The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective

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> The [ancient] civilizations [of the Americas] have left us with rich historical landmarks, proud people and the desire to explore and experience their past, understand their present and visualize their future.
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> - Luis Vasquez[1] -

During the late twentieth century, culture[2] has become "big

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1 TRAVEL WORLD NEWS 35 (Mar. 1997) (discussing statement by the President of MILA, a wholesaler specializing in cultural tours to Latin America).

2 Indigenous and native culture, the focal point of this Article, has been variously defined, depending on the aspects of "culture" seeking protection. For instance, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter Convention on Illicit Transfer], classifies cultural property into categories and allows each country to determine which objects have cultural significance

for archeology, history, literature, art, and science. *See id.* art. I, 823 U.N.T.S. at 231, 10 I.L.M. at 289. Other definitions have similarly focused on "culture" as demonstrated through its objectification in relics or artifacts. *See, e.g.,* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C.A. § 3001(3)(D) (1997) (defining "cultural patrimony" as "an object having ongoing historical, traditional or cultural importance central to . . . [the] culture itself . . . and which . . . cannot be alienated, appropriated or conveyed by an individual . . . ."); *see also infra* note 21 (discussing the Native American Graves Protection and Repatriation Act). By contrast, conventions which concern "culture" as a "human right" appear to treat culture as an amorphous concept which includes all aspects of a group's history, works, traditions, practices and knowledge. *See, e.g*., International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (providing that persons belonging to "ethnic, religious or linguistic minorities . . . shall not be deprived of the right, in community, with other members of their group to enjoy their own culture. . . .").

Much of the legislation regarding the protection of indigenous culture has focused on tangible manifestations and has limited protection to those objects that have archeological, scientific or historical values. *See, e.g.,* Terri Janke et al*., Proposals for the Recognition and Protection of Indigenous Cultures and Intellectual Property* § 5.3 (last modified Aug. 27, 1997) <http://www.icip.lawnet.com.au/part2-2.htm>; *see also infra* note 22 (discussing the definition of "culture"). This effort to compartmentalize culture has been strongly criticized by some scholars and commentators. The distinction between "cultural property" and "intellectual property" of indigenous peoples has been criticized as inappropriate by "try[ing] to subdivide the heritage of Indigenous peoples into separate legal categories such as 'cultural,' 'artistic' or 'intellectual,' or into separate elements such as songs, stories, science or sacred sites." Erica-Irene Daes, *Study in the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. Sub-commission on Prevention of Discrimination of Minorities, at 9, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993). Daes prefers the term "heritage" to "culture," which she defines as "includ[ing] all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and which is also the basis for maintaining social, economic and diplomatic relationships—through sharing—with other people." *Id.* at 39.

Similarly, the term "heritage" has been used to refer to indigenous culture and has been defined as "all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its Territory." *The Final Report on the Protection of the Heritage of Indigenous People* at 10, U.N.Doc. E/CN/4/Sub2/1995/26 (1995). This definition also includes "objects, knowledge and literary or artistic works which may be created in the future based upon its heritage." *Id*. The treatment of "heritage" as an all-encompassing definition is further emphasized by the *Report*'s reiteration that the definition includes

> all moveable cultural property as defined by the relevant convention of UNESCO; all kinds of literary and artistic works . . . ; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape and audiotape.
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> *Id.*

business." From eco-tourism to cultural tours and souvenir artifacts, culture has been transformed into a commodity that can be merchandised and sold across international borders.[3] This "commodification"[4] of culture is part of a larger trend—the

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The author does not disagree that the "culture" of a people can be an all encompassing term that incorporates every aspect of a people's history, knowledge, works and traditions. However, given the traditional requirement that intellectual property consist of some tangible manifestation, whether fixed or unfixed, the author has chosen to adopt a definition of "culture" that reflects only those definitions that can be expressed in a tangible manner. Thus, "culture," for purposes of this Article, includes the historical, political, artistic, folkloric, and ritualistic elements of a nation's heritage which can be manifested or expressed in some tangible form. This definition is intended to encompass the broadest possible spectrum of elements that may form part of a region's or country's cultural heritage. The following elements are included: artistic, literary, and musical works; scientific, agricultural, and medical innovations; and folkloric traditions, indigenous religious rituals, and monumental works. This definition does not include human remains. Although such remains are clearly entitled to respect and protection, they do not involve the product of intellectual creativity or indigenous knowledge, which is an activating requirement for the protection scheme discussed in this Article.

[3] *See, e.g.,* Terri Janke et al., *Contribution to Industry,* Pt. III, § 2.2 (last modified Aug. 27, 1997) <http://www.icip.lawnet.com.au/part 1-2.htm>. A survey of international visitors to Australia conducted in February and March 1993 found that almost one-half are interested in experiencing the indigenous cultures and that one third actually do experience an indigenous cultural performance or participate in a tour. *See id*. Similarly, the value of sales of indigenous arts and souvenirs to international visitors has been estimated at $46 million per year. *See id*.; *see also* Robert McKelvie*, Shooting Very Very Big Fish (with a Nikon)*, THE INDEP.-LONDON, Nov. 2, 1997, at 4, *available in* 1997 WL 15214307 (noting that the eco-tourist explosion in Kaikoura, New Zealand led to an increase in tourists from 3,400 in 1987 to 188,000 in 1995); Susan C. Valerio, *Weekender: What Really is Ecotourism*?, BUS. WORLD (MANILA), Sept. 19, 1997, *available in* 1997 WL 13852251 (examining the historical development, goals and problems caused by eco-tourism); *Ecotourism Officials Meeting in Brazil*, DALLAS MORNING NEWS, Sept. 19, 1993, at K2, *available in* 1993 WL 3388210 (analyzing conservation and the business of eco-tourism); Terri Janke et al*., Proposals for the Recognition and Protection of Indigenous Cultures and Intellectual Property*, § 5.3 (last modified Aug. 27, 1997) <http://www.icip.lawnet.com.au.part/2-2.htm> (discussing the problem of boomerangs and didgeridoos being manufactured abroad and then imported into Australia and sold as authentic Aboriginal art). Although "true" eco-tourism can provide certain benefits, including the preservation of natural resources and cultural heritage, *see, e.g.,* Valerio, *supra* (discussing the potential benefits of eco-tourism), the big business aspects of eco-tourism and cultural tours can result in the transformation of culture into a marketable commodity divorced from its cultural context. *See* Janke, *supra*.

[4] The right to control the commodification of culture is implicit in the claim of a proprietary right to control indigenous culture. Thus, Native American accusations that mainstream Canadian authors are guilty of "cultural theft, the theft of voice" in their use of native histories seems to imply that part of the loss caused by such "unauthorized"

emergence of a global marketplace and the resulting drive by newly industrialized countries to develop an industrial and commercial base in order to participate in this marketplace.[5] These trends impose a growing need for developing countries[6] to seek foreign investment, in both capital and technology, in order to face the economic challenges of the coming century. Increasingly, the ability to attract such foreign investment is tied to the protection of so-called "intellectual property rights," including patents,[7]

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uses involves losing the ability to control the marketing of the cultural goods derived from this "voice." *See* Rosemary T. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURIS. 249 (1993). In keeping with this view that culture has a proprietary nature, "commodification" for purposes of this Article is defined as the transformation of an object, custom or ritual into a commercial good or service capable of being mass-marketed. Examples of commodification include, but are not limited to, the manufacturing and sale of "cultural artifacts" as souvenirs for tourists, the development and presentation of bastardized rituals as part of a tourist enterprise, and use of cultural icons and traditions in popular fiction outside of its cultural context.

5 *See, e.g.,* Jeffrey Blatt et al., *Preparing for the Pacific Century: Fostering Technology Transfer in SouthEast Asia*, 3 ANN. SURV. INT'L & COMP. L. 235 (1996); James Forstner, *Patent Strategies: Asia Pacific*, PLI GLOBAL INTELL. PROP. SERIES (1992); *International Developments*, J. PROPRIETARY RTS., May 1997, at 24; *see also infra* note 19 (describing the effects of this process on developing nations).

6 "Developing country" and "developed country" have various definitions. Such terms are usually based either on United Nations definitions used to determine foreign aid levels or on World Bank definitions based on per capita income. *See, e.g.,* Marco C.E.J. Bronchers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries*, 31 COMMON MKT L. REV. 1245 (1995); Reiko R. Feaver, *China's Copyright Law and the TRIPS Agreement,* 5 J. TRANSNAT'L L. & POL'Y 431 (1996). For purposes of this Article, the term "developing country" refers to Third World countries that have not attained the level of industrialization of members of the Organization of Economic Cooperation and Development (OECD). This definition will include lesser developed countries (LCD's), newly industrialized countries (NIC's), and members of the "Group of 77." By contrast, the term "developed country" will refer to industrialized countries such as the United States, Canada, Japan, and most members of the European Union, and the OECD. Developed countries are generally perceived as owning or controlling most of the world's presently available technology. The above definitions generally comply with United Nations guidelines and will serve to place present disputes in an understandable context.

7 There is no generally accepted international definition for the various forms of intangible property rights that are included within the definition of "intellectual property." Nevertheless, based on widely accepted multinational treaties, some commonly accepted parameters of protection can be ascertained. For instance, patent law usually protects scientific inventions and discoveries concerning new products and processes. These include, for example, machines, manufacturing processes, and chemical or electrical structures and compositions, as long as such inventions are new, useful, and non-obvious. *See, e.g.,* Agreement on Trade Related Aspects of Intellectual

copyrights,[8] trademarks[9] and trade secrets.[10] Newly industrialized

Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, art. 27, 33 I.L.M. 81 [hereinafter TRIPS]; *see also* 35 U.S.C. § 101 (1997) (permitting patent protection for a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . ."); Patent Law of the People's Republic of China, ch. I, art. 22 (1985) (giving protection to inventions that are novel, inventive, and have practical applicability); Japanese Patent Law, arts. 2, 29 (1959), *reprinted in Japan*, 2F WORLD PATENT LAW & PRACTICE (John Sinott ed., 1997) (defining an invention, *hat samei,* as "any high grade creation among creations of technical idea utilizing natural rules" and requiring novelty, non-obviousness, and ability to be "utilized in industry" for patentability); West German Patent Law, art. I, *reprinted in Germany,* 2D WORLD PATENT LAW & PRACTICE (John Sinott ed., 1997) (permitting patent protection for "new inventions which permit industrial application").

[8] Copyright law generally protects works of artistic, literary and musical expression, including books, cinematographic works, paintings, sculpture, photographic works, pantomime, and, more recently, computer software programs and databases. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 14, 1967, art. 2, 828 U.N.T.S. 221, 227 [hereinafter Berne Convention] (defining copyrightable subject matter as "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression"); *see also* 17 U.S.C. § 102 (1997) (enumerating eight categories of protectable works under U.S. law, including, *inter alia,* literary, dramatic, graphic, architectural and musical works, and computer programs); (U.K.) Designs and Patents Act of 1988 (c48), pt. I, ch. I, § 1(a) (1989) (protecting literary, dramatic, musical and artistic works, computer programs, cinematographic and audio-visual works); Teruo Doi, *Japan*, *in* 2 INTERNATIONAL COPYRIGHT LAW & PRACTICE (Paul E. Geller et al. eds., 1997) (citing Japanese Copyright Act, arts. 2(1)(i), 10(1) (1970), which protects works of authorship, *Chosakubutsu,* which is defined as a "production in which thoughts or emotions are expressed in a creative way and which fall in the literary, scientific, artistic or musical domain" and listing as protected nine enumerated categories of literary, musical and choreographic works; paintings, woodcut prints, architectural works, maps, cinematographic works; and program works, including computer programs); Economic Law of Russia Law of the Russian Federation No. 5351-1, arts. 6, 7 (1993), *available in* LEXIS, Intlaw Library, Rflaw File (covering "works of science, literature and the arts, that are the result of creative activity, irrespective of the purposes or merits of such works"; forms include written, oral, sounds or videorecording, image and three-dimensional forms and lists as "objects of copyright," literary, dramatic, choreographic, musical, audio-visual; paintings, sculpture, applied art, scenographic art, architecture, photographic works, maps and computer programs).

[9] Trademark law generally protects corporate symbols, logos and other distinctive indicia of the origin of goods or services. *See, e.g.*, TRIPS, *supra* note 7, art. 15 (defining a trademark as "any sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings"); *see also* 15 U.S.C. § 1127 (1997) (defining a trademark under U.S. law as "any word, name, symbol or device, or any combination thereof used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown"); Japanese Trademark Law No. 127, art. 2(1) (1991), *reprinted in* INTERNATIONAL INTELLECTUAL PROPERTY LAW: GLOBAL JURISDICTIONS 27 (Dennis

Campbell et al. eds., 1996) (protecting "letters, figures, signs or 3-dimensional shapes, or any combination of these and colors").

10 Trade secret law generally protects confidential information that has commercial value due to its secret nature and that has been the subject of reasonable steps by the person lawfully in control of the information to keep it secret. *See, e.g.*, TRIPS, *supra* note 7, art. 39 (defining as "secret" protected confidential information having "commercial value because it is secret," and having been subject to "reasonable steps" to keep it "secret"); *see also* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (defining a trade secret under U.S. law as confidential information which is not generally known and is subject to reasonable efforts to protect its secret nature); UNIFORM TRADE SECRETS ACT § 1(4) (1985) (defining trade secrets as "information . . . that derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons . . . and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy"); Peter Chrocziel, *Germany*, *in* WORLD WIDE TRADE SECRETS LAW § B11.02(1) (Terrence F. MacLaren ed., 1997) (stating that trade secrets are protected in Germany if the information is secret, known only to a limited number of people, subject to reasonable steps for its protection, and where the owner has a business interest in keeping it secret); Kathie Claret, *France, in* INTERNATIONAL WORLD WIDE TRADE SECRETS LAW § 3.02(1)(a) (Terrence F. MacLaren ed., 1997) (stating that France protects manufacturing secrets, *secrets de fabrique*, confidential business information and know-how, *savoir faire*); Kazuko Matsuo, *Japan*, *in* WORLD WIDE TRADE SECRETS LAW § C1.02(1) (Terrence F. MacLaren ed., 1997) (stating that Japan protects technical information that has economic value, is protected and treated as a secret, and is not publicly known); Simon Mehigan et al., *United Kingdom, in* WORLD WIDE TRADE SECRETS LAW § B2.01(2) (Terrence F. MacLaren ed., 1997) (stating that the United Kingdom protects information used in trade or business where the owner limits dissemination because its disclosure to a competitor would result in significant harm to the owner). The growth of trade secret protection as a topic of international protection concerns is a relatively new development.

One other form of "traditional" intellectual property right that has been the subject of multinational protection is the so-called "industrial design," also referred to as "utility models" or "utility designs." *See, e.g.*, Margaret Boulware et al., *An Overview of Intellectual Property Rights Abroad*, 16 HOUS. J. INT'L L. 441 (1994); CHRISTINE FELLNER, INDUSTRIAL DESIGN LAW (1995), HECTOR L. MACQUEEN, COPYRIGHT, COMPETITION AND INDUSTRIAL DESIGN (2d ed. 1995); GUY TRITTON, INTELLECTUAL PROPERTY IN EUROPE ch. 5 (1996). "Industrial designs" generally include those designs not subject to patent protection, but having some degree of novelty or originality that warrants protection against unauthorized use. *See* FELLNER, *supra*. The standards for novelty or originality of an industrial design are generally lower than for a patent or copyright. *See id*. *See generally* TRIPS, supra note 7, art. 25(a) (members to protect "independently created industrial designs that are new or original"); Roland Liesegan, *German Utility Models After the 1990 Reform Act*, 20 AM. INTELL. PROP. L. ASS'N Q.J. (1992) (comparing the different inventiveness requirements underlying German patent and industrial design law).

Despite their potential usefulness in protecting certain design elements that could not otherwise qualify for patent or copyright protection, industrial designs, in the author's opinion, ultimately serve little practical usefulness in constructing an intellectual property-based protection scheme to protect a developing country's culture

countries are faced with mounting refusals by multinational corporations to enter into joint investment or research-development deals without the assurance of "adequate protection" for the technology the multinational corporations are expected to provide.[11] Such "adequate protection" generally includes the enactment and subsequent enforcement in the developing countries of laws protecting intellectual property rights—laws which are heavily influenced by or modeled on U.S. or European systems.[12]

The conflict between developed and developing countries over the enforcement of intellectual property rights is one of the most divisive legal issues of the latter twentieth century.[13] Despite the

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against de-culturizing forces. This is because industrial designs have been subject to wide divergence in protection, more than any other form of intellectual property (with the exception of trade secrets). Moreover, the author shares the view of other scholars that utility designs form a poor basis for a future-looking protection regime. *See, e.g.*, Ruth Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735 (1996). Consequently, the author will not discuss the use of industrial design protection as part of her proposed protection scheme.

11 For example, in 1977, Coca-Cola terminated its operations in India after being ordered to dilute domestic equity to 40% or divulge its secret formula. Operations were not resumed until 1993 when the threat of disclosure was lifted. *See Coca-Cola India to Sell Shares to Public*, AGENCE FRANCE-PRESSE, Oct. 26, 1997, *available in* 1997 WL 13421059. This is only one example, and an admittedly extreme one, of the refusal to invest in developing countries without adequate intellectual property protection. *See generally* Blatt et al., *supra* note 5, at 235 (1996); *see also infra* note 12 (examining the relationship between foreign investment and intellectual propertyrights).

12 *See, e.g., Transnational Corporations and Management Divisions of the UN Department of Economic and Social Development: Intellectual Property Rights and Foreign Direct Investment*, U.N. Doc. ST/CTC/SER.A/24 (Carlos M. Correa ed., 1993) (examining the inter-relationship between intellectual property rights and foreign investment in diverse countries); Judy Dempsey, *U.S. and Israel Clash on Trade Barriers*, FIN. TIMES, May 30, 1997, at 6, *available in* 1997 WL 11031361 (reporting that weak intellectual property rights handicap Israel in attracting foreign investment); *Not Quite So Sparkling China: Foreign Investment—Has Foreign Investment Peaked in China? And will It Ever Take Off in Japan?*, ECONOMIST, Mar. 1, 1997, at 38 (reporting that weak intellectual property rights enforcement is slowing down foreign investment in China); Jennifer Humphrey, *Mercosur Magnetism*, 9 INT'L BUS. 41-42 (1996) (reporting that stronger patent protection in Brazil results in higher foreign investment).

13 *See generally* EDWARD S. YAMBRUSIC, TRADE BASED APPROACHES TO THE PROTECTION OF INTELLECTUAL PROPERTY (1992); THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (Terrence P. Stewart ed., 1993) [hereinafter A NEGOTIATING HISTORY]; Doris Estelle Long, *The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMP. & INFO. L. 129 (1996) [hereinafter Long, *The Protection of Information Technology*]. The global piracy problem of the 1970s which gave impetus to the negotiation of a multilateral trade treaty specifically dealing with the problem of international protection of intellectual property rights, in the

accession of over 111 countries to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[14] global piracy and the efforts required to eradicate it remain key areas of dispute.[15] Intellectual property protection undeniably impacts a broad range of international issues, including *inter alia,* trade,[16] technological development,[17] wealth-transfer,[18] environmental

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author's opinion, was an early indication that intellectual property rights protection would take a prominent position in international affairs during the latter part of the twentieth century. For a brief history of the problems posed by global piracy and its impact on multinational trade negotiations, see Joseph A. Greenwald, *The Protection of Intellectual Rights, in* GATT AND THE URUGUAY ROUND: THE U.S. VIEWPOINT, IN CONFLICT AND RESOLUTION IN U.S.-E.C. TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 229 (Seymor J. Rubin & Mark L. Jones eds., 1989); *see also infra* note 49 (describing the TRIPS agreement). The negotiation of such a treaty itself under the auspices of the General Agreement on Trade and Tariffs (GATT) took over seven years and was marked by intensive debate. If the negotiation of TRIPS was expected to resolve these issues, at least in the short-run, it has failed to do so. Counterfeiting remains a problem of global significance. Moreover, the question of the scope of protection to be afforded intellectual property rights is increasingly interjected into debates dealing with such diverse topics as biodiversity, the protection of the heritage of indigenous peoples, and technology transfers. *See infra* notes 18-21 and accompanying text (describing the various topics and viewpoints in these debates). A speech delivered by Fidel Castro at the 1992 Rio de Janeiro Conference on Biodiversity is only one example of the increasing passions which underscore these issues. For further description of Castro's speech, see *infra* note 19.

14 *See* TRIPS, *supra* note 7.

15 A major impetus behind negotiations that led to the TRIPS Agreement was the desire of developed countries to combat global piracy. For a more detailed discussion of earlier efforts to combat piracy under GATT auspices, and the role of these anti-counterfeiting activities in connection with the negotiation of TRIPS during the Uruguay Round, see Doris Estelle Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or An Illusory Promise?,* 22 AM. INTELL. PROP. L. ASS'N Q.J. 531, 535-547 (1995) [hereinafter Long, *Copyright and the Uruguay Round Agreements*]. The enactment of TRIPS, however, has *not* eliminated the problem of global piracy. *See infra* note 40 (describing the continuing problem of global piracy).

16 The TRIPS Agreement negotiated during the Uruguay Round of GATT represents the clearest acknowledgment of the trade nature of intellectual property rights enforcement. Not only was it negotiated as part of a multinational *trade* treaty, TRIPS itself recognizes in its preamble the critical role of enforcement of intellectual property rights "to reduce distortions and impediments to international trade . . . and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade." TRIPS, *supra* note 7, pmbl., cl. 1.

17 Intellectual property law historically has been related to the protection of technological advances. Thus, for example, copyright law has long served as a critical method for protecting the products of new technological advances. The first U.S. copyright statute protected a relatively limited category of works—maps, charts, and books. *See* Copyright Act of 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124.

Subsequent revisions reflected the advance of technology, adding, respectively, photographs, motion pictures, and computer programs. *See* Copyright Act of 1865, 13 Stat. 530; Copyright Act of 1909, 35 Stat. 1075 (1909), *repealed by* Copyright Act of 1949, 61 Stat. 668, *amended by* Copyright Amendments of 1980, 94 Stat. 3028 (codified as amended 17 U.S.C. § 1 (1997)); Copyright Amendments of 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3028. Patents have reflected a similar growth in scope of protection, from mechanical and chemical processes, to bacteria, *see Diamond v. Chakrabarty*, 447 U.S. 303 (1980), and computer programs, *see Diamond v. Diehr*, 450 U.S. 175 (1981). The scope of protection granted intellectual property rights currently serves as one of the key sources of debate between developed and developing countries regarding the cost of access to technological advances. *See generally* Long, *The Protection of Information Technology*, *supra* note 13 (discussing the relationship between technology and intellectual property rights); *see also infra* note 18 (giving examples of the range and tenor of the debate between developed and developing nations regarding the scope of protection to be afforded intellectual property rights in technology).

18 The transfer of technology from developed to developing countries has been the subject of intense international debate. *See, e.g.,* ASSAFA ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES (1995); Ruth L. Gana, *U.S. Science Policy and the International Transfer of Technology*, 3 J. TRANSNAT'L L. & POL'Y 205 (1994); David M. Hang, *The International Transfer of Technology: Lessons that East Europe Can Learn from the Failed Third World Experience*, 5 Harv. J.L. & Tech. 209 (1992); Long, *Copyright and the Uruguay Round Agreements, supra* note 15; J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market,* 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171 (1993). This debate is fueled in part by the belief among developing nations that without the technology "wealth" of the industrialized nations they will continue to remain poor step-children of their richer, and in many cases former colonial, masters. *See, e.g.,* FIDEL CASTRO, TOMORROW IS TOO LATE: DEVELOPMENT AND THE ENVIRONMENTAL CRISIS IN THE THIRD WORLD (Ocean Press 1993). In a report circulated at the 1992 Earth Summit in Rio de Janeiro, Fidel Castro tied Third World poverty, environmental protection, and sustainable development to present intellectual property protection schemes. Castro stated, in pertinent part:

> Today more than ever, the underdeveloped countries urgently need access to knowledge, to scientific and technological development. This is not only because it would allow them to solve infinite economic, social and ecological problems, but because, in the current stage of capitalist development, scientific knowledge plays a principal role in the accumulation of capital . . . Through the possibilities presented by the modern development of modern biotechnology, the genetic resources of the underdeveloped world have gained extraordinary value . . . In fact, the possession and control of genetic resources constitutes a new way of plundering the Third World, which has become the main objective of those transnational corporations involved in this field . . . .
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> The privatization boom, together with the need to maximize profit, are having a growing impact on the new mechanisms for controlling copyrights of biotechnological advances, and even on the control of the national heritage of the underdeveloped countries. Attempts are being made to impose a patent system on the underdeveloped countries which . . . does not recognize the right of these countries to enjoy the profits made . . . . Due to the fragility of the ecosystems of the underdeveloped nations and the lack of resources available

protection,[19] sustainable development[20] and cultural patrimony.[21]

> for them to confront the deterioration of the environment, the transfer of environmentally sound technology is an essential component of sustainable development . . . . As a consequence of the profound transformations brought about by the current scientific and technological resolutions, there have been significant changes in the corporate strategies of transnational companies. These corporate strategies promote the formation of strategic alliances among firms in the developed nations in order to confront the rising costs of research and development and to guarantee greater protection of copyrights. This lessens the transfer of technology to the Third World.
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> These new corporate strategies have met with strong support from the industrialized nations. In effect, the governments of these countries, particularly that of the United States, have pushed strongly in the Uruguay Round for stricter and more uniform norms regarding the protection of intellectual property rights.
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> The establishment of these kinds of protective measures would result in rising costs for imported technology, especially in the industries that make intensive use of patented procedures. This entails additional demands for financial resources in the underdeveloped nations, which must be taken into account where new agreements and protocols are signed for the protection of the environment.

Id. at 32-40.

This speech strongly reflects the views of developing countries that intellectual property represents the "common heritage of mankind," and should be freely available. The position papers presented by India, Brazil, and other developing countries during the Uruguay Round Negotiations reflect similar views. *See* YAMBRUSIC, *supra* note 13 (reprinting diverse position papers including those of the Republic of Korea, Brazil, Peru, and India); *see also* A NEGOTIATING HISTORY, *supra* note 13 (discussing the debates and issues during the GATT Uruguay Round).

19 See *supra* note 18 for Fidel Castro's views on the value and exploitation of underdeveloped countries' ecological resources; *see also* Edgar J. Asebey & Jill D. Kempenaar, *Biodiversity Prospecting: Fulfilling the Mandate of the Biodiversity Convention*, 28 VAND. J. TRANSNAT'L L. 703 (1995); David R. Downes, *New Diplomacy for the Biodiversity Trade: Biodiversity, Biotechnology and Intellectual Property in the Convention on Biological Diversity*, 4 TOURO J. TRANSNAT'L L. 1 (1993); David Hurlbit, *Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property*, 34 NAT. RESOURCES J. 379 (1994) (discussing the relationship between biodiversity and the protection of intellectual property rights).

20 *See supra* note 18 for various sources detailing the divergent views on technology transfers from developed to developing nations.

21 *See* Bellagio Declaration, Mar. 11, 1993, *reprinted in* INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 107 (Anthony D'Amato & Doris Estelle Long eds., 1996) (supporting the development of neighboring (or related) rights regimes to protect "folkloric works," "works of cultural heritage," and "biological and ecological 'know-how' of traditional peoples") [hereinafter Bellagio Declaration]; *see also* E.P. Gavrilov, *The Legal Protection of Works of Folklore*, 20 COPYRIGHT 76 (1984); Doris Estelle Long & Anthony D'Amato, *Intellectual Property as Culture*, *reprinted in* INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 95 (Anthony D'Amato & Doris

Each topic warrants its own in-depth examination. This Article has a more modest goal. It focuses on the threat of globalization to native and indigenous culture[22] and presents potential solutions,

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Estelle Long eds., 1996).

The term "cultural patrimony" has been variously defined as "antiquities," "cultural goods," and "cultural property." Lisa J. Boradkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995) (antiquities), Victoria J. Vitrano, *Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulations for the Protection and Return of Cultural Objects*, 17 FORDHAM INT'L L.J. 1164 (1994) ("cultural goods" and "cultural property"). Similarly, "cultural patrimony" has been defined as "an object having ongoing historical, traditional, or cultural importance central to the . . . culture itself . . . and which . . . cannot be alienated, appropriated, or conveyed by any individual . . . ." Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001(3)(D) (1997). Moreover, UNESCO defines "cultural property" as "property which, on religious or secular grounds, is specifically designated by each state as being of importance for archeology, prehistory, history, literature, art or science . . . ." Convention on Illicit Transfer, *supra* note 2, art. I, 823 U.N.T.S. at 231.

The protection scheme the author proposes in this Article might be applied to cultural elements that fall within these varied definitions, but should not be considered limited to objects of "cultural patrimony." Moreover, as the definitions contained herein demonstrate, the definition of "cultural patrimony" varies depending on the goals sought to be achieved. Thus, the issue of which elements of a country's culture require protection in accordance with the regime proposed herein necessarily will vary in accordance with the needs and views of the culture at issue, and the strength of the de-culturizing forces it faces.

[22] Most multinational treaties and draft treaties regarding the protection of culture use the term "indigenous peoples" or "indigenous culture" to refer to the culture of a particular people. *See, e.g.*, INTERNATIONAL LABOUR CONFERENCE, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 1, para. 1(b) (1989), *reprinted in* 15 OKLA. CITY U. L. REV. 237, 238 (1990) (categorizing people as indigenous peoples "on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions"). *But see* Tunis Model Law on Copyright for Developing Countries, UNESCO Pub. No. 92-3-101 463-3 (1976) [hereinafter Tunis Model Law] (suggesting protection for works of "*national* folklore") (emphasis added).

Despite this apparent equivalency, the author submits there may be a perceived distinction between need for specialized protection depending on the dominant nature of the culture at issue. Thus, for purposes of this Article the term "indigenous culture" refers to the culture of the original inhabitants of a particular country or region. "Native culture," by contrast, refers to the culture of non-indigenous peoples. For example, in the United States, "indigenous culture" would be represented by the Native Americans and Native Hawaiians while "native culture" would be represented by subsequent tribal and regional groups, including long-standing immigrant groups. The terms are not precise but are used simply to indicate that both cultures may be considered deserving, and in need, of protection against harmful de-culturization.

using intellectual property laws as the framework.

Part I of this Article briefly examines the impact of globalization on native and indigenous culture, seen through the prism of intellectual property rights.[23] In Part II, present international standards for intellectual property rights protection are set forth, with a primary emphasis on TRIPS standards as the international norm.[24] Finally, Part III proposes changes in intellectual property laws that developing countries can make that will assure protection of their culture and comply with international standards.[25] In effect, this solution permits developing countries to utilize demanded-for intellectual property rights as a sword *and* shield against the de-culturizating forces of globalization and foreign investment. Part IV concludes by summarizing the problems faced by developing countries and by providing potential solutions to these problems afforded by international intellectual regimes.[26]

I. Coca-Colonization and McWorld—De-Culturization in the Global Marketplace

The presence of foreign investment and the subsequent development of a commercial culture that facilitates participation in the global marketplace can have an adverse impact on indigenous culture.[27] The "Coca-colonization" of non-Western, non-capitalist societies is a documented fact of twentieth century life.[28] Symbolized by the spread of a global, commercial culture

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[23] *See infra* notes 27-42 and accompanying text.

[24] *See infra* notes 43-144 and accompanying text.

[25] *See infra* notes 145-209 and accompanying text.

[26] *See infra* section IV.

[27] There is no question commodification of culture leads to certain, albeit limited, benefits. Eco-tourism must be credited at least in part for preservation of wildlife and natural parks to fill consumer demand. *See, e.g.*, Larry Tye, *Eco Tourism*, BOSTON GLOBE, Sept. 1, 1989, *available in* 1989 WL 4909142; Valerio, *supra* note 3. Similarly, the dissemination of culture, by commodification into souvenirs and tourist ceremonies at least serves to broaden the reach of such culture, though in a bastardized form. Such dissemination may facilitate cross-cultural exchanges that enrich both parties. *See infra* note 30 (listing articles on the potential benefits that can accrue from these exchanges). These potential benefits, however, do not eradicate or exceed the harms of de-culturalization that may accompany commodification.

[28] The term "Coca-colonization" appears in ULF HANNERZ, CULTURAL COMPLEXITY: STUDIES IN THE SOCIAL ORGANIZATION OF MEANING 217 (1992). "Coca-

based largely on Western consumer images of technological advancement and popular culture—fast food, fast computers, fast music and fast news, purveyed by such well-known multinational corporations as KFC, Microsoft, MTV and CNN—Coca-colonization has become the new economic imperialism of developed countries.[29] The key aspect of this Coca-colonized global commercial culture is image—modern, forward-moving and above-all conspicuous consumerism.[30]

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colonization" generally refers to the global homogenization which arises from the replacement of local products with mass produced goods, which usually originate in the industrialized countries of the West. *See* David Howes, *Introduction: Commodities and Cultural Borders,* CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES 3 (David Howes ed., 1996). Other terms used to refer to this twentieth-century phenomenon include "Neo-Fordism," L. GROSSBERG, WE GOTTA GET OUT OF THIS PLACE: POPULAR CONSERVATISM AND POST MODERN CULTURE (1992); "cultural imperialism," JOHN TOMLINSON, CULTURAL IMPERIALISM (1991); and "McWorld," BENJAMIN R. BARBER, *JIHAD V. MCWORLD*: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1996). *See generally infra* notes 29-37 and accompanying text (discussing the cultural impact of mass produced goods); *see also* Howes, *supra,* at 3-8 (discussing the universalist and transcultural aspects of Coca-Cola's image, and the role that the image has on the internalization of American political ideology).

29 The author does not mean to suggest that the cultural-leveling effect of Coca-colonization is solely a problem for developing countries. To the contrary, the "traditional" American culture of mom and pop enterprises, local bookstores, and the proverbial "Main Street USA" has given way to mega-stores, malls, and all of the other fast food, fast-living, convenience-driven life style represented by "Coca-colonization." *See, e.g.*, Jim Dufresne, *Specialty Outdoor Outlets Feeling Pinch from Chain Stores*, GRAND RAPIDS PRESS (Iowa), OCT. 25, 1997, *available in* 1997 WL 15625337; Holly Rosenkrantz, *Latte, Anyone?,* FAIRFIELD COUNTY BUS. J. (Conn.), Sept. 23, 1996, at 1, *available in* 1996 WL 855023. Thus, even the Western industrialized societies that spawned the phenomenon must deal with its adverse affects.

30 *See, e.g.*, BARBER, *supra* note 28 (examining the conflict between global commercial culture and Third World values); CELIA LURY, CONSUMER CULTURE (1996) (examining, *inter alia*, globalization and consumer culture); Monroe Price & Aimee Brown Price, *Custom, Currency and Copyright: Aboriginal Art and the $10 Note*, CARDOZO LIFE, Fall 1996, at 19 (exploring the conflict between aboriginal rituals and commercial demands for art); Michael Blakeney, *Milpurrurru & Ors. v. Indofurn Pty Ltd. & Ors—Protecting Expressions of Aboriginal Folklore Under Copyright Law,* (visited Aug. 21, 1997) <http://www.murdoch.educ.au/issues/v2n1/blakeney.txt> (exploring the conflict between aboriginal rituals and commercial art).

The author does not intend to suggest that the cross-cultural borrowing represented by "McWorld" is unique to the twentieth century or that all cross-cultural borrowing is necessarily harmful or destructive. To the contrary, cross-cultural borrowing may enrich the native culture and may also lead to greater mutual tolerance of cultural differences. *See* David Howes, *Cultural Appropriation and Resistance in The American Southwest: Decomodifying 'Indianness,' in* CROSS-CULTURAL CONSUMPTION: GLOBAL MARKETS, LOCAL REALITIES 156 (1996) [hereinafter Howes, *Cultural Appropriation Resistance in*

Benjamin R. Barber coined the term "McWorld" to describe this growing trend toward a homogenized, global marketplace, notable for its absence of recognizable national boundaries.[31] He stated:

> What just a few years ago, Robert Reich called "the coming irrelevance of corporate nationality," is not coming anymore. It is here . . . . Thomas Jefferson's warning that merchants have no country has become a literal truth for the multinational corporations of McWorld. And the markets they ply now a days are more anonymous still. How are nations to control the market in pirated software or smuggled plutonium? . . . Has it even got an address?[32]

According to Barber, "McWorld" exists outside of national or political boundaries. It is "a product of popular culture driven by expansionist commerce . . . . It is about culture as commodity, apparel as ideology."[33] It seems that the opening of non-industrialized countries to the global marketplace is invariably accompanied by the arrival of Western commercial culture. For example, icons such as Mickey Mouse, Ronald McDonald, and Barbie are known throughout the world.[34]

The arrival of a global commercial culture brings the all-too-common de-culturization of traditional customs, rituals and folklore in order to allow their streamlining for mass consumption.

The American Southwest]. However, the author believes that cross-cultural borrowing that results in de-culturization represents the type of destructive borrowing that countries may, and should, wish to control. Furthermore, although this Article focuses on the use of intellectual property laws to protect the culture of Third World countries, concern over de-culturization is *not* limited to the Third World. To the contrary, French and Canadian efforts to protect their culture from the leveling effects of U.S. television and movies is well-known. *See* Lawrence G.C. Kaplan, *The European Community's Television Without Frontiers Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255 (1994) (discussing the use of the Television Without Frontiers Directive by the EC to protect European culture from globalization); Stacie I. Strong, *Banning The Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 DUKE J. COMP. & INT'L L. 93 (1993) (examining the use of cultural exclusions under the Canadian Free Trade Agreement to protect Canadian culture from dominance by the U.S. broadcasting industry).

31 *See* BARBER, *supra* note 28, at 231.

32 *Id.*

33 *Id.* at 13, 17.

34 Indeed, in a recent trip to Cuba, the author discovered a photo studio which used Mickey Mouse to advertise its child portrait services despite a U.S. embargo that should have made this icon virtually unknown in the country.

For example, the traditions of the Maori in New Zealand, the native Hawaiians and native Americans in the United States, and certain indigenous cultures of Latin America have become commercialized to such an extent that their cultural and religious significance has been virtually erased from public memory. Thus, tourists in New Zealand watch performers clad in bastardized versions of "traditional" Maori dress perform a welcoming ceremony although the performers have no concept of, or appreciation for, the cultural significance of such rituals.[35] In Peru, local workers manufacture and sell replicas of golden artifacts symbolizing Incan culture with no remembrance or connection to the heritage that created such artifacts.[36] In the United States, the names of native American tribes and historical personages have been used to name and adorn every type of consumer "good" imaginable including sports teams, T-shirts, and alcoholic beverages.[37]

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35 *See, e.g., Maoris to Develop Mark of Authenticity*, TRAVEL TRADE GAZETTE EUROPA, Sept. 5, 1996, at 30, *available in* 1996 WL 16536096.

36 *See supra* notes 29-30 (discussing the leveling effects of cultural commodification); *see also* CROSS-CULTURAL CONSUMPTION, *supra* note 28 (containing diverse articles exploring the impact of globalization on local culture).

37 *See infra* note 42 (discussing the perceived lack of benefit afforded developing countries from the enforcement of intellectual property rights); *see also* Howes, *Cultural Appropriation and Resistance in the American Southwest, supra* note 31, at 142-44. Howes describes a controversy involving a comic book entitled "The Kachinas Sing of Doom," published in March 1992 by Marvel Comics. In this comic book, the villains are white members of a local gambling cartel who wear Kachina masks and costumes as disguises. The use of such imagery is directly contrary to the transformative power represented by the masks in the Hopi religion. The Kachina mask does *not* serve as a disguise. Instead, the wearer is transformed into the spirit represented by the mask. *See id*. David Howes posits that the harm caused by this de-culturization is actually two-fold. The first he calls "the dilution of tradition," which results in the undermining of the culture's fundamental beliefs by incorporating the misconceptions derived from the de-culturization. In the case of the Marvel Comics, the misconception would be that masks are for disguise, not revelation. *See id.* at 143. The second harm he calls "the dissemination of tradition," which is the loss of control over public dissemination of "culturally sensitive information." *Id*. Where, as in the Hopi culture, the ritual or information is considered sacred, or restricted only to initiates, its uncontrolled public dissemination is directly contrary to the cultural precepts in which it arises. *See id.* at 143-44; *see also* Blakeney, *supra* note 30 (examining the adverse impact on Pitjantjara culture of an anthropology textbook which disclosed secret rituals).

Both harms, in the author's opinion, qualify as de-culturizing harms against which protection should be provided. Protection against the harm of unauthorized "dissemination" however, should be carefully exercised since it could lead to harmful

This transformation of "indigenous culture" into a de-culturized, marketable commodity may be facilitated and, potentially even accelerated, by the development and enforcement of the intellectual property laws required to attract foreign investors. Such laws may exacerbate this de-culturization by promoting "McWorld" over native traditions and customs.[38] The products of culture that have the greatest value in the global marketplace, at least for the present, appear to be those of the technologically developed, industrialized countries.[39] Patented drugs, copyrighted videos, records, computer programs, and trademarked fast food franchises are "hot commodities" in the global marketplace.[40] By contrast, developing countries currently do not pose a large body of protected works created by their own

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censorship. *See infra* notes 173-175 and accompanying text (examining censorship issues).

38 *See, e.g.,* Constance Classen, *Sugar Cane, Coca-Cola and Hypermarkets: Consumption and Surrealism in the Argentine Northwest*, *in* CROSS-CULTURAL CONSUMPTION, *supra* note 28, at 39, 42-43 (examining the adoption of Coca-cola and other Western products and traditions into the culture of Northwestern Argentina to such an extent that they are considered indigenous); Mary M. Crain, *Negotiating Identities in Quito's Cultural Borderlands: Native Women's Performances for the Ecuadorian Tourist Market, in* CROSS-CULTURAL CONSUMPTION, *supra* note 28, at 125, 137 (examining de-culturizing forces on the hotel labor force and the tourist market's presentation of "native" culture). For a contrasting view of the impact of globalization on native traditions, see Carol Hendrickson, *Selling Guatemala: Maya Export Products in U.S. Mail-Order Catalogues*, *in* CROSS-CULTURAL CONSUMPTION, *supra* note 28, at 106, 112-13 (examining the methods used to market native products through references to "tradition," "uniqueness" and environmental protection benefits).

39 *See infra* note 40 (discussing the type and quantity of goods pirated from industrialized nations).

40 Perhaps the most telling evidence of the global desirability of these products is the amount of revenues lost as a result of the pirating of such goods. According to the Intellectual Property Alliance, in 1995, the United States lost an estimated $6.9 billion in exports due to foreign counterfeiting of movies, records, books, and software. *See* Bruce Stokes, *The Diminishing Return of Slapping China for Piracy of U.S. Copyrights*, L.A.TIMES, May 26, 1996, at M2. The Pharmaceutical Manufacturer's Association estimates lost revenue due to pirating of patented drugs exceeds three billion dollars. *See id.*; *see also* Eric Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 559 (1996). The Software Business Alliance claims that in 1996, the U.S. lost over $11.2 billion as a result of the illegal copying and distribution of computer software worldwide. *See* Berta Gomez, *Global Software Piracy Continues to Rise, Says New Survey* (visited July 1997) <http://www.usia.gov/topical/global/ip/piracy/html>. For an interesting examination of the history and impact of global copyright infringement, see JOHN GURNSEY, COPYRIGHT THEFT (Aslib Gower ed., 1995).

authors, inventors or native culture which can find a ready international market.[41] Thus, the recognition and enforcement of intellectual property rights may be seen as providing little benefit to the developing countries themselves.[42]

Given these concerns, newly industrialized countries may be faced with a painful dilemma—seek foreign investment to advance their technological and industrial base at the risk of potentially irreversible harm to indigenous and native culture *or* protect such culture at the cost of technological advancement. This author contends that there may be a workable solution to this problem, based on the very intellectual property laws that seem to contribute to the problem.

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41 The only exception may be de-culturized items created for the tourist market and some mail-order catalogue creations. *See* Hendrikson, *supra* note 38.

42 *See, e.g.*, Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989) (examining Third World views regarding the harm caused by intellectual property rights protection); Long, *The Protection of Information Technology*, *supra* note 13 (discussing developing countries' view that technology is "the common heritage of mankind"). Furthermore, such laws might actually be perceived as harmful since they might be used to solidify rights in the de-culturized aspects of native culture in the hands of the commodifier. For example, in the United States the names of various Native American tribes and historical figures have been used in connection with sports teams and consumer products, including alcoholic beverages such as Crazy Horse beer. The users of these de-culturized products of Native American culture have sought trademark protection for such uses, thus investing their use with the benefits of proprietorship. *See, e.g.*, Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1996) (discussing the Crazy Horse case, among others). Although efforts have been made to challenge these attempts at appropriation, *see* Cathryn Claussen, *Ethnic Team Names and Logos—Is There a Legal Solution?*, 6 MARQ. SPORTS L. J. 409 (1996) (briefly analyzing efforts to remove federal trademark registrations of team names using ethnic terms), they are not always successful. A recent attempt to challenge the use of the mark "The Original Crazy Horse Malt Liquor" ultimately failed on First Amendment grounds. *See* Hornell Brewing Co. v. Minnesota Dept. of Public Safety, Liquor Control Division, 553 N.W.2d 713 (Minn. Ct. App. 1996). Descendants of the original Chief Crazy Horse challenged the unauthorized use of their ancestor's name. *See id*. at 715. The association was considered particularly pernicious since Chief Crazy Horse did not drink alcoholic beverages and had even argued against the evils of alcohol during his lifetime. Although the label was originally held illegal for its misleading affiliation with an American Indian leader, the decision was ultimately reversed for violating the brewing company's First Amendment free speech rights. *See id.* at 719.

II. Current International Intellectual Property Protection Regimes

Most intellectual property law models are based on Western, capitalist philosophy, and indeed appear to be developed with such a world-view in mind.[43] The mere fact that works of intellectual

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[43] *See, e.g.*, ASSAFA ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES (1996). Although it is the author's position that Western capitalist views do not necessarily have to be adopted in order to comply with present international standards, there is no question that most models appear to incorporate the individuated property views of the West. *See infra* note 49 and accompanying text (discussing the role of "private rights" in international intellectual property models). For example, protected works under the copyright laws of the developed countries generally require an individual, recognizable author to whom exploitation rights for these works are granted. See *supra* note 9 and *infra* notes 45-47 and accompanying text for a discussion of these laws. Such individuated rights by their nature preclude recognition of the governmental or societal ownership views of a socialist economic system. Thus, although pre-Soviet Russia boasted intellectual property laws that recognized ownership and exploitation rights for the individual author or inventor, such rights were eliminated under the socialist system of the Soviet Union. *See, e.g.,* ENDESHAW, *supra,* at 75-79; *see also* IRINA V. SAVALEYA, COPYRIGHT IN THE RUSSIAN FEDERATION (1993) (discussing pre-Soviet patent laws in Russia). These rights were re-established after the collapse of the Soviet Union and the re-emergence of a market economy. *See id*.

Similarly, the individuated property rights of Western intellectual property systems appear to preclude recognition of commutarian or tribal authorship which underlies much of the intellectual property rights of the indigenous and native cultures of the developing countries. *See, e.g.,* VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS (Stephen B. Brush & Doreen Stabinsky eds., 1996); Rosemary J. Coombe, *The Properties of Culture and The Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CONST. J.L. & JURIS. 249 (1993); Madhaui Sunder, *Authorship and Autonomy As Rites of Exclusion: The Intellectual Propertization of Free Speech in* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 49 STAN. L. REV. 143 (1997). As the Bellagio Declaration recognized:

> Contemporary intellectual property law is constructed around a notion of the author as an individual, solitary and original creator, and it is for this figure that its protections are reserved. Those who do not fit this model—custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties . . . are denied intellectual property protection.

Bellagio Declaration, *supra* note 21, at 108. Consequently, recent efforts to extend protection to communtarian works such as folklore have focused on *sui generis* regimes outside traditional intellectual property schemes. *See supra* notes 168-173 (discussing the author's proposed protection scheme).

As discussed more fully below such *sui generis* schemes are not mandated under current international standards, and may even be counterproductive, in the author's opinion, because they unnecessarily place the protection of such works outside the

creativity and innovation, so-called "works of the mind," are granted the status of protectable *individual property* itself represents a Western view.[44] It is no coincidence that intellectual property rights were first recognized in Western Europe where individual ownership of property was possible.[45]

The Western model for protecting works of cultural and intellectual creativity is based largely on the recognition of property rights granted to creators of the work in question.[46]

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mainstream of intellectual property protection. Such "special" status not only slows the extension of protection on a global scale (because new accords must be developed), it also makes such protection less likely, because there is no pre-existing framework on which to develop an international protection regime.

44 In *To Steal a Book is an Elegant Offense*, William Alford cogently examines the "problem" of intellectual property enforcement in China and makes a strong case for the view that property-based views of such protection are contrary to Chinese culture. Alford explains that "interaction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture." WILLIAM A. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 28 (1995) (footnote omitted). Such interaction requires both unfettered access to information in all forms, including written, musical and painted forms, and unfettered distribution of those forms deemed useful by the pertinent authorities. This type of access and distribution exists outside the merchant guilds and printers monopolies that characterized the development of intellectual property rights in Europe. *See also* Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 N.W. J. INT'L L. & BUS. 15 (1993). Tribal cultures have a communitarian view of property and information that similarly does not translate to individual proprietorship. *See* RONALD V. BETTY, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 12-13 (1996) (Indian and Balinese traditions); Christopher Byrne, Chilkat Indian Tribe v. Johnson and Nagpra: *Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109 (1993) (Native American traditions); Ruth Gana, *Has Creativity Died In the Third World? Some Implications of the Internationalization of Intellectual Property,* 24 DENV. J. INT'L L. & POL'Y 109, 132-37 (1995) (diverse aboriginal traditions); Philip McCabe & Brent Porter, *Of Lore, Law and Intellectual Property*, 27 IP WORLD 23 (1995) (Maori traditions).

45 The first reported copyright law was enacted in England in 1710. Statute of Anne, 8 Anne, c. 19 (1710). The first reported trademark type regulation may have been enacted in Venice in the Middle Ages. *See* STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY 8-9 (1930). Multinational treaties governing intellectual property rights were similarly first established in Europe, including, most notably, the Berne Convention for the Protection of Literary and Artistic Works in 1886 and the Paris Convention for the Protection of Industrial Designs in 1883. *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967); FRANK SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS (1925). *See generally* DONALD CHISUM & MICHAEL JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW (1992); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW (1995).

46 For example, Article I of the U.S. Constitution grants Congress the right to

These property rights give creators the legal right to control the use of their creations, including control over the economic terms on which they will allow their commercial commodification and dissemination.[47] Despite the historical role that Western views of property ownership have played in the growth of intellectual property rights,[48] the adoption of such Western views is not necessarily required under current international standards.[49] To

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"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. Under this clause, copyright owners are granted a proprietary interest in their protected works, *see* 17 U.S.C. § 106 (1997), and inventors are granted similar rights over their patented inventions, *see* 35 U.S.C. §§ 154, 271 (1997). *See generally* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?,* 68 CHI.-KENT L. REV. 715 (1993); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1933).

47 For example, U.S. copyright law grants authors five exclusive rights over their protected works, including the right to authorize the reproduction and distribution of the work, in whole or in part. *See* 17 U.S.C. § 106 (1997). Other countries grant similar rights. *See* United Kingdom Designs and Patents Act of 1988 (c48), pt. I, ch. I, § 16(1) (1989); Law of the People's Republic of China arts. 21, 45 (1990), *reprinted in* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, 1 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1990); Russian Federal Law on Copyright and Neighboring Rights art. 15 (1993), *reprinted in* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1995).

48 *See supra* note 45 (discussing Western intellectual property law development).

49 The author does not mean to suggest that TRIPS cannot be seen as representing the Western capitalist view of intellectual property rights as individual property rights. *Accord* Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996); J.H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75, 113 (1993). TRIPS itself recognizes that intellectual property rights are "private rights." TRIPS, *supra* note 7, pmbl., cl. 4. However, this recognition must be balanced with the equivalent recognition in TRIPS of "public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives," and the need for "maximum flexibility" to allow developing countries "to create a sound and viable technological base." *Id.* pmbl., cls. 5, 6. Furthermore "private rights," do not necessarily mean "property" rights as that term is defined under Western philosophy, particularly since several articles in the Agreement concern "unfair competition" issues. *See, e.g.*, TRIPS, *supra* note 7, arts. 39-40 (protecting undisclosed information as "ensuring effective protection against unfair competition as provided in Article 10^{bis} of the Paris Convention" and permitting members to prohibit licensing conditions or practices that "constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market"). Even though TRIPS may be seen

the contrary, using TRIPS[50] as the source for current international intellectual property protection norms, the author believes that a domestic system of protection can be created to meet these international standards while providing the flexibility required to assure that indigenous cultures and traditions can be protected and, more importantly, nurtured.

TRIPS is the most recent, and most comprehensive, multinational treaty which deals with the protection of all four "traditional" forms of intellectual property.[51] For the source of its international protection norms, TRIPS relies on the long-established, minimum substantive norms contained in the Berne Convention for the Protection of Literary and Artistic Works (governing copyrights)[52] and the Paris Convention for the Protection of Industrial Property (governing patents and trademarks).[53] Although a detailed discussion of these critical

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as a pro-developed country regime, as demonstrated more fully below, it does not *require* standards that impose such a regime.

50 TRIPS, *supra* note 7. Because of broad support in the international community for TRIPS—over 111 countries signed it initially—TRIPS undoubtedly serves as an international standard for protection. Most of its provisions incorporate pre-existing international treaty provisions which have long served as the basis for international protection standards for intellectual property rights. *See infra* notes 51-144 and accompanying text (discussing TRIPS). Although TRIPS contains significant gaps in coverage, including, perhaps most importantly, copyright protection in a digital environment, it is a forward-looking multinational treaty that arose from a lengthy negotiation process involving most of the countries of the world. See Long, *Copyright and the Uruguay Round Agreements, supra* note 15, at 2281-91, for a detailed examination of the negotiating history of TRIPS.

51 *See* TRIPS, *supra* note 7. See *supra* notes 8-11 for a brief review of the general attributes of the four "traditional" forms of intellectual property that are pertinent to the issue of protection against de-culturization—patents, copyrights, trademarks and trade secrets. Negotiated under the Uruguay Round of GATT, TRIPS not only establishes multinational protection norms, it represents the growing international acknowledgment that intellectual property rights are an item of *trade. See generally* Long, *Copyright and the Uruguay Round, supra* note 15. Furthermore, unlike previous multinational treaties affecting intellectual property rights, TRIPS established minimum enforcement standards and had the force of GATT (now WTO) sanctioning mechanisms to compel compliance. See *infra* notes 91-144 and accompanying text for a more detailed discussion of TRIPS.

52 *See supra* note 9.

53 *See* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised by* July 14, 1967, 21 U.S.T. 1629 [hereinafter Paris Convention]. TRIPS incorporates Articles 1-21 of the Berne Convention and Articles 1-12 and 19 of the Paris Convention. *See* TRIPS, *supra* note 7, arts. 9, 2. These incorporated articles contain the major substantive law provisions of their respective treaties. Despite the incorporation

multinational treaties is beyond the scope of this Article,[54] each of these contains several pertinent provisions that must be understood in order to develop a workable solution to the problem of de-culturization.

The Berne Convention was first established in 1886.[55] The result of multinational negotiations, which can be traced to an international convention presided over by the famous French author Victor Hugo,[56] the Berne Convention has gone through numerous revisions.[57] Yet, the Convention has maintained its

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of these standards, the author does not mean to imply that TRIPS merely reflects the older protection regimes of the Paris and Berne Conventions. To the contrary, TRIPS represents a marked advance over these regimes. While international protection under the Berne and Paris Conventions established some substantive protection norms, many standards were left to domestic law norms. *See* Ruth Gana, *Prospects for Developing Countries Under TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735 (1996). The resulting patchwork of protection failed to provide a consistent international protection standard. This lack of consistency was one of the motivating forces behind the TRIPS negotiation. *See* Long, *Copyright and the Uruguay Round Agreements*, *supra* note 15.

Although scholars debate the desirability and efficacy of the protection regime established under TRIPS, there is no doubt that the intention was to establish stricter standards for protection. Hence, some of the vagaries of the Paris and Berne Conventions, such as the definition of a patented invention or a trademark, have been clarified in TRIPS. *See infra* notes 104-144 and accompanying text (discussing some of the significant advances in protection established under TRIPS).

54 *See generally* SAM RICKETSON, BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886–1986 (1987) (providing a helpful general reference on the Berne Convention); GEORGE BODENHAUSER, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION (1968) (providing a helpful general reference on the Paris Convention); INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT (1996) (providing a helpful general reference on TRIPS); LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (Joseph F. Dennis ed., 1995) (same).

55 A detailed examination of the Berne Convention is beyond the scope of this Article. All Berne Convention provisions relating to the substantive protection of copyrights have been incorporated into the TRIPS Agreement. *See* TRIPS, *supra* note 7, art. 9 (incorporating Articles 1-21 of the Berne Convention, excluding Article 6^{bis} which relates to *moral* rights, *not* copyrights); see *infra* notes 195-199 and accompanying text for a brief discussion of Article 6^{bis} and moral rights.

56 *See* Peter Burger, *The Berne Convention: Its History and its Key Role in the Future*, 3 J. LAW & TECH. 1 (1988). In 1878, Hugo presided over an International Association conference that adopted five resolutions that eventually became the foundation for the original Berne Convention. *See id.*

57 Diplomatic conferences to revise the Convention were held in Berlin in 1908, Rome in 1928, Brussels in 1948, and Stockholm in 1967. *See id.* Most recently, WIPO convened a diplomatic conference in Geneva in 1996 to discuss the so-called "Berne Protocol," designed to "update" Convention coverage to include such newly emerging

status as the pre-eminent multinational copyright treaty.[58] Like many other early multinational and bilateral treaties, the Berne Convention required adherents to grant the identical level of protection to domestic and foreign intellectual property owners (referred to as "national treatment").[59] The Berne Convention, however, went beyond merely requiring national treatment to establish minimum substantive standards of protection that adherents were required to meet in their domestic laws. The Convention currently requires copyright protection for enumerated categories of "literary and artistic works [including] every production in the literary, scientific and artistic domain whatever may be the mode or form of its protection."[60] It also requires that authors be granted a term of protection of *no less* than the life of the author plus fifty years for most copyrighted works,[61] and that

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issues as database rights, digital communication and the protection of performance rights. This latest conference resulted in the entry into force of two new treaties, the WIPO Copyright Treaty, WIPO Doc. CRNR/DC94 (Dec. 23, 1996), 36 I.L.M. 65 (1997), and the WIPO Performances and Phonograms Treaty, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996), 36 I.L.M. 76 (1997), both of which used the Berne Convention as their starting point for copyright protection principles.

58 Although the United States did not accede to the Berne Convention until 1989, such delay was not based on the low status of the Convention as a force for international copyright standards. *See* REPORT ON THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H. R. Rep. No. 352, 100th Cong., 2d Sess. 3 (1988). To the contrary, accession was delayed largely by United States concerns over Article 6*bis* and its requirement that adherents grant moral rights protection to artists. *See* Berne Convention, *supra* note 8, art. 6*bis*, 828 U.N.T.S. at 235. *See generally* Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); Orren G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention,* 22 CORNELL INT'L L.J. 171 (1989); *see infra* notes 195-199 and accompanying text (discussing moral rights and Article 6*bis*).

59 *See* Berne Convention, *supra* note 8, art. 5, 828 U.N.T.S. at 231-32.

60 *Id.* art. (2)(1), 828 U.N.T.S. at 227. Among the enumerated works included in this definition are the following:

> books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Id.

61 *See id.* art. 7, 828 U.N.T.S. at 235-37.

they be given the right to control the reproduction of their works,[62] their translation,[63] and their public distribution, performance and display.[64] The Berne Convention expressly recognized a country's right to provide certain exceptions to these granted rights for purposes of news reporting,[65] education[66] and other designated "fair uses."[67] Although the United States did not accede to the Berne Convention until 1989,[68] the Convention has served as a primary driving force in the establishment of international copyright protection norms.[69] It is currently administered by the

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62 *See id.* art. 9, 828 U.N.T.S. at 239.

63 *See id*. art. 8, 828 U.N.T.S. at 239. Article 12 of the Berne Convention also grants authors the exclusive right of "authorizing adaptations, arrangements and other alterations of their works." *Id.* art. 12, 828 U.N.T.S. at 243-44.

64 *See id.* arts. 11, 11bis, 11ter, 828 U.N.T.S. at 241-42.

65 *See id* art. 10 ^{bis}, 828 U.N.T.S. at 241.

66 *See id.* art. 10(2), 828 U.N.T.S. at 241.

67 For example, Article 2bis of the Berne Convention permits member countries to exclude from copyright protection "political speeches and speeches delivered in the course of legal proceedings." Berne Convention, *supra* note 8, art. 2bis(1), 828 U.N.T.S. at 229. Article 10 allows exemptions for purposes of comment so long as the use of such works "is compatible with fair practice" and does not "exceed that justified by the purpose." *Id.* art. 10(1), 828 U.N.T.S. at 239. These provisions have been incorporated through TRIPS Article 9 and, therefore, remain legitimately recognized international exceptions to protection. *See* TRIPS, *supra* note 7, art. 9.

68 *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1983). This delay in accession was largely due to U.S. reluctance over the moral rights provision of Article 6bis of the Berne Convention. *See supra* note 58 (discussing the U.S. reluctance to accede to the Berne Convention).

69 This importance was demonstrated when the United States acknowledged that the Berne Convention established international protection norms for copyrighted works. In the House Report for the Berne Implementation Act, Congress stated:

> The Berne Convention for the Protection of Literary and Artistic Works . . . is the highest internationally recognized standard for the protection of works of authorship of all kinds. US membership in the Berne Convention will secure the highest available level of multilateral copyright protection for US artists, authors and other creators. Adherence will also ensure effective US participation in the formulation and management of international copyright policy. Adherence to the Convention is in the national interest because it will ensure a strong, credible US presence in the global marketplace . . . . For more than 100 years, the Berne Convention has been the major multilateral agreement governing international copyright relations . . . . Accession to Berne assures the highest level of protection in the countries that are the largest users of American copyrighted works.

REPORT ON THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H. R. Rep. No. 100-

World Intellectual Property Organization (WIPO).[70]

The Paris Convention governs patents and trademarks and was first established in 1883.[71] Like its counterpart, the Berne Convention, the Paris Convention requires national treatment[72] and establishes minimum protection standards for patented inventions. The Paris Convention requires member countries to provide patent owners many rights, including a right of priority of one year from the date of national filing in which to file patent applications in member countries;[73] independence of existence so that forfeiture of a patent in one country does not result in world-wide forfeiture;[74] and the right of the inventor to be mentioned as such in the patent.[75] Remarkably, the Paris Convention provides no definition of the term "patent."[76] Like the Berne Convention, the patent provisions of the Paris Convention have received constant international attention and have been modified numerous

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352, 100th Cong., 2d Sess. 3 (1988). The Berne Convention continues to play a pre-eminent role in the development of international copyright standards, as demonstrated by the adoption of Berne Convention standards in the TRIPS Agreement. *See supra* note 52 and accompanying text (discussing the incorporation of Berne Convention standards in TRIPS).

70 *See Texts of Treaties Administered by WIPO,* (visited Feb. 17, 1997) <http://www.wipo.org/eng/iplex/index.htm>.

71 *See* Berne Convention, *supra* note 8. A detailed examination of the Paris Convention is beyond the scope of this Article. Similar to the treatment of Berne Convention requirements for copyright protection incorporated into TRIPS, all pertinent provisions of the Paris Convention relating to the substantial protection of patents and trademarks have been incorporated into TRIPS. *See* TRIPS, *supra* note 7, art. 2 (incorporating Articles 1-12 and 19 of the Paris Convention).

72 *See* Paris Convention, *supra* note 53, art. 2(1), 21 U.S.T. at 1631.

73 *See id.* art. 4, 21 U.S.T. at 1631-32.

74 *See id* art. 4^{bis}, 21 U.S.T. at 1635-36.

75 *See id.* art. 4^{ter}, 21 U.S.T. at 1636.

76 Instead, Article I defines "patents" as one of the "objects" of "protection of industrial property." *Id.* art. 1(2), 21 U.S.T. at 1630. The only "definition" appears in Article 1(4) which provides that patents "shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc." *Id.* art. 1(4), 21 U.S.T. at 1630. TRIPS finally established a multinational definition of sorts for a protectable invention. In Article 27, it provides that patents "shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." TRIPS, *supra* note 7, art. 27. See *infra* notes 106-112 and accompanying text for a more detailed discussion of patent requirements under TRIPS.

times.[77]

The Paris Convention also requires national treatment for trademark owners[78] and establishes minimum substantive standards for their protection.[79] Similar to its treatment of patent rights, the Convention contains no detailed definition of the types of source designators which qualify as protectable trademarks.[80] The Convention does, however, indicate that marks may be refused protection if they are "devoid of any distinctive character . . . ."[81] Most of the provisions of the Paris Convention regarding the protection of trademark rights focus on the requirements for allowing a foreign owner the ability to register and protect its mark.[82] The Convention also requires member countries to provide protection for "well-known" marks by prohibiting their "reproduction, imitation, or translation" on identical or similar

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77 Since its inception, the Paris Convention has been revised four times. Conferences were held in The Hague in 1925, London in 1934, Lisbon in 1958, and Stockholm in 1967. *See* J.W. BAXTER, 2 WORLD PATENT LAW AND PRACTICE § 10.05 (1996).

78 *See* Paris Convention, *supra* note 50, art. 2(1), 21 U.S.T. at 1631.

79 *See infra* notes 80-82 and accompanying text (describing the key substantive standards under the Convention).

80 Although the Paris Convention provides for the protection of trademarks, service marks and collective marks, it does not define these terms or provide any other list or explanation of the types of industrial property which should qualify as a protected mark. In fact, it does not even use the term "source designator" or "indicator" when referring to such potentially protectable marks. *See* Paris Convention, *supra* note 53.

81 *Id.* art. 6*quinquies* (B)(2), 21 U.S.T. at 1644.

82 Among the registration standards established under the Paris Convention are the right of member countries to require use prior to registration; *see id.* art. 5(C)(1), 21 U.S.T. at 1637; the acceptability of concurrent use by co-proprietors of the mark; *see id.* art. 5(C)(3), 21 U.S.T. at 1638; and the independence of trademark registrations so that cancellation in the country of origin does not result in automatic cancellation worldwide. *See id.* art. 6(3), 21 U.S.T. at 1639.

Subsequent multinational treaties regarding trademarks have similarly focused on registration issues, including the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, Aug. 2, 1972, 23 U.S.T. 1336, 550 U.N.T.S. 45 (known as the "Nice Classification Treaty"); the Madrid Agreement Concerning the International Registration of Trademarks, Apr. 14, 1891, *as revised* June 15, 1997, 828 U.N.T.S. 389; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 28, 1989, *available in* <http://www.wipo.org/eng/iplex/index.htm> ("Madrid Protocol"); and the Trademark Law Treaty, Oct. 27, 1994, *available in* <http://www.wipo.org/eng/iplex/index.htm>.

goods where such use is "liable to create confusion."[83] It also grants owners of protected marks the right to secure seizures of infringing goods where their marks are subject to domestic protection.[84]

The Paris Convention did not directly address the protection of trade secrets. It did, however, in Article 10*bis*, require "effective protection against unfair competition,"[85] and defined acts of unfair competition as including "any act of competition contrary to honest practices in industrial or commercial matters."[86] Although subsequent language in the treaty focused on unfair acts which "create confusion" or "mislead the public,"[87] Article 10*bis* has subsequently served as the basis for establishing minimum trade secret rights.[88] The Paris Convention, like the Berne Convention, is administered by WIPO.[89]

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83 Paris Convention, *supra* note 53, art. 6*bis*(1), 21 U.S.T. at 1640. This article provides:

> The countries of the Union undertake, *ex officio* if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

Id.

84 *See id.* art. 9, 21 U.S.T. at 1647.

85 *Id.* art. 10*bis*(1), 21 U.S.T. at 1648.

86 *Id.* art. 10*bis*(2), 21 U.S.T. at 1648.

87 Article 10*bis* specifies three "particular" acts which must be "prohibited," including "all acts of such a nature as to *create confusion* by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor," *Id*. art. 10*bis*(3)(1), 21 U.S.T. at 1648 (emphasis added), and "indications or allegations the use of which in the course of trade is liable to *mislead the public* as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods," *Id.* art. 10*bis*(3)(3), 21 U.S.T. at 1648. The third prohibited act is use of "false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial, activities, of a competitor." *Id.* art. 10*bis*(3)(2), 21 U.S.T. at 1648.

88 *See* TRIPS, *supra* note 7, art. 39. For a more detailed discussion of TRIPS, see *infra* notes 91-144 and accompanying text.

89 *See, e.g., Texts of Treaties Administered by WIPO* (visited Jan. 31, 1998) <http://www.wipo.org/eng/iplex/index.htm.>

The most recent, and in the author's view, the most significant, multinational treaty concerning intellectual property rights is TRIPS.[90] The result of nearly seven years of multinational negotiations during the Uruguay Round of GATT,[91] TRIPS not only relies upon the long-established protection norms of the Berne and Paris Conventions, it fills some important gaps in protection under these treaties. Like the in the Berne and Paris Conventions, adherents to TRIPS are required to grant the identical level of protection to domestic and foreign intellectual property owners (referred to as "national treatment").[92] Moreover, TRIPS goes beyond simply requiring national treatment and, like its predecessors the Berne and Paris Conventions, establishes minimum substantive standards of protection.[93]

Because it incorporates Articles 1-12 of the Berne Convention, TRIPS provides copyright protection for the enumerated categories of "literary and artistic works" as set forth in the Berne Convention.[94] Such protection includes a term of protection for most works of *no less* than the life of the author plus fifty years[95] and the right to prohibit the unauthorized reproduction,[96]

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90 *See* TRIPS, *supra* note 7.

91 See, for example, A NEGOTIATING HISTORY, *supra* note 13, for a history of the length and range of the debates leading up to TRIPS.

92 *See* TRIPS, *supra* note 7, art. 3. TRIPS requires national treatment "with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967) [and] the Berne Convention (1971)." *Id.* TRIPS defines "protection" as including "matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement." *Id.* art. 3 n.3. "Intellectual property rights" is defined as copyrights, trademarks, industrial designs, patents, geographical indications, topographies of integrated circuits and trade secrets (or "undisclosed information"). *See id.* art. 1(2). "Geographical indications "are defined as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." *Id.* art. 22. They are often treated as a sub-category of trademarks.

93 *See infra* notes 94-127 and accompanying text (describing the key substantive standards established under TRIPS).

94 *See* TRIPS, *supra* note 7, art. 9 (incorporating Article (2) of The Berne Convention).

95 *See id.* (incorporating Article 7 of the Berne Convention).

96 *See id.* (incorporating Article 9 of the Berne Convention).

translation,[97] public distribution,[98] public display[99] or public performance[100] of their protected works. TRIPS explicitly extends copyright protection to computer programs and "compilations of data or other material . . . which by reason of the selection or arrangement of their contents constitute intellectual creations."[101] TRIPS also adopted the Berne Convention exceptions for protection for purposes of education and news reporting.[102] However, TRIPS provides that "limitations or exceptions to exclusive rights" must be confined to "certain special [but undefined] cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[103]

Similar to its treatment of copyright,[104] TRIPS incorporates the minimum substantive standards of the Paris Convention for its required level of protection for patents, trademarks and trade secrets.[105] However, TRIPS goes beyond these standards to establish minimum definitional requirements for a patentable invention. It requires that patent protection be extended to inventions "in all fields of technology"[106] and further requires that patent rights be extended only to those inventions which are "new," "involve an inventive step," and are "capable of industrial

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97 *See id.* (incorporating Articles 8 & 12 of the Berne Convention).

98 *See id.* (incorporating Article 11*bis* of the Berne Convention).

99 *See id.* (incorporating Article 11*ter* of the Berne Convention).

100 *See id.*

101 *Id.* art. 10(2). This category was not previously expressly protected under the Berne Convention. *See supra* note 60 (defining protected works under the Berne Convention). TRIPS, however, does not define or otherwise specify the requirements for constituting an "intellectual creation," including to what extent "originality" of the work may be required. *See infra* note 148 (discussing various tests for "originality" and their impact on international protection issues).

102 *See* TRIPS, *supra* note 7, art. 9. (incorporating Articles 2 and 10 of the Berne Convention).

103 *Id.* art. 13. TRIPS does not further define which cases would "conflict with a normal exploitation of the work." This language originally appeared in Article 9(2) of the Berne Convention but was limited to fair use reproduction. *See* Berne Convention, *supra* note 8, art. 9(2), 828 U.N.T.S. at 239.

104 See *supra* notes 94-103 and accompanying text (discussing copyright treatment).

105 *See* TRIPS, *supra* note 7, art. 2.

106 TRIPS, *supra* note 7, art. 27.

application."[107] Among the rights that foreign and domestic patent owners must be granted under TRIPS is a twenty year minimum term of protection from the date of the application,[108] the right to prohibit the unauthorized use of a patented process,[109] and the unauthorized "making, using, offering for sale, selling or importing" of a patented product[110] or of a product created directly by a patented process.[111] TRIPS recognizes a country's right to deny patent protection where the prevention of commercial exploitation is "necessary to protect *ordre public* or morality" including "to protect human, animal or plant life or health" or "to avoid serious prejudice to the environment."[112]

In connection with its expanded protection of trademark rights, TRIPS defines those source designators that must be protected. It requires that trademark protection be granted to "[a]ny sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings."[113] The owner of a registered trademark must be granted the "exclusive right" to prohibit the use by unauthorized third parties

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107 *Id.* The phrases "inventive step" and "capable of industrial application" may be considered synonymous with "non-obvious" and "useful," respectively. *See id*. art. 7 n.5. They are not further defined under TRIPS. Despite the absence of specificity, these requirements represent a marked advance over Paris Convention treatment of patents. The Paris Convention did *not* specify patent-protected subject matter. *See* Paris Convention, *supra* note 53. Instead, its most significant contribution to patent protection, in the author's opinion, was the recognition of a member country's obligation to honor an applicant's prior filing of a patent application in a member country—so long as the applicant makes the subsequent filing within six months of the original filing date (the so-called "priority right"). *See id.* art. 4.

108 *See* TRIPS, *supra* note 7, art. 33.

109 *See id.* art. 28(1).

110 *Id*.

111 *See id.*

112 *Id.* art. 27(2). Countries may also deny patent protection to "diagnostic, therapeutic and surgical methods for the treatment of humans or animals," "plants and animals other than micro-organisms," and "essentially biological processes, for the production of plants or animals other than non-biological and microbiological processes." *Id.* art. 27(3). TRIPS also incorporates Paris Convention registration requirements. See *supra* notes 79-84 and accompanying text for a discussion of these requirements. TRIPS also establishes further requirements, including the duty to "disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art." TRIPS, *supra* note 7, art. 29.

113 *Id.* art. 15(1).

of "identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion."[114] Registration must be granted for a minimum term of seven years and must be indefinitely renewable.[115] Protection of unregistered marks remains subject to the discretion of domestic laws except for famous or well-known marks, which continue to be protected under Article 6^{bis} of the Paris Convention.[116] Use may be required to maintain a trademark registration,[117] but such use cannot be "unjustifiably encumbered by special requirements, such as . . . use in a special form."[118]

TRIPS builds on the brief mention of "honest practices in industrial or commercial matters" in Article 10^{bis} of the Paris Convention[119] and explicitly requires the protection of "undisclosed information . . . in a manner contrary to honest commercial practices."[120] Such information must be protected so

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114 *Id.* art. 16(1). The treaty does not specify the factors to be used in deciding whether likelihood of confusion exists. Under U.S. law, such factors vary depending on the forum. *See generally* DORIS ESTELLE LONG, UNFAIR COMPETITION AND THE LANHAM ACT 55-64 (1993) (listing by circuit the factors used to determine likelihood of confusion). Generally, however, such factors as the strength of the marks, their similarity, the similarity of the respective goods and services, the similarity of the respective channels of trade and distribution, the sophistication of the respective customers, evidence of actual confusion, and the second user's bad faith in creating his mark are considered. *See, e.g.,* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir.), *cert. denied*, 368 U.S. 820 (1961); *In re* E.I. DuPont deNemours & Co., 476 F.2d 1357 (C.C.P.A. 1973).

115 *See* TRIPS, *supra* note 7, art. 18.

116 *See* Paris Convention, *supra* note 50, art. 6^{bis}(1), 21 U.S.T. at 1640 (incorporated by reference under Article 2 of TRIPS); *see also supra* note 83. Article 16 of TRIPS further clarifies that Article 6^{bis} protection of well-known marks applies to service marks and provides that "knowledge of the trademark in the relevant sector of the public, including knowledge . . . obtained as a result of the promotion of the trademark" must be considered in deciding whether the mark is well-known. TRIPS, *supra* note 7, art. 16(2).

117 *See* TRIPS, *supra* note 7, art. 19.

118 *Id.* art. 20. TRIPS also requires adherents to allow "interested parties" to prevent the use of misleading "geographical indications," including the right to "refuse or invalidate the registration of a trademark" which "contains or consists" of a misleading geographic indication. *See id.* art. 22.

119 *See* Paris Convention, *supra* note 53, art. 10^{bis}, 21 U.S.T. at 1648; *see supra* notes 85-89 and accompanying text (discussing trade secret protection under the Paris Convention).

120 TRIPS, *supra* note 8, art. 39.

long as it is "secret,"[121] "has commercial value due to its secret nature"[122] and "has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."[123] TRIPS also requires the protection of undisclosed test or other data whose "origination . . . involves considerable effort"[124] and which is submitted as a condition of approving the marketing of pharmaceutical or agricultural chemical products utilizing "new chemical entities."[125] Such protection is excused where disclosure is "necessary to protect the public"[126] or where "steps are taken to ensure that the data are protected against unfair commercial use."[127] These provisions in TRIPS represent one of the few times that trade secrets have been the subject of an express multinational treaty obligation.[128]

Perhaps the most notable advance in protection contained in TRIPS is its establishment of procedural enforcement norms that adherents must include in their domestic laws.[129] Included among

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121 *See id.* art. 39(2)(a). TRIPS defines "secret" as "secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within circles that normally deal with the kind of information in question." *Id.* This definition largely follows the definition under U.S. law. See *supra* note 10 for the definition under U.S. law.

122 TRIPS, *supra* note 7, art. 39(2)(b).

123 *Id.* art. 39(2)(c).

124 *Id.* art. 39(3).

125 *Id.*

126 *Id.*

127 *Id.*

128 The only other instances are Article 10*bis* of the Paris Convention, which formed the basis for the relevant TRIPS provision, see *supra* note 119 for the relevant provision, and Article 1711 of the North American Free Trade Agreement, *see* North American Free Trade Agreement, Dec. 14, 1992, art. 1711, 32 I.L.M. 612, 674. In NAFTA, the term "trade secret" was used, as opposed to "undisclosed information." *See id.* To qualify for protection, the "information" at issue must be "secret," have "actual or potential commercial value" because of its secret nature, and be subject to "reasonable steps . . . to keep it secret." *Id.* These are broadly the same requirements established under TRIPS, although NAFTA may protect a broader category of information since information must only have "potential commercial value" to be protected. *Cf.* TRIPS, *supra* note 7, art. 39 (requiring that the information "*has* commercial value because it is secret") (emphasis added).

129 This requirement is a substantial advance over the Berne and Paris Conventions, which contained no procedural enforcement norms. *See* Berne Convention, *supra* note

these procedural norms are that enforcement procedures available under a member's national laws "permit effective action against any act of infringement of intellectual property rights covered by [TRIPS], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement."[130] All such procedures must be "fair and equitable"[131] and cannot be "unnecessarily complicated or costly"[132] or "entail unreasonable time limits or unwarranted delays."[133] Decisions on the merits must be made available to the parties "without undue delay"[134] and must be based only on evidence "in respect of which parties were offered the opportunity to be heard."[135] TRIPS does not require members to establish a separate judicial system for the enforcement of intellectual property rights.[136] It does, however, require that litigants be given certain procedural safeguards including the protection of confidential information,[137] representation by independent legal counsel,[138] and the right to substantiate . . . claims and to present all relevant evidence."[139] It also establishes minimum remedies that must be provided to litigants, including the right to injunctive relief,[140] the right to money damages "adequate to compensate for

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8; Paris Convention, *supra* note 53.

130 TRIPS, *supra* note 7, art. 41(1).

131 *Id.* art. 41(2).

132 *Id.*

133 *Id.*

134 *Id*. art. 41(3).

135 *Id.* In connection with willful trademark counterfeiting and copyright piracy "on a commercial scale," TRIPS also requires members to provide for "criminal procedures and penalties including imprisonment and/or monetary fines . . . sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of corresponding gravity." *Id*. art. 61.

136 *Id*. art. 41. Article 41 of TRIPS specifically provides: "It is understood that this Part [establishing general obligations for enforcement mechanisms for intellectual property rights] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general . . . ." *Id.* art. 41(5).

137 *See id.* art. 42.

138 *See id*.

139 *Id*.

140 *See id*. art. 44.

the injury the right holder has suffered . . ."[141] and, in connection with pirated and counterfeit goods, criminal penalties "sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of corresponding gravity."[142] Failure to live up to treaty requirements results in trade sanctions by the World Trade Organization—the governing body for TRIPS.[143] The existence of this sanctioning power assures that obligations under TRIPS should form at least the floor for international protection of intellectual property rights in the future.[144]

III. Intellectual Property Rights—Sword and Shield

Although TRIPS established broad standards for intellectual property protection, these standards need not become cultural

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141 *Id*. art. 45(1).

142 *Id*. art. 61.

143 *See id.* These sanctions include the imposition of tariff barriers against the offending country's goods. *See id*. art. 64(1). For an in-depth review of WTO Dispute Settlement Procedures, see PIERRE PESCATORE ET AL., HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT (1996).

144 Such sanctioning power realistically did not exist under either the Berne or Paris Conventions. Consequently, although the basic protection standards under these two multinational treaty regimes have been largely adopted by most countries, and, in the author's opinion, can be considered as at least part of accepted international law regarding the scope of protection that must be afforded intellectual property rights, they did not contain the same force for adherence that TRIPS poses. It should be noted, however, that as of the date of this Article, although various claims for sanctions are pending before the WTO for failure to meet TRIPS obligations, decisions on these claims remain unresolved. *See, e.g., U.S. Europe Challenge Japanese Recorded Music Copyright Practices*, West's Legal News, *available in* 1996 WL 258541 (Feb. 15, 1996) (reporting complaint filed against Japan for failure to provide rental rights for sound recordings created prior to 1972); *see also Sanctions* (visited Nov. 25, 1997) <http://www.wto.org/cgi-bin/wto~search.pl> (listing various complaints filed under TRIPS, including a claim against India and Pakistan for failure to provide adequate patent protection for pharmaceutical and agricultural chemical products, one against Ireland for failure to grant neighboring rights, another against Denmark and Sweden for failure to provide provisional measures in civil proceedings to enforce intellectual property rights, and one against Portugal for failure to provide required terms of patent protection). Thus, it is too soon to tell whether WTO sanctioning power will be wielded with the full force it appears to have. The potential for such sanctions alone, however, has already helped to assure compliance. Russia, China, and even the United States have revised their laws to assure TRIPS compliance. *See*, *e.g.*, Uruguay Round Agreements Act, 108 Stat. 4809 (1994). Whether such *in terrorem* force will continue, however, if WTO does not impose stringent sanctions, or if it does not obtain compliance with any such sanctions, is not clear.

straitjackets, designed solely as a sword to protect the de-culturizing acts of foreign investors. To the contrary, both the language of TRIPS and the circumstances surrounding its negotiation support a flexible approach to intellectual property rights enforcement, an approach that is broad enough to permit developing countries to use their intellectual property laws as a shield against the ravages of de-culturizing foreign investment.

The language of TRIPS eschews narrowly circumscribed standards of protection in favor of a broad-based, theoretical approach that grants adherents maximum flexibility in fashioning acceptable domestic laws.[145] This flexibility is apparent in the general lack of specificity contained in many of the substantive treaty provisions.[146] For example, although TRIPS requires the protection of "[c]ompilations of data . . . which by reason of the selection or arrangement of their contents constitute intellectual creations,"[147] it does not specify what level of originality, if any, is required to qualify as an "intellectual creation."[148] Similarly, in

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145 The nature of multinational treaties, to a certain extent, requires a broad-based theoretical approach in order to obtain the consensus required for concordance. Thus, TRIPS is not alone in using broader language in establishing minimum substantive standards for protection. Berne Convention, *supra* note 8, and the Paris Convention, *supra* note 53, for example, similarly failed to establish standards for such fundamental issues as originality, infringement or fame. The "problem" with such flexible approaches, however, is that they result in inconsistent treatment on a global basis. For example, efforts to protect the unique design of Coca-Cola's rippled bottle as a trademark were successful in the United States but unsuccessful in the United Kingdom, despite the fact that both parties were signatories to the Paris Convention at the time of their respective decisions. *Compare In re* Coca-Cola Application, 1 W.L.R. 695 (1986), 2 All E.R. 274 (1986) (denying contour bottle registration in the U.K.) *with* U.S. Trademark Regis. No. 696, 147 (April 12, 1960) (citing decision by U.S. Trademark Office to register the bottle design).

146 This flexibility also serves as the basis for criticism since it does not guarantee the identity of protection which the supporters of TRIPS seemed to anticipate. *See* Long, *Copyright and the Uruguay Round Agreements, supra* note 16, at 550-55. In the absence of identity of protection, disputes regarding the appropriate level of protection to be afforded intellectual property rights will, no doubt, continue.

147 TRIPS, *supra* note 7, art. 10(2).

148 In a seminal decision, Rural Telephone Service Co. v. Feist Publications, Inc., 499 U.S. 340 (1991), the United States Supreme Court refused to extend copyright protection to the white pages of a telephone directory on the grounds that such factual compilations lacked the requisite modicum of originality. *See id*. at 346. This originality requirement has been applied to refuse protection to certain computer databases. *See* Atari Games Corp. v. Nintendo of Am., Inc., 30 U.S.P.Q.2d 1401, 1404-07 (N.D. Cal. 1993). This high level of originality is not required in Western Europe.

keeping with the treatment of intellectual property rights under the Berne and Paris Conventions, TRIPS does not establish standards for such critical protection issues as the test for infringement of the protected right,[149] the standard to determine if a mark is "well-known" enough to require protection regardless of its registered status in a country,[150] what role, if any, the doctrine of equivalents should have in determining patent protection,[151] or the doctrinal

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Compare this treatment with the E.C. Database Directive, which grants *sui genesis* protection to databases that "by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation," Council Directive 96/9, art. 3(1), 1996 O.J. (L 77) 20, 25, and yet define such "creation" as requiring "qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents." *Id*. art. 7(1), 1996 O.J. (L 77) at 25.

The issue of the need for "originality" or "intellectual creativity" in determining copyright protectability is not limited to the subject of databases. To the contrary, the issue remains a hotly debated one for all types of potentially copyright protected works. *See, e.g.,* FELLNER, *supra* note 10, at 63-64 (varying definitions of "originality" for designs under U.K. law). *Compare* Interlego A.G. v. Tyco Indus., Inc., [1987] 1 App. Cas. 217, 241 (P.C. 1988) (appeal taken from H.K.) (stating that under U.K. law originality for artistic works requires some artistic element) *with* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (stating that work does not have to be artistic or have artistic merit to qualify for protection in the United States). The outcome of this dispute could have a direct impact on the scope of protection afforded native or indigenous works of long-standing existence.

149 For example, the treaty does not specify what elements are used to establish infringement of the right of reproduction of a copyrighted work. Such critical elements as the need for access to the work, the amount of the work required to be copied for infringement to lie and the degree of similarity needed where verbatim copying has not occurred are not specified. Differences in treatment of these elements could be outcome determinative of protection. TRIPS similarly fails to specify what elements are required to establish "likelihood" of confusion of a trademark, or whether patent infringement can be based on other than literal infringement of the claims at issue. *See supra* note 105-112 and accompanying text (discussing patent protection under TRIPS).

150 Under Article 6*bis* of the Paris Convention, a well-known mark must be protected against uses "liable to create confusion." Paris Convention, *supra* note 53, art. 6*bis*, 21 U.S.T. at 1640 (incorporated by reference by TRIPS, *supra* note 7, art. 2(1)). Neither the Paris Convention nor TRIPS establishes the factors used to establish the requisite degree of notoriety of a mark. Whether actual use in the country is required can have a direct impact on the scope of protection afforded a mark. Where certain cultural symbols have achieved broad notoriety, such symbols might qualify as famous marks, worthy of protection beyond the borders of the source country. The scope of protection for such symbols could be directly affected if renown alone is not sufficient to justify protection.

151 Neither the Paris Convention nor TRIPS specifically addresses the issue of the extent to which the doctrine of equivalents can or should be used in establishing infringement or patentability. Where strict claim construction is followed for purposes of patentability or literal infringement is required for purposes of infringement, local

requirements for novelty and/or non-obviousness.[152]

Perhaps most notably, enforcement standards under TRIPS are posited in broad terms such as requiring "fair and equitable" procedures,[153] "adequate compensation" for infringing uses,[154] and indemnification to defendants when enforcement procedures have been "abused."[155] Since TRIPS does not require the establishment of a separate judicial system for enforcement of intellectual property rights, these broad concepts permit countries to adapt existing systems.[156] This virtually ensures widespread divergence between countries in both the methods used for enforcing rights under the treaty and the domestic law standards for undefined terms.[157]

TRIPS expressly recognizes that members may "adopt measures necessary to . . . promote the public interest in sectors of vital importance to their socio-economic . . . development."[158] It allows members to limit the broad rights granted copyright owners under the treaty when such works are used for such socially

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adaptations of existing patented inventions would not be considered infringing. This would directly affect the scope of the monopoly afforded a patent owner. See *infra* note 157 for a further discussion of this issue.

152 Although TRIPS imposes the dual obligation that an invention be "new" and "involve an inventive step," TRIPS, *supra* note 7, art. 27(1), these are equivalent to the requirements of novelty and non-obviousness. See *supra* note 107 for a brief discussion of this equivalency. The terms are not further defined. Thus, for example, "novelty" may depend on the role of prior public use and the degree of newness required. The outcome of these decisions could have a direct impact on the protectable nature of such cultural elements as folk remedies and medical practices.

153 TRIPS, *supra* note 7, art. 41(2).

154 *Id.* art. 45(1).

155 *Id.* art. 48.

156 *See id.* art. 41(g). Article 41(g) permits enforcement under members' national laws by permitting them to use already existing legal systems. *See id.*

157 The author does not mean to suggest that there are no standards for defining such terms. Clearly, definitions of "novelty," "non-obviousness," and the like should conform with international standards. Since, however, there is presently no agreed-upon *single* definition for these requirements, TRIPS permits a degree of flexibility within certain parameters in establishing the content of such terms. This flexibility can be used to a developing country's advantage in crafting intellectual property laws to protect its cultural heritage. Thus, for example, if a country did not require absolute novelty, public use in the form of a traditional folk remedy might not bar patent protection for adapted local uses. See *supra* note 151 and accompanying text for a discussion of the issue.

158 TRIPS, *supra* note 7, art. 8(1).

desirable goals as news reporting and scholarship.[159] Patent rights may be similarly subjected to compulsory licensing requirements, including working requirements, where such provisions fill public needs.[160] Even the grant of trademark protection rights are subject to exceptions derived from the need for public order.[161]

The circumstances surrounding the establishment of TRIPS similarly support a flexible approach to intellectual property protection that can be used to protect indigenous culture. During the period of the Uruguay Round Negotiations, no single philosophical basis for the protection of intellectual property rights existed, even among developed countries. For example, the fundamental activating principle behind U.S. copyright law was the encouragement of the creation and dissemination of new works to the public by providing economic incentives to creators. Article I of the U.S. Constitution recognizes the importance of copyright protection by establishing the mechanism of "securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[162] One of the purposes of this limited right was to encourage authors to spend the time, money, and effort required to create new works by granting authors merchandising rights in those new works.[163]

By contrast, Continental Western European nations placed authorship and the "romantic" view of creative "genius" at the center of protection.[164] The creative "spark" represented by an

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159 See *supra* notes 65-67 and accompanying text for the pertinent provisions. TRIPS incorporates Article 10 of the Berne Convention. *See* TRIPS, *supra* note 7, art. 9.

160 *See* TRIPS, *supra* note 7, art. 31.

161 *See id.* art. 17. Article 17 permits exceptions such as the "fair use of descriptive terms" so long as such exceptions "take account of the legitimate interests of the owner of the trademark and of third parties." *Id.*

162 U.S. CONST. art. I, § 8, cl. 8. See also *supra* note 43 and accompanying text for a further discussion of the impact of this clause on intellectual property rights in the United States.

163 *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that the limited grant under Article I "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."). These merchandising rights in the United States include the exclusive right to publicly distribute the copyrighted work or to authorize such public distribution. *See* 17 U.S.C. § 106(3) (1997).

164 *See generally* Jeff Berg, *Moral Rights: A Legal Historical and an*

author's personality was protected under these schemes—not simply the economic value of the artist's labor in creating the work.[165] TRIPS did not choose among these competing schemes, but allowed both rationales to flourish.[166]

Given that TRIPS expressly permits members to adopt measures that promote their own socio-economic interests and that the standards set forth in the treaty are broadly worded,[167] developing nations should be able to craft domestic laws that protect their culture from the harm of de-culturization while complying with the international standards under TRIPS.

Although this Article uses the broadest definition of "culture" in examining the potentially adverse impact of globalization and foreign investment on native culture, in reality not all aspects of such "culture" need specially crafted intellectual property laws to protect them from de-culturization. "Traditional"[168] artistic,

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Anthropological Reappraisal, 6 INTELL. PROP. J. 341 (1991); Steven L. Carter, *Does It Matter Whether Intellectual Property Is Property?,* 68 CHI.-KENT L. REV. 715 (1993) (advocating support for authors' moral rights); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,* 102 YALE L.J. 1533 (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of 'Authorship,'* 1991 DUKE L.J. 455 (1991); Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty,* 15 LOY. L.A. ENT. L.J. 509 (1995). This does not mean that commercial exploitation is not considered a significant right, merely that such right derives from the value of personality, and not simply from the desire to compensate an author's labors.

165 *See supra* note 164 and sources cited therein.

166 The exception of the moral rights provisions of Article 6*bis* of the Berne Convention from inclusion in TRIPS under Article 9 does not contradict this view. *See* TRIPS, *supra* note 7, art. 9. Although such exclusion represents, to a certain extent, the victory of the U.S. position that only *economic* rights should be included in TRIPS, the exclusion does not *prohibit* moral rights protection or copyright protection regimes based on the recognition of the personality value of the creative act or a creator's "natural right" to control her creation. To the contrary, TRIPS allows such systems to continue to flourish by virtue of its broad conceptual terms which allow and, the author contends, promote variable treatment by adhering nations. *See supra* notes 145-152 and accompanying text (discussing the variable treatment under TRIPS of diverse intellectual property protection issues). Such variable treatment includes permitting diverse philosophical foundations for protection. *See supra* notes 142-49 and accompanying text. Given that TRIPS is intended to be a *trade*-based treaty, failure to include non-economic rights, such as moral rights, is fully in keeping with the trade objectives of TRIPS and may be explained on that basis.

167 *See* TRIPS, *supra* note 7, art. 31; see also *supra* notes 141-48 and accompanying text for examples of such broadly worded standards.

168 The term "traditional" is not intended in this instance to refer to a particular style or type of work, such as "classic," "neo-classic" or the like, but to those works which fit

literary and musical forms are already amply supported by "traditional" Western views of protected rights represented in the intellectual property laws sought by foreign multinationals.[169] Instead, it is those forms of "culture" that do not readily conform to such traditional views that are most in need of a new approach to assure their protection. Such "non-traditional" forms lack an identifiable creator. They cannot be considered within the type of "products of the mind" protected due to individual effort or by the need to protect a particular creator's personality-value. They are most often forms which are currently considered part of the public domain[170] because of their long existence or their current identification as part of a nation's cultural patrimony.[171] Such forms include, but are not be limited to, fables, stories, myths, rituals, costumes, folk medicine and other elements of pre-literate society that combine to form cultural "expression" or heritage.[172]

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easily within the definitions of a protectable work, see *supra* note 60 for examples of such works, and have a readily-identifiable creator capable of exercising control over the use and dissemination of the work in order to avoid its de-culturization.

169 Most copyright laws of the developed countries protect "traditional" musical, literary and artistic works, such as novels, poetry, songs, paintings and sculpture. *See supra* note 8 and accompanying text. These laws in turn grant the creator the right to control the exploitation of these works, for example. *See supra* note 47 and accompanying text. By contrast, folklore and other "works" which do not have an identified creator do not readily fit within these "traditional" forms. *See generally* Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293 (1994); *see also* Bellagio Declaration, *supra* note 21, at 108.

170 Works may be considered in the public domain either through failure to comply with required formalities for protection, such as, failure to publish a copyrighted work with adequate notice, *see* 17 U.S.C. § 401 (1988) (subsequently revoked under the Berne Implementation Act of 1989), or failure to exercise quality control over a trademark, *see* Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 366 (2d Cir. 1959), or due to expiration of the period of time granted for protection of the work under domestic law, *see* 17 U.S.C. § 302 (1997) (establishing the term limits for U.S. copyrights).

171 *See supra* note 21 and accompanying text (defining "cultural patrimony").

172 In an excellent examination of the problems posed by efforts to protect folklore as culture, Cathyrn A. Berryman defined folklore's basic traits as follows:

> (I) It is passed from generation to generation by unfixed forms; (II) It is a community-oriented creation in that its expression is dictated by local standards and traditions; (III) Its creations generally are not attributable to individual authors; and (IV) It is being continually utilized and developed by the society in which it lives.

Berryman, *supra* note 169, at 311. These traits help underscore some of the more

Since most folklore and ritual lack identifiable creators or holders of rights, their protection pose unique problems for intellectual property regimes.

There is no question that one of the most difficult issues regarding the protection of works of folklore is the adverse effect such protection would presumably have on the scope of works available from the public domain. Virtual elimination of the public domain through the wholesale protection of all cultural elements of a society would do untold harm to the creation of future works. At a minimum, such control would impose derivation costs not currently present by requiring the payment of license fees for use of protected elements. Where control over the formerly public domain elements is exercised by a governmental agency, there is also a serious threat of censorship. Selective use of protection of cultural works that might otherwise be considered part of the public domain, creating a limited "domain public payant," should reduce harmful derivation costs by removing only those elements of the nation's culture from unfettered use which the nation itself believes to be either more vulnerable to de-culturization *or* more valuable to the maintenance of the country's cultural heritage.[173]

Censorship is a more problematic issue, but the refusal to protect cultural elements from the harm of de-culturization solely

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problematic aspects in crafting intellectual property laws that protect folklore and other elements of cultural heritage while still complying with present international standards. *See generally supra* note 2 and accompanying text (discussing the elements of cultural heritage).

173 For these reasons, the author does not support or recommend the development of an across the board, unlimited public domain "payant" such as established in Section 17 of the Tunis Model Law, *supra* note 22. This model law, developed under the auspices of UNESCO and designed to assist developing countries in devising copyright laws which would protect their countries' valuable intellectual property, including folklore, contains many provisions which the author believes are not required under current international standards and may actually defeat the goals of protection they are designed to meet. Thus, for example, under Section 17 of the Tunis Model Law, "use of works in the public domain or their adaptation, including works of national folklore" are subject to use fees based upon a specified percentage of the receipts "produced" by such use. *Id.* § 17. While a limited "domain public payant" may serve the cultural protection goals discussed in this Article, *see supra* note 167 and accompanying text, an unrestricted one could raise the cost of native creativity without providing an equivalent societal benefit. The goal of a public domain "payant" should be to protect native and indigenous culture, not simply to raise funds regardless of the use to which public domain elements are being put.

on the basis that such protection *might* result in censorship is to ignore the concrete problem of de-culturization for the potential problem of harmful censorship.[174] Moreover, the threat of uncontrolled censorship can be reduced through careful delineation of the types of elements to be protected and the acts or uses that qualify as "unauthorized." The purpose of the protection regime proposed in this Article is to prevent the creation and distribution of *de-culturized* products.[175] Only those uses that remove the significant cultural meaning of works, rituals and the like should be prohibited. Thus, for example, parody and satire should not generally be prohibited since they are not based on de-culturization but, in fact, rely upon the acknowledged existence of the cultural traditions being parodied.

It is the author's contention that copyright laws can form the first line of defense in protecting indigenous culture and still comply with TRIPS standards. There is no requirement under TRIPS that protected works be recorded or fixed in some tangible medium of expression.[176] Oral works and performances, such as fables, storytelling, and folkloric dances and rituals, may thus be protected despite the absence of a fixed record of such performances.[177] Since there is no requirement of originality or

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174 It is not the author's intention to discuss the merits of censorship or to debate on a metaphysical level whether protection of intellectual property rights itself serves as a form of censorship. There are, however, levels of censorship which harm the vitality of cultural growth and interchange of ideas. *See supra* note 27 and accompanying text (discussing the positive impact of cross-cultural borrowing and efforts to regulate such borrowing). This type of censorship must be avoided to prevent the proposed protection scheme from becoming a sword that strikes down the very culture it is designed to protect. *See, e.g.,* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967) (equating the flourishing of Elizabethan literature with the relatively free borrowing of plots, characters and the like by authors).

175 The second purpose of the proposed protection scheme is undeniably to provide compensation to the developing country for the development of mass-marketable products and processes. Such purpose, however, does not directly impact censorship concerns.

176 The Berne Convention, incorporated by Article 9 of TRIPS, merely provides member countries with the right to "prescribe that works . . . shall not be protected unless they have been fixed in some material form." Berne Convention, *supra* note 8, art. 2(2), 828 U.N.T.S. at 227. Although U.S. law requires fixation other countries do not. *Compare* 17 U.S.C. § 102 (1997) (limiting protection to "works . . . fixed in a tangible medium of expression") *with* Russian Federal Copyright Law, *supra* note 8, art. 6(2) (extending protection to oral works "in any objective form whatsoever").

177 Presumably such fables, pantomime and ritualistic dance would fall within the

intellectual creativity under TRIPS for copyright-protected works,[178] the fact that such folklore has been in existence for centuries—and may therefore lack present day "originality"—should not preclude its protection.[179]

Similarly, the absence of an identifiable "author" for such folklore should not preclude protection. U.S. and European intellectual property laws reflect the "romantic" view of the author as creative genius and appear on their face to require a natural person to be at the heart of the creative experience.[180] No such international requirement exists, however.[181] Furthermore, the growth of doctrines such as "work for hire," which grant copyright ownership to the employer for works created by employees within the scope of their employment,[182] and the protection of collective

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categories of potentially protected literary and artistic works, more specifically lectures, dramatic works and choreographic works. *See* Berne Convention, *supra* note 8, art. 2(1), 828 U.N.T.S. at 227 (incorporated into TRIPS under art. 9); *see also supra* note 57 (defining protected works under the Berne Convention).

178 The only requirement for intellectual creativity under TRIPS is for compilations of data. *See* TRIPS, *supra* note 7, art. 10(2).

179 To the contrary, given the largely anonymous nature of most cultural works, and their relatively lengthy existence (often pre-dating literate society), an "originality" requirement, applied conscientiously, would preclude protection of many works which, the author believes, should be protected from harmful de-culturization. For this reason, the author does *not* support the adoption of the Tunis Model Law, without changes, since it appears to limit protection to "original" works. *See* Tunis Model Law, *supra* note 22, §§ 1(1), 1(3).

180 *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 485-91 (1991); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992).

181 Neither the Berne Convention nor TRIPS requires a human agent as an author. Although both treaties discuss rights to works in terms of "authors," neither defines the term. Furthermore, the rights granted to such "authors" do not preclude their exercise by a non-human agent. *See* Berne Convention, *supra* note 8; Paris Convention, *supra* note 53.

182 *See* 17 U.S.C. § 101 (1997) (defining a "work made for hire" as *inter alia* "a work prepared by an employee within the scope of his or her employment"); *see also* 17 U.S.C. § 201 (1997) (granting ownership rights in a work for hire to the employer). For a brief review of European work for hire doctrines, see, for example, Gerald Dworkin, *The Moral Right of the Author: Moral Rights and The Common Law Countries*, 19 COLUM. - VLA J.L. & ARTS. 229 (1995); Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 B.C. INT'L & COMP. L. REV. 29 (1993).

works[183] have already seriously eroded the view that "authorship" requires a sole human agent as the focus for copyright protection.

As a practical matter, the absence of an identifiable author may make the enforcement of granted rights difficult because no one person would have the standing to assert the protected right. Where there is no identifiable author, as in the case of a folkloric fable or traditional ritual, copyright ownership could reside in a private or governmental rights organization charged with licensing the use of such works. Such organizations could assure that commercialization of protected works does not result in de-culturization.[184]

Developing countries are already using copyright law to protect their folkloric traditions. For example, Russian copyright law protects oral works, including folklore.[185] Chinese copyright law protects *quyi*[186]—a form of unfixed ritual dance and pantomime.[187] Cuban copyright law protects "works of folklore"

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183 *See* 17 U.S.C. § 101 (1994) (defining a "collective work" as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole"). By their nature, collective works are often the result of collaborative efforts and are in direct opposition to the sole authorship view of traditional copyright doctrines.

184 Such organizations could be modeled on ASCAP or other private or governmental models. To limit the increase in derivation costs, minimal fees could be charged for those who seek to use the elements to create new works that maintain the required cultural contextualization to prevent de-culturization. For further information about ASCAP, see *American Society of Composers, Authors, and Publishers,* (visited Jan. 1, 1998) <http://www.ascap.com>.

185 *See* Russian Federation Law on Copyright and Neighboring Rights art. 6 (1993), *reprinted in* UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1995). The scope of folklore protected is not so broad as, for example, under the Tunis Model Law, *supra* note 22, since Article 8 specifically excludes "folk art" from the scope of copyright works. *See id.* art. 8. Thus, those elements of "folklore" which are embodied in works of folk art, such as icons or other objects of figurative arts or wall hangings, would be excluded from protection. Fables, pantomimes and other elements of folklore, however, remain protectable.

186 *See* Guo Shoukan, *China*, 1 INTERNATIONAL COPYRIGHT LAW & PRACTICE (Paul E. Geller et al. eds., 1997) (citing Copyright Act of the Peoples' Republic of China art. 3 (1990)).

187 *Quyi* is defined under Chinese copyright law as *xiang sheng* (cross talk), *kuaishu* (clapper talk), *dagu* (ballad singing with drum accompaniment) and *pingshu* (story telling based on classical novels), which are all used for performance involving mainly recitation or singing or both. *See id*.

that apparently are "of an original character,"[188] and "involve creative activity on the part of their authors."[189] These laws could form useful study models for other countries to consider in developing protection standards for their own folkloric and ritual traditions.[190] However, when crafting protection for "folklore," the scope of the protected work should be clearly defined so that enforcement is predictable in accordance with international standards. Similarly, a finite term of protection needs to be established. The term of protection should be no greater than required to protect the cultural element at issue from the threat of de-culturization. This period of protection could be limited by a specified term measured from the date of creation (if such a date can be determined), or from the date of first efforts to produce or market de-culturized products.[191]

The integrity of costumes, rituals, literature and artwork can be further protected through carefully drafted moral rights and trademark laws. Moral rights are non-economic rights granted to

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188 Cuban Law of Copyright arts. 2, 26, *reprinted in* UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, 2 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1977). Article 26 of the present Cuban copyright law protects "works of folklore." To qualify for protection, a work of folklore "must have been transmitted from generation to generation, thereby contributing in an anonymous and collective manner, or in any other form, to a national institution of cultural character." *Id*. art. 26. The act, however, only specifically grants protection to persons who assemble and compile "dances, songs, proverbs, fables and other manifestations of national folklore which are "authentic and specific works." *Id*. art. 27. Article 2 further limits copyright protection to "works of an original character" which "involve creative activity on the part of their authors." *Id* art. 2. At first blush, the requirement of "originality" appears limited to enumerated categories of protected "original works," including "written and oral works, musical works [and] choreographic works . . . ." *Id*. However, since works of folklore appears to include dances, songs and fables, which fall within the enumerated categories of protected works, originality may also be required to protect "folklore."

189 *Id*. art. 2. See *supra* note 188 for a discussion of the apparent requirement of originality in protection of folklore under Cuban law.

190 The author does not mean to suggest that any of these models fully meet current international protection standards. But they, along with the Tunis Model Law, *supra* note 22, serve as a useful beginning point for utilizing the ideas contained in this Article to create an appropriate protection regime.

191 In the latter case, measurement from the date of first efforts of de-culturization would not establish the date of protection, but, more specifically, the limited term of *continued* protection.

the author of a protected work.[192] Because they protect reputational rights and the creative value of the work, moral rights generally survive the transfer of the author's copyright interest, and are usually non-transferable and non-waivable.[193] Moral rights are not required under TRIPS.[194] They are, however, required under Article 6^{bis} of the Berne Convention, which provides:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[195]

One of the rights included among an author's moral rights is the right of integrity.[196] This right prohibits the alteration of a protected work without the author's permission.[197] Thus, for example, films in the United States may be colorized without the director's permission because the director has no recognized moral rights in the film.[198] By contrast, in France, the director's moral rights preclude such unauthorized mutilation of the film's integrity.[199] Moral rights laws may similarly be used to maintain

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192 *See, e.g.,* Jack A. Cline, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435, 435 (1990). Moral rights are designed to protect the author's reputation rights and the creative value of the work. *See id.*

193 *See, e.g.*, Raymond Saurraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, 16 AM. J. COMP. L. 465 (1968).

194 Article 9 expressly exempts the moral rights provision of the Berne Convention from inclusion, and does not require any equivalent rights be granted by members. *See* TRIPS, *supra* note 7, art. 9.

195 Berne Convention, *supra* note 8, art. 6^{bis}, 828 U.N.T.S. at 235. These moral rights are generally referred to as including the right of attribution, or patrimony, and the right of integrity.

196 *See, e.g.,* Cline, *supra* note 192, at 438.

197 *See* Berne Convention, *supra* note 8, art. 6^{bis} (1), 828 U.N.T.S. at 235.

198 U.S. copyright law currently extends moral rights protection to works of visual art, which does *not* include motion pictures. *See* 17 U.S.C. §§ 101, 106A (1994) (extending rights of "attribution and integrity" to authors regardless of copyright ownership in the work in question).

199 *See, e.g.*, Judgment of May 28, 1991 (Huston v. LaCinq) Cass. 1e civ. 1991 Bull. Civ. No. 89-19.522 (Fr).

the cultural integrity of native works.[200] Such laws could grant the creator of the work the legal right to protect the work against unauthorized alterations. These laws should specify that such rights exist separate from any copyright transfers. Where the work has no identifiable creator, a designated rights organization could be granted moral rights over the work. However, where moral rights are not exercised by a natural person, who has a finite life-span and, therefore, a finite right to control the moral rights contained in a work, it may be desirable to establish a measurable period of time during which moral rights exist.[201] Care should be exercised to limit control over integrity to de-culturizing uses. Thus, for example, while a parody may, on its face, appear to violate the integrity of a work,[202] such uses should generally qualify as permissible exceptions since, as noted earlier, parodies do not usually qualify as a de-culturizing use.[203]

Trademark laws may also be used to protect against the

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200 Although moral rights are usually designed to protect a human author's reputation value, the absence of a definable author for most works of folklore sought to be protected under the proposed regime should not preclude the application of moral rights principles. To the contrary, the protection of integrity and reputation value embodied in moral rights principles are strongly analogous to the prohibition of de-contextualizing de-culturization that is the concern of this Article.

201 Given the close relationship between copyright and moral rights, the author recommends a term of protection co-extensive with the term of copyright granted the work at issue.

202 A parody must necessarily "mimic [the] original to make its point." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 (1994). This need to "conjure-up the original," may result in a work that is close enough to the original to be considered an unauthorized alteration of the work. *See id*. at 1168.

203 The author recognizes that "true parodies" and satires are not always easy to distinguish from de-culturizing uses. Much of the debate in U.S. copyright law over whether a work qualifies as a fair use parody or illegal infringement is based upon an often unpredictable analysis of the extent to which the original work is required to be used to call-up the original. *Compare* Loew's Inc. v. Columbia Broad. Sys., 239 F.2d 532 (9th Cir.), *aff'd*, 356 U.S. 43 (1956) (per curiam) (holding burlesque of movie "Gaslight" which utilized key scenes and dialogue did not qualify as a fair use because "a parodized or burlesque taking is to be treated no differently from any other appropriation") *with Campbell*, 510 U.S. at 569 (holding parody of song "Pretty Woman" is fair use because of its transformative nature regardless of the amount of original utilized). As Justice Kennedy, in his concurring opinion in *Acuff-Rose*, recognized: "As future courts apply our fair use analysis, they must take care to ensure that not just any commercial take-off is rationalized *post hoc* as a parody." *Id*. at 680. Care must similarly be taken to assure that not just any commercial take-off is condemned as an unauthorized alteration.

impermissible marketing of de-culturized products. Although trademark law generally protects source designators,[204] it can also be used to protect against false descriptions or representations related to marketed goods and services. Thus, for example, section 43(a) of the Lanham (Federal Trademark) Act of the United States prohibits the unauthorized use in interstate commerce of any "false or misleading description . . . which is likely to cause confusion, or to cause mistake or to deceive . . . ."[205] This statute has been used to prohibit the unauthorized alteration of broadcasted comedy skits because such alteration constitutes a false description—an unannounced departure from the original.[206] Similar applications may be used to prohibit the commercialization of specified cultural rituals without adequate notice of the de-culturized nature of such rituals. This notice could include a detailed disclaimer regarding the de-culturized nature of the cultural artifact or ritual in question. While this limitation does not prohibit the marketing of de-culturized products, it does at least require that such products be put in a cultural context. Such contextualization would reduce some, but not all, of the harm created by its de-culturization.

Patent laws, in the author's view, may be of relatively limited significance in the fight against de-culturization. They might, however, be crafted to protect the practice of folk medicines. Since TRIPS requires commercial application as well as an "inventive step,"[207] patent laws themselves probably could not be used to protect the practice of a well-known folk remedy *per se* and still comply with international standards. Patent protection, however, could be made available for the distillation of the chemical composition that has the required therapeutic characteristics or for the manufacturing processes utilized to commercialize the folk remedy.

In crafting such laws, the author strongly urges reconsideration of the first-to-file procedures generally adopted for patent

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204 *See* JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE (1996); LONG, UNFAIR COMPETITION AND THE LANHAM ACT, *supra* note 114; J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (3d ed. 1995).

205 15 U.S.C. § 1125(a) (1997).

206 *See* Gilliam v. American Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).

207 *See* TRIPS, *supra* note 8, art. 27. See also *supra* note 107 and accompanying text for a brief discussion of this requirement.

applications.[208] Such procedures, which grant patent protection to the first applicant to file for protection, as opposed to the first to invent, do not adequately protect the rights of the indigenous practitioners. To the contrary, they virtually guarantee that multinational corporations, who have a more sophisticated approach to patent applications, will obtain patents for such folk remedies.[209] By contrast, where protection is granted to the first inventor, it is more likely exploitation rights will be held by native users.

Finally, trade secret laws could be developed that protect

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208 Under first-to-file procedures, the patent is granted to the first applicant to file a valid application disclosing a patentable invention. This procedure has the benefit of easy administrability and places the greatest emphasis on winning the race to the Patent Office. When combined with publication of pending applications, the end result of this procedure is to encourage early public dissemination of potentially patentable inventions.

By contrast, first-to-invent procedures grant the patent to the first person to invent a patentable device, regardless of when the application is filed. For instance, in order to qualify as the first inventor, the United States requires that the applicant have been the first to conceive of the invention and have worked diligently to reduce the conception to practice. *See* 35 U.S.C. § 101 (1997). First-to-file procedures emphasize, within limits, rewarding the act of conception but may delay patent issuance due to interference proceedings brought by other alleged first investors claiming rights to the applied-for invention. The first-to-invent system may adversely affect predictability of patent enforcement, since even an issued patent might be subject to a claim that another person developed the invention first. For an examination of the first-to-file debate, see generally Charles R. B. Macedo, *First-To-File: Is American Adoption of the International Standard in Patent Law Worth the Price?*, 1988 COLUM. BUS. L. REV. 543 (1988); Robert W. Pritcherd, *The Future is Now—The Case for Patent Harmonization*, 20 N.C. J. INT'L L. & COM. REG. 291 (1995).

209 The grant of patents for folk medicines and seed varieties have caused some of the most heated debates over the desirability of intellectual property protection regimes for developing countries. *See* Peter Jinks, *Battle Ahoy Over "Pirates" of Bio-Booty*, THE SCOTSMAN, May 25, 1997 (discussing the threat to the Third World posed by protection for bio-technology products); Michael D. Lemonick, *Seeds of Conflict*, TIME, Sept. 25, 1995, (Magazine), at 50 (discussing the patenting of a pesticide made from neem seeds from India); Alan Simpson, *The Theft of Our Souls,* THE GUARDIAN (London), July 11, 1997, at O19 (discussing problems posed by granting patents on the "healing powers of the neem trees"); *Sowing the Seeds of Conflict*, THE HINDU, Mar. 23, 1997, at 25 (examining the adverse effect of patent protection on seed varieties); S.M. Mohamed Idris, *Doublespeak and the New Biological Colonialism,* (visited Feb. 16, 1997) <http://www.livelinks.com/sumeria/earth/colony.html> (alleging a double standard for protection of knowledge where knowledge of Third World farmers "does not qualify as knowledge" but laboratory creations qualify as "new knowledge" for which patent protection is available).

manufacturing, gathering and curing techniques for folk medicines. Although such processes lack the novelty required for patent protection, where the processes have been disclosed in an environment where confidentiality was required (such as to a limited number of practitioners, sworn to secrecy), such processes could continue to be protected under a carefully drafted trade secret law.

IV. Conclusion

Developing countries cannot survive without becoming active participants in the global marketplace. Such participation, fueled largely by foreign investment, often places the culture and heritage of developing countries on a collision course with the global consumer culture of the more powerful developed countries. The commodification and de-culturization of native and indigenous culture that results from such a collision is supported, and may even be enhanced, by the intellectual property protection regimes enacted by the developing countries at the behest of foreign investors. Although the purpose of such laws is usually seen through the narrow prism of protecting the technological investment of foreign multinationals, present international protection standards do not require such a view. To the contrary, despite the potential for misuse in supporting the commodification and de-culturization of native and indigenous culture, properly crafted and enforced intellectual property laws may not only meet the protection demands of foreign investors but can actually shield a country's cultural heritage against the leveling forces of globalizing de-culturization.

Using the protection norms of the Berne and Paris Conventions, as refined by TRIPS, developing countries can craft a protection regime that would provide protection for such critical cultural elements as folklore, ritual, costumes, and folk medicine. Focusing on copyright as the primary tool for inhibiting unauthorized de-culturization of cultural works, these regimes would recover cultural works by redefining the scope of public domain elements and establishing rights organizations to administer these newly expanded rights. A careful balance is required to avoid imposing too high a cost for the creation of new works using protected elements, or from the threat of harmful censorship. Native culture must not only be protected by such

laws, but must also be allowed to flourish. Thus, too strict an application could destroy (through stagnation) the very culture the law was designed to protect. Appropriately crafted moral rights, trademark, patent and trade secret laws should be enacted to support these efforts.

In addition to serving as a cultural shield, strong intellectual property protection may positively affect the variety of domestically-created products available for consumption. With the assurance of a sufficient economic return granted under such laws, native authors and artists will have greater incentives to spend the time, money and effort to create new products for a growing marketplace. Where legitimate channels of distribution are protected, problems of scarcity and inconsistent supply may be eliminated, further expanding the available pool of products and services. In order to assure that these positive developments are not purchased at the price of the destruction of the country's native and indigenous culture, however, laws must be created with the dual roles of promotion of economic growth and protection of culture firmly in mind. The secret is in creating an acceptable set of intellectual property laws that meet these twin goals. It is not an easy task, but for developing countries, it may well be a matter of cultural survival.