which give a property right in the fruits of creative energy, but rather, that such activity will be minimal<sup>70</sup> and industrial growth will be constrained.<sup>71</sup> As a result, the enactment of intellectual property laws has been linked to economic development, growth, and prosperity.<sup>72</sup> Failure to enact intellectual property laws, some literature suggests, results in economic stagnation, the inefficient use of scarce resources, technological backwardness, and general economic malaise.<sup>73</sup> Further, the absence of intellectual property laws discourages indigenous creativity and innovation.<sup>74</sup> It is with this claim, and more specifically, the inference that creative activity does not

69. Virtually every article one picks up on intellectual property echoes this justification. I mentioned earlier that the premise of this reasoning is an economic theory: "By defining the parameters for the use of scarce resources and assigning the associated rewards and costs, the prevailing system of property rights establishes incentives . . . for investment, production and exchange. Since property rights define the behavioral norms for the assignment and use of resources, it is possible to predict how differences in property rights affect economic activity." Rapp & Rozek, *supra* note 27, at 77.

70. See Meiners & Staaf, *supra* note 26, at 911, 913.

71. The strongest testament against this argument is the recent transformation of countries of such as South Korea, Taiwan, Hong Kong, and Singapore. These countries have become efficient producers of technology goods and, thus, have come to occupy positions of strategic importance in modern international economic relations. The gains made by these countries certainly are not due solely or even largely to intellectual property laws. Rather, these countries and others economies such as that of India and more recently China, embarked upon economic and political reforms which encouraged domestic innovation and competitiveness by developing R & D infrastructure which improved local capacity to absorb technical and scientific knowledge. In addition, export oriented strategies were implemented in countries such as Korea and India, combined with investment in education and R & D and general liberalization of foreign investment regulation. See generally AGMON & VON GLINOW, *TECHNOLOGY TRANSFER IN INTERNATIONAL BUSINESS* (1991); JOSEPH M. GRICCO, *BETWEEN DEPENDENCY AND AUTONOMY, INDIA'S EXPERIENCE WITH THE INTERNATIONAL COMPUTER INDUSTRY* (1984).

72. This argument has been around for sometime and indeed is to be found among the development literature I mentioned earlier. For contemporary advocates of this thesis, see Richard T. Rapp and Richard P. Rozek, *supra* note 27. See ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* (1990); Edwin Mansfield, *Intellectual Property Rights, Technological Change, and Economic Growth*, in *INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE* (Charles E. Walker & Mark A. Bloomfield eds., 1988).

*But cf.* Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1954); A. Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMIC* 67, 67-95 (1934); Stephen Bryer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 *HARV. L. REV.* 281 (1970); A. Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMIC* 167 (1934). All arguing that the award of copyrights and patents is unnecessary to stimulate or encourage creative activity.

73. SHERWOOD, *supra* note 72; Mansfield, *supra* note 72; see also Rapp & Rozek, *supra* note 27.

74. In addition to other literature, WIPO publications tend to take this position. See, e.g., *BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY*, *supra* note 62, at 43: "Without a national industrial property system and, more particularly, a patent system, it will be difficult for a country to stimulate and protect the results of indigenous innovation." *Id.*

exist in the Third World as a consequence of weak or non-existent intellectual property laws<sup>76</sup> that issue is taken in this section<sup>76</sup> with discussion limited to the context of copyrights, the most recent bone of contention between developed countries and the Third World.<sup>77</sup>

The subject matter of copyright protection is creative expression.<sup>78</sup> Copyright protects the expression of an idea and not the idea itself,<sup>79</sup> the latter being the purview of patent law.<sup>80</sup> In order to be copyrightable, an expression must be original and fixed.<sup>81</sup> These elements constitute the core of formal requirements for copyright-ability in most legal systems today.<sup>82</sup>

Creative expression has been a part of human experience ever since Adam "named" the animals and, later, Eve in the garden of Eden.<sup>83</sup> The essence of communication, whether in language, prose, song, or symbol, requires some modicum of creativity and forms the core of every society,

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75. *Id.*; see also Gutterman, *supra* note 67, at 55, 59.

76. The title for this paper was a question I had long been grappling with since my "baptism" in this area of study. The perennial question of piracy, and the implications that the Third World stole what it could not create were troublesome to me. More troublesome however, was the implication that resistance to intellectual property laws, or the refusal to enact particular forms and of intellectual property laws, were persistent because there was nothing to *protect* in the Third World. I began my research by asking the question, is there no creativity in the Third World?

77. I have also chosen to limit my discussion to copyrights because of the discernible difference between creativity and innovation. See Kline & Rosenberg, *supra* note 26. The difference currently is of no legal import per se, but it has some implications for my broader thesis.

78. See 17 U.S.C.A., § 102(a) (1994).

79. See *Baker v. Selden*, 101 U.S. 99 (1879); *Mazer v. Stein*, 347 U.S. 201, 217 (1954). The idea/expression dichotomy in copyright law is a fundamental, but troublesome, doctrine in copyright law particularly in the area of new technologies. See, e.g., *Computer Assocs. Int'l v. Altai Inc.*, 982 F.2d 693 (2d Cir. 1992). "Drawing the line between idea and expression is a tricky business." *Id.* at 704; *Whelan Assoc. Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983); *Peter Pan Fabrics Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Id.* at 489. The idea/expression dichotomy is codified in 17 U.S.C. § 102(b).

80. See *Baker*, 101 U.S. at 102.

81. See 17 U.S.C. § 102(a) (1994). The fixation requirement for copyright protection requires a work of authorship to be fixed in a tangible medium of expression from which the work can be perceived, reproduced or otherwise communicated. This requirement which is also incorporated in the Berne Convention, and now the TRIPS agreement, is problematic for many indigenous societies which do not maintain forms of literary expression. For example, many African societies and Native American societies have oral traditions. The contemporary norms of copyright law preclude the representation of the vast wealth of oral literature existing in these societies, in the copyright system as a result of this fixation requirement.

82. This uniformity in part, reflects the international consensus expressed in the treaties governing copyright. See, e.g., Art. 2, Berne Convention; Art. I, Universal Copyright Convention.

83. See Genesis 2:19-23.

regardless of its stage of development. Indeed, any cursory study of history or anthropology will reveal that every society at any stage of development invented, created, and developed *sui generis* products necessary to sustain the life and well being of the society. These products were both mechanical, such as farming tools, and expressive, such as music, arts, and literature. The same holds true for the Third World and the continued vitality of creative expression is undeniable.<sup>84</sup> From songs to dances, artistic designs, paintings, sculptures, herbal and other medicinal formulas, and folktales, the list of protectable subject matter emanating from Third World societies is endless. These products are often located in western market economies as goods for sale or as objects of educational benefit in museums.

In addition to the manifestation of creativity in material objects, creative expression in Third World societies often takes place in the context of specific cultural institutions which are responsible for accumulating and preserving the history and heritage of the society. Creative expression through the famous "talking drums" of Yoruba tradition is but one example of this phenomena.<sup>85</sup> In a great number of African societies, oral literature remains a significant form of creative expression. While the validity of the term "oral literature" has been debated by anthropologists, historians, and ethnologists,<sup>86</sup> it seems clear that societies not restricted to printed expression, indeed those whose intellectual and creative experiences have not been formed around Gutenberg's press nor defined by printed works fall completely outside the sphere of copyright norms. Consequently, creativity in indigenous societies of most Third World countries do not "fit" the model for copyright protection which has captured the landscape of international economic relations in this era.

The critical point to note about recognizing creativity in the Third World is that forms of recognition and protection are a function of, and deeply embedded in, the institutions and underlying norms of social organization. In one sense, this is no different from the forms of protection for intellectual goods in the developed world. The individualism on which property rights are based and the nature of commodification which is central to liberal market economies are reflected clearly in modern intellectual property laws.

As far back as Biblical times, these goods which are now the subject matter of intellectual property were not protected in the forms and categories of patents, copyrights, trademarks, or trade secrets.<sup>87</sup> Indeed, it was

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84. See, e.g., KARIN BARBER, *THE POPULAR ARTS IN AFRICA* (1986).

85. See BARBER AND FASIAS, *DISCOURSE AND ITS DISGUISES: THE INTERPRETATION OF AFRICAN ORAL TEXTS* (1989).

86. On this matter, and on the subject of the use and power of oral literature in social and political organization in African society, see VAIL & WHITE, *supra* note 20.

87. A trade secret protects information, such as "a formula, pattern, compilation, program, device, method, technique or process" which generates independent economic value. UNIFORM TRADE SECRETS ACT, § 1(4) (1985). To be protectable, a secret must not be known

not until the era of Kings in ancient Israel that material reward was given for the results of creative effort.<sup>88</sup> Yet, creativity and its fruits existed, and in abundance!

During the reign of King Solomon,<sup>89</sup> intellectual endeavor and skill expressed in literary and artistic works was recognized, protected, and rewarded.<sup>90</sup> In the process of building the Temple,<sup>91</sup> Solomon requested woodcarvers from the King of Tyre after acknowledging their superior skill in the art of carving.<sup>92</sup> Solomon hired Hiram of Tyre, who was "filled with wisdom, understanding and skill to work (engrave) with bronze."<sup>93</sup> The Sidonians, a people recognized for their great carving skills, were also hired to carve designs and sculptures for the Temple.<sup>94</sup> The elaborate engravings of Hiram and the sculptures of the Sidonians certainly constitute protectable subject matter under modern copyright laws.<sup>95</sup> These works and the individual artists were, however, not "protected" in the form copyright law today provides. Apart from the fact that duplication of the Temple design was nearly impossible,<sup>96</sup> creative ability in this society was attributed to God who inspired these artists and gave the skill which was used in the creation of the products.<sup>97</sup> Similarly, the Pima-Papago Native American tribe distinguished "picked up songs" (learned from other tribes or white settlers) from "dreamt songs" (obtained from spirits) and "songs given in the beginning" (in a sense, natural songs).<sup>98</sup> In this understanding of "authorship," like that of ancient Israel, the individual was not recognized as the source of the created work. The idea of Hiram "owning" the Temple engravings or the Sidonians "owning" the

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and there must be reasonable efforts made by the claimant to maintain its secrecy. *Id.*

88. Solomon paid wages for the work of the Sidonians. He also gave Hiram twenty thousand cors of wheat and twenty cors of pressed oil each year until the Temple was completed. *See* 1 Kings 5:6,11.

89. 961 B.C. - 922 B.C.

90. *See* 1 Kings 5:6.

91. *See* 1 Kings 5:5.

92. 1 Kings 5:6.

93. 1 Kings 7:13,14; *see also* 2 Chronicles 2:14.

94. It is interesting to note that a similar arrangement is valid under contemporary intellectual property law. Under the "work for hire" doctrine, an employer is regarded as the lawful owner of a product created or invented by an employee during the course of employment. *See* 17 U.S.C.S. § 101(1) (1981); *see also* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

95. *See* 17 U.S.C.S. § 102(a)(5) (1994) (recognizing pictorial, graphic, and sculptural works as copyrightable subject matter). *See* *Mazer v. Stein*, 347 U.S. 201 (1954); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

96. *See* 1 Kings 7: 15-43.

97. *See, e.g.*, Exodus 31:1-6: "Then the Lord spoke to Moses saying, 'See I have called by name Bezaleel, the son of Uri, the son of Hur, of the tribe of Judah. And I have filled him with the Spirit of God, in wisdom, in understanding, in knowledge, and in all manner of workmanship. And I, indeed I, have appointed with him Aholiab the son of Ahisamach, of the tribe of Dan; and I have put wisdom in the hearts of all who are gifted artisans, that they may make all that I have commanded you.' *Id.*

98. HAROLD E. DRIVER, *THE INDIANS OF NORTH AMERICA* 221 (1962).

woodcarvings would have been unthinkable; indeed, it would have been tantamount to a claim by Moses of ownership of the ten commandments (which, incidentally, also qualify as copyrightable subject matter).<sup>99</sup> The forms of intellectual goods recognized in this Biblical example (sculptures and engravings) were first protected in the United States under the Copyright Act of 1909.<sup>100</sup>

Under Moses' leadership, elaborate rules existed governing the use and ownership of a new process or formula. For example, use of anointing oil, in ways or for purposes other than those prescribed, was prohibited by law,<sup>101</sup> and sanctions for violation were clearly spelled out.<sup>102</sup> The norms which governed recognition of creative effort were rooted in the nature of the theocracy under which ancient Israel, at the time, was governed. Not surprisingly, the primary reason for protection was ecclesiastical with the goal of preserving the sanctity or purity of a process or product in obedience to a holy command. This "controlling" feature in copyright has a long history. For example, it was evident in England during the nineteenth century when controlling the press was essential to the government's decision to grant a stationer's copyright.<sup>103</sup> In order to maintain purity of text, censorship was also a dominant feature of copyright law in Imperial China.<sup>104</sup> Additionally, while China led the world in the invention of printing<sup>105</sup> and several other significant technological advances, China, until very recently did not protect creativity in the forms expected by prevailing western jurisprudence.<sup>106</sup>

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99. Actually, even much more than the wood carvings or Temple designs, the ten commandments are clearly copyrightable subject matter. The four main requirements of copyright — copyrightable subject matter (the commandments are literary work), originality (who would doubt this?), fixation (written on tablets of stone), authorship and ownership (who would claim it? This wouldn't be a problem as Moses had the rights "transferred" to him on Mount Sinai!). See generally Exodus 20:1-17; 34:1. Obviously, the term of copyright protection would have expired by now.

100. See U.S. STAT. AT LARGE, VOL. 1, 124 (1789). The Act originally extended copyright protection to "authors of books, maps and charts"). *Id.* Sec. 1. Through a series of amendments however, the scope of copyright protection was expanded to include among other things, artistic works and sculpture. Thus by 1903, courts recognized copyrightable subject matter in a variety of products which were expressive of creative effort in a literary or artistic sense. See, e.g., *Bleisten v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (recognizing copyright in chromolithographs).

101. See generally Exodus Chapter 30.

102. *Id.*

103. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 21-22 (1987); see generally AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* (photo. reprint 1973) (1960).

104. See William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 11-18 (1993).

105. Block printing was invented in China in the 6th century and paper was invented around A.D. 105. See NORBERT WIENER, *INVENTION: THE CARE AND FEEDING OF IDEAS* 47 (1993).

106. Alford, *supra* note 104, at 6-7.



Intangible property was recognized by all Native American groups.<sup>107</sup> Examples of such goods include familiar objects of modern intellectual property law such as songs, dances, formulas, as well as less familiar types of intellectual property such as myths, membership in sibs and sodalities, and magic formulas.<sup>108</sup> The type of property recognized included the right to participate in ceremonies, the right to wear certain insignia and the right to perform a particular dance.<sup>109</sup> In terms of protection for processes, knowledge of herbal medicines developed through a process of time and training was guarded by the institution of native doctors.<sup>110</sup> Other kinds of specialized knowledge, such as new hunting methods or other skills, were taught to the community or to selected members of the group.

There is some sense in intellectual property literature that once the development concerns are substantially resolved,<sup>111</sup> intellectual property issues will "fit" in the developing world structure. This approach ignores the fact that local perceptions of intangible goods, in particular goods which result from creative activity, and local values which shape a system of protection for these goods have never been seriously considered in the context of the North-South debate over intellectual property protection. Substantive intellectual property doctrine has played an ancillary role in this debate, with the issue framed, primarily, in ideological terms.<sup>112</sup> Scholarship from both sides tends to focus exclusively on the economic impact of protecting intellectual property rights.<sup>113</sup> However, there is nothing conclusive available in the economic literature about the effect of intellectual property rights;<sup>114</sup> yet, there is nothing that takes into account indigenous perceptions of intangible goods and indigenous approaches to intellectual property protection. These may very well have more of a significant impact on the success of intellectual property protection in developing countries.

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107. See DRIVER, *supra* note 98, at 263.

108. *Id.*

109. *Id.* at 264.

110. *Id.* at 219.

111. These concerns include technological "backwardness," huge national debt, poverty, illiteracy, and political instability.

112. The ideology of intellectual property, quite distinct from its philosophy, has also been a point of conflict between developed and developing countries. During the development era, scholarship from a "Third World perspective" regarded intellectual property and scientific knowledge in general as "the common heritage of mankind." This view held that preventing access to the fruits of modern science was wrong and ought not to be enforced within an international system premised on equality. Western European countries as well as the United States rejected this position, maintaining that science and technology were the result of investment and labor. As such, the fruits of invention belong to the creators and not, to "humanity."

113. Oddi, *supra* note 66; VAITSOS, *supra* note 36.

114. Some scholars have concluded that it is simply impossible to determine exactly, whether, how, and why intellectual property systems are indispensable to a society.

*B. Elements of Laws and Norms Concerning The Regulation and Protection of Creative Efforts In Indigenous Societies*

Recognition and protection of intellectual goods in indigenous societies differs substantially from the modern treatment of intellectual property in industrialized nations.

A first cause of the differences in treatment of intellectual property is that forms of property ownership in these societies are different. Many indigenous societies are not organized around individuals as such but around a clan or other extended unit.<sup>115</sup> As such, "ownership" means something different from its accepted conception in Anglo-American law. Property in most western societies consists of a bundle of rights. The most important of these rights are the right to absolute possession, the right to exclude others from use, and the right to dispose of the property as one wishes. Virtually all forms of property in western societies are defined in relation to these rights; the most important right being the right to exclude.<sup>116</sup> This absolutist conception of property in Anglo-American law was transferred wholesale into the domain of intellectual goods.<sup>117</sup>

Exclusive individual ownership of goods, however, is not a scientific principle of social existence. Exclusive ownership was, for example, a rare feature of social organization in some Native American tribes.<sup>118</sup> Notwithstanding this fact, however, all Native American groups recognized ownership rights in intangible property,<sup>119</sup> including some objects familiar to modern intellectual property laws such as songs, dances, and formulas,<sup>120</sup> as well as less familiar ones, such as myths, membership in sibs, sodalities, and magic formulas.<sup>121</sup> Among the Mesa-Indians of North America, rights in intangible goods as well as other goods included the right to be recognized as "owner," but not the right to exclude others from use.<sup>122</sup>

115. It is important not to confuse the clan or hamlet with the broader society as a whole. Perhaps a helpful analogy is once again the Biblical nation of Israel. There are twelve tribes which together comprised this political unit. See Exodus 1:1-4. Each tribe, however, was identified by specific rules, specific histories, and in some cases, specific sub-cultures.

116. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927). "The essence of private property is always the right to exclude." *Id.*

117. In *INS v. Associated Press*, *supra* note 79, at 246. Justice Holmes and Brandeis maintained a vigorous dissent to the court's decision to diminish the absolutist conception of property when it related to property in news. Property could not be "quasi" the justices maintained. The distinguishing feature of property was its absolute nature. *Id.*; see also HORWITZ, *supra* note 29.

118. See DRIVER, *supra* note 98.

119. *Id.*

120. Protected under copyright law and trade secret law respectively. See 17 U.S.C. § 102 (1994); Uniform Trade Secrets Act § 1(4) (1985).

121. See Rennard Strickland, *Implementing the National Policy of Understanding Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZONA ST. L.J. 175, 184 (1992).

122. See DRIVER, *supra* note 98.

Even where individual ownership was possible within certain Native American groups, such ownership was limited to specific categories of goods.<sup>123</sup> For example, Native Americans along the Northwestern coast of North America recognize private ownership, in the exclusive sense, of fishing, trapping, and wild plant gathering rights.<sup>124</sup> "Ownership" according to this group of Native Americans was really a form of stewardship, wherein an owner in title was recognized, but the refusal to bar other members of the society from using the product was not permitted.<sup>125</sup>

Another important feature of "ownership" of intangible goods in certain Native American groups is that tribal laws often restrict the right to dispose of the good.<sup>126</sup> Typically, this restriction was limited to disposition to non-members of the group. In addition, sometimes one was permitted to exclude members of the clan from using or making a good which was the subject of an ownership claim, but very often the owner could not assert these rights against family members.<sup>127</sup> Finally, it is important to note that ownership is a function of the system of rights distribution. In some Native American groups, exclusive "ownership" rights could be earned, such as a right to sing a bear song, to participate in a traditional ceremony, or to take on a certain name.<sup>128</sup>

A second cause of difference in intellectual property treatment in Third World countries lies in the purpose of protection. Whereas the stated underlying purpose of Anglo-American intellectual property law is to encourage creative endeavor, protection of creative endeavor in Third World societies is purposely used to achieve a myriad of social, political, and economic goals. Thus, in Imperial China, unauthorized copying was forbidden out of concern for the ways in which various commodities were identified (i.e. a form of trademark law), in an attempt to maintain the purity of classic texts<sup>129</sup> as well as to fulfill the censorship function mentioned earlier. Concern for public order or morals<sup>130</sup> also led to outlawing of reproduction and dissemination of "devilish books and talk," to preserve the supremacy of certain literary and to prevent the spread of

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123. *Id.* at 251.

124. *Id.*

125. *Id.*

126. Thus, for example, one of the key elements of the Native Graves Protection and Repatriation Act (1990) (NAGPRA) is that the concept of "ownership" or "right of possession" is cast in the Native American cultural context. See Strickland, *supra* note 121, at 180; see also Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV., 161, 165 (1993).

127. *Id.*

128. See DRIVER, *supra* note 98.

129. Alford, *supra* note 104, at 11.

130. While the protection or preservation of public order and morals is not a central feature of most Western copyright laws, exceptions do exist for government interference with the rights of individual authors when it is necessary for the public interest. A similar provision exists under the Berne Convention. See Berne Convention, *supra* note 42, at Art. 17.

works that would denigrate imperial authority.<sup>131</sup>

For many indigenous societies, protection exists to protect the sanctity of a process or idea, to preserve cultural patrimony and in particular, to preserve the sacredness of an object, or to preserve the sacredness of meaning. In the recent case of *Milpurrurru v. Indofurn Pty Ltd.*,<sup>132</sup> the applicant and other well-known and internationally recognized Aboriginal artists brought an action for copyright infringement under the Australian Copyright Act of 1968 against a company, Indofurn, and its three directors, who were selling rugs bearing unauthorized copies of various paintings by the applicants. The company had imported carpets from Vietnam which bore imprints of the works of the various artists. The carpet designs were substantial reproductions of various paintings which the applicants had authorized for use by the Australian National Art Gallery (ANAG) and the Australian Information Service (AIS). The ANAG and AIS had issued posters of these paintings from which the reproductions had been made. The applicants had not approved the reproduction of their work on carpets. By importing carpets which infringed protectable works and which the respondents should have known were infringing works, the respondents were deemed to have infringed the copyright of the Aboriginal artists. The applicants sought damages and an order from the Court for respondents to deliver up the infringing carpets.<sup>133</sup>

The case indicates that the Aboriginal artists in question were concerned about the accuracy of the depictions of the paintings on the infringing carpets. The Court noted that the paintings "concerned creation stories of spiritual and sacred significance to the artist," and that it also had "deep cultural and religious significance to Aboriginal people."<sup>134</sup> In the Court's words, "[A]ccuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the *faithful* reproduction of painting, can cause deep offence to those familiar with the dreaming."<sup>135</sup>

The language of the Court suggests that even the most careful reproduction of a work of art will not avoid harm to the community represented in the art and to those to whom the art speaks. Art in such a society is not only about creativity, it is about community. In this society, the preservation of sacredness and sanctity, as in the case of Israel and the anointing tabernacle oil,<sup>136</sup> is prescribed by the law that recognizes the property. Similarly, with Native American art, particularly among the Pueblan Indians, the preservation of sacredness is a significant function

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131. Alford, *supra* note 104, at 12-13.

132. *Milpurrurru v. Indofurn Pty Ltd.*, Federal Court of Australia, 13 December 1994, (reported in 17(3) EUR. INTEL. PROP. REV., March 1995, at D-61).

133. This is a remedy recognized in almost all copyright laws, and was recently included as an element of the global model for copyright under the TRIPS agreement. See *Trips Agreement*, *supra* note 10, at Art. 46, Part III.

134. *Id.*

135. *Id.* (Emphasis added).

136. *Id.*

of protecting art forms. As one scholar has noted:

Understanding the sacredness of the art objects of a holistic people requires a holistic view . . . [P]rinciples such as holistic integration of life within art, are held in common among Native Americans . . . . These works provide a multi-faceted window through which to glimpse and better understand the religion and lifeways . . . that made them and continue, in most instances to make them.<sup>137</sup>

A third cause of the differences in intellectual property treatment in the Third World is that the theory of creation or creativity is different. Under Aboriginal law, for example, "the right to create paintings and other works depicting creation stories and stories of the dreaming resides in the traditional owners (or custodians) of the stories or images."<sup>138</sup> This right is vested exclusively but jointly in the custodians as prescribed by Aboriginal law and custom. In the same sense, under ancient Israel's theocratic rule, creativity was recognized as a gift from God, thus limiting the extent to which its fruits could be commodified.<sup>139</sup>

A fourth cause of the differences in intellectual property treatment in indigenous societies is that the value ascribed to creative expression is jointly held by the group as a whole.<sup>140</sup> This value is not material as such, thus reflecting the non-commodifiability of certain goods in these cultures. Under Aboriginal law for example, the right to create paintings and other works about creation is vested in a group of custodians who are responsible for determining "whether the stories and images may be used in a painting, who may create the painting, to whom the painting may be published, and the terms on which it may be reproduced."<sup>141</sup> By maintaining such a structured form for administering the right to create, the Aboriginals are able to guard the value of the meaning of the painting to their society. The Australian Court in *Milpurrru* recognized the personal and cultural distress that the infringing carpets had caused to the Aboriginal community, noting that the losses, "which were a reflection of the aboriginal cultural environment in which the artists reside," could be accounted for in giving award damages.<sup>142</sup>

Among Native American groups of the Northwest coast, art is used "as a language of social power, creating images that connote aristocratic perogatives."<sup>143</sup> The objects of western intellectual property, such as songs, formulas, drawings, dances, and emblems are, in these groups, methods for acquiring power, visible expressions of power, or even sacred

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137. Strickland, *supra* note 121, at 182.

138. *Milpurrru*, *supra* note 132, at D-61-62.

139. For example, it was forbidden for the anointing oil to be reproduced by any individual, the punishment being ostracism. See Exodus 30:32. Similarly, the composition of the perfume Moses was instructed to make could not be reproduced. See Exodus 30:37.

140. See Strickland & Supernaw, *supra* note 126, at 165.

141. Cohen, *supra* note 116.

142. *Id.*

143. Strickland, *supra* note 121, at 182.

objects.<sup>144</sup> As Professor Strickland points out:

Western classification systems are out of touch with the American Indian world-view. Indeed, even the terms art, art work . . . as non-Indians use them, embody concepts foreign to Native American societies. Among many Indian peoples, all man-made objects are grouped together and referred to as that-which-has-been-made. The distinction between aesthetic objects, sacred objects, functional objects, public objects and commercial objects simply does not exist.<sup>145</sup> In a holistic society, there are no such lines.<sup>146</sup>

Finally, a fifth cause of differences in recognition and protection of intellectual property between indigenous societies and industrialized nations is that the organizing principles of these societies are so different as to affect the very idea of what is considered the appropriate subject of private ownership. Most Third World societies are organized around a social unit which extends certainly beyond the individual and, in most cases, beyond the nuclear family. The forms and very definition of ownership are thus crafted in a way opposite to property conceptions of western legal and economic structures central to the development of private and public law.<sup>147</sup> What is representative of intellectual property laws in these societies are thus, not surprisingly, nothing like their western counterparts.

There is one important similarity between the protection of creative endeavor under western intellectual property laws and in indigenous societies. Both aim, ultimately, to enhance public welfare by protecting the fruits of creative effort. Given the value ascribed to creativity in many indigenous societies, it seems obvious that the protection of the fruits of creative energy is essential to the well being, to the sense of identity, and to the preservation of cultural patrimony that is so vital to the viability of these groups. Similarly, the enhancement of public welfare has long been the asserted purpose of intellectual property law in Anglo-American jurisprudence.<sup>148</sup> The divergent forms that these laws take on in indigenous societies and in the western hemisphere is the strongest testimony of the fundamentally different philosophical tenets which underlie these systems. Above all, the fact that creativity remains a vital part of life and

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144. *Id.* at 184-185.

145. *Id.* at 184. The distinction between functional objects and aesthetic objects is particularly important in copyright law. Under the utilitarian function exception, copyright protection does not extend to works whose artistic features are not distinguishable from its utilitarian dimensions. "Such works are not copyrightable regardless of the fact that they may be 'aesthetically satisfying and valuable.'" H.R. 5668, 94th Cong., 2d Sess. (1976). See *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

146. Strickland, *supra* note 121, at 184.

147. See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

148. See Mazer, *supra* note 79, at 219. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare." *Id.*

that it holds such powerful leverage and meaning in these societies tells the rest of the world that creativity is not only alive, but that it is also central to the social, political, and economic welfare of indigenous societies.<sup>149</sup>

#### IV. THIRD WORLD CREATIVITY AND THE INTERNATIONALIZATION OF INTELLECTUAL PROPERTY

Prior to the TRIPS agreement, intellectual property had significant international dimensions. Technological advances during the nineteenth century made the reproduction of literary works relatively cheap, and thus created a demand for the works of authors and artists. International piracy emerged as a significant problem which led to the negotiation of two principal international agreements on intellectual property, namely, the Berne Convention for the Protection of Literary and Artistic Works<sup>150</sup> and the Paris Convention for the Protection of Industrial Property.<sup>151</sup>

These two treaties neither created international patent or copyright rights nor established substantive law in these areas. Rather, the Berne Convention reflected an attempt to create rights, at the international level, for individual authors as their works moved through channels of commerce from country to country.<sup>152</sup> Similarly, as suggested by the events during its incipient stages, the Paris Convention arose out of a desire to provide protection for foreign *works* whereby nations agreed to recognize and protect the rights of foreign artists within their own domestic borders.<sup>153</sup> The issue, then, for international patent and international copyright protection was not the absence of similar domestic laws but

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149. See Strickland, *supra* note 121, at 181-189; see also BARBER, *supra* note 84, at 28-45.

150. Berne Convention, *supra* note 42.

151. Paris Convention, *supra* note 44.

152. See RICKETSON, *supra* note 26.

153. The origins of the Paris Convention may be traced back to a temporary law enacted by the Austria-Hungarian Empire in 1873, to encourage inventors to participate in an international exhibition of inventions to be held in Vienna. The unwillingness of inventors to participate because of fear that inventions would be duplicated and ideas stolen led to the law which provided special protection for foreign exhibitors and their inventions for the duration of the exhibition. By this time however, domestic patent systems existed in most European states. In 1873, the same year of the international exhibition, a Congress was convened in Vienna with the objective of examining the possibilities for a more effective and useful international system for protecting patented works. In 1878 an International Congress on Industrial Property was convened as a follow up to the earlier Vienna Congress, with the purpose of determining the basis of uniform legislation in the field of industrial property. A proposal for an international union was prepared and sent to other governments together with an invitation to attend an international conference in 1880. The 1880 conference adopted a draft Convention, parts of which is still incorporated in the Paris Convention today. Finally, in 1883, a new conference convened in Paris to adopt and sign a final draft of the 1880 Congress. This was the Paris Convention for the Protection of Industrial Property. It has since been revised several times, the most popular revision being the Stockholm revision of 1967. See generally BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 62, at 49-50.

rather the refusal to extend domestic protection under the law to the works of foreigners.<sup>154</sup> Both treaties built upon concepts of copyright and patent laws<sup>155</sup> similar to what already existed in the countries represented as well as that which conformed to the general philosophies of the time. Professor Ricketson points out that, in the area of copyright,

“[a]lthough the legal theories underlying copyright protection differ from country to country, the origins of this form of protection in each country were strikingly similar: the grant of exclusive printing rights or privileges which were made to printers and publishers soon after the introduction of printing in Europe in the late fifteenth and early sixteenth centuries.”<sup>156</sup>

The concern for providing adequate protection of foreign works resulted in a national treatment principle as the central requirement of the international treaties. The national treatment principle meant that treatment of foreign authors and their works would be no less favorable than treatment afforded to the nationals of the protecting country.<sup>157</sup> This effectively put a stop to the discriminatory treatment of foreign works. Thus, the Berne Convention and the Paris Convention did not create substantive law for member states; further, they also did not impose new law on the member states. Rather, they reflected, to a large extent, a consensus reached among the states which was legitimated by the existence of a similar system within their respective domestic countries.

The TRIPS agreement<sup>158</sup> makes the protection of intellectual goods in the forms and categories recognized in western cultures a mandatory requirement for nations within the multilateral trading system. TRIPS requires countries to protect copyrights and related rights,<sup>159</sup> patents (including utility and process patents),<sup>160</sup> trademarks,<sup>161</sup> industrial designs,<sup>162</sup> layout-designs of integrated circuits,<sup>163</sup> and trade secrets.<sup>164</sup> Part

154. See RICKETSON, *supra* note 26, at 5-19.

155. This should not be surprising as these countries shared to some degree, a similarity in political structures. The arts have always been a significant part of European culture and life. It is thus not surprising that these principal treaties have their roots in Europe, but also, that they were informed by European conceptions of what constitutes civilized society. Thus in the 1858 Brussels Conference on Literary and Artistic Property an outline of what would constitute elements of a universal copyright law was prepared by the Congress, which was of the opinion “that the principle of international recognition of the property of authors in their literary and artistic works should be enshrined in the legislation of all *civilised* peoples.” *Id.*

156. RICKETSON, *supra* note 26, at 3.

157. The principle of national treatment is a standard feature of most trade and intellectual property treaties.

158. TRIPS Agreement, *supra* note 10, at 209-237.

159. *Id.* at § 1, Art. 9-14.

160. *Id.* at § 5, Art. 27-34.

161. *Id.* at § 2, Art. 15-21.

162. *Id.* at § 4, Art. 25-26.

163. *Id.* at § 6, Art. 35-37.

164. *Id.* at § 7, Art. 39.



II of the agreement requires nations to comply with the substantive provisions of the Berne Convention<sup>166</sup> with the exception of the moral rights provision.<sup>166</sup> This includes nations which may not have acceded to the Berne Convention. The requirement essentially erodes any possibility that a nation might independently negotiate its own accession to the Berne Convention, which has always been a possibility under the international aspects of intellectual property protection. Computer programs are to be protected as literary works for which the Berne Convention does not yet explicitly provide. The agreement lays a basis for rental rights,<sup>167</sup> defines what kinds of marks must be protected,<sup>168</sup> and provides for minimum rights of all rights holders.<sup>169</sup> Similar provisions are also made for industrial designs.<sup>170</sup> Finally, in the area of patents, the agreement establishes the scope of patentable subject matter,<sup>171</sup> defines the rights a patent must confer on its owner,<sup>172</sup> and outlines the conditions for granting a patent application.<sup>173</sup> Significantly, the agreement requires a twenty year protection period for all inventions, products, and processes, in virtually every area of technology.<sup>174</sup> This is a broader right than that which is currently recognized under the Paris Convention.<sup>175</sup>

Part III of the Agreement sets out the obligations of contracting members to ensure that the rights of domestic and foreign authors and inventors are effectively enforceable within the local legal system.<sup>176</sup> The treaty does not require the establishment of a separate system of enforcement but establishes civil and administrative procedures and remedies with which the contracting members must comply.<sup>177</sup> Remedies spelled out in the text include damages, injunctions, imprisonment, fines, and the right of judicial authorities to order the destruction or disposal of the infringing goods.<sup>178</sup> The agreement also requires that judicial authorities have the power to order prompt provisional measures and that criminal penalties and procedures be provided in the case of wilful infringements in a commercial transaction.<sup>179</sup>

Finally, the agreement includes a phase-in time period for countries at various stages of development to implement legislation to bring their

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165. *Id.* at Art. 9.

166. *Id.*

167. *Id.* at Art. 11.

168. *Id.* at Art. 15(1).

169. *Id.* at Art. 1.

170. *Id.* at Arts. 1, 25.

171. *Id.* at Art. 27.

172. *Id.* at Art. 28.

173. *Id.* at Art. 29.

174. *Id.* at Arts. 33, 34.

175. The agreement raises the level and scope of protection for all categories of intellectual property.

176. *TRIPS Agreement*, supra note 10, at Art. 41, 42.

177. *Id.* at § 2.

178. *Id.*

179. *Id.* at Art. 35, 61.

respective local laws and judicial systems into conformity with the agreement.<sup>180</sup>

The TRIPS agreement at best prioritizes intellectual property, and at worst, imposes a model assumed to be objectively the "right form" of intellectual property protection. This "form" has all the elements of western property concepts, including exclusive ownership, the right to limit use, and the ownership right of control over the propertized good.

How do Native American or Aboriginal conceptions of intellectual goods fare under this system? What place does the "holistic world view" of Native American peoples play in this model? Is there any possibility that indigenous laws protecting creativity will have room to assert themselves in a system based on this foreign model of intellectual property protection? For example, will an Aboriginal, wanting to sell a painting depicting the dreaming which he has been given the right to create by the community leaders, be able to assert against the group a right to distribute that painting in channels of commerce? Can an art object which is not considered alienable by a Native American group, yet which is created by an individual member of the group, be alienable by such a member because copyright law recognizes the member as the "author" giving this individual an exclusive right to dispose of it? Above all, how will intellectual goods, which have significant spiritual and cultural meaning to these peoples, be affected by the commodification which undergirds the internationalization of intellectual property?

The ramifications of these questions touch on the thesis of this article, but cannot be fully addressed here. Suffice it to remark that the current international framework does not supply encouraging answers. Unfortunately, the burden will once again fall on indigenous peoples to establish mechanisms which will protect their laws and preserve their sense of meaning. History suggests, however, that these groups ultimately face, in the absence of laws which recognize and serve in their interests,<sup>181</sup> the translation and thus death of objects and values which undergird their creativity under the current multilateral framework.<sup>182</sup> As Strickland observes:

Many non-Indians have a problem in the cultural translation of Native works. A non-Indian viewer of a Hopi figure, a Tlingit mask, or a Shoshone-painted hide translates the object into the familiar framework of his own culture. In doing so he confronts the same distortion

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180. *Id.*

181. Virtually all international treaties recognize the needs of developing countries and, at least on paper, attempt to make some special provisions for them; the TRIPS agreement is no exception. Without going in to the merits of these "special" provisions, it is important to note that a system, which at once globalizes a model and yet provides for a mechanism for assimilating differences, is at best palliative and at worst deceiving. A truly multilateral agreement must both recognize and serve the interests of all parties, however fragile that consensus may be.

182. Strickland, *supra* note 121, at 185.

as the English-speaking reader of a translated Cherokee lovesong. The song, translated into English, has its syntax transposed, verb tenses approximated, and inflections altered. No longer a linguistic reflection of its maker, the song becomes a carnival mirror, distorting the delicate thought patterns of its creator's culture. The non-Indian's perception of Native American objects requires a similar translation. *The visual arts, and the verbal arts, demand a holistic context.* It is simply not possible to judge the meaning of a sacred object from a viewpoint and value structure outside the culture itself.<sup>183</sup>

## V. SOME IMPLICATIONS

It is quite clear that one of the central motivations behind the TRIPS agreement was to target enforceability of foreign intellectual property rights in developing countries. As such, the global model of intellectual property protection imposed by the agreement is not a reflection of the need to encourage creativity or to promote the public welfare. Rather, the chief aim of the agreement is to secure from these countries and societies the full monopoly benefits that western intellectual property laws offer. The implications of these strategic moves are many, the most important of which are discussed below.

The need to maintain incentives to encourage creative activity is limited, in many respects, to western market democracies. These democracies revolve, in large part, around individual autonomy and liberty, notwithstanding the greater social loss of nonmaterial value that individualism tends to breed. The successful commodification of intellectual goods can only be achieved in a society which embraces this sort of rugged individualism. Until indigenous societies reach this point, the international community may have to come to terms with a persistent level of piracy in international trade.<sup>184</sup> Piracy, however, cannot simply be explained mechanically in economic terms based on the reasoning that poverty necessitates the availability of cheap products.<sup>185</sup> For many of these societies, the difficulty in introducing western copyright principles is that these principles attempt to overturn social values which are centuries old.<sup>186</sup> The laws protecting intellectual goods in these societies simply reflect fundamental notions of what the society considers to be the appropriate subject of exclusive ownership. The duplication of literary work is thus, for example, not perceived as stealing but as making a good thing accessible to the general public.<sup>187</sup> Knowledge in many indigenous socie-

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183. *Id.*

184. One should note that piracy is not limited to Third World societies/developing countries. A fair amount of piracy exists in Europe and the United States as well.

185. *See, e.g.,* Remarks by Donald Westmore, *Economic Development in the Third World: What Can Be Expected From the Uruguay Round?*, A.S.I.L. Proceedings, April 8-11, 1987.

186. *See, e.g.,* WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

187. For example, China. *Id.*

ties is not perceived as something that can be commodified or objectified through law. It is impossible to ignore such fundamental conceptions in these communities.

In addition to responding to a persistent level of piracy, the internationalization of intellectual property also suggests that there is some way to objectively measure protection of intellectual property. By not taking into account the possibility of alternative forms of protection, the TRIPS agreement, as did its predecessor treaties,<sup>188</sup> presupposes that "all civilized nations" will and must recognize this global model of intellectual property protection.<sup>189</sup> By mandating this model, governments in developing countries are faced with the difficult job of destroying, or at least attempting to destroy, native conceptions about life and living and about what constitutes an ordered society. The allocation of material value to goods, and the way in which this value is expressed, is grounded firmly in the history of the evolution of a people. The internationalization of intellectual property threatens to undermine, if not totally destroy, the values that indigenous systems ascribe to intellectual property and the manner in which they allocate rights to intellectual goods.

What the internationalization of intellectual property implies, ultimately, is that there is only one way to participate in the international economy and that is by playing in accordance with prescribed rules, regardless of its impact on a group of peoples. It is a message that is not unfamiliar in the history of world affairs, and yet it is a message which, so history informs us, has caused devastation of unimagined proportions to human society. The next few years will reveal just how far native peoples, indigenous groups, and developing countries will fare in the preservation of their cultural patrimony and in their ability to determine the identity of their group in an increasingly hostile international economic environment.

## VI. CONCLUSIONS

There is still much to be said about intellectual property and its coronation as the defining element of international economic regulation. For the purposes of this article, however, only the implications of a system which denies legitimacy and which threatens the viability of anything opposed to it, is important. Third World creativity, regardless of how it is to be protected, must be recognized not only as a matter of law but as a matter of life within the various communities. Perhaps an innovation versus creativity distinction mentioned earlier in the article will prove useful in helping to fashion a system which offers Third World creativity an op-

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188. The Berne Convention and the Universal Copyright Convention.

189. Native Americans were "encouraged" in a similar manner to "engage in the industrious pursuits of agriculture and civilized life" by adopting property laws similar to those recognized at common law. See RENNARD STRICKLAND, *FIRE AND SPIRITS* 51, 237-238 (1975), quoted in Strickland & Supernaw, *supra* note 126, at 103.

portunity to be protected on terms necessary to ensure its continued viability.<sup>190</sup> Innovation, undoubtedly, holds benefits for all societies, although surely it is unnecessary for every society to re-invent the wheel. On the other hand, some societies may invent better wheels, better at least, to suit their specific needs as a community.<sup>191</sup> Innovation, however, does not come without costs. The present form of protecting innovation incurs particular social costs in Third World societies; costs which are destructive to the accepted values and principles of their social and political organization. It is critical for developing countries, as well as for all groups of people recognized as forming a distinct ethnic/political entity, that social costs of protecting innovation and creativity be properly linked to their specific political, social, and cultural contexts. In this regard, different legal rules may emerge for innovation, rules which fairly represent the large amounts of capital expended by multinational corporations and which will also perhaps take into account the years of effort and resources a community may have invested in perfecting, for example, an herbal drug through the work of traditional native doctors.<sup>192</sup>

The TRIPS agreement represents an attempt to protect certain forms of creative activity (i.e., innovation) in specific ways which have proved beneficial to corporatized, post-modern economies. As one scholar has observed:

postmodernity is distinguished by a dramatic restructuring of capitalism in the post war period, a reconstruction of labor and capital markets, the displacement of production relations to non-metropolitan regions, the consolidation of mass communications in corporate conglomerates, and the pervasive penetration of electronic media and information technologies. Such processes have coalesced in the Western world societies oriented towards consumption. Consumption is managed by the mass media's capacity to convey imagery and information across vast areas to ensure a production of demand. Goods are increasingly sold by harnessing symbols, and the proliferation of mass media imagery means that we increasingly occupy a "cultural" world of signs and signifiers that have no traditional meanings within social communities or organic traditions.<sup>193</sup>

However one interprets the TRIPS Agreement it is important that

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190. See *supra* note 26.

191. See GEORGE BASALLA, *THE EVOLUTION OF TECHNOLOGY* 7-14 (1988). One of the longstanding criticisms of the international patent system has been the way the system blocks specialized inventions once the idea of, for example, the wheel, has been patented elsewhere in the world.

192. See Stephen R. King, *The Source of Our Cures*, 43 *CULTURAL SURVIVAL Q.* 19, 23 (1991) (noting that the antimalarial drug known as quinine was first used by Indians). See generally Kirsten Peterson, *Recent Intellectual Property Trends in Developing Countries*, 33 *HARV. INT'L L.J.* 277 (1992) (discussing in some detail the importance indigenous native healers in discovering new sources of treatment for modern ills).

193. Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *TEX. L. REV.* 1860, 1862-1863 (1991).

the current implications to non-Western societies of the internationalization of intellectual property not be ignored.