DEVELOPING COUNTRIES AND THE INTERNATIONAL COPYRIGHT REGIME:
The Neglected Issue of Cultural Survival

by

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ABSTRACT

My thesis is concerned with the impact of the new international copyright regime established by the TRIPs Agreement on culture in developing countries. It argues that the TRIPs Agreement, to an unprecedented degree, imposes a rigid view of what constitutes culture on members of the WTO. In particular, the Agreement imposes Western, industrialized concepts, principles, and standards of intellectual property protection on developing countries. Since intellectual property rules are subject to the general mechanisms for dispute settlement and the enforcement of rulings at the WTO, the vision of culture embodied in the TRIPs Agreement is potentially coercive.

In view of these developments, moral rights have become an area of growing importance for cultural policy. Moral rights have traditionally been closely linked to the protection of culture, due to their fundamental emphasis on the "non-economic" interests of authors and artists. The de facto exclusion of moral rights from the TRIPs system also accords them a new importance in relation to culture, as a potential area of relative independence for WTO members in the development of cultural policy.

This thesis examines the basic question of whether developing countries can make use of moral rights protections in their copyright laws to improve the situation of culture under the TRIPs regime. In analyzing this question, my thesis considers in detail the treatment of moral rights in a representative developing country, India. It argues that India's historical experiences and cultural characteristics, as well as its historic leadership in copyright matters among developing countries, make it a highly relevant example for the majority of the developing world.

My thesis argues that moral rights can make a substantial contribution to the state of culture in developing countries, and that moral rights doctrine should be developed as an important part of their cultural policies. This conclusion is based on three findings. First, moral rights doctrine shares some fundamental points of compatibility with traditional approaches to culture in many developing countries. Secondly, leading developing countries have already shown a basic commitment to moral rights doctrine in their copyright laws, and in the judicial development of moral rights protections. Finally, moral rights allow developing countries a degree of independence from the requirements of the new international intellectual property regime in formulating their cultural policies.

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Dedication

To my parents, Vijaya Bharati and Sundara Rajan
for their help and unfailing example.

"Vous pouvez vivre trois jours sans pain; - sans poésie, jamais; et ceux d'entre vous qui disent le contraire se trompent: ils ne se connaissent pas."
-Baudelaire, "Aux bourgeois" (Préface), *le Salon de 1846.*

"The purpose of art is...the gradual, lifelong construction of a state of wonder and serenity."
-Glenn Gould, "Let's Ban Applause" (February 1962) 82 Musical America at 11.

The arts today pose a different problem than they did at the time of the creation of the United Nations Charter. They are now commodity-oriented rather than people oriented and thus are more accessible to a world audience. The potential for the art market of the next century is enormous if the communication giants of today create the proposed networks bringing images, sound, and text into every home in the globe. The individuals who are able to create and orchestrate the images, write the texts, and create the sound or music are going to be extremely valuable human commodities in the future and will control the knowledge base.... Consequently, this is a factor in world trade that will be increasingly important to all nations in the next century, and the foundation for dissemination and ownership must be created in this century. The issue is critical to future development of arts in the world community as their role in the world economy continues to grow during the next decade. The dramatic change in economic positioning of the arts in world trade, and their emergence as a major commodity in world markets were key stones in our current round of trade talks and emphasize how important they have become to the United States economy.
-S.S. Madeja, "The Arts As a Cultural and Economic Factor in World Trade" (1994) 14 N. Ill. L. Rev. 439 at 451-52.

"Let us look briefly at the confused and confusing state of the arts today. Although the buying and selling of art works is a billion-dollar business and although hundreds of thousands of people throng to major art exhibitions, the arts today for most people are more occasions for perplexity than avenues to insight....Certainly, intimations of sacredness, beauty, privilege, refinement, and imperturbability continue to cling to the idea of art like wisps of mist shrouding a tree's higher reaches. More evident, however, is the trashy clutter at ground level, the less estimable associations of commodification, provocation, charlatanry, fickleness, and vulgarity."
-E. Dissanayake, *Homo Aestheticus: Where Art Comes From and Why* (New York: The Free Press - A Division of Macmillan, 1992) at xiv-xv.

Chapter I

Introduction

The loss of cultural diversity is a phenomenon which affects a growing number of regions in the world.[1] While international awareness of this problem is increasing, the attention of the international community has mainly been directed towards the specific cultural issues affecting aboriginal peoples.[2] In contrast, the concerns of developing countries in relation to culture remain less widely recognized.

Nevertheless, the loss of cultural heritage is a serious concern for the peoples of the developing world.[3] Developing countries, whose societies are subject to intense

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[1]The aboriginal peoples of various regions, as well as developing countries, confront major threats to the continuation of their cultural life. Other groups who face special difficulties in preserving their cultural heritage include the formerly Communist states of Eastern Europe, and countries and regions of the world which have been extensively involved in armed conflict, such as Sri Lanka, Kosovo, Afghanistan, and Rwanda. R.K. Paterson," The Protection of Cultural Property in Internal Law" (1996) 6:2 Int'l J. Cult. Prop. 267 at 267, points out that, "[p]olitical instability, economic crisis, or outright physical conflict in certain parts of the world has heightened the risk of damage or destruction to cultural property..."

[2]For example, see C.M. Horton,"Protecting Biodiversity and Cultural Diversity under Intellectual Property Law: Toward a New International System" (1995) 10 J. Env. L. & Lit. 1 at 4-6. Horton provides a detailed discussion of the loss of cultural diversity among indigenous peoples, including the frightening statistic that, "[a]t least 90 percent of the 6000 languages now being spoken are expected to die out within roughly 100 years."

[3]Indeed, there are important parallels in the situations affecting these different groups. For example, the problems of developing countries and aboriginal peoples in preserving their cultural heritage are remarkably similar - an area that remains largely unexplored in international scholarship, perhaps due to the perception that the political interests of developing countries and their own "aboriginal" populations are often in conflict. For a broad-ranging discussion of some issues of cultural heritage affecting aboriginal peoples, with an emphasis on conceptual concerns which are also closely related to the problems of developing countries, see J. Tunney, "E.U., I.P., Indigenous people

pressures flowing from the dual challenges of poverty and modernization, are profoundly affected by global cultural trends. Most of these countries have experienced some degree of cultural deterioration; some of them face extreme situations of cultural impoverishment.[4]

This thesis examines the fundamental problem of whether copyright law can make a contribution to the preservation and promotion of culture in developing countries. Recent copyright developments in the international arena, culminating in the adoption of an Agreement on Trade-Related Intellectual Property Rights as one of the network of agreements comprising the new World Trade Organization,[5] lend a degree of urgency to this issue. This study considers three specific questions.

First, what are the implications of the international copyright regime established by the TRIPs Agreement for the preservation and promotion of culture in developing countries? In particular, how will the TRIPs Agreement affect the ability of these countries to develop independent, sovereign, cultural policies? Secondly, how can developing countries make use of the concepts, rights, and obligations in the international

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and the Digital Age: Intersecting Circles?" [1998] E.I.P.R. 335.

[4]Examples of developing countries which have suffered serious cultural deterioration, in terms of both cultural property and traditional arts, include Bangladesh, Mali, and Western Samoa: for a detailed description of their situations, see L.V. Prott & P.J. O'Keefe, *Law and the Cultural Heritage,* vol. 3, *Movement* (Oxford: Professional Books, 1984) at 11-12.

[5]*Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the WTO Agreement, 15 April 1994, 33 I.L.M. 1197 (entered into force 1 January 1995) [hereinafter TRIPs Agreement].

copyright system to further their cultural objectives and meet their cultural needs? Finally, my thesis will undertake a brief consideration of the potential, longer-term effects of the TRIPs Agreement on cultural development. Will copyright law ultimately prove to be a useful and appropriate means of fulfilling the cultural objectives of developing countries?

A. Conceptual Framework: The Dimensions of Cultural Heritage

Developing countries often experience two forms of cultural impoverishment. First, these countries commonly suffer significant physical losses to their cultural heritage, through the removal of art, artefacts, and other objects of religious or historical importance from their territories. Secondly, their populations are usually subject to the deterioration of the skills, knowledge, and values which provide a non-material basis for ongoing cultural development.

1. The Link Between "Cultural Property" and "Intellectual Property"

The loss of cultural property and the deterioration of cultural knowledge are two distinct phenomena. In legal terms, the movement of cultural property is governed by national laws and international conventions which specifically seek to regulate the flow of cultural property out of its countries of origin, usually poor countries.[6] In contrast,

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[6]The two main international instruments which attempt to control the international movement of cultural property are the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* (1971) 10 I.L.M. 289 [hereinafter UNESCO Convention], and the *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects,* 24 June 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention]. While cultural property often flows from developing countries to industrialized countries, it should be noted that there are cultural property controversies within each of these groups as well. For example, Caruthers points

cultural knowledge is largely dealt with in national intellectual property statutes, and in international conventions on intellectual property which have come to be integrated into the international trade regime.[7]

The subject-matter of intellectual property protection has often proven to be elusive, and concepts of cultural knowledge in international intellectual property instruments remain inadequate to deal with the variety and complexity of cultural forms existing in developing countries. At the same time, cultural property law has proven to be equally ineffective in stemming the flow of cultural property out of developing countries. The difficulties of cultural property law art largely due to a failure to confront the political and economic inequality driving the trade in cultural property, as well as the basic clash of cultural values between art-source and art-market nations.[8]

The shortcomings of international cultural property and intellectual property law in relation to developing countries suggest that these two phenomena may be more

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out that Thailand has become a major market for smuggled art and artifacts from Cambodia: see C. Caruthers, "International Cultural Property: Another Tragedy of the Commons" (1998) 7 Pac. Rim. L. & Pol'y J. 143 at 159. Similarly, N.R. Lenzner, "The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?" (1994) 15 U. Pa. J. Int'l Bus. L. 469 at 471-72, observes that Italy is a major victim of art theft in the industrialized world. Caruthers' analysis, in particular, suggests that subtler gradations in levels of economic development affect the international movement of cultural property, with objects typically moving from less-industrialized to more-industrialized areas.

[7]The TRIPs Agreement, *supra* note 5, has become the preeminent international instrument dealing with intellectual property.

[8]For a detailed examination of these factors, and their impact on cultural property, see Caruthers, *supra* note 6 at 159, and C.F. Sayre, "Cultural Property Laws in India and Japan" (1986) 33 UCLA L. Rev. 851 at 857, 886-89.

realistically understood as two aspects of a single process. The loss of cultural property and the decline in cultural knowledge have reciprocal effects on one another. Moreover, cultural property and cultural knowledge also contribute jointly to the accumulation of cultural heritage, and to cultural development, overall.

a. Cultural Property

The most important threat to the material cultural heritage of developing countries is, arguably, the growing movement of cultural property outside the territories of these countries.[9] The vast majority of this international trade is illicit, having its origin in the interplay of complex social factors in developing countries, and in the values informing the demand for art in industrialized countries. Widespread poverty among the populations of developing countries, and a corresponding decline in social values, acts as a powerful incentive for local individuals to collaborate with dealers in cultural property to make objects of cultural value available for sale on the international art market.[10]

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[9]The tremendous scale of international movement, and the fact that most of this movement occurs outside the framework of international or domestic regulation, lends support to this view: see Prott & O'Keefe, *supra* note 4 at 11-16. The problems of preserving cultural property within developing countries, including limited resources and knowledge of Western-style techniques of preservation, are both different in kind and, at present, less significant.

[10]Without the participation of local people, the smuggling of cultural objects would not be possible on such a huge scale. At the same time, poverty drives individuals in developing countries to become involved in the illicit trade in cultural property. Borodkin identifies these people as "subsistence looters": see L.J. Borodkin, "The Economics of Antiquities Looting and a Proposed Legal Alternative" (1995) 95 Colum. L. Rev. 377 at 412. See also Sayre, *supra* note 8 at 875, who identifies the "growing indifference to spiritual values and objects of worship among the Indian population" as an important factor making the theft of cultural property possible in India.

The success of international law in curtailing the illicit international trade in cultural property has been extremely limited, reflecting the complexity of the interests involved in cultural property, and the difficulty of balancing these interests in the international arena. While international legal developments represent a recognition of the value of cultural objects, the sources of their value remain largely unarticulated.[11] The perspectives of developing countries on their cultural property are greatly under-represented in international discourse on cultural property issues, due to language and cultural barriers, resulting in a critical imbalance in communication between art-source and art-market countries in this sphere.

b. "Intangible" Aspects of Culture[12]

In addition to cultural property, the cultural heritage of a people has an important intangible aspect. Cultural property is a visible manifestation of this intangible knowledge. More fundamentally, the knowledge of the artists, intellectuals, and artisans of a society is, itself, a part of a country's cultural heritage.

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[11]Fundamentally, the international art trade results in the "commodification" of objects which were originally not intended to be treated as commodities. For a discussion and critique of the phenomena which support the commodification of art, see E. Dissanayake, *Homo Aestheticus: Where Art Comes From and Why* (New York: The Free Press, 1992) at xiv-xv.

[12]The terminology of "tangible" and "intangible" cultural property is used by C.A. Berryman, "Toward More Universal Protection of Intangible Cultural Property" (1994) 1 J. Intell. Prop. L. 293, to emphasize the essential unity of cultural and intellectual property, and the links between the legal treatment of these two areas.

i. Cultural Property As an Embodiment of Knowledge

The intangible features of a culture are often closely related to cultural property. In countries which have traditions of oral culture, non-verbal forms of expression make a significant contribution to cultural heritage. In this context, objects have traditionally been able to express complex ideas in a highly concentrated form. These ideas are grasped by an audience educated in the culture, often in intuitive ways that would be extremely difficult to define in words. This knowledge tends to be misunderstood, unseen, and even devalued in modern culture, with its emphasis on written and verbal information.[13]

An interesting example of the phenomenon of knowledge expressed in an object is the image of Shiva Nataraja, a Hindu representation of the Divine Being as the dancing figure of a man, originating in India.[14] Nataraja has been represented in a series of celebrated bronze sculptures made between the tenth and thirteenth centuries in the South-Eastern part of India currently known as Tamil Nadu. These bronzes must have communicated a sophisticated knowledge about the workings of the universe to Tamils of that age, who were educated in the appreciation of the Nataraja form.[15] Coomaraswamy

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[13]See Dissanayake, *supra* note 11 at 194-225 for a discussion of the implications of writing for art.

[14]For an explanation of the symbolism of the Nataraja form, see A.K. Coomaraswamy, "The Dance of Shiva" in *The Dance of Shiva: Fourteen Indian Essays,* rev. ed. (New York: The Noonday Press, 1957) 66 at 70-71.

[15]The Nataraja image would have been understood among Indians generally, due to cultural relationships among the various peoples in India, and knowledge of the Nataraja form throughout the sub-continent.

points out the "grandeur of [the conception of Shiva's dance]... as a synthesis of science, religion and art."[16] He goes on to suggest that,

> In these days of specialization, we are not accustomed to such a synthesis of thought; but for those who "saw" such images as this, there could have been no division of life and thought into water-tight compartments.[17]

Indeed, this kind of knowledge is difficult for modern readers to recognize and understand. Not only do we have difficulty in relating intuitive and rational knowledge, but we have a tendency to consider scientific knowledge as a kind of "absolute" knowledge. The traditionally tense relationship between science and culture in Western society, especially in relation to religion, also obscures the close link between science, art, and religion which is characteristic of the cultures of many developing countries. Moreover, modern industrial culture is informed by a popular belief that no knowledge, once discovered by man, can remain unexploited. Whether mathematics is a language, or model, for the description of physical reality, or a direct reflection of the nature of the universe, is a debate for physicists. However, it is interesting to consider physicist Fritjof Capra's comparison of Nataraja to modern, scientific ways of viewing the universe:

> The same idea about matter is conveyed, for example, to the Hindu by the cosmic dance of the god Shiva as to the physicist by certain aspects of quantum field theory. Both the dancing god and the physical theory are creations of the mind: models to describe their authors' intuition of reality.[18]

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[16]See Coomaraswamy, *supra* note 14 at 77.

[17]*Ibid.*

[18]F. Capra, *The Tao of Physics: An Exploration of the Parallels Between Modern Physics and Eastern Mysticism* (Boulder, Colorado: Shambhala, 1975) at 44.

ii. Intellectual Property

While the loss of cultural property has important negative consequences for a nation's cultural heritage, the gradual and subtle disappearance of cultural knowledge is equally serious. This "invisible" loss of culture entails particular dangers for a developing country, because it is the ultimate source of creativity and cultural regeneration.[19] In addition to its function as a manifestation of the social accumulation of concrete skills and knowledge over time, cultural knowledge is intertwined with the maintenance of values and beliefs, the cultural expression of a life-view, and the evolution of traditional social structures and customs.

In contrast to cultural property, cultural knowledge is inherently creative. It is the force which drives the evolution of a culture, by allowing it to reinvent itself continuously in new forms. Cultural property may participate in this process of evolution by inspiring new developments, or by serving as a reminder of historical creativity, but the value of cultural knowledge transcends any particular object or group of objects. It is this "commodity," which practically defies definition or categorization, that is known in industrialized countries as "intellectual property." It is the specific role of copyright law to regulate intellectual property which, in the form of literary and artistic works, is a major component of cultural heritage, and makes an essential contribution to cultural life.

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[19]Significantly, Ndiaye observes that, "[i]n actual fact, in the cultural sphere, we are all 'developing.'" See N. Ndiaye, "The Berne Convention and Developing Countries" (1986) 11:1 Colum. - VLA J. L. & Arts 47 at 56.

2. Relationship between Copyright Law and Culture

The present state of culture in many developing countries suggests that the preservation of cultural heritage and the promotion of cultural development require conscious steps. In view of the pressures and obstacles which interfere with development in the cultural sphere, cultural policy, particularly in relation to the "intangible" aspects of culture, may prove to be an important means of protecting and promoting culture in developing countries. In basic terms, cultural policy may be defined as the framework of administrative and legislative means put in place by governments, at the national, regional, and local levels, to promote artistic and intellectual endeavour.[20] Developing countries may find that it is to their advantage to adopt an active approach to cultural policy, through the creation of legal, administrative, and institutional regimes to promote cultural development.[21]

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[20]For a detailed discussion of what cultural policy is, and how it may be defined and developed, see J. McGuigan, *Culture and the Public Sphere* (New York: Routledge, 1996) at 5-29. In particular, McGuigan draws attention to the fundamental difficulty of attempting policy intervention in a sphere which essentially defies regulation, and, indeed, is hostile to the very concept. He points out that "[t]he problem is related to the etymological connection between 'policy' and 'policing'. 'Cultural policy' has deeply entrenched connotations of 'policing culture', of treating culture as though it were a dangerous lawbreaker or, perhaps, a lost child." *Ibid.* at 6.

[21]For example, *domaine public payant* schemes, which involve the payment of fees for the use of works in the public domain, with a view to making a fiscal contribution to the maintenance of cultural heritage, are potentially useful for developing countries. For a discussion of how the *domaine public payant* might work in practice, see Berryman, *supra* note 12 at 307-08. This approach to the public domain is suggested in the World Intellectual Property Organization, *Tunis Model Law on Copyright for Developing Countries* (Geneva: WIPO, 1976), s. 17.

In both the industrialized and developing worlds, copyright law is a common tool of cultural policy. By allowing the creator of a literary or artistic work to control the economic exploitation of his creation, copyright law is generally believed to provide an incentive for the growth and development of creative and intellectual endeavours in society.[22] However, the extent to which this theory actually operates is difficult to assess, since the phenomena of creative and intellectual genius remain poorly understood.[23] For example, some scholars point out that copyright protection is closely connected to the development of an international mass market for culture.[24] While copyright promotes the creation of works for mass-market commodification and consumption, it is not a factor in the production of works of genius that have lasting value.[25]

At a conceptual level, the relationship between copyright and the production of

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[22]For a discussion of some of the policy justifications typically applied to copyright, see E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge & Kegan Paul, 1980) at 22-30 and D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Concorde, ON.: Irwin Law, 1997) at 21-22.

[23]This is the case in spite of sophisticated scholarly efforts to analyze the phenomenon of authorship in its historical and social contexts: for example, see M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425 and M. Foucault, "What Is an Author?" in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) 101.

[24]For example, see Ploman & Hamilton *supra* note 22 at 179 (citing Thomas, 1967 at 21-22).

[25]*Ibid.*

creative work appears to be tenuous. However, in the social and economic context of developing countries, the functions of copyright law take on a new importance. Copyright law, in developing countries, potentially has three types of possibilities. First, in situations where poverty is widespread, the economic protections offered by copyright may make it possible for artists and intellectuals to produce an improved quantity and quality of work.[26] Secondly, copyright protection may favor the development of indigenous cultural industries, such as publishing, by creating opportunities for wider national marketing of creative and intellectual work.[27]

The third source from which copyright law draws its importance for developing countries may be found in the nature of the social functions which legal regimes typically accomplish. Law must inevitably play an important role in creating a sound framework for the development of effective cultural policies in developing countries. It fulfills two social functions which are of particular importance for culture. First, law is the basic vehicle for the expression of social values and priorities, and it also acts as the main administrative instrument for balancing competing interests in society.[28] Secondly, law specifically acts as the principal mediator between artists and society. While it guarantees

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[26]See *ibid.* at 22-25. In particular, Ploman & Hamilton draw on Masouyé's work (1974 & 1977) to provide a list of grounds on which copyright is typically used by developing countries. In addition to economic reasons, Masouyé emphasizes the objectives of "cultural progress" and "national prestige" which copyright represents.

[27]*Ibid.*

[28]For a detailed discussion of this point, see R.L. Gana, "Implications of the Internationalization of Intellectual Property" (1995) 24 Denv. J. Int'l L. & Pol'y 109 at 111-12, 119-20.

that society will be able to realize the social value inherent in creative work, it also provides artists with fundamental protections from conventional limitations on thought and action.

In relation to culture, copyright law is currently the dominant legal form of cultural policy in the world. Internationally, copyright is the primary legal concept for the protection of culture, and it is the central feature of the international system for the protection of creative works as intellectual property. The recent TRIPs Agreement has arguably created the first truly international copyright regime, since it imposes standards, obligations, and enforcement procedures on a virtually universal membership. As a result of the Agreement, copyright has become the preeminent legal means of protecting cultural wealth in the form of cultural knowledge. International developments in copyright will also have significant effects on how member countries approach cultural policy in their particular social and economic environments.

3. The Special Importance of "Moral" Rights for Culture

Copyright law fundamentally aims to secure the economic returns flowing from the dissemination of literary or artistic works to owners of copyright. At the level of pure theory, copyright has two defining limitations. First, the focus of copyright protection is economic in nature, and, as a result, copyright is not implicated in the non-economic interests which may arise in relation to the work. Secondly, the rights which copyright protects must be exercised by the owner of the copyright, who may or may not also be the

creator of the work.[29]

In their undiluted form, these limitations might seriously affect the ability of copyright law to serve as a tool for the protection of cultural heritage. Copyright provides an economic incentive for the protection and distribution of literary and artistic works. It does not, however, accommodate interests in the conservation of works, or the maintenance of objective standards of quality in relation to these works. Moreover, its focus is highly individualistic. The subject-matter of copyright is the work of individual authors, and its jurisdiction extends primarily over copyright-owners. Copyright is not concerned with the character of a body of creative works taken together, which, in their totality, constitute a cultural heritage.

a. The Non-Economic Emphasis of Moral Rights

The doctrine of moral rights, which has its origins in a distinct continental tradition of "authors' rights,"[30] plays a crucial role in softening these implications of pure copyright theory. Moral rights doctrine flows from an awareness that authors have significant, non-

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[29]These characteristics may essentially be identified with Anglo-Saxon traditions of copyright. Although the "personal" aspects of the author's interests in his work were expressed in the celebrated early English case of *Millar* v. *Taylor* (1769), this strand of thinking did not become dominant in the development of copyright in the Anglo-Saxon world. For a detailed consideration of the case, and a discussion of these issues, see G. Dworkin, "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1994) Aus. Intell. Prop. J. 5.

[30]The French expression for copyright is *droit d'auteur,* "author's right." Moral rights doctrine is generally considered to have its origins in French theories of authors' rights: see generally S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Center for Commercial Law Studies, Queen Mary College, 1987) at paras. 8.93-8.95.

economic interests in their literary and artistic creations which should be recognized and protected by law. Ironically, the orientation of moral rights is, in a sense, far more individualistic than copyright, since moral rights are concerned with an author's personal interests in his work.[31] In spite of this theoretical limitation, however, moral rights have broad, practical implications for culture.

Most importantly, through its emphasis on non-economic interests, moral rights doctrine generates opportunities for the protection of culture per se. Moral rights allow for the possibility of creating a legal framework to protect aspects of literary and artistic works which are not directly involved in economic transactions, and which may even be in conflict with economic interests in wider publication and dissemination. For example, through an understanding of the creative work as an embodiment of its author's personality, moral rights offer legal protection to the integrity of an author's work.

The moral right of integrity makes two distinct contributions to the preservation of a nation's cultural heritage. First, by protecting the works of individual authors, it contributes to the preservation of the integrity of a body of cultural heritage, which is, to a significant degree, a product of the works of individual authors. Secondly, the concept of integrity may be separated from authorship, by bringing it to bear directly on the work. In this vein, Berryman suggests that the public should have a legal right to object to violations of the integrity of "folkloric" works, anonymous or community works which

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[31]This problem is alluded to by Ricketson, *ibid.* at para. 8.93. A translation of *droit moral* which captures its French connotations more precisely is, perhaps, "personal right"; Ricketson suggests that "'spiritual', 'non-economic' and 'personal' convey something of the intended meaning."

form an integral part of the traditional cultures of many countries.[32] In practical terms, such a right of integrity could enable community leaders and organizations, professional organizations of artists or artisans, or special interest groups to undertake legal action in the interests of protecting national cultural patrimony.

b. Moral Rights in the International Copyright Regime

In the current international copyright system, moral rights have an additional importance for cultural policy, arising out of their place in the international legal framework for copyright protection. The international community has shown a degree of ambivalence towards incorporating moral rights protection into the international copyright system. The main driving force behind the extremely limited recognition of moral rights provided by the TRIPs Agreement has been United States policy. While the United States provides its authors and artists with protections analogous to moral rights, through the availability of common-law actions and through legislation on moral rights issues such as the Visual Artists Rights Act of 1990, moral rights are not specifically included within the ambit of U.S. copyright law. The reasons for the American ambivalence towards moral rights are complex, having their origins in U.S. constitutional policy on artistic and intellectual endeavour,[33] and culminating in the political opposition of powerful

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[32]*Supra* note 12 at 310-21.

[33]For a discussion of the relationship between copyright and the protection of free speech under the First Amendment of the U.S. Constitution, see S. Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm/Ent L.J. 287 at 297-304.

entertainment-industry groups, including the U.S. film industry, to moral rights protection.[34] As a result, moral rights are practically excluded from the TRIPs Agreement.[35]

At the same time, the TRIPs Agreement requires members of the WTO to adhere to Article *6bis* of the Berne Convention, on moral rights.[36] In view of this situation, moral rights, while excluded from the range of dispute-settlement and enforcement procedures which are available under the TRIPs Agreement, are likely to gain an unprecedented degree of international exposure and acceptance. All members of the WTO will have to bring their copyright systems into line with the moral rights requirements outlined in Article *6bis*.[37]

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[34]*Ibid. at* 304-20: Fraser particularly emphasizes the competitiveness of American entertainment industries in the international mass-market as a factor determining U.S. policy on moral rights. See also D. Nimmer, "Conventional Copyright: A Morality Play" (1992) 3 Ent. L. Rev. 94 at 95.

[35]Art. 9.1 of the TRIPs Agreement, *supra* note 5, which is the basic TRIPs provision on copyright protection, provides that: "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Art. *6bis* of that Convention or of the rights derived therefrom."

[36]*Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, 828 U.N.T.S. 221, online: World Intellectual Property Organization (WIPO) <http://www.wipo.org/ eng/iplex/wo_ber0_.htm> (date accessed: 15 May 1999) [hereinafter Berne Convention].

[37]See Nimmer, *supra* note 34 at 96-98. Due, especially, to the U.S. approach to bringing its copyright law into conformity with Art. *6bis,* it is not precisely clear what countries will have to do to meet the moral rights requirements of the Berne Convention. Previously, U.S. copyright law had been widely recognized to limit the applicability of moral rights doctrine. However, at the point of joining the Berne Convention, the U.S. Congress declared that U.S. protection for moral rights was "adequate" to meet the requirements of Berne. At the same time, the United States went on to pass the Visual Artists' Rights Act in 1990, specifically providing limited moral rights protection to the

The WTO system preserves the non-coercive and flexible approach of the Berne Convention to moral rights. Member countries may choose to develop moral rights protection with a view to protecting nationally-important interests in literary and artistic work, and accommodating specific cultural forms which may benefit most from the application of moral rights. In the new copyright regime, moral rights remain an area of unusual freedom and flexibility for developing countries who want to implement moral rights protections in their legislation and case law as part of a broader policy for the protection of culture.

B. Methodology

In the light of these considerations, my thesis attempts to examine the ways in which developing countries approach moral rights doctrine in their national regimes for the protection and promotion of culture. Due to the large number of countries which are considered to be "developing," the cultural diversity of these countries, and the wide variations in their levels of economic and social development, this thesis will undertake a detailed examination of a single example, India. A detailed study of a single developing country is, however, broadly applicable to the situations of many developing countries, due to certain basic similarities between these countries.[38] The cultural and legal characteristics which are specific to India also make it a particularly valuable example for

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creators of works of visual art. See also Dworkin, *supra* note 29 at 14-16, for a discussion of the U.S. approach to Art. 6*bis*.

[38]Indeed, certain common features will also make this example relevant to the situations of aboriginal peoples, and of many former Communist countries: see *supra* note 3.

other developing countries to consider in developing their copyright systems. As Ploman and Hamilton observe:

> The position of India in relation to intellectual property rights appears at the same time unique and typical of the problems faced by many developing societies.[39]

1. Common Features of Developing Countries

"Developing" countries constitute an extraordinarily varied group, ranging from the relative wealth and power of India, Mexico, and Brazil, to the extreme poverty of sub-Saharan Africa.[40] Their societies and cultural traditions are also vastly different from one another, so that it is difficult to make general comments about the state of culture in developing countries. This study seeks to examine cultural issues in developing countries on the basis of three fundamental characteristics which are shared by a great majority of these countries: the pursuit of economic development, the problem of poverty, and a colonial past.

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[39]*Supra* note 22 at 131.

[40]The case of China, with its Communist government and centrally-planned economy, also raises unique issues in relation to culture and development. Some of these issues are discussed in the context of the Chinese approach to copyright in Ploman & Hamilton, *ibid.* at 140-47. See also R.L. Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735 [hereinafter "Prospects"] at 764-66, for a brief summary of the history of copyright protection in China, and a consideration of traditional approaches to knowledge in the Confucian tradition.

a. Industrialization

All developing countries are engaged in the pursuit of industrial development on the Western European model.[41] In developing countries, industrialization uniformly represents a non-indigenous economic system to which their societies must adapt. Over the past decade, developing countries have generally adopted export-oriented, trade-based approaches to industrialization, which have displaced earlier models of development emphasizing economic self-sufficiency and the protection of local industries from global competition.[42] This new external orientation has led to an unprecedented level of involvement in the international economic system among developing countries, resulting both in a greater degree of integration into the international trade system, and growing dependence on the rules and practices governing it.

b. Poverty

Even the wealthiest developing countries must deal with the problem of poverty

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[41]The Industrial Revolution experienced by the most advanced Western European nations during the nineteenth century, including England, France, and Germany, continues to serve as a basic model for industrial development today. The appropriateness of applying this model to the present situation of developing countries is considered by E. Henderson, "TRIPs and the Third World: the Example of Pharmaceutical Patents in India"(1997) 19 Eur. Intell. Prop. Rev. 651 at 654. Henderson examines this issue in the context of the connection between patent protection and industrial development.

[42]For a detailed discussion of import-substitution models of development and the movement of developing countries towards economic policies favoring trade liberalization, see M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 314-22.

among a significant proportion of their populations.[43] Policy-making in developing countries, in relation to all areas of economic and social life, essentially requires the strategic allocation of scarce resources.[44] Any new policy objective or legal framework in a developing country is strictly defined and limited by the reality of scarcity. Moreover, many developing countries experience a disturbing divergence of interests between their governments and their populations. Corruption, and its economic and social consequences, are a basic reality of government in these developing states. The effects of corruption are also visible in government policies affecting culture, which, at best, appear to reflect an attitude of "benign neglect."[45]

c. Colonial History

Developing countries share a history of colonial oppression by Western European powers. Their present position in the international system remains one of economic and political weakness.[46] At the same time, their struggle to create viable models of economic

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[43]Both Mexico and India are cases in point: see Henderson, *supra* note 41 at 657 and G. Kransdorf, "Intellectual Property, Trade, and Technology Transfer Law: The United States and Mexico" (1987) 7 Boston College Third World L.J. 277 at 279.

[44]For example, implementing a scheme for patent protection involves substantial costs. For an analysis of what these costs entail, see G.Y. Gonzalez, "An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement" (1993) 34 Harv. Int'l L.J. 305 at 310-12; Gonzalez lists seven types of costs identified by A.S. Oddi.

[45]Corruption in government, leading to short-sighted economic and social policies, and a general decline in social values are mutually reinforcing trends. See Sayre, *supra* note 8 at 875 and Prott & O'Keefe, *supra* note 4 at 14.

[46]See Henderson, *supra* note 41 at 663. Henderson traces the current technological imbalance in the international economic system to the colonial experience of developing

and social development to bring about a smooth transition to industrialized life is without any proper precedent in history.[47] Subject to the pressures generated by poverty and constant change, many developing countries face the threat of imminent political, economic, and social chaos.[48]

2. Relevance of the Indian Example

There are three factors which give particular weight to a study of copyright developments, and their relationship to culture, in India.

a. India As a Representative Developing Country

First, India shares many of the common features which characterize the historical experience of developing countries. Copyright legislation was first introduced in India by the British Imperial government.[49] Under British rule, India also participated in the Berne copyright union. Although India is a relatively wealthy developing country, a large

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countries by arguing that colonization may have created "a disincentive for inventive activity." She cites R.L. Gana, "Profiteering from Life and Death: Intellectual Property and the Pharmaceutical Industry in Emerging Economies: A Nigerian Case Study" (1993) 2:1 Intellectual Property Law: An International Analytical Journal 7 at 15-16.

[47]Henderson, *ibid.* at 654 points out that, "developing countries are not simply in the same position as Western nations were centuries ago. Western nations developed industrially and technologically ahead of other nations. Less developed countries are operating in a completely different environment because they are surrounded by nations with vastly superior technology and wealth. Western countries were never in that position."

[48]This potential for chaos exists even in developing countries which appear to be economically advanced and politically stable. Recent events in Southeast Asia, especially Indonesia, reveal this reality.

[49]The *Indian Copyright Act* of 1914, Act III of 1914 (passed by the Governor-General of India in Council) was promulgated by the British Government in India, and was based on the *British Copyright Act, 1911.*

proportion of its population lives in extreme poverty. Indeed, Indian society mirrors societies in other large developing countries in its disturbing combination of the extremes of poverty and wealth.[50]

b. India's Uniqueness

The combination of India's size and cultural diversity makes it a widely interesting and useful example among developing countries. In terms of population and resources, India is among the largest developing countries. However, an enormous variety of linguistic, racial, religious, cultural, and aborigisnal groups live on Indian soil, and call themselves Indian. The variety and complexity of the Indian cultural context lends interest and relevance to its legislative experiments in relation to culture for a diverse group of outside observers, as well.

c. India As a Model of Copyright Reform

Finally, among developing countries, India has played a special historical role in relation to copyright. Throughout the history of developing countries' participation in the Berne Union, it has been a leading advocate for the interests and perspectives of the developing world. At the same time, India's participation in the international copyright system, and in the international community, in general, has been tempered by a sense of ideological and cultural independence which, perhaps, has its roots in the Indian freedom movement. India's copyright legislation reflects its unique perception of its international

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[50]Mexico is an obvious example: see Kransdorf, *supra* note 43 at 279-81.

role. Recent amendments to the *Copyright Act, 1957,*[51] have made its legislation one of the most highly developed copyright laws in the world. In many respects, the *Copyright Act* provides both legal models and practical illustrations for other countries who wish to develop certain features of their own copyright systems.[52]

3. Special Difficulties of Least-Developed Countries

The general relevance of the Indian experience with copyright to the diverse situations of developing countries is most severely tested by a comparison with the situations of the world's poorest countries, for example, in the region of sub-Saharan Africa.[53] The challenges posed by economic conditions in these countries are a product of historical, geographical, and social circumstances which, in certain respects, are unique in the world. The colonial experiences of these countries were, perhaps, unique in their brutality and excesses. At the same time, these countries have special types of endowments of natural resources which have not assured them of a stable presence in the international trading regime, while industrial development in this region is quite limited.[54]

By a terrible irony, these countries are also among the most culturally-rich in the

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[51]Act 14 of 1957 [hereinafter *Copyright Act*].

[52]See S. Ramaiah, "India," in *International Copyright Law and Practice,* ed. P. Geller and M. Nimmer (New York: Matthew Bender, 1988) at IND-11 - IND-14.

[53]For example, the World Bank recently classified Mali as the seventh poorest country in the world: see "Mali: A day for complaints" in The Economist, July 10th to 16th 1999 at 40.

[54]For a discussion of the economic situation of these countries and its historical roots, see C.A. Bogdanowicz-Bindert, "Sub-Saharan Africa: an Agenda for Action" (1982) 16: 4 J. World T. 283 and S. Demske, "Trade Liberalization: De Facto Neocolonialism in West Africa" (1997) 86:1 Georgetown L.J. 155.

world. Their cultural heritage not only includes massive wealth in cultural property, but it also represents some of the most diverse and unique social traditions in the world. These factors call for a closer examination of the present state of culture in these countries, and a consideration of the potential contribution of copyright law, as part of a framework for cultural policy, to the protection of their cultural heritage and the promotion of cultural development among their peoples.

At first glance, the appropriateness of applying copyright concepts to these countries, which bring an industrialized vision of culture to profoundly non-industrial traditions, may, itself, seem uncertain. However, least-developed countries, as developing countries generally have done, have almost uniformly chosen to implement copyright schemes in their domestic legislation, often with the assistance of international specialist agencies.[55] A detailed analysis of copyright schemes in these countries is beyond the scope of the present study. However, in light of the example provided by India, a more general examination of the potential contribution of copyright to the protection of cultural heritage in these countries is worth examining.

C. The Importance of Culture in Developing Countries

For most developing countries, the satisfaction of the basic needs of their populations is a priority. The governments of developing countries are often preoccupied with the short-term fulfilment of immediate material needs, such as food and health-care. The policies of wealthier developing nations reflect aspirations for economic stability in

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[55]Ploman & Hamilton, *supra* note 22 at 207-08 draw attention to this "curious" feature of international copyright.

the longer-term, while the poorest or most unstable nations must manage real or potential crises. As a result, issues of culture in many developing countries are either threatened with total neglect, or dealt with in a casual manner. These imbalances are also reflected in legal scholarship on developing countries. While legal scholars of both industrialized and developing countries appreciate the value of culture in developing countries, scholarship is generally oriented towards the more immediate problems of industrialization.[56] No doubt, these attitudes may be readily justified.

Nevertheless, current developments in the international arena suggest a need to re-affirm the importance of culture, particularly in developing countries. This thesis argues that developing countries must meet the challenge of maintaining their cultural wealth and encouraging its growth in the face of the obstacles presented by poverty, limited resources, the urgency of industrial development, and international economic pressures. In spite of the harsh economic and social realities faced by developing countries, it must be recognized that culture continues to be an area of crucial importance for them.

Indeed, in view of the fact that the societies of developing countries are undergoing a process of fundamental transformation, it may be argued that culture should actually

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[56]For example, legal scholarship in the area of intellectual property, in both industrialized and developing countries, has focussed on issues surrounding patent rights, since changes in the international patent system are perceived to have an immediate impact on technological development in industrial countries: see K.R.G. Nair & A. Kumar, *Intellectual Property Rights,* UDCCS Seminar Papers Series No.1 (New Delhi: Allied Publishers, 1994), a collection of essays primarily from Indian scholars, Henderson, *supra* note 41, and "Prospects", *supra* note 40. In contrast, the copyright implications of current developments in intellectual property for developing countries appear to attract far less scholarly inquiry.

enjoy a heightened prominence and prestige in these countries. A focus on culture in developing countries can be justified on at least three major grounds.

1. Economic Value

To begin with, culture has the potential to make a significant economic contribution to developing countries. In relation to cultural property, the economic value of cultural objects is increasingly recognized, resulting not only in the growth of an international art market, but in the development of increasingly lucrative cultural industries, such as tourism, travel, and trade.[57]

2. Heritage Value

The richness of the cultural heritage in developing parts of the world also mandates action for its preservation. The erosion of culture in developing countries will ultimately lead to the impoverishment of human civilization and historical knowledge. This potential loss should not only be of concern to the citizens of developing countries, but it should also be a matter for action in industrialized countries. Consequences of the loss of cultural diversity, like the reduction of biodiversity, may be difficult to quantify in the immediate future, but they will clearly involve significant economic and social costs in the long-term.[58]

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[57]It should be noted that developing countries lose potentially important revenues from travel and tourism to industrialized countries, where art and artefacts from developing countries are often major attractions. See Prott & O'Keefe, *supra* note 4 at 23-25; they point out that "a carefully planned development of cultural tourism in rich sites" may bring substantial benefits to the cultures of poor countries.

[58]See Horton, *supra* note 2 at 6-7, 13-15, 25-30 for an interesting exploration of the relationship between biodiversity in cultural diversity. Horton is especially concerned

3. Human Value

Although neglecting culture potentially has major economic consequences, the justification of cultural policy must ultimately take non-economic forms. To consider the value of culture primarily from an economic perspective is to overlook the non-economic qualities which constitute its essence. Rather than developing an over-simplified understanding of the requirements of human existence, it is crucial to remember that culture makes a significant non-material contribution to society. It represents the larger social objective of satisfying human needs and desires beyond basic material wants, and makes an important contribution to the personal development of individuals.[59] The value of culture must find its ultimate expression in humanistic, and pragmatic, terms. Cultural products and cultural knowledge are special kinds of products which should not be treated in the same way as other types of goods, information, or knowledge.[60]

For developing countries, it may be argued that inattention to the state of culture will eventually prove to be a source of national weakness. The loss of culture is likely to

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with "ethnopharmacology," or the contribution of indigenous knowledge about the medicinal qualities of plants to the development of modern pharmaceuticals by multinational firms.

[59]It is not uncommon for great artists to emphasize this private value of art over its "public manifestations": for example, see G. Payzant, *Glenn Gould: Music & Mind* (Toronto: Van Nostrand Reinhold, 1978) at 64, quoting from an article published by the pianist, G. Gould, "Let's Ban Applause"(February 1962) 82 Musical America at 11. For Gould, experiencing the reality of art meant "awakening to the challenge that each man contemplatively create his own divinity."

[60]See Fraser, *supra* note 33 at 319.

entail a corresponding loss of identity, leading to growing difficulties in establishing development objectives.[61] Neglecting culture may translate into a subtle inability to weather national crises, or to bear the costs of economic adjustment and social change associated with industrialization. In order to be most effective, development should be pursued in conjunction with a commitment to the preservation and development of cultural heritage.

D. Structure of This Study

My thesis will examine some of the implications of the international copyright regime established by the TRIPs Agreement for the development of coherent and effective approaches to cultural policy in developing countries, including the legal treatment of culture through copyright law.

1. Thesis Outline

Chapter II will set out the main features of the TRIPs copyright regime, and it will examine the position of developing countries in the TRIPs system. It will show that the differences between the TRIPs/WTO approach to copyright and the copyright system embodied in the Berne Copyright Convention are subtle. However, they ultimately imply a fundamental change in the international treatment of author's rights, and in the status of literary and artistic works in the international community.

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[61]For an examination of the link between culture and development, see World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development,* 2d ed.(Paris: United Nations Educational, Scientific and Cultural Organization, 1996) at 22-30. The authors argue convincingly that successful economic development depends on the integration of culture into the process of growth.

I will argue that the approach to copyright in the TRIPs Agreement imposes important new restrictions on the ability of developing countries to define their cultural policies. Some of the special considerations which developing countries must now take into account in bringing their copyright laws into conformity with TRIPs requirements may be summarized in three broad categories. First, developing countries need to accommodate non-Western cultural forms in their copyright systems, such as improvised classical music or "folklore." Secondly, they must accurately locate the identity of the creator of the cultural work, who might as easily be a family, community, or caste, as an individual. Finally, developing countries must take social attitudes towards culture into consideration, with particular reference to the artist's role in the community. Some of these issues have traditionally posed problems for developing countries in framing their copyright laws, while others represent a new awareness of the potential scope of copyright protection. In both cases, however, current developments in copyright law call for a reassessment of conventional approaches to these issues.

Chapter III will assess the conceptual foundations of moral rights doctrine, in order to determine whether moral rights theory, as it is currently understood in the Western world, restricts the usefulness of moral rights in the cultural policy of developing countries. I will argue that these conceptual difficulties should not interfere with the practical application of moral rights to the problems of cultural development. Moreover, the current evolution of moral rights, flowing from technological innovation in the world's most sophisticated economies, leads to a fascinating juxtaposition of concepts and values

from "very new" technologies and "very old" cultures.[62] The transformation of copyright under the pressures of new technologies in the industrialized world may actually generate new opportunities for developing countries in the international arena.

Chapter IV of my thesis will undertake a detailed analysis of the treatment of moral rights in Indian copyright legislation and case law. It will consider the ways in which India may continue to develop the application of moral rights to the cultural activities of its people, especially in the light of its membership in the WTO. I will seek to demonstrate that the framework for moral rights protection in Indian law has already made a significant contribution to the preservation of India's cultural heritage. I will argue that this contribution is likely to become more important in the TRIPs system.

In conclusion, my thesis will examine the prospects for culture in developing countries under the new international copyright regime. More generally, I will consider the potential impact of the TRIPs system on international cultural diversity.

2. Objectives and Limitations

In view of the variety, richness, and complexity of cultural life in developing countries, my thesis will only attempt to explore some of the crucial meeting points between law and culture in these countries. The main objective of this study is to examine whether the concept of moral rights, which is well-established in Western and international copyright law, can make a significant contribution to the societies of non-Western nations.

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[62]The expressions, "newest" and "oldest" are introduced and explored by Tunney, *supra* note 3 at 335-36, 342-46, to reveal the new potential for contact between technology and tradition in the "digital age."

This question is particularly timely and important because of the recent changes which have transformed the international framework for the protection of literary and artistic works, and of their authors. The new international copyright system fosters an unprecedented degree of rigidity in understanding culture and developing concepts of what defines culture in the international arena. However, the ultimate importance of culture and its continuing relevance to modern life may actually reside in the unpredictability, spontaneity, and variety with which its forms attest to the enduring vitality of human experience.[63] The reality of cultural life, in this sense, is nowhere more vibrant, or more readily perceived, than in developing countries, whose heritage and traditions invariably continue to astonish Western eyes.

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[63]Interestingly, Dissanayake, *supra* note 11 at xii-xiii, points out that, "[u]ndeniably, one of the most striking features of human societies throughout history and across the globe is a prodigious involvement with the arts....This universality of making and enjoying art immediately suggests that an important appetite or need is being expressed."

Chapter II

Developing Countries and the International Copyright Regime

Copyright has historically generated deep divisions between industrialized countries and the developing world. The implications of copyright principles for developing countries diverge widely from their effects on the societies of industrialized countries. In part, the different experiences of these countries are a product of the historical forces driving copyright developments. They also grow out of specific types of incompatibility between international copyright principles and the interests of developing countries.

In the industrialized world, the idea of an international copyright system had already become well-established by the late nineteenth century.[1] The internationalization of copyright in industrialized countries was a response to complex social factors, such as the growth of literacy and the expansion of publishing as an industry.[2] The development of copyright was also promoted by the efforts of authors' groups, who sought to guarantee their rights in the international arena.[3]

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[1]For details of the first international copyright conventions, see E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge and Kegan Paul, 1980) at 18-21.

[2]For a discussion of the social and economic factors contributing to the growth of international copyright among industrialized countries, see *ibid.* The development of copyright is examined in terms of the historical forces giving rise to a new concept of creative genius during the eighteenth century, in M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425.

[3]*Ibid.*

The participation of developing countries in the international copyright system, however, was a consequence of colonial domination.[4] Copyright in developing countries did not flow from historical developments, but was imposed, by government action, upon existing social structures in these countries. While most former colonies affirmed their acceptance of international copyright law after independence,[5] a deeper understanding of copyright principles, and of their interaction with society and culture, had yet to develop in these countries.

A. Copyright Concerns of Developing Countries

There are three major kinds of potential incompatibility between Western-style copyright principles and the traditions and goals of many developing countries. These potential areas of conflict involve issues of access to knowledge, recognition of cultural diversity, and the development of effective cultural policies.

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[4]For a discussion of the conditions under which developing countries first joined international copyright conventions, see N.M. Tocups, "The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries" (1982) 29:4 J. Copyright Soc. USA 402 at 406-09. She points out that, as a result of these processes, "provisions regarding the special copyright needs of underdeveloped areas of the world are missing from early multilateral copyright agreements." She identifies the lack of experience in copyright matters, as well as the continued economic and cultural dependence of developing countries on former colonial powers after independence, as obstacles to the recognition of the interests of developing countries in the international copyright sphere.

[5]See *ibid.* at 407; see also S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Center for Commercial Law Studies, Queen Mary College, 1987) at 590-93 for a discussion of the initial participation of developing countries in the Berne Convention.

1. Access to Knowledge

The most commonly-cited area of conflict between Western copyright law and developing countries is the issue of access to copyrighted materials for educational purposes. Developing countries argue that they need access to materials published in industrialized countries in order to promote economic and technological development, as well as literacy and education among their populations more generally.[6]

At first glance, this assertion seems oddly anachronistic and, indeed, suggests the persistence of a colonial-era mentality in developing countries. As Narendra Kumar points out:

> [T]he intellectual dependence carefully instilled over hundreds of years [by colonial powers in their dominions] is, understandably, too deep-rooted to be easily cast aside by...emerging nations...[A]lthough politically independent, it is not surprising that most of Asia and Africa still bears the cross of intellectual neo-colonialism.[7]

On closer examination, it is apparent that the nature of demand for Western educational materials in developing countries is a complex matter. Substantial scholarship on development issues originates in Western countries, and these materials may make an important contribution to knowledge in developing countries. Moreover, at some level, the process of industrialization in developing countries is inevitably linked to Westernization. It is understandable that the promotion of Western-style industrial,

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[6]For a summary of these issues, see Ricketson, *ibid.*

[7]N. Kumar, "Cultural Imperialism and Third World Publishing" [1983] Copyright 17 at 17: Kumar goes on to suggest that the situation of Third World publishing is one of "material and cultural dependence," and argues that "cultural imperialism is imperialism at its most tenacious." *Ibid.* at 21.

economic, social, and political objectives requires access to the works of Western intellectuals, scientists, and artists.

More fundamentally, developing countries' need for access to Western intellectual property is a product of economic realities, and in particular, the realities governing key industries involved in the dissemination of information and knowledge, such as publishing. In developing countries, the dissemination of literary and intellectual works occurs primarily through foreign publishing.[8] Not only are domestic markets for books dominated by foreign books, but domestic publishing in many developing countries does not thrive.[9] Rather, an important feature of publishing in developing countries is the presence of publishing houses from industrialized countries, and their local subsidiaries.[10]

Seen from this perspective, access to Western materials is of great importance to the promotion of education and literacy in developing countries. These countries are

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[8]For a discussion of the role played by foreign publishing in developing countries, and the interaction of foreign and indigenous publishing efforts, see *ibid.* at 17-18.

[9]See *ibid.* at 19-20 for a description of the obstacles which typically interfere with indigenous publishing in developing countries. Kumar also discusses the special cultural and social role which publishing could potentially play in developing countries. At the same time, Ploman & Hamilton, *supra* note 1 at 132 draw attention to the size and importance of India's publishing industry within Asia.

[10]*Ibid.* at 17-18. The problem is not restricted to developing countries, however. For example, the publishing industry in Canada is engaged in an ongoing struggle to survive competition from large, U.S. publishing firms. Some of these issues came to a head in the Canada-U.S. magazines litigation at the WTO: see *Canada -- Certain Measures concerning Periodicals (Complaint by the United States)* (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report), online: WTO < http://www.wto.org/wto/dispute/distab.htm> (last modified: 6 August 1999).

confronted by a basic choice between using Western materials and seeking out unavailable, or minimally available, domestic materials. While the role of social attitudes in fostering this kind of "cultural dependence" should not be underestimated, it is important to note that the situation of developing countries is also a reflection of economic forces in the international private sector.[11]

2. Cultural Diversity Within Developing Countries

A second area of conflict between international copyright and culture in developing countries is the need to recognize and protect non-Western cultural forms which are common in these countries. Some recognition of this issue is apparent in international copyright discourse, where attempts to provide copyright-style protection to "folklore" in developing countries have become increasingly publicized.[12] The further evolution of

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[11]In the same vein, it is interesting to consider that Britain's domination of the Indian sub-continent began through the activities of the British East India Company; the country was later administered directly by the British Crown. See S. Wolpert, *A New History of India,* 3d ed. (New York: Oxford University Press, 1989) at 187-249. The British government assumed direct control over India in 1858.

[12]C.A. Berryman, "Toward More Universal Protection of Intangible Cultural Property" (1994) 1 J. Intell. Prop. L. 293 at 309-16 considers copyright protection of the various cultural traditions and expressions which constitute "folklore" in developing countries. She makes special reference to provisions regarding folklore in the *Tunis Model Law on Copyright for Developing Countries,* and assesses the potential of Art. 15(4) of the Berne Convention for dealing effectively with folklore: *ibid.* at 313-15. For an example of how folklore is dealt with in the copyright legislation of a developing country, see Ploman & Hamilton, *supra* note 1 at 130-31: they discuss the approach to the protection of folklore adopted in the Tunisian *Copyright Act* of 1966. Folklore has also grown to be an important area of concern in relation to the cultures of aboriginal peoples around the world. For a consideration of some of the issues which have arisen in relation to Canadian First Nations peoples, see D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Concorde, ON.: Irwin Law, 1997) at 282-84.

trends toward copyright protection for unique kinds of cultural activity may eventually prove to be of intense interest to developing countries.

3. Development of Cultural Policy

Finally, adherence to the international copyright system raises broader, more general questions of cultural policy in developing countries. These issues are related to the promotion of literacy and education. They also involve a recognition of the value of their own cultures by the peoples of developing countries, and the adoption of measures which, in spite of economic and social pressures, will favour the preservation and promotion of national cultures.[13] For example, copyright policy in developing countries will have important consequences for the recognition of regional cultures at the national level, the movement of culture between different regions, and the recognition of the cultures of non-mainstream groups within developing countries, including those of aboriginal peoples.[14] Due to the wide linguistic and cultural variations that characterize

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[13]Poverty and the general deterioration in traditional values which the process of industrialization entails have serious consequences for the state of culture in developing countries. For a discussion of how these circumstances contribute to the impoverishment of material culture in developing countries which are rich in art and artefacts, see C.F. Sayre, "Cultural Property Laws in India and Japan" (1986) 33 UCLA L. Rev. 851 at 875 and L.V. Prott & P.J. O'Keefe, *Law and the Cultural Heritage,* vol. 3, *Movement* (Oxford: Professional Books, 1984) at 14. It is important to note that material culture and intellectual culture are often inextricably intertwined. Cultural objects embody various kinds of knowledge and social values, and the loss of these objects must inevitably erode the accumulation of "intellectual property."

[14]While aboriginal peoples face obstacles in achieving the recognition of their cultures and values in developing countries, their situation in the developing world differs somewhat from the kinds of oppression which they have faced in industrialized countries, at the hands of European colonial powers.

many developing societies, translation and adaptation will remain central features of cultural policy and cultural exchange in these countries.

In view of these kinds of concerns, current developments in international copyright are of great importance to developing countries. It is clear that recent changes to the international copyright system will have an important effect on cultural development in developing countries. They will also fundamentally affect the ways in which developing countries shape their economic and cultural policies in the decades to come.

B. Consequences of the Decline of the WIPO International Copyright System for Developing Countries

The effects of international trade dynamics on intellectual property rights have been widely recognized for more than a century. Different levels of intellectual property protection among trading partners allow intellectual property to be exploited in countries with lower standards at a fraction of the cost incurred by users in the country of origin. As a result, the author of a literary or artistic work is unable to enjoy returns abroad which would normally be available to him domestically.[15]

In order to secure gains to an author flowing from the export of his work, the international community has made numerous efforts to harmonize intellectual property standards. For example, important regional initiatives on intellectual property have been

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[15]For a detailed discussion of the contribution of these forces to the development of "international copyright," see de Freitas, *The Copyright System: Practice and Problems in Developing Countries* (London: Commonwealth Secretariat, 1983) at para. 7.

undertaken in North America, through NAFTA,[16] South America, through MERCOSUR,[17] and in the European Union, through E.U. directives.[18] The dominant international agreement on intellectual property, however, remains the Berne Copyright Convention, which, in 1886, created a union of countries interested in protecting "the rights of authors in their literary and artistic works."[19] While recognizing that intellectual property rights fundamentally flow from domestic law and policy, the Berne Convention promotes the harmonization of standards of copyright protection among its members. It

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[16]*North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994), c. 17 [hereinafter NAFTA]. See J.R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Aurora, ON.: Canada Law Book, 1994) at 423-50 for a detailed discussion of the intellectual property provisions of the Agreement.

[17]Intellectual property protection was not explicitly provided for in the treaty establishing the South American Common Market (MERCOSUR), a multilateral trade accord between the United States and a number of South American countries, but the development of a framework for intellectual property protection is understood to be part of this trade regime. See M.J. Anderson, A.J.P. Ellard & N. Shafran, "Intellectual Property Protection in the Americas: The Barriers Are Being Removed" (1992) 4:4 J. Proprietary Rts. 2 at 6; they point out that, "[a]lthough a uniform industrial property law is not explicitly the treaty, it is an expected result; it is recognized as necessary to give effect to the treaty's elimination of inter-regional barriers trade goods and services."

[18]For a discussion of the course of copyright harmonization in the European Union, with a view to comparing European and North American developments, see Y. Gendreau, "Copyright Harmonisation in the European Union and in North America" (1995) 10 E.I.P.R. 488.

[19]*Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, 828 U.N.T.S. 221, online: World Intellectual Property Organization (WIPO) <http://www.wipo.org/ eng/iplex/wo_ber0_.htm> (date accessed: 15 May 1999) [hereinafter Berne Convention], Art. 1.

does so through the basic principle of national treatment for authors.[20]

The approach to international copyright protection embodied in the Berne Convention reflects an emphasis on the development and refinement of national copyright schemes, in accordance with principles established through a negotiated consensus at the international level.[21] An examination of the institutional context of the Convention shows that consensus is at the heart of the Berne system. The Berne Convention is administered by the World Intellectual Property Organization (WIPO), a specialist agency of the United Nations.[22] The mandate of WIPO is specifically educative and reform-oriented in nature.[23] In particular, WIPO has been extensively involved in advising developing countries on intellectual property matters, and in providing these countries with technical assistance in

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[20]Berne Convention, *ibid.*, Art. 3. Ricketson, *supra* note 5 at 39-40 discusses the importance of national treatment for a "universal law of copyright." See also M. Blakeney, Trade *Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (London: Sweet & Maxwell, 1996) at 21-22, for a consideration of the place of national treatment in the Berne copyright system.

[21]R.L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 Denv. J. Int'l L. & Pol'y 109 at 121 develops this point. A consideration of the negotiating history of the Convention, and of the involvement of developing countries, in particular, supports this view: see Ricketson, *supra* note 5 at 590-632, 662-64.

[22]For a history of WIPO's organizational status, see Blakeney, *supra* note 17 at 24; see also Ploman & Hamilton, *supra* note 1, who locate WIPO within the broader context of other international organizations. M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 258-59 set out some of the main reasons why developing countries have historically favored WIPO.

[23]For an enumeration of WIPO's functions, see Blakeney, *ibid.* at 25-26.

generating their laws.[24] The political character of WIPO reflects tendencies in the United Nations system as a whole, and provides a forum for economically less powerful countries to voice their interests.[25]

1. The Impact of Technological Innovation on WIPO

Throughout its history, the WIPO system of intellectual property rules has been subject to important limitations. Over the past decade, these restrictions have become major factors affecting international intellectual property relations. Notably, industrialized countries, led by the United States, have come to perceive WIPO as an ineffective forum for the enforcement of intellectual property rights and standards in the international community.[26] The concerns of industrialized countries may be traced to the pace of technological development, and WIPO's failure to accommodate the intellectual property requirements generated by these changes within the existing international framework for intellectual property protection. WIPO's unsatisfactory performance in this regard is a reflection of both its political characteristics and its institutional structure.

During the decades when it was the main international forum for the protection of

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[24]For details of the WIPO "development assistance programmes," see *ibid.* at 25; see also Gana, *supra* note 18 at 123.

[25]Trebilcock & Howse, *supra* note 19 at 259, point out that, "...developing countries have traditionally had more influence in the UN system than in the GATT."

[26]For a discussion of the reasons why industrialized countries, and especially the United States, wanted to move intellectual property rights out of WIPO's exclusive jurisdiction, see S. Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm/Ent L.J. 287 at 311-13.

intellectual property rights, WIPO did not compel its members to conform to specific intellectual property standards, and it did not possess any institutionalized mechanisms for dispute settlement.[27] Since the norms developed by WIPO were fundamentally dependent on voluntary adherence growing out of a basic level of international consensus, WIPO standards did not necessarily meet the requirements for intellectual property protection generated by leading-edge technological developments.[28]

2. U.S. Economic Interests in the WIPO System

While the political dynamics of WIPO failed to promote the interests of world leaders in intellectual property, particularly the United States, intellectual property has become an area of increasing economic importance in the industrialized world.[29] The growing importance of information and knowledge-based trade for the United States economy must be viewed against the backdrop of expanding trade deficits in the United

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[27]*Ibid.* at 312.

[28]See R.C. Dreyfuss & A.F. Lowenfeld, "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va. J. Int'l L. 275 at 294-95. Most countries, including the developing countries, were unable or unwilling to adhere to standards at this level. In the case of developing countries, lower levels of technological development, different policy and fiscal priorities, and limited administrative structures have all been factors influencing their attitudes towards intellectual property protection.

[29]*Ibid.*: Dreyfuss & Lowenfeld argue that, "WIPO has tended to operate through coordinated group voting rather than through genuine consensus building. For at least the last 15 years, politicization of deliberations in WIPO has interfered with its lawmaking efforts." But see Gana, *supra* note 19 at 121; she argues that the approach to international intellectual property at WIPO "is the product of a certain level of real consensus."

States during the 1980s.[30] Among American analysts, estimated losses from the unauthorized exploitation of American intellectual property abroad are an important factor in the unfavorable United States balance of trade.[31] In addition, while the majority of intellectual property violations against American rights-holders takes place in the developing world, the United States, with the European Union, is also one of the world's major markets for the exports of developing countries.[32]

Technological innovation generates wealth in the industrialized economies through at least two kinds of processes. Technology stimulates domestic productive activity, and it also allows countries which are important centres of technological development to exploit an international competitive advantage in innovation.[33] Indeed, the growing economic role of technological change in the industrialized world has led some observers to speculate that these economies are in the process of a fundamental shift to a new type of industrial

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[30]See T.J. Richards & R.M. Gadbaw, eds., *Intellectual Property Rights: Global Consensus, Global Conflict?* (Boulder: Westview Press, 1988) at 2, and R.M. Gadbaw & R.E. Gwynn, "Intellectual Property Rights in the New GATT Round" in Richards & Gadbaw, *ibid.* 38 at 48: writing in 1987, they estimate these losses at $60 billion. See also A.A. Caviedes, "International Copyright Law: Should the European Union Dictate Its Development?" (1998) 16 Boston U. Int'l L.J. 165 at 179 on the U.S. analysis of the growth in its deficit during the 1980s.

[31]Richards & Gadbaw, *ibid.* at 2-9, Gadbaw & Gwynn, *ibid.* at 44-49.

[32]*Ibid.* at 48; Gadbaw & Gwynn emphasize the importance of trade with the U.S. for developing countries.

[33]See Trebilcock & Howse, *supra* note 19 at 252-54 for a discussion of comparative advantage in innovation, as opposed to "the imitation and adaptation of others' innovations." They also discuss the dominance of the United States in innovation, and compare and contrast, in historical terms, the positions of the United States and Japan in relation to innovation.

system. The United States, as the world's preeminent technological economy, is in the forefront of this change.[34] As Gana points out:

> [T]he Uruguay Round, through its accomplishments, is indicative of a general movement in the Western hemisphere to re-order the basis of economic relationships. This is the case particularly for the United States which, in the early 1980's, began a gradual but fundamental transformation from a manufacturing to an information-based economy.... The "public goods problem," intrinsic to information goods, and the ease with which these goods are duplicated necessitated a restructuring of rules which govern international economic conduct. The embodiment of this restructuring is the TRIPs Agreement, that focuses on the capture of economic rent from the international exploitation of intellectual property.[35]

C. Developing Countries, the World Trade Organization, and the "TRIPs" Agreement

The adoption of an Agreement on Trade-Related Intellectual Property Rights by the World Trade Organization (WTO) was, in part, a reflection of international dissatisfaction with the WIPO intellectual property system.[36] By integrating intellectual property into the new WTO, TRIPs negotiators fundamentally changed the approach to intellectual property issues in the international arena. The TRIPs system is coercive, in the sense that

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[34]Japan is also deeply implicated in technologically driven growth. Interestingly, Japan was a major supporter of the U.S. initiative to bring intellectual property into the WTO: see Fraser, *supra* note 23 at 312.

[35]R.L. Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735 [hereinafter "Prospects"] at 741-42. The dependence of U.S. competitiveness on intellectual property protection is mentioned by Gadbaw & Gwynn, *supra* note 27 at 44-45.

[36]*Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the WTO Agreement, 15 April 1994, 33 I.L.M. 1197 (entered into force 1 January 1995) [hereinafter TRIPs Agreement]. The TRIPs Agreement contains a general grace period of one year for all members of the WTO in Art. 65.1, so that its provisions are not effective before 1 January 1996. See Fraser, *supra* note 23 at 311-14.

adherence to the TRIPs Agreement is a required condition of membership in the WTO.[37] At the same time, the consensus reflected in the TRIPs Agreement cannot be precisely understood as a consensus on intellectual property standards. Rather, the TRIPs consensus, and the participation of developing countries, in particular, was achieved by successful bargaining in other traditional areas of conflict between industrialized and developing countries in international trade, including agriculture and textiles.[38]

The intellectual property standards in the TRIPs Agreement are enforced by making disputes over intellectual property subject to the general dispute settlement mechanism at the WTO.[39] Ultimately, the integration of the TRIPs Agreement into the WTO makes the imposition of trade sanctions across all areas of trade covered by the WTO agreements available to member countries who complain about the treatment of intellectual property.[40] These unprecedented features of the TRIPs Agreement arguably

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[37]De Koning uses the expression, "coercive," to describe the approach to intellectual property rights in TRIPs, because "[t]he sanction mechanisms are the main advancement of TRIPs over previous harmonisation efforts." See M. de Koning, "Why the Coercion-based Approach is not the Only Answer to International Piracy in the Asia-Pacific Region" (1997) 2 Eur. Intell. Prop. Rev. 59 at 59. In view of their renewed commitment to trade-based development, it was not a realistic possibility for developing countries to remain absent from the WTO system: see Gadbaw & Gwynn, *supra* note 27 at 47.

[38]See "Prospects", *supra* note 31 at 739.

[39]See J.S. Thomas & M.A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Scarborough, ON.: Carswell, 1997) at 325.

[40]In practical terms, the suspension of trade concessions is equivalent to sanctions: see de Koning, *supra* note 33 at 59, who refers to the "sanction mechanisms" of TRIPs, and "Prospects", *supra* note 31 and 771-72.

make the TRIPs/WTO system the first true international intellectual property regime.[41] In contrast to previous international arrangements, the TRIPs Agreement represents a rule-based, enforceable system of intellectual property standards which every member of the WTO must incorporate into its domestic legal system. In order to achieve this result, the Agreement had to succeed in resolving a fundamental tension between intellectual property rights and international trade. As Gonzalez observes:

> The internationalization of trade ... underscores an inherent tension in the trade of intellectual property: while intellectual property has become a global commodity, the rights to particular creative forms of expression, original ideas, inventions, new discoveries, and trade secrets remain limited by national borders.[42]

1. Forging a New "Link" between Intellectual Property and International Trade

The creation of a relationship between intellectual property and international trade in the TRIPs Agreement represents a major innovation in international trade practice. International trade law traditionally aims to promote the growth of international trade through principles of trade liberalization which are designed to reduce barriers to trade. These barriers include both tariffs and other types of obstacles to trade, such as quotas.[43]

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[41]NAFTA was actually the first international agreement implementing these "linkages" between intellectual property and trade to come into effect. However, the intellectual property provisions in NAFTA are largely based on the Dunkel Draft of the TRIPs Agreement, so that it may be argued that the TRIPs Agreement really represents the genesis of these ideas in relation to intellectual property. See Johnson, *supra* note 16 at 423-24.

[42]G.Y. Gonzalez, "An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement" (1993) Harv. Int'l L.J. 305 at 305.

[43]For details of how the GATT system worked, and the objectives of the system, see Dreyfuss & Lowenfeld, *supra* note 25 at 278-79.

Two cornerstones of the international trading system are national treatment and most-favored-nation (MFN) treatment. While national treatment means that foreign and domestic goods will receive equal treatment under national laws, MFN treatment means that goods from all member countries will be treated alike, regardless of national origin.[44]

In relation to intellectual property, however, national treatment and MFN treatment are not sufficient to promote growth in trade. In contrast to other types of goods in the international trading system, intellectual property is, by definition, intangible.[45] Current technological developments allow intellectual property to be reproduced and transmitted with extreme ease. While the clandestine movement of intellectual property may thrive in a regime of uneven standards, producers of intellectual property have little incentive to export goods to countries where their returns are not assured.

The promotion of trade in intellectual property requires a combination of standard trade liberalization measures and measures which specifically accommodate the special features of intellectual property. The TRIPs Agreement links national treatment and MFN treatment with minimum standards, virtually universal membership, and economically-

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[44]For example, see GATT 1947, Arts. I and III on MFN treatment and national treatment; these provisions have been incorporated into Annex 1A of the WTO Agreement as the GATT 1994. See Thomas & Meyer, *supra* note 35 at 54-56 for a discussion of national treatment and MFN treatment in the GATT 1994. The Tokyo Round GATT negotiations saw a movement away from MFN treatment to "conditional" MFN treatment see Gadbaw & Gwynn, *supra* note 27 at 48.

[45]This reality is at the heart of the traditional separation between idea and expression in Western copyright law, and results in the importance of "fixation." Generally, the substance of intellectual property, rather than the particular form which it takes, is important: for example, there is no practical distinction between different copies of the same book, copies of the same compact disc, and so on.

based enforcement measures in an attempt to bring intellectual property successfully into the international trade arena.

a. Minimum Standards

Minimum standards of protection are an essential feature of trade promotion in the intellectual property field. As Johnson points out:

> To be effective, an agreement respecting intellectual property rights must go beyond establishing basic non-discrimination obligations and prescribe minimum standards of protection of intellectual property rights that each country must provide.[46]

In imposing minimum standards of intellectual property protection on its members, the TRIPs Agreement follows the framework for regulating the international movement of intellectual property established by the Berne Convention.[47] Part II of the TRIPs Agreement deals with copyright and related rights. Article 9 of the Agreement specifically incorporates the copyright system established in Articles 1 to 21 of the Berne Convention, which includes the minimum standards of protection for intellectual property that each member of the Berne Union must implement in its domestic copyright law.[48]

The TRIPs Agreement imports the system of minimum standards and reciprocity established by the Berne Convention into a broader regime which seeks to govern

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[46]Johnson, *supra* note 16 at 424.

[47]See Dreyfuss & Lowenfeld, *supra* note 25 at 279-80: with respect to dispute settlement, they assess the combination of the Berne approach to intellectual property with approaches to international trade originating in the GATT as, "moving in largely uncharted waters."

[48]See Berne Convention, *supra* note 16. Art. 2 of the Convention defines protected works, while Art. 7 deals with the duration of copyright protection.

international trade as a whole.[49] Minimum standards for intellectual property protection in TRIPs are combined with mandatory membership, de facto, in the TRIPs system, since all countries who wish to participate in the WTO trading system must agree to TRIPs. All members must also be prepared to submit to the international dispute-settlement mechanisms at the WTO.

Although the idea of minimum standards is well-established in international intellectual property conventions, the integration of minimum standards into the broader context of the WTO trade regime represents a novel approach to both the intellectual property and the international trading spheres. In effect, the juxtaposition of intellectual property "protectionism" with international trade "liberalization" creates an unprecedented conceptual and practical framework for international economic relations.[50] As Dreyfuss and Lowenfeld point out:

> [T]he vocabulary of intellectual property and the vocabulary of the GATT sit in uneasy contrast.... For the intellectual property community, pro-competitive measures are those that promote innovation by maximizing the public's ability to utilize intellectual products already a part of the storehouse of knowledge. Patents, copyrights, trademarks, and trade secrets limit public access. They are, therefore, considered anti-competitive. Within the GATT/WTO system as it has emerged from the Uruguay Round, the thinking is reversed. The TRIPs Agreement, intended mainly to promote global competition, treats patents, copyrights, trademarks, and trade secrets as pro-competitive. Similarly, the GATT disfavors protectionism – a word the intellectual property community has long used to

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[49]In contrast, from the international trade perspective, Gadbaw & Gwynn, *supra* note 27 at 48, describe the general movement towards reciprocity and "conditional" MFN treatment in the international trading system.

[50]See Gonzalez, *supra* note 37 and 305, and Johnson, *supra* note 41 at 424. Both of these scholars point out the ways in which protectionism becomes a feature of liberalization, in relation to intellectual property.

describe precisely the... policies that the TRIPs Agreement mandates.[51]

Dreyfuss and Lowenfeld go on to discuss the significance of combining trade liberalization and intellectual property policy objectives in the TRIPs Agreement. They observe:

> These differences may turn out to be mere semantics. But in both the world of diplomacy and the world of reasoned decision-making, words have persuasive power. More important, these words represent issues that for the intellectual property community are, in many cases, acutely controversial.[52]

b. "Universal" Membership

The regime of minimum intellectual property standards established by the TRIPs Agreement applies to virtually every trading nation in the world. In particular, TRIPs negotiators were successful in overcoming a major division between industrialized countries and developing countries over intellectual property.[53] Developing countries had to be persuaded to accept two types of regimes which they had traditionally approached with ambivalence. These were the intellectual property standards of TRIPs, on the one hand, and membership in the international trading system, on the other.

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[51]Dreyfuss & Lowenfeld, *supra* note 25 at 279-81.

[52]*Ibid.*

[53]It should be noted, however, that controversy over intellectual property rights also divided industrialized countries. For a detailed discussion of the conflict between the United States and France with respect to intellectual property rights in film, see Fraser, *supra* note 23.

i. Intellectual Property Standards in Developing Countries

While the protection of intellectual property in industrialized countries is a reflection of economic and technological trends in the industrialized world, intellectual property protection is viewed quite differently in developing countries. Many developing nations do not have consistent standards of protection across all areas of intellectual property.[54] Since most technological innovation occurs in the industrialized world, developing countries have tended to maintain lower and more flexible intellectual property standards than those of industrialized countries, with a view to improving their access to technology.[55] At the same time, intellectual property standards in developing countries reflect cultural traditions and priorities in these countries.[56]

ii. Participation of Developing Countries in International Trade

To a still greater extent, developing countries have traditionally been highly sceptical of the international trading system, particularly as embodied in the GATT

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[54]See Gadbaw & Gwynn, *supra* note 27 at 18: they make the interesting observation that the Latin American distinction between industrial property and copyright "is so great that intellectual property protection is not even viewed as a unified subject for policy consideration."

[55]This is especially true in relation to patent protection: for example, see L-N. McLeland & J.H. O'Toole, "Patent Systems in Less Developed Countries: The Cases of India and the Andean Pact Countries" (1987) 2 J. L. & Tech. 229 at 230-31; see also Trebilcock & Howse, *supra* note 19 at 252-54.

[56]Gadbaw & Gwynn, *supra* note 27 at 19, point out that "in traditional Chinese culture the highest form of compliment an artist or author could receive was to have his work copied." They also discuss traditional concepts of "copyright" which are peculiar to India: *ibid.* at 19-20. See Ploman & Hamilton, *supra* note 1 at 29-30, for a summary of the cultural policies which developing countries have attempted to pursue through copyright.

framework. The experiences of these countries in the international trade arena have been mixed. For developing countries, trade involves an important degree of economic dependence on industrialized countries, and on an international system of economic relations which has shown itself to be potentially fluid and unreliable.[57] While developing countries have been encouraged to promote industrialization and technological growth through trade, they have faced major obstacles to successful participation in the international trading system. For example, in spite of the GATT commitment to the reduction of barriers to trade, industrialized countries have not allowed trade to flow freely in areas where developing countries potentially have a competitive advantage, such as textiles and agriculture.[58]

(1) Importance of Trade-Based Development

During the decades of the 1970s and early 1980s, developing countries responded to this situation by adopting protectionist approaches to wealth creation and development in their economies.[59] The combination of trade protectionism and industrial subsidies

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[57]Trebilcock & Howse, *supra* note 19 at 301-302, describe the difficulties faced by developing countries in participating in international trade. Quoting Bela Balassa's phrase, they describe relations between industrialized and developing countries at the GATT as a "'Faustian bargain' between the North and the South."

[58]*Ibid.* at 302.

[59]*Ibid.*: they draw attention to the contradictory emphasis on exports and domestic protectionism which was fostered in developing countries as much by Western conduct in the international trade regime, as by the influence of socialist countries, and argue that "although it is fashionable to blame leftist theories of development economics and the influence of Soviet bloc central planning approaches for the protectionist policies of the developing world in this epoch, the treatment of developing countries in the Western-dominated global trading order made inward-oriented policies easy, while it set up

which they favored has come to be known as an "import-substitution" approach to development.[60] In preference to relying on access to the international economy to generate wealth and industrial development, developing countries attempted to stimulate local industry and research. Import-substitution specifically promoted the local production of goods which were available on the international market, in part, through the imposition of barriers to exports from industrialized countries. Many developing countries subsidized domestic industry with loans and aid from international organizations and industrialized countries.[61] This approach to development sought to fuel economic growth by developing local economic infrastructure and productive activity, at the expense of imports.

A number of factors have been responsible for bringing about changes in the attitude of developing countries towards international trade. First, models of development based on import substitution have generally come into disfavour in the developing world, due to the manifestly negative effects of these policies in many developing countries. Notably, economies which were based on import substitution proved to be vulnerable to the various shocks experienced in the world economy during the 1980s, such as the drop in world oil prices.[62] As a result, this decade saw a shift to export-oriented approaches to development in these countries, a theory which currently constitutes a widely accepted

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obstacles to export-led growth."

[60]See *ibid.* at 301-03, 314-22.

[61]*Ibid.* at 319-21.

[62]*Ibid.*

basis for economic development policy.[63] Some observers have also identified the worldwide decline of socialist government as an ideological factor promoting trade-based development.[64]

(2) TRIPs Negotiations: A "Faustian Bargain"?[65]

In view of the growing emphasis on international trade for economic development in developing countries, it became critically important for them to participate in the new WTO.[66] Since adoption of the TRIPs Agreement was required for membership in the WTO, developing countries were, in this sense, compelled to join TRIPs. Many developing countries also feared unilateral action by the United States in retaliation against their weak intellectual property standards, an additional factor encouraging them to accept TRIPs.[67]

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[63]However, the precise relationship between export-oriented development policies and economic growth remains uncertain. For example, the economic success of the East Asian newly-industrialized countries seems to be the product of a complex system of economic policies, with the promotion of certain exports as one feature of the system. Trebilcock & Howse, *ibid.* at 318, observe: "However attractive to proponents of liberal trade (such as ourselves), the theory and evidence of export-led growth still leave much to be explained and debated concerning the relationship between trade liberalization and development."

[64]*Ibid.* at 302, 321: in view of the historic developments of the past decade, it seems that there is no viable alternative to market-oriented industrial development in the world, at present.

[65]Bela Balassa, quoted in Trebilcock & Howse, *supra* note 19 at 301-02.

[66]Gadbaw & Gwynn, *supra* note 27 at 47, emphasize the unprecedented importance of international trade for industrial development in the developing world.

[67]The United States threatened to take unilateral action against countries with weak intellectual property standards through the "Special 301" measures of its *Omnibus Trade Act,* and through the revocation of GSP preferences, whether or not these actions would

Industrialized countries also offered some incentives to developing countries to persuade them to accept the TRIPs Agreement as a condition of membership in the WTO. In particular, they agreed to trade "concessions" in textiles and agriculture.[68] However, it is important to note that the trade "concessions" offered by industrialized countries occurred in areas which were previously subject to unusual restraints on trade.[69] As Gana points out:

> [T]he lack of avid participation by developing countries in pre-Uruguay Round trade negotiations is attributable to the perception that the system yielded no concrete benefits to them. This was a strongly felt and legitimately held conviction, particularly since developed countries have long maintained barriers against key exports from developing countries in the area of textiles and agricultural products. At the same time, the GATT system made these countries vulnerable to arbitrary unilateral actions by developed countries.[70]

The participation of developing countries in the TRIPs WTO system was not the direct result of a negotiated consensus between industrialized and developing countries on intellectual property issues during the Uruguay Round. Rather, the substance of the

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be consistent with international trade practice. The Generalized System of Preferences (GSP) allowed industrialized countries to grant non-reciprocal tariff concessions to developing countries: see Trebilcock & Howse, *supra* note 19 at 301-02. See also Richards & Gadbaw, *supra* note 27 at 5-10, 25-28, for a discussion of unilateral U.S. strategies against international violations of the intellectual property rights of its nationals. Unilateral U.S. trade policies regarding intellectual property are also assessed by E. Henderson, "TRIPs and the Third World: the Example of Pharmaceutical Patents in India" (1997) 11 E.I.P.R. 651 at 652.

[68]See "Prospects", *supra* note 31 at 739.

[69]For details of some of the special regimes for developing countries in the GATT, and changes to the system in the context of Uruguay Round negotiations, see Trebilcock & Howse, *supra* note 19 at 301-30.

[70]"Prospects", *supra* note 31 at 739.

TRIPs Agreement was largely negotiated among the industrialized countries, with the United States playing a leading role.[71] The Agreement was presented to developing countries for their accession, in exchange for the various concessions and general advantages flowing to these countries from WTO membership.[72] However, the intellectual property standards set out in the TRIPs Agreement are not universally acceptable to developing countries, and, indeed, are perceived by many of them to be fundamentally incompatible with their development needs.[73]

Moreover, developing countries object to the rigidity of the TRIPs intellectual property system. The TRIPs Agreement effectively creates a standardized approach to intellectual property issues which all members of the WTO must follow. In the area of

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[71]Fraser, *supra* note 23 at 311-14 describes how trade-related intellectual property rights came to be included in the Uruguay Round of trade talks, and the nature of negotiations among industrialized countries over TRIPs. He also draws attention to some important conflicts which arose among industrialized countries, especially in relation to cultural issues and entertainment industries. See Fraser, *ibid.* for details of the U.S.-France conflict over film, where the French position was generally representative of other European countries and Canada.

[72]For a developing-country perspective confirming this view of the process of TRIPs negotiations, see K.R.G. Nair & A. Kumar, *Intellectual Property Rights,* UDCCS Seminar Papers Series No.1 (New Delhi: Allied Publishers, 1994) at 11.

[73]The situation of developing countries is one that is unprecedented in history. As a result, there is no proper empirical basis for determining the probable impact of intellectual property protection on economic development in these countries. See Henderson, *supra* note 67 at 654. She points out that developing countries "are not simply in the same position as Western nations were centuries ago. Western nations developed industrially and technologically ahead of other nations. Less developed countries are operating in a completely different environment because they are surrounded by nations with vastly superior technology and wealth. Western countries were never in that position."

copyright, the absence of discussion surrounding the special requirements of developing countries may have a lasting negative impact on cultural policy in these countries.[74]

c. Dispute Settlement and its Consequences

The dispute settlement mechanism of the WTO is an important element in the creation of a "linkage" between intellectual property rights and international trade embodied in the TRIPs Agreement. Dispute settlement at the WTO includes several features which are unprecedented in international trade practice. In contrast to dispute settlement at the GATT, which was consensus-based and diplomatic in nature,[75] the Dispute Settlement Understanding establishes a formal, rule-based system of adjudication by international panels of experts.[76] Panel decisions are subject to review by a standing Appellate Body, whose members are representative of WTO membership, but officially independent of governments.[77] The decisions of the panels, and the review decisions of

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[74]This situation presents an important contrast to the involvement of developing countries in negotiations surrounding the Berne Convention: see Ricketson, *supra* note 5 at 590-630.

[75]C.C. Parlin, " WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?" (1998) 32 Int'l Law. 863 at 867, draws attention to the "diplomatic" focus of GATT dispute-settlement. Thomas & Meyer, *supra* note 35 at 308-11 provide a detailed description of approaches to dispute settlement in the GATT system, prior to the Uruguay Round.

[76]*Understanding on Rules and Procedures Governing the Settlement of Disputes,* Annex 2 to the *Agreement Establishing the World Trade Organization,* 15 April 1994, online: WTO <http://www.wto.org/wto/legal/finalact.htm> (last modified: 21 April 1999)(entered into force 1 January 1995) [hereinafter Dispute Settlement Understanding, DSU].

[77]Art. 17 of the DSU provides for appellate review of the decisions of dispute settlement panels. See Art. 17.3; this article also includes provisions on the availability of

the Appellate Body, are expected to constitute sources of law and precedent in the international trade arena.[78]

i. A New Institutional Structure for Dispute Resolution

The DSU presents a number of advantages and disadvantages for developing countries who want to participate in the WTO system. The strengths of the DSU lie in its potential to generate consensus among member countries at different levels of economic development, by bringing a new dimension of objectivity and fairness to the international trading regime. However, its major weakness is reflected in its enforcement-oriented stance, which gives the TRIPs regime a coercive flavor.[79]

While the international debate on the structure of the international intellectual property system has, in a sense, been brought to a close by the TRIPs Agreement, the

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Appellate Body adjudicators and conflicts of interest. Art. 17.1 provides for the DSB to establish a standing Appellate Body composed of seven people, with three people reviewing any one panel decision. Members of the Appellate Body serve four-year terms and may be reappointed once, although Art. 17.2 provides that special terms of two years apply to the people who are initially appointed, as well as their replacements. Members of the Appellate Body must be recognized experts in international trade and in the specific subject areas of the various WTO agreements. See Arts. 16.1 to 16.4 for the time frame surrounding the adoption of panel reports. The DSB can also decide, by consensus, not to adopt a report.

[78]See D. Palmeter & P.C. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 Am. J. Int. Law 398 at 398-407, for a detailed discussion of the international legal status of WTO panel and appellate decisions, and how these decisions are likely to evolve into a body of precedent. Thomas & Meyer refer to the shift from the informal procedures of the GATT to the rule-based approach of the WTO as the "legalization" of dispute settlement in the international trade arena: *supra* note 35 at 309.

[79]De Koning explores the implications of this terminology in detail: see de Koning, *supra* note 37.

economic and social issues underlying the controversy are far from being resolved. The TRIPs Agreement sets out the rules which will govern the international movement of intellectual property under the WTO. However, rules depend on enforcement to shape reality.[80] In the case of the TRIPs Agreement, the forum for interpretation and enforcement of the rules will be the dispute settlement arena. Although international discourse on intellectual property matters can no longer affect the drafting of basic rules, it will shape their interpretation and enforcement at this new forum for discussion. In the process, the dispute settlement arena may provide renewed opportunities for developing countries to raise the concerns underlying their ambivalent views on intellectual property protection.

ii. Trade Remedies: "Retaliation" and Suspension of Concessions

Member countries must accept the dispute settlement framework established by the DSU as a mandatory part of membership in the WTO. The procedures set out in the DSU apply across all of the agreements which constitute the WTO.[81] As a result, measures for

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[80]Thomas & Meyer, *supra* note 7 at 308 cite the common lawyer's expression that "there is no right without a remedy."

[81]Some agreements which form part of the WTO network of agreements have special measures for dispute settlement which take precedence over the dispute settlement arrangements set out in the DSU: see Appendix 2 to the DSU, *supra* note 76. Arts. 63 and 64 of the TRIPs Agreement deal with the prevention and settlement of disputes. Art. 63 sets out transparency requirements, while Art. 64 specifies that non-violation complaints will not be allowed in relation to TRIPs for a period of five years, while the Council for TRIPs investigates the potential consequences of these types of complaints for the TRIPs system. See Blakeney, *supra* note 17 at 142-43. See also Dreyfuss & Lowenfeld, *supra* note 25 at 283-84: they analyze dispute settlement under the TRIPs Agreement in the context of the development of measures to deal with disputes at the GATT, and, in particular, in relation to the potential for "non-violation complaints" under

enforcing the decisions of panels and the Appellate Body are very broad in scope. Since decisions are put forward in the form of recommendations, and no organ of the WTO can intervene directly in the domestic law of its members, the ultimate enforcement mechanisms which the Dispute Settlement Body (DSB) can deploy are economic in nature.

If a country fails to comply with the recommendations adopted by the DSB, the complaining country may "retaliate," by suspending trade concessions, effectively imposing trade sanctions on the defendant. In the first instance, retaliatory measures should attempt to be as close to the area of the complaint as possible, but if broader sanctions are required for reasons of effectiveness, they may be authorized by the DSB.[82] As Thomas and Meyer point out:

> This potential to retaliate across sectors is likely to greatly increase the deterrent effect of the retaliation option, thus improving overall compliance with recommendations and rulings.[83]

Although the remedies of retaliation, through the suspension of trade concessions, and the payment of compensation by the offending country for injury caused by its policies are available at the WTO, it is important to note that these alternatives can only serve as "temporary measures" to resolve trade disputes.[84] The ultimate objective of the

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the WTO system.

[82]See DSU, *supra* note 76, Art. 22: see especially Arts. 22.3 (a), (b), and (c), respectively.

[83]*Supra* note 35 at 325.

[84]See DSU, *supra* note 76, Art. 22.1; Art. 22.2 provides for negotiations between the disputing parties in order to "develop[...] mutually acceptable compensation." The failure of these negotiations may lead to retaliation.

WTO dispute settlement system is to bring the domestic law and practice of its members into conformity with the texts of the WTO agreements.[85] The true power of this system, which allows the manipulation of trade concessions as part of the dispute settlement process, is its capacity to bring about legislative and practical conformity in trade-related matters among all countries participating in the WTO.[86]

The combination of dispute settlement measures with the intellectual property standards in TRIPs provides a potent incentive for developing countries to bring their intellectual property protections into line with the requirements of TRIPs. However, the interaction of dispute settlement and intellectual property at the WTO is an unprecedented approach to both intellectual property and international trade. The novelty of the system is particularly important for developing countries, whose acceptance of TRIPs has been a product of various external pressures. Developing countries may feel the effects of this experimental linkage most strongly. As Dreyfuss and Lowenfeld argue:

> [I]n the context of a dispute brought before a panel...[t]here are... significant reasons to refrain from taking...[a] hard...line. It is important to remember that the impact of the TRIPs Agreement on the developing world was not comprehensively considered at the time the Agreement was drafted. The principal negotiators were almost uniformly interested in strengthening the international intellectual property regime. And because the GATT/WTO system requires its

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[85]*Ibid.*, Art. 22.1.

[86]The efficiency of the dispute settlement system at the WTO, in terms of time and, therefore, cost, is a fundamentally important factor contributing to its effectiveness. All dispute settlement procedures are subject to strict time limits: for example, see Art. 12 on panel procedures, especially Arts. 12.3, 12.6, 12.8 and 12.9; Art. 16, on the adoption of panel reports; Art. 17.5, under Appellate Review; and Art. 20 on DSB decisions. Art. 21 sets time limits for the implementation of dispute-settlement recommendations. To date, the system has achieved a reputation for success.

> members to accept all the principal agreements negotiated in the Uruguay Round, there was no practical way for any country... to stay outside the TRIPs Agreement.[87]

2. Special Measures for Developing Countries at the WTO

In recognition of the special difficulties which developing countries may experience in adapting their intellectual property laws to the TRIPs regime, the TRIPs Agreement includes a number of measures designed to ease the transition of these countries to industrialized levels of intellectual property protection. These measures are complemented by measures in the DSU, which seek to provide a means of minimizing the economic and political vulnerability of developing countries at the WTO.

a. TRIPs Transition Periods

In addition to the general transition period of one year which the TRIPs Agreement allows to all members of the WTO, the Agreement includes special transition periods for developing countries. Developing countries may postpone implementation of the TRIPs Agreement for an additional four-year period. In relation to patent protection, the TRIPs Agreement allows an additional grace period of five years to implement patent protection in fields where patents were previously not allowed.[88]

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[87] *Supra* note 25 at 301-02.

[88] See TRIPs Agreement, Arts. 65.2 and 65.4. However, developing countries who wish to take advantage of the transitional arrangements for patents must meet the requirements of Arts. 70.8 and 70.9 of the TRIPs Agreement. Under these provisions, developing countries must immediately implement certain rights related to patents for pharmaceuticals and agricultural chemicals. These articles have proven to be acutely controversial, and have given rise to the first major dispute under TRIPs, the U.S.-India Patents Case: see *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States)* (1997), WTO Doc. WT/DS50/R (Panel

Least-developed countries are allowed extended transition periods to implement the TRIPs Agreement. While the Agreement provides for a transition period of ten years for these countries, the period may be extended still further by the Council for TRIPs.[89] The TRIPs Agreement explicitly recognizes that least-developed countries require flexibility in implementing intellectual property standards, in order to have the widest range of means available for the promotion of technological development.[90]

b. The Dispute Settlement Understanding

The DSU contains a number of special provisions for developing countries which aim to provide additional safeguards for ensuring objectivity and fairness in resolving disputes between industrialized and developing countries.[91] Notably, where a developing

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Report), online: WTO <http://www.wto.org/wto/dispute /distab.htm> (last modified: 31 May 1999) [hereinafter Patents Case; specific references to the report of the panel will be cited to the Panel Report]. The European Communities were a third party to the dispute. Transitional arrangements for patents are also known as provisions for "pipeline" protection. At least one commentator refers to the provisions of TRIPs Art. 70.8 as "classical pipeline protection": see B.S. Chimni, "Towards Technological Wastelands: A Critique of the Dunkel Text on TRIPs" in Nair & Kumar, *supra* note 72, 91 at 100-01.

[89]See TRIPs Agreement, *supra* note 32, Art. 66.1; see also Blakeney, *supra* note 17 at 144-45.

[90]TRIPs Agreement, *ibid.* In the history of international intellectual property regulation, the classification of countries according to their levels of development has sometimes proven to be a difficult and contentious issue: for a discussion of this problem in relation to the evolution of the Berne Convention, see Ricketson, *supra* note 5 at 598-602, 609-10, and 633-37. It is interesting to note that this issue has not been dealt with in the TRIPs Agreement.

[91]Dreyfuss & Lowenfeld point out that most TRIPs disputes will occur between industrialized country complainants and developing country respondents: see *supra* note 25 at 282-83. But see de Koning, *supra* note 33 at 73: she cites, as relevant, "statistical information that most disputes involving the text of multilateral agreements arise between parties from developing countries."

country is involved in a dispute, it may request that at least one member of the dispute settlement panel be from a developing country.[92] In addition, where a measure taken by a developing country is in dispute, the DSU attempts to encourage a conciliatory solution to the dispute by providing for the extension of time limits for consultations.[93] Where the complainant is a developing country, the DSB may consider special action to the implementation of its recommendations and rulings, especially in view of the impact of controversial measures on the economies of concerned developing countries.[94] Finally, WTO members are required to exercise "due restraint" in bringing complaints against least-developed countries, and in attempting to suspend trade concessions or seeking compensation in the course of a dispute with a developing country.[95]

c. Measures for Cooperation between Industrialized Countries and Developing Countries

In addition to setting out special transition periods for developing countries, Part VI of the TRIPs Agreement also contains a number of articles which provide for cooperation between industrialized and developing countries in implementing the Agreement. Article 67 explicitly deals with "technical cooperation" between industrialized and developing countries. It provides for assistance to developing countries

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[92]See DSU, *supra* note 76, Art. 12.

[93]*Ibid.*, Art. 12.10.

[94]See DSU, *supra* note 76, Art. 21.8. de Koning, *supra* note 33 at 74, points out that, "the difference in treatment of LDC's and Developing Countries is fairly high, and Developing Countries will have hardly any opportunity to avoid trade sanctions on the basis of excuse and circumstances, public interest exceptions, etc."

[95]DSU, *ibid.*, Art. 24.2; see also Blakeney, *supra* note 17 at 143.

in bringing their intellectual property laws into line with the requirements of TRIPs. At the request of developing countries, industrialized countries may also provide assistance in relation to the administration and enforcement of intellectual property rights.

In relation to least-developed countries, industrialized countries are asked to provide their own industry with incentives to invest in these countries.[96] The involvement of companies from industrialized countries in disseminating technology in least-developed countries should be undertaken with a view to assisting these countries in the creation of a technological infrastructure for future growth.[97]

The measures on cooperation in Part VI of the TRIPs Agreement are complemented by Article 68 of the Agreement, which sets out the activities of the Council for TRIPs. The TRIPs Council is charged with assisting the members of the WTO in complying with the standards in the TRIPs Agreement. In particular, it is responsible for providing assistance to countries in relation to dispute settlement procedures. It also acts as a liaison between the WTO and WIPO, and is responsible for creating a framework for making the expertise of WIPO generally available to the members of the WTO.[98]

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[96]TRIPs Agreement, *supra* note 32, Art. 66.2.

[97]*Ibid.*

[98]Art. 69 of the TRIPs Agreement, *ibid.*, on "international cooperation," sets out measures for cooperation between countries which seek to curb the international movement of intellectual property goods in contravention of TRIPs standards. This Article could be interpreted as encouraging communication between industrialized and developing countries in relation to administrative and enforcement matters, as well.

3. Effects of These Measures from the Perspective of Developing Countries

In the industrialized world, the TRIPs Agreement has been hailed as the embodiment of a radically new approach to intellectual property rights in the international arena, an approach that will secure the recognition and enforcement of these rights around the world.[99] Many observers in industrialized countries believe that the system created by combining a regime of baseline intellectual property standards with trade-based enforcement mechanisms will achieve these results. For industrialized countries, enforcement of intellectual property standards is an issue of critical importance. The effective international enforcement of intellectual property rights is essential for the growth and development of the information and knowledge industries in industrialized countries, and specifically, for the preservation of the international competitive advantage in innovation which these industries currently enjoy.[100]

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[99]The novelty of the approach to intellectual property rights in TRIPs is the creation of a "linkage" between intellectual property and international trade; the actual approach to intellectual property, itself, is basically the same as the treatment of intellectual property embodied in the Berne Convention. For detailed discussion of the implications of this linkage, see J.L. Dunoff, "Rethinking International Trade" (1998) 19 U. Pa. J. Int'l Econ. L. (Symposium on "Linkage as Phenomenon: An Interdisciplinary Approach") 347 at 370-75.

[100]Industries which depend on heavy investments in research and development, such as the pharmaceutical industry, are an important component of the innovation sector. See Trebilcock & Howse, *supra* note 19 at 252-54 for a discussion of what is meant by a "comparative advantage in innovation," and the importance, to most countries, of a comparative advantage in "the imitation and adaptation of others' innovations." Interestingly, Canada has historically favored a patent regime for pharmaceuticals which closely resembles the types of regimes existing in developing countries, in order to fulfil public policy objectives relating to the availability of medications to the general population, and, in particular, to disadvantaged groups: see Trebilcock & Howse, *ibid.* at 272. See also "Prospects", *supra* note 31 at 768-73 on the approach to enforcement of

In view of the vast differences between the economic situations of industrialized countries and developing countries, and the different role played by technology in these economies, it is hardly surprising that developing countries assess the TRIPs Agreement quite differently. Developing countries are aware that their interests in intellectual property have not been explicitly incorporated into the TRIPs Agreement. Indeed, many developing countries perceive the TRIPs Agreement to be a tool of U.S. interests in intellectual property, and as such, a system of rules that is skewed towards the interests of the most technologically-advanced economies in the world. As Nair and Kumar point out:

> There are... enough indications that the Dunkel Draft [of the TRIPs Agreement] has, even in its very spirit, been influenced more by the viewpoints of the developed countries than of the developing ones.... In fact, many [commentators] ,... are of the view, that while the Dunkel Draft made the U.S. climb down on many fronts vis-à-vis the developed countries, this is amply compensated by the over generous attitude in the Dunkel Draft to the U.S. vis-à-vis the developing countries.[101]

a. TRIPs, Copyright, and Patents

Most studies of the potential effects of the TRIPs Agreement on developing countries focus on patent protection, while copyright is generally neglected.[102] There are a

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intellectual property rights in the TRIPs Agreement.

[101]See Nair & Kumar, *supra* note 72 at 11: the Dunkel Draft was the draft version of the series of agreements constituting the WTO, achieved during the Uruguay Round negotiations.

[102]For example, see Nair & Kumar, *ibid.*: this comprehensive collection of essays from a large number of Indian scholars, and a few Canadians, does not include a single essay specifically on copyright developments at the Uruguay Round and their potential effects on developing countries. On the other hand, virtually every essay deals specifically with some aspect of patent protection.

number of possible reasons for this imbalance in the study of intellectual property issues affecting developing countries. In contrast to copyright, patent systems are believed to have a direct impact on economic development.[103] Developing countries have historically attempted to use patent policy, in conjunction with other development strategies, to favour the development of national industry. As a result, patent schemes in developing countries often diverge widely from patterns of patent protection in the industrialized world.[104]

One of the main objectives of the TRIPs Agreement is to bring patent regulation in developing countries into line with the types and levels of patent protection in industrialized countries. A major change to regimes of patent protection among WTO members effected by the TRIPs Agreement is the movement from process patent regimes to regimes which allow patents for end products.[105] This development has been controversial in developing countries, especially in relation to pharmaceuticals and agricultural chemicals, which are perceived to be areas of great economic and social sensitivity in these countries. Moreover, in these sensitive areas, the transition periods which developing countries generally enjoy in relation to the TRIPs Agreement are

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[103]See Henderson, *supra* note 67 at 653-57, for a discussion of the theoretical connection between patents and economic development; she also provides a critique of conventional justifications for patent protection.

[104]See *ibid.* at 657-62 for a discussion of the achievements of the Indian pharmaceutical industry, which, as she observes, "relies on the absence of patent protection." The successes of the Indian pharmaceutical industry reflect these realities: see M.J. Adelman and S. Baldia, "Prospects and Limits of the Patent Provision in the Trips Agreement: the Case of India" (1996) 29 Vand. J. Transnat'l L. 507 at 525-29.

[105]Process patent regimes allow the processes for producing certain end products to be patented, while the final products of these processes are not patentable.

disallowed.[106]

In comparison to the situation surrounding patents, changes to the copyright systems of developing countries which will be required by the TRIPs Agreement are much subtler. At a theoretical level, the link between copyright and economic development is less precisely defined than the connection between patents and industrialization. Copyright protection is perceived to be important to keep developing countries abreast of current technological developments, rather than affecting their ability to deal with the basic economic needs of their populations.

Moreover, most developing countries already have well-developed copyright laws, and indeed, a number of these countries are signatories to the Berne Convention.[107] For developing countries, their acceptance of international copyright principles is a product of diverse social and cultural factors.[108] Clearly, many of these countries perceive copyright

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[106]See TRIPs Agreement, *supra* note 32, Arts. 70.8 and 70.9. Chimni, *supra* note 88 at 100-101, argues that the patent provisions of TRIPs, in relation to pharmaceuticals and agricultural chemicals, are "a hoax," and "[make] a mockery of the very idea of a transitional period from a process to a product patent regime." He argues that the Dunkel draft of the TRIPs Agreement "grants no special and differential treatment to the developing countries (... other than the least developed countries)." Not surprisingly, the first major dispute over TRIPs was a complaint by an industrialized country against a developing country in relation to these provisions: see U.S.-India Patents Case, *supra* note 88.

[107]For a list of states party to the Berne Convention, see Ricketson, *supra* note 5 at 956-59 (Appendix 2).

[108]See Richards & Gadbaw, *supra* note 27 at 19 for a discussion of the cultural traditions underlying approaches to intellectual property protection in Latin America, India, and China.

protection as an important tool for the promotion of culture in their territories.[109]

b. Impact of TRIPs Innovations on Developing Countries

Since modern systems of copyright protection are essentially products of Western, industrial culture, the widespread acceptance of copyright in the developing world raises an interesting dilemma. The key to developing countries' participation in the development of international copyright under WIPO is, arguably, the relative flexibility of the WIPO copyright system. Notably, countries which adhere to the Berne Convention have been able to incorporate Berne principles into their national frameworks for cultural policy. As Ploman and Hamilton point out:

> The nations which have adopted systems of copyright represent a broad spectrum of political, social, economic and cultural ideologies; thus the popularity of copyright cannot be accounted for simply by a meeting of minds on the subject. Instead a contributing though underrated factor would appear to be the ability of copyright to be integrated flexibly into a wide variety of economic structures and to be moulded in a way which advances differing national priorities....[T]he flexible nature of copyright allows it to serve different functions and combine with other methods for the financial support of intellectual creation. While most countries would maintain that they applied basic principles of copyright, the results may vary considerably from one to another. The high degree of international co-operation in this field has fostered a greater uniformity among national copyright laws than would otherwise be the case. But since the international conventions have been drafted so as to achieve a maximum agreement on common principles, these principles yield different results when they are applied in various economic and social systems.[110]

The most significant difference, perhaps, between the copyright system

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[109]Ploman & Hamilton, *supra* note 1 at 24 list five major objectives that copyright is believed to accomplish in developing countries, including "cultural progress," "social justice," and "national prestige," as well as economic objectives.

[110]*Ibid.* at 23.

administered by WIPO and the intellectual property regime established by TRIPs, is the much greater rigidity of the TRIPs framework. The TRIPs Agreement is more specific than the Berne Convention in providing for the types of protection for intellectual property goods which are required, as well as stating which aspects of intellectual property are subject to the Agreement.[111] At the same time, the administrative and enforcement requirements of TRIPs, as set out in both TRIPs and the DSU, are stringent, and have important implications for the allocation of scarce resources in developing countries. Due to the economic focus of TRIPs, developing countries have also lost the limited political voice which they had in the WIPO system.

These subtle changes may potentially have a very strong impact on cultural policy in developing countries. Prior to TRIPs, countries which adopted copyright systems, either independently or by joining the Berne Union, were able to maintain a degree of flexibility in implementing their copyright laws.[112] However, the TRIPs Agreement

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[111]For example, Art. 10 of the TRIPs Agreement makes the explicit addition of computer programs and compilations of data to protect temple subject-matter under the Berne Convention. Art. 10(1) specifies that computer programs will be protected as literary works, while Art. 10(2) provides for compilations of data, and similar types of information, to be protected as "intellectual creations." In contrast, Art. 2(1) of the Berne Convention does not address technological works as separate and specific subject-matter. Art. 2 also provides for countries to "determine the extent of the application of their laws" to certain novel or controversial areas: for example, see Art. 2 (7) on industrial designs and models, and Art. 2(2) on the flexibility of the fixation requirement. Other important issues for developing countries include compulsory licensing and translation rights. For a discussion of the evolution of these areas from the Berne Convention to the TRIPs Agreement, see "Prospects," *supra* note 31 at 759-63. In particular, Gana raises the question of what "exceptions" will continue to be allowed in accordance with Art. 9(2) of the Berne Convention, under TRIPs.

[112]See *ibid.*

seriously impairs the ability of developing countries to create policies which differ in significant ways from current, Western approaches to copyright. As Gana observes:

> [C]lose examination of the TRIPs Agreement reveals an overall disproportionate burden in the area of intellectual property protection in developing countries without any tangible development benefit. In other words, developing countries may have gotten some "benefits" in the agreement over textiles and agriculture, but the concerns over the impact of the international intellectual property regime on development objectives remain unchanged from what existed in the pre-TRIPs Agreement era, and their ability to avoid those principles of protection which undermine development goals has been severely restricted by the TRIPs Agreement.[113]

In the light of these considerations, it should be noted that the enforcement system instituted by the DSU has some important limitations from the perspective of developing countries. Access to dispute settlement measures for developing countries, and for least-developed countries in particular, is limited by the costs of procedures. Moreover, as Gana points out, the suspension of trade concessions is a remedy which can only be used effectively by more industrialized countries against less-developed ones.[114] In practical terms, the enforcement system of the WTO is basically designed for the use of industrialized countries against one another, and against developing countries. Where developing countries can afford the procedures and choose to initiate them, dispute settlement may prove to be most useful in mediating conflicts between less-developed countries.[115]

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[113]"Prospects", *supra* note 31 at 740.

[114]See *ibid.* at 771-73 on the practical operation of trade sanctions in the international community.

[115]See de Koning, *supra* note 33 at 73.

4. Interpretation of the TRIPs Agreement before the Dispute Settlement Body

Ultimately, the effects of the system of intellectual property rules embodied in the TRIPs Agreement will depend on the ways in which these rules are implemented in the international trading community. The principal forum for the interpretation and enforcement of TRIPs rules will be the dispute settlement arena. Due to the history of friction between industrialized countries and developing countries, the DSU is especially important for relations between the two worlds, both on matters of international trade and intellectual property. In this sense, the manner in which the rules of the TRIPs Agreement are enforced will have important consequences for the effectiveness and legitimacy of the WTO system as a whole.

The emphasis on the "enforcement" of intellectual property rights through the dispute settlement mechanism, however, potentially raises some difficulties in relation to developing countries. Notably, a basic tension between modern, Western concepts of intellectual property and traditional approaches to "intellectual property" in developing countries is brought to light. While industrialized countries are eager to obtain the recognition and enforcement of domestic rights in intellectual property in the international sphere, it seems unlikely that these objectives will be realized through threats of economic retaliation, alone.[116]

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[116]This point is supported by Gana in "Prospects", *supra* note 31 at 771. Gana specifically argues that intellectual property rights will remain of secondary importance to developing countries as long as basic development needs are not satisfied: "The core issue in developing countries is development - that is, the need for infrastructure, the provision of basic human needs, the guarantee of basic human rights, and the upward mobility of the people in general.... In light of such priorities, intellectual property rights, divorced from

In many developing countries, the full enforcement of Western intellectual property rights involves a fundamental readjustment of values. The governments of developing countries must not only finance the recognition, administration, and enforcement of intellectual property rights in their territories, but they must also combat cultural attitudes towards "intellectual property."[117] These attitudes often represent extremely ancient traditions, and reflect values which are deeply rooted in the social systems of developing countries. In the absence of a "culture of intellectual property" that is compatible with Western concepts of intellectual property, enforcement of intellectual property rights may prove to be impossible.[118] Indeed, the effects of attempting to enforce intellectual property laws in these circumstances may prove to be quite counter-productive, and generate a general disrespect for the legal culture of rights that will ultimately weaken the

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perceived immediate needs of the country, will likely be treated as luxuries." This argument is persuasive, and certainly represents one important aspect of the reality surrounding intellectual property rights in developing countries. However, two points should be noted. First, the difficulties underlying acceptance of intellectual property in developing countries are not located purely in the economic sphere, and indeed, the include social, historical, and cultural obstacles that will prove to be at least as powerful and problematic as poverty in the long run. Secondly, related to this observation, it must be remembered that economic development cannot occur without social and cultural change. The intellectual property policies of developing countries as they stand indicate that these countries are well aware of a potential link between the treatment of intangible property and the national enrichment of material wealth.

[117]In this context, the term, "intellectual property," is used to refer to the intangible cultural wealth of developing countries.

[118]For a discussion of "the politics of culture," and how they are reflected in intellectual property policy, see "Prospects", *supra* note 31 at 764-68.

international intellectual property regime at its core.[119]

In addition to considerations of culture, it is important to note that the dispute settlement mechanism is constrained to function within the context of the broader economic realities which define the WTO system, as a whole. The dispute settlement process must inevitably express some recognition of the relative economic power of parties to disputes, and attempt to balance their interests in a pragmatic manner. The dispute settlement mechanism must be perceived to be fair by economically strong and weak countries alike, in order to achieve legitimacy, and to maintain its effectiveness.

The first ruling on TRIPs under the DSU raises some interesting questions about the capacity of the dispute settlement bodies to address these issues. The first decision on the TRIPs Agreement under the Dispute Settlement Understanding was the United States-India Patents Case.[120] The complaint was brought by the United States against India for alleged inadequacies in its implementation of patent provisions under Articles 70.8 and 70.9 of the TRIPs Agreement.[121] This dispute provided the Dispute Settlement Body,

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[119]The case of Mexico provides an example of this phenomenon. In spite of Mexico's implementation of rigorous intellectual property standards and its attempts to enforce them, the Mexican government has had limited success in its efforts. Many observers believe that this is due to the cultural and economic realities underlying Mexico's intellectual property system, including the problems of unemployment and under-employment and the role played by copyright infringement in alleviating them: see "U.S. and Mexico Agree on Measures to Combat IP Violations in Mexico" (July 1998) 10 :7 J. Proprietary Rts. 19 at 19-20.

[120]*Supra* note 88.

[121]Art. 70.8 requires developing countries which delay implementing full patent protection to provide an immediate "means" for the filing of patent applications for pharmaceutical and agricultural chemical products. This "means" must allow for the

through the adjudication of both the dispute settlement panel and the Appellate Body, with an opportunity to set out guidelines as to how the rules in the TRIPs Agreement are likely to be interpreted in future disputes. More generally, the approaches of the panel and the Appellate Body to this conflict provide an indication of how the different interests of industrialized and developing countries will be weighed at the WTO.

a. The U.S.-India Patents Case

The complaint brought by the United States against India at the WTO concerned the special provisions on pharmaceutical patents in Articles 70.8 and 70.9 of the TRIPs Agreement.[122] These provisions impose certain obligations on developing countries who

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consideration of applications for pharmaceutical patents from the date of filing under the transitional measures. It is known as a "mailbox" system. Art. 70.9 complements these measures by providing for the grant of exclusive marketing rights in relation to the products included in Art. 70.8, during a five-year period after the new pharmaceutical product has gained market approval in the developing country, or until the grant or rejection of the patent application, whichever period is shorter. As Art. 70.8 preserves the priority of applications, this provision is intended to preserve the novelty of the new product, or the market share of the manufacturer making the application, during the transition period. Developing countries believe that the effect of these provisions is to deprive them of the benefit of a transition period in relation to pharmaceuticals and agricultural chemicals.

[122]While the provisions of Art. 70 include both pharmaceuticals and agricultural chemicals, I have confined my discussion of these provisions in this section to pharmaceuticals. Not only do pharmaceuticals represent larger trade issues, but there is an important degree of overlap in the manufacture of pharmaceuticals and agricultural chemicals, with pharmaceutical manufacturers involved in both types of production. Indeed, India's *Patent Act* actually includes these two types of products within a single definition: see S. 2(1)(iv) of the Act, which includes a variety of agricultural chemicals, such as insecticides, within the definition of "medicine or drug." *The Patents Act, 1970* (No. 39 of 1970), online: The National Informatics Centre and the Legislative Department, Government of India <http://caselaw. delhi.nic.in/incodis> (last modified: 4 December 1998).

choose to take advantage of the transition periods in Part VI of the TRIPs Agreement.[123]

i. Article 70 Provisions

Article 70.8 requires developing countries who choose to delay the full implementation of patent protection under TRIPs to provide an immediate "means" for the filing of patent applications for pharmaceutical products.[124] This "means" must allow for the consideration of applications for pharmaceutical patents from the date of filing under the transitional measures. It is known as a "mailbox" system.[125]

The purpose of Article 70.8 is to allow pharmaceutical manufacturers to maintain the novelty of their inventions, one of the basic requirements for a product to be deemed to be patentable.[126] In the same vein, Article 70.8 seeks to allow applications for pharmaceutical patents to maintain their priority of filing during the transition period, so that when these applications are eventually assessed under a new patent regime, they remain competitive.

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[123]It should be noted that Arts. 70.8 and 70.9 are also not subject to the general grace period of one year before the TRIPs Agreement becomes operational which is set out in Art. 65.1. Therefore, these provisions came into effect on January 1, 1995.

[124]This provision applies "[w]here a Member does not make available as of the date of entry into force of the Agreement Establishing the WTO patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Art. 27... ." Art. 27 of the TRIPs Agreement defines patentable subject-matter under the Agreement.

[125]This term is defined in the Panel Report, at para. 3.1(c) fn.

[126]The criteria for patentability which are common in the industrialized world, and which were incorporated into Art. 27 of the TRIPs Agreement, are novelty, non-obviousness, and usefulness. For a detailed discussion of these criteria, and how they are applied in the assessment of patent applications, see Vaver, *supra* note 11 at 131-38.

Article 70.9 provides for the grant of exclusive marketing rights in relation to pharmaceutical products. Exclusive marketing rights must be granted for a period of five years after the new pharmaceutical product has gained market approval in the developing country, or until the grant or rejection of the patent application, whichever period is shorter. As Article 70.8 preserves the priority of applications, this provision is intended to preserve the novelty of the new product, or the market share of the manufacturer making the application, during the transition period.[127]

In assessing the conformity of Indian law and practice with Article 70 of TRIPs, the dispute settlement panel was fundamentally involved in examining the interaction of these provisions with the transition periods for developing countries. In effect, the panel was required to develop an interpretation of the special measures for developing countries under TRIPs. Moreover, it had to consider these measures in relation to an area of great sensitivity to developing countries. As a result, the adjudication of the U.S.-India dispute by the dispute settlement panel and the Appellate Body potentially has important general implications for the balancing of interests between industrialized and developing countries at the WTO.

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[127]Transitional arrangements for patents are also known as provisions for "pipeline" protection. The provisions in the TRIPs Agreement are somewhat different from the straightforward incorporation of pipeline protection as in, for example, Art. 1709 of NAFTA. Nevertheless, at least one commentator refers to the provisions of TRIPs Art. 70.8 as "classical pipeline protection": see Chimni, *supra* note 88 at 100-01.

ii. Facts of the Case

Patent protection in India is provided by the *Patents Act 1970.*[128] Following TRIPs negotiations, the Indian government established an Expert Group which was charged with assessing the conformity of Indian laws with Articles 70.8 and 70.9 of TRIPs. The Expert Group was to recommend amendments which would be necessary to bring Indian laws into alignment with Articles 70.8 and 70.9 of the TRIPs Agreement, while protecting Indian interests under TRIPs.[129]

Under Section 5 of the Indian *Patents Act* of 1970, inventions which are intended for use as medicines are not patentable.[130] In keeping with the legislative practice of many developing countries, Section 5 does allow processes for the manufacture of these inventions to be patented.[131] Although medical inventions may not be patented, the Patents Act does not prohibit the filing of applications for medical inventions. However, where patent applications for inventions which are unpatentable under the Patents Act are forwarded to the Controller of patents, Section 15 of the Act provides that the Controller must refuse the patent application.

The Expert Group advised the Indian government to modify these measures of the Patents Act to ensure compliance with the obligations of TRIPs Articles 70.8 and 70.9.

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[128]*Supra* note 89 [hereinafter Patents Act].

[129]Panel Report at para. 2.4.

[130]S. 5(a) also provides that food-related inventions are not patentable.

[131]S. 5 provides that "claims for the methods or processes of manufacture" of these inventions are patentable.

However, due to time constraints in the Indian Parliament, the Indian government's attempts to pass amending legislation were unsuccessful. As a result, companies wanting to apply for patents in India under Article 7 were compelled to rely on informal, administrative measures to file their applications.

This situation was opposed by the United States, on the grounds that the administrative measures taken by the Indian government did not amount to a "mailbox" system under Article 70.8. At the very least, the United States asserted that India had failed in its obligation to maintain the transparency of its filing system under Article 63.

iii. Findings of the Panel

All of the U.S. claims were supported by the dispute settlement panel in its decision. The panel based its findings on the importance of protecting the "legitimate expectations" of members of the WTO, and it defined these expectations to include certainty and security as to the future status of applications for patents for pharmaceutical and agricultural chemical products in developing countries. The Appellate Body subsequently objected to the panel's characterization of the dispute as an issue of "legitimate expectations," and it attempted to impose important restrictions both on the capacity of the dispute settlement panel to diverge from the procedures set out in the DSU, and on the range of its interpretative freedom in relation to the TRIPs Agreement. However, it substantially upheld the panel's decision.

iv. Interpretative Issues Raised by the Decision

The facts of the U.S.-India Patents Case demonstrate how dispute settlement at the WTO may have the potential to address some of the inequalities of the international

trading system, by upholding a strong framework of rules to govern economic conduct in the international arena. At the same time, the deliberate formalism of the approach to fact-finding and adjudication in this dispute, at both the panel and appellate levels, suggests that WTO adjudicators are either unable or unwilling to consider the full range of social and economic costs borne by developing countries in exchange for membership in the WTO. While developing countries can rely on an unprecedented degree of certainty in international trading relations, the extent to which they can expect assistance from the international trading community in improving their position in international trade remains uncertain.

The underlying issues raised by developments in India involve both the extent and the nature of conformity with the TRIPs Agreement required of developing countries. In its submissions, India raised two important concerns about the position of developing countries under the TRIPs Agreement. First, India's arguments raised the basic question of how the TRIPs transition periods should be applied to developing countries. In effect, the ruling in this complaint means that the TRIPs transition periods do not apply to pharmaceutical and agricultural chemicals. Secondly, India pointed out that developing countries' understanding of TRIPs requirements should be considered in the interpretation of the TRIPs Agreement under the DSU. As far as exclusive marketing rights are concerned, no developing country, at the time of this complaint, had introduced a system for granting these rights in relation to patents for pharmaceutical products. This

argument, however, was not addressed at either the panel or appellate levels.[132]

D. Implications of TRIPs for Developing Countries

The TRIPs Agreement has three major types of consequences for developing countries. These involved changes in the institutional framework for the protection of intellectual property rights, effects on national copyright policy, and, more generally, implications for cultural sovereignty in developing countries.[133]

1. The Uncertainty of WIPO's New Role in the International Intellectual Property Arena

The assistance of WIPO was crucial to the successful drafting of the TRIPs Agreement. TRIPs negotiators relied on the expertise of WIPO in international intellectual property matters to resolve substantive intellectual property issues in the TRIPs Agreement. At the same time, the TRIPs Agreement, and its integration into the WTO system, were a response to dissatisfaction with the WIPO system, and with WIPO as a forum for dealing with intellectual property at the international level.

Upon a superficial analysis, TRIPs seems to have rendered WIPO redundant, since all international intellectual property matters affecting the membership of the WTO are now governed, in the first instance, by the TRIPs Agreement. However, the TRIPs

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[132]See Panel Report at para. 6.17: the panel did observe that it "felt that it was much too early for practice to have arisen under the TRIPs regime which commenced only on 1 January 1995." The panel's statement seems somewhat inconsistent with its finding that India had unduly delayed implementing legislative changes to bring its intellectual property regime into conformity with Arts. 70.8(a) and 70.9 of TRIPs.

[133]Fraser, *supra* note 23 at 320, observes: "Once a country loses its ability to define itself to its own people, it exchanges more than just a tool in its economic policy for the sake of free-trade. It loses an important element of sovereignty."

Agreement also contains measures which are specifically concerned with cooperation between WTO and WIPO. These include the creation of the Council for TRIPs, which is intended to act as a link between WIPO and the WTO, and an agreement specifying measures for cooperation between the two organizations.[134] In view of the fact that the TRIPs Agreement is new, as is the concept of trade-related intellectual property rights in general, it seems likely that, in order to ensure the effective functioning of the TRIPs system, the WTO will have to draw on the expertise of WIPO in intellectual property matters.

WIPO, itself, has attempted to respond to criticism by developing more current and sophisticated approaches to intellectual property within its system of treaties. The development of the relationship between WIPO and WTO, and the evolution of a precise international role for WIPO, will depend on the success of the TRIPs Agreement in resolving international differences over intellectual property, and achieving, through the dispute settlement mechanism, a degree of legitimacy among all WTO members.[135]

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[134]See *Agreement between the World Intellectual Property Organization and the World Trade Organization,* 22 December 1995, Online: World Trade Organization <http://www.wto.org/wto/ intellec/17-wipo.htm> (last modified: 28 April 1999).

[135]Opinions about the current status of WIPO vary widely, from Horton's assessment that, " the TRIPs Agreement is now the only game in town," to, "a return as soon as possible to harmonization efforts under the WIPO... umbrella after TRIPs has managed to create the desired level of protection and enforcement mechanisms in developing countries": see C.M. Horton, "Protecting Biodiversity and Cultural Diversity under Intellectual Property Law: Toward a New International System" (1995) 10 J. Env. L. & Lit. 1 at 27-28, and de Koning's discussion of different assessments of WIPO's position, *supra* note 33 at 72-74.

2. The Effects of TRIPs on National Copyright Policy

The TRIPs Agreement will affect the ability of all members of the WTO to generate independent, domestic copyright policies. The structure of the Agreement demands a high degree of conformity in the approaches to copyright adopted by WTO members. The rigidity of the intellectual property system embodied in TRIPs will affect the ability of member countries to determine sovereign copyright policies through legislative means.

Trends in dispute settlement procedures under TRIPs suggest that the rigidity of the TRIPs intellectual property framework will be reinforced by approaches to dispute settlement, rather than softened by the process of dispute resolution. The economic power of industrialized countries and their commitment to an "enforcement"-oriented intellectual property regime is likely to be reflected in developments in the dispute-settlement arena.

3. TRIPS: Imperialism Revisited?

The differences between the TRIPs Agreement and previous international conventions on intellectual property reflect a fundamental change in the orientation of the international intellectual property community. The WIPO system attempted to harmonize standards among its members. The TRIPs Agreement goes much further than harmonization, and actually seeks to generate a uniform system of intellectual property protection among WTO members. Key features of the TRIPs system include specific requirements on what should be protected as intellectual property, and how these

protections should be implemented and enforced by member countries.[136] As a result, the TRIPs Agreement may be better understood, not so much as an instrument of harmonization, but as part of a broader trend in the international economy towards "globalization."[137]

The perspectives on globalization which the TRIPs Agreement represents are a product of the balance of economic power in the international trade arena. Specifically, the model of globalization reflected in the TRIPs Agreement is based on the international dominance of industrial culture. The TRIPs Agreement must be understood in the context of the ease with which modern, Western culture is exported to developing countries, on the one hand, and the rapidity with which it is absorbed by these societies, on the other. As Hamilton observes:

> Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPS attempts to remake international copyright law in the image of Western copyright law. If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history. Moreover, the Agreement will have achieved this goal under the heading "trade-related," which makes it appear as though it is simply business.[138]

The intellectual property norms set out in the TRIPs Agreement inevitably reflect

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[136]For example, see TRIPs Agreement, Art. 10; see also "Prospects," *supra* note 31 at 759-63.

[137]See Gana, *supra* note 18 at 120-22: she draws a similar distinction, between the"international aspects" of copyright under WIPO and the "internationalization," or "'global model'" of intellectual property rights under TRIPs.

[138]M.A. Hamilton, "The TRIPS Agreement: Imperialistic, Outdated, and Overprotective" in A.D. Moore, ed., *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman & Littlefield, 1997) 243 at 243.

the interests of the most technologically-advanced countries in the world. A detailed examination of the structure and operation of the TRIPs/WTO system also suggests that Hamilton's assessment of the regime as fundamentally "imperialistic" is well-founded. However, Hamilton goes on to call the coercive aspect of the TRIPs Agreement, "freedom imperialism."[139] She observes:

> It is no accident that intellectual property norms are spreading worldwide at the same time that totalitarian regimes are falling. A people must value individual achievement and believe in the appropriateness of change and originality if it is going to concede to and adopt a Western-style intellectual property regime. Indeed, there is an intimate link between respect for individual human rights and respect for a copyright system that values and promotes individual human creative achievement....
>
> The encoded message within TRIPS is that change, creativity, and originality are positive goods.[140]

It is true that the TRIPs Agreement, and intellectual property systems in general, reflect important social values. Hamilton is correct to point out that these values include ideas about the place of human creativity and innovation in society, and concerns about how to promote and maintain creative activity that fulfils important social needs. However, Hamilton assumes that respect for human rights, individual creativity, and "originality" necessarily translate into a system of social organization along modern, Western, industrial lines, where culture and creativity are increasingly defined in commodity-based, market-oriented terms.

On the contrary, however, the positive social values of freedom and the promotion

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[139]*Ibid.* at 245.

[140]*Ibid.* at 245, 257.

of creativity, taken on their own terms, do not necessarily translate into a culture of commodification, where the products of creativity must be made into saleable commodities in order for their social value to be realized.[141] This equation is simply too facile. Creativity continues to be mysterious even in Western countries; in developing countries, there is a pronounced absence of information and knowledge about the history, development, and current state of the cultural sphere in developing countries. Hamilton's assumptions about the countries which have historically favoured lower intellectual property standards expresses a somewhat stereotypical and even patronizing assessment of what freedom and culture are, particularly in non-Western countries.[142]

The important question of whether TRIPs reflects imperialistic trends in history merits a balanced response. The TRIPs regime does demonstrate an imperialistic approach to intellectual property. The structure of the TRIPs system, which brings intellectual property into the WTO trading regime, and the orientation of the system towards coercion and compulsory "enforcement" measures, more than the content of the rules, themselves, support this view.

At the same time, however, the adherence of developing countries to the TRIPs

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[141]In the same vein, see E. Dissanayake, *Homo Aestheticus: Where Art Comes From and Why* (New York: The Free Press, 1992) at xiv-xv for a discussion and critique of the phenomena which support the commodification of art and cultural property.

[142]The use of the expression "historically" in this context only reflects historical developments since World War II. It is an interesting irony that, during the period leading up to the creation of the Berne Union in 1886, the United States was "a notorious piracy haven": see D. Nimmer, "Conventional Copyright: A Morality Play" (1992) 3 Ent. L. Rev. 94 at 94.

Agreement suggests that, at some level, these countries must believe that the system can work to their advantage. Notably, the new potential for fairness in dealing with international trade disputes at the WTO, potentially represents a significant move towards political equality in the international sphere, in spite of continuing economic inequality. Although the initial decision on TRIPs was disappointing from the perspective of developing countries, it will require more time before the dispute settlement framework is fully fleshed out.

Ultimately, the suggestion that developing countries are incapable of judging and protecting their own interests at the WTO is somewhat paternalistic. While the coercive elements of the TRIPs/WTO system should be recognized, it is analytically and pragmatically useful to develop this proposition only up to a certain point, and no further.

It is important to note that non-industrial cultures have sustained an important level of vitality and endurance over many centuries of human history. The cultural wealth of these countries, in both its physical and knowledge-based forms, attests to the strength of their societies and values. In view of the values which it embodies, the TRIPs intellectual property regime is certain to have an impact on the traditional cultures of non-Western countries. What remains to be seen, however, is how these cultures can succeed in maintaining their traditional values and inner dynamism under the pressures generated by TRIPs. From the perspectives of these countries, the TRIPs Agreement comes uncomfortably close to imposing a monolithic vision of culture on all member countries.[143]

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[143]In essence, the Agreement attempts to define culture and all its forms. It seeks to determine what should fall under copyright protection, and in doing so, it also determines

In these circumstances, the question of how copyright may continue to play a role in cultural policy in developing countries remains more interesting and pertinent to their situations than ever before.

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what should be excluded. Ploman & Hamilton, *supra* note 1 at 1, observe: "Copyright is used as a legal mechanism for the ordering of social and cultural life, or, put another way, copyright is one method for linking the world of ideas to the world of commerce." Since copyright is perhaps the main method through which cultural forms gain legal recognition, as well as economic value, the implications of TRIPs for culture should not be underestimated. For a brief consideration of some related issues, see also Gana, *supra* note 18 at 141-43.

Chapter III

The Application of Moral Rights Theory to Developing Countries

The copyright doctrine of moral rights is a potentially valuable tool for developing countries in the pursuit of their cultural objectives. Moral rights are concerned with the personal interests of an author in his work. They flow from an understanding of the literary or artistic work as an embodiment of its author's personality. Moral rights are not only distinct from an author's economic rights in his work, but they are also independent of his economic interests.[1]

The vision of authors' rights which moral rights represent is fundamentally different from the current thrust of international copyright law towards the protection of authors' economic interests in their work. As Ricketson observes:

> In Continental law, . . . [the] recognition [of moral rights] sprang from the assumption that an artist's work was an extension of his personality and, therefore, that any interference with that work which offended the honour or reputation of its author was to be restrained, quite apart from any adverse economic effect that this action might have.[2]

The cultural vision embodied in moral rights finds significant parallels in the cultural practices and values which are traditionally associated with non-Western and non-industrial societies. In view of the apparent contradictions between the cultural traditions

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[1]Ricketson points out that the "notion of independence is, of course, basic to the whole concept of moral rights." See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Center for Commercial Law Studies, Queen Mary College, 1987) at para. 8.103.

[2]S. Ricketson, *The Law of Intellectual Property* (Melbourne: The Law Book Company, 1984) at para. 15.56 [hereinafter *Intellectual Property*].

which they represent, the similarities between moral rights doctrine and cultural values in traditional societies are particularly interesting. A closer analysis of moral rights can help to clarify some of these contradictions. In particular, a consideration of the broader implications of moral rights for cultural issues shows how developing countries can potentially make use of this doctrine to promote cultural development.

A. The Interests Protected by Moral Rights

The doctrine of moral rights protection has its roots in judicial development and interpretation.[3] In this respect, moral rights present an interesting contrast to copyright, which has never been recognized as a common-law right, but is fundamentally a creature of statute.[4] Moreover, courts succeeded in developing the idea of moral rights in a

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[3]*Ibid.* at paras. 15.56-.57; see also R.J. DaSilva, "Droit moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980) 28 Bull Copyrt. Soc'y 1 at 7-11 and J. Dine, "Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls" (1995) 16 Mich. J. Int'l L. 545 at 550-51.

[4]See M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993) at 5 for a discussion of the solidification of copyright concepts in eighteenth-century England. He discusses the cases of *Millar* v. *Taylor* (1769), which asserted the existence of a common-law copyright and was the first English case to discuss the "personal" aspects of author's rights, and *Donaldson* v. *Becket* (1774), which reversed the earlier case and imposed new limits on copyright protection. For a consideration of the "personal rights" aspects of *Millar* v. *Taylor,* see G. Dworkin,"The Moral Right of the Author: Moral Rights and the Common Law Countries" (1994) Aus. Intell. Prop. J. 5 at 6. See also R.R. Dadachanji, *Law of Literary and Dramatic Copyright in a Nut-Shell* (Bombay: Rustom R. Dadachanji, 1960) at 3-5. He discusses the common-law evolution of the concept of a property right in the product of one's intellectual labor, and argues that, in *Donaldson* v. *Becket,* this right "became merged in" the statutory right created by the *Copyright Act* of 1709. Dadachanji's observation that, "[t]he personal right of property which, a writer, author, artist or a musician acquires in his work as a natural right by tradition and universal acceptance, is common law copyright" provides an interesting perspective on subsequent developments related to moral rights, particularly in

legislative culture which accordance a particularly authoritative status to written law.[5] As Michaélidès-Nouaros observes:

> ...[L]a notion du droit moral, forgée par la jurisprudence sur la base des principes généraux du Droit, de l'équité et de la raison a comblé d'une façon remarquable les lacunes de la legislation française sur les droits d'auteur.[6]

1. Definition of Moral Rights

The most widely-recognized moral rights are the rights of attribution and integrity.[7] Moral rights can also encompass a number of protections for authors which are less widely recognized in national laws. Some jurisdictions recognize a right of disclosure, which allows an author to determine whether his work will be published, and how it will be made public.[8] The author is occasionally granted a right of recall, which allows an author

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British law.

[5]See Dine, *supra* note 3 at 550, who points out that, "[t]he doctrine's origin is entirely judicial, perhaps unusual in illegal system that stresses legislative over judicial lawmaking."

[6]"The notion of a moral right, constructed by jurisprudence on the basis of general principles of law, equity and reason has addressed, in a remarkable fashion, the shortcomings of French legislation on author's rights." G. Michaélidès-Nouaros, *Le droit moral de l'auteur: Étude de droit français, de droit comparé et de droit international* (Paris: Librairie Arthur Rousseau, 1935) at para. 1.

[7]See *Intellectual Property, supra* note 2 at para. 15.57: the French expressions are *droit à la paternité* and *droit au respect de l'oeuvre,* respectively. In line with common usage, this author prefers to deal with a right of attribution, avoiding the gender connotations of the "paternity" right. See also Ricketson, *supra* note 1 at paras. 8.94, 8.95 for an interesting discussion of development of moral rights doctrine in the French courts, and in particular, the "innovative" approach of the courts to the extent of author's moral rights.

[8]*Intellectual property, ibid.* at para. 15.57: Ricketson refers to the Whistler case, where the artist was commissioned to paint a portrait, but eventually refused to deliver it because it fell short of his standards. He was required to pay damages to the plaintiff, but

to withdraw a published work from circulation on the grounds that it has ceased to represent his views, or has become damaging to his reputation.[9] The author may also have a right to take legal action against "excessive or vexatious" criticism.[10] Ricketson points out that this right is potentially in conflict with freedom of speech; nevertheless, it is an established moral right of the author in French law.[11]

a. Attribution

There are three aspects to the right of attribution. At its core is the author's capacity to assert authorship of his work. This right also allows the author to object to the attribution of his work to someone else. Finally, the author has a corresponding right to prevent the attribution to him of a work which he did not create.[12]

The right of attribution has some potentially interesting implications for cultural

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he was allowed to retain the portrait.

[9]*Ibid.*: however, it is not clear whether the author must establish that the work is damaging to his reputation, on objective grounds, or whether the author's perception that it is of inferior quality is sufficient to allow him to recall the work. This right is recognized in French, German, and Italian law.

[10]*Droit de divulgation* and *droit de retrait ou de repentir: ibid.*

[11]*Ibid.* This right is discussed in the French context by Michaélidès-Nouaros, *supra* note 6 at para. 168, who argues that criticism must be done "avec sincérité [with sincerity]" and in "termes corrects [appropriate terms]."

[12]In *Intellectual Property, ibid.,* Ricketson identifies these three features of the right of attribution as the "positive" and "negative" aspects of this right, allowing the author to claim authorship and to reject the false attribution of authorship, whether it is to his work or to the work of another. But see S. Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm/Ent L.J. 287 at 291: he considers these three rights to be distinct, and identifies the false attribution of the author's name to a work which he did not create with the common law tort of "passing off."

heritage. The proper association of an author with his work promotes historical accuracy about the contributions of particular individuals to national culture. It may also contribute to a better understanding of the course of cultural development, by placing works in their proper historical and social context. Accurate attribution promotes effective criticism and assessment of quality, both in relation to individual authors and their bodies of work, and with respect to broader artistic and intellectual trends. Finally, if a work is in need of repair or restoration, knowledge about authorship may also allow conservation efforts to be most effective.

b. Integrity

The right of integrity allows an author to protest against abusive treatment of his work, including distortion, mutilation, or other damaging alterations to it. This right is generally restricted to treatment which is prejudicial to the honour or reputation of the author.[13] It is also widely accepted that the right of integrity applies only to the manner in which a work is treated, and does not protect the work from outright destruction.[14] In spite of these limitations, the right of integrity provides relatively broad protections to the author, allowing him to object to a variety of practices, including editing, publishing, and

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[13]See *Intellectual Property, ibid.* Ricketson observes that, "Belgium and France...treat it as an absolute right against alteration," in contrast to Germany, where "its exercise [is] dependent upon proof of some identifiable injury to the author's honour and reputation."

[14]*Ibid.* at n. 48.

performance, which are not compatible with his standards or intentions.[15]

A consideration of the French name for the moral right of integrity, *le droit au respect de l'oeuvre,* reveals its broader importance for culture.[16] The focus of the right is on "respect for the work." The right of integrity favors the preservation of works of cultural importance, by requiring them to be treated in a way that protects them from deterioration and gradual destruction. By encouraging the maintenance of the integrity of individual works, the right of integrity makes a contribution to the integrity of a nation's cultural heritage, as a whole. Moreover, if the right of integrity is extended to protect works from outright destruction, it may contribute to the accumulation of cultural property, and other culturally-important materials.

All of these protections ultimately depend on the ability and initiative of authors and their representatives to pursue integrity interests through litigation. In view of the costs which are typically associated with legal action, in terms of money, time, and personal costs, as well as the financial limitations which creative artists and intellectuals must often contend with, this feature of moral rights protection potentially represents a serious restriction on the contribution of the right of integrity to preserving and maintaining cultural heritage. At the same time, however, it should be noted that the creator of a work often has an immediate and intimate interest in the preservation of its

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[15]*Ibid.* at para. 15.57: Ricketson provides some examples of the kinds of treatment which might raise objections from the author. Interestingly, he points out that the right of integrity might pose special difficulties in the case of adaptations, for example, of an original novel into a film.

[16]*Ibid.*

integrity, which may not be mirrored in any other social group.[17]

2. Status of Moral Rights in the TRIPs Agreement

Article 9 of the TRIPs Agreement deals with copyright obligations at the WTO. Under Article 9.1 of the Agreement, which incorporates the substantive copyright provisions of the Berne Convention into TRIPs, Article 6*bis* of the Berne Convention continues to set the international standard for the protection of moral rights.[18] However, the provisions of Article 6*bis* are explicitly excluded from the operation of the TRIPs/WTO system. Article 9.1 states:

> ... members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of [the Berne] Convention or of the rights derived therefrom.

In effect, moral rights are not subject to the dispute-settlement and enforcement mechanisms which govern other aspects of the TRIPs Agreement. Under Article 9, members of the WTO are entitled to provide for moral rights protection in their copyright legislation, in accordance with the moral rights provisions of Article 6*bis* of the Berne Convention. However, moral rights protection is not a mandatory part of the framework

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[17]Interestingly, the TRIPs Agreement may lead to the improvement of domestic facilities for the exercise and enforcement of intellectual property rights, in accordance with the requirements of Arts. 41-50 of the Agreement. These provisions specify the minimum types of civil and administrative procedures and the remedies which member countries must make available to intellectual property right-holders. Moral rights are not specifically included within the TRIPs Agreement; however, these developments may indirectly make it easier to claim violations of moral rights under copyright statutes.

[18]Art. 9.1 of the TRIPs Agreement requires members to adhere to Arts. 1-21 of the Berne Convention, as well as the Appendix on Special Provisions Regarding Developing Countries.

for copyright legislation set out in Article 9.[19]

As a result of these considerations, it is apparent that the status of moral rights protection under TRIPs will ultimately depend on two factors: the future status of the Berne Convention as an international copyright instrument, and the shape of the evolving international consensus, especially as reflected in the activities of the Dispute Settlement Body of the WTO, on copyright and moral rights issues.

The exclusion of moral rights from the TRIPs Agreement is, in many ways, a defining feature of both the TRIPs regime and the United States approach to domestic and international copyright protection. In particular, this feature of the WTO regime reflects the unwillingness of the United States to promote the protection of authors' moral rights at the domestic level.[20] While the United States wished to assume a position of leadership in the international copyright community when it joined the Berne Convention in 1989, conformity with the moral rights protections in Berne was perceived by American officials to be incompatible with United States interests in copyright.[21] This is the case, both in

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[19]M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (London: Sweet & Maxwell, 1996) at 51-52 observes that, "[t]his language leaves open the obligation of signatories of the Berne Convention to recognize moral rights as part of their general obligations as Members of the Berne Union." In contrast to NAFTA, however, members of the WTO are not required to accede to the Berne Convention: see Fraser, *supra* note 12 at 313-14.

[20]The United States also excluded moral rights from the intellectual property protections of chapter 17 of NAFTA: see Appendix to Chapter 17. Fraser, *ibid.* at 312-16 considers some of the consequences of the United States exemption from moral rights protection under NAFTA, especially in relation to film production.

[21]The official position of Congress was that existing United States law was sufficient to ensure conformity with Art. 6*bis*. See D. Nimmer, "Conventional

relation to American traditions of public access to culture,[22] and in the light of the economic and political power of the entertainment industries in the United States.[23]

In view of the American position on the protection of moral rights, it is particularly interesting to consider the link between moral rights and the protection of culture. Fraser's analysis of the TRIPs Agreement and the interplay of United States interests and those of other countries, both industrialized and developing, around cultural issues, suggests that moral rights have the potential to make an important contribution to the protection of culture in the international trade arena. He observes:

> Since the United States has rarely been threatened by outside cultural domination,...U.S. trade representatives "just don't get it" when other countries take action to protect their cultural heritage in the hopes of protecting and furthering its development. Since such strategies are seen as protectionist measures against trade in its copyrighted "goods," the United States fails to understand that such bars to entry are not always meant as retaliation for having a stronger product, or to protect a weaker "industry" per se. They are, in fact, mere expressions of a nation's wish to control its own cultural destiny, which it has a sovereign right to exercise.[24]

Copyright: A Morality Play" (1992) 3 Ent. L. Rev. 94 at 95-97: Nimmer's analysis shows how the passage of the Visual Artists' Rights Act in 1990 contradicts this assertion. See also Dine, *supra* note 3 at 547-48.

[22]See Fraser, *supra* note 12 at 318-19. Fraser points out that, "the United States has refused to extend more than cursory protection to the moral rights of authors because doing so contradicts the purposes of the U.S. copyright system to benefit the public foremost. These purposes have been achieved by providing an economic incentive to authors to create original works."

[23]The United States film industry was an especially powerful force in this debate: see *ibid.* See also Dine, *supra* note 3 at 547-49, and Nimmer, *supra* note 20 at 95.

[24]Fraser, *ibid.* at 319.

3. Scope of Moral Rights Protection under the Berne Convention

Article *6bis* of the Berne Convention sets out the moral rights protections that member countries must provide to authors in their domestic law. Article *6bis*(1) of the Berne Convention provides that signatories must protect an author's moral rights of attribution and integrity. It states:

> Independently of the author's economic rights, and even after the transfer of the 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.

An author's right to be acknowledged as the author of his own work is explicitly protected by this article, while the "negative" exercise of this right, to prevent another person from claiming authorship of his work, may also be inferred from the text of the article.[25] However, it remains uncertain whether an author can prevent the attribution of another person's work to him. For example, Ricketson argues that this situation is dealt with in some common-law jurisdictions under the tort of "passing off," or through unfair competition law.[26]

Article *6bis*(1) also protects a moral right of integrity. From the text of the Article, it is apparent that the right of integrity is subject to two major restrictions. First, Article *6bis* may not be sufficient to protect literary and artistic works from outright

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[25]But see *ibid.* at 291: Fraser argues that, "[i]t is questionable whether the right of attribution under the Berne Convention was meant to include the [right to prevent attribution of one's work to someone else]."

[26]See Ricketson, *supra* note 1 at para. 8.105: he also observes that the language of the provision seems to disallow this application. See also Fraser, *ibid.* at 291.

destruction.[27] Secondly, the prohibited acts must have a negative impact on the honour or reputation of the author, before they will fall within the ambit of Article 6*bis*. This proviso imposes an evidentiary burden on the author, requiring him to show that his honor or reputation has sustained damage.

Article 6*bis* appears to apply, not only to the author's or artist's professional reputation, but also, to his personal reputation. In view of the close relationship between these aspects of an author's reputation, the extension of the right of integrity to the author's personal honour and reputation is important. Damage to an author's personal reputation may have a significant impact on his professional success.[28] Moreover, personal reputation may also involve important heritage issues, for example, in relation to the preservation of an accurate historical record. At the same time, the right of integrity is restricted to negative influences on personal reputation.

The application of the right of integrity also depends on the way in which damage to the author's reputation is assessed. The author must be able to demonstrate objectively that the "distortion, mutilation or other modification" is prejudicial to his reputation.[29] It

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[27]Ricketson, *ibid.* at para. 8.109. Delegates to the Brussels Revision Conference generally did not consider destruction of the work to "relate to the author's moral interests." Ricketson concludes that, "destruction still remains outside the scope of the article."

[28]For example, if the author becomes associated with socially unacceptable personal activities, his audience may decline or change. A famous example from the world of classical music is von Karajan's association with the Nazis.

[29]An alternative view, favored by the French, is that any distortion, mutilation or modification is, in itself, a violation of the right of integrity. However, the text of Art. 6*bis*(1) does not appear to support this reading. See Ricketson, *supra* note 1 at para.

is the role of the court to determine prejudice.[30]

The extent of these rights depends on two further considerations. First, the duration of protection affects the scope of moral rights. The Berne approach to duration reflects a basic tension between the economic orientation of Anglo-Saxon copyright law, which seeks to limit the duration of moral rights protection in line with limitations on the copyright protection of economic rights, and the orientation of Continental law towards authorship, which, at a conceptual level, favors perpetual protection for moral rights.

a. Duration

Paragraph 2 of Article 6*bis* provides that the author's moral rights shall be maintained after his death "at least until the expiry of the economic rights."[31] Article 7 of the Berne Convention provides for protection for "the life of the author and 50 years after his death." The language of Article 6*bis*(2) provides for a minimum period of protection for moral rights, which will be equal to the term of protection for economic rights. This provision was first formulated in the Stockholm discussions of 1967, and represented a radical change from previous Convention provisions, which did not allow for the

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8.112.

[30]Ricketson, *ibid.* at para. 8.116 argues that the Berne Convention also protects a right of publication. This right is implied by Arts. 10 and 10*bis* on "free uses" of published works. Ricketson observes that these exceptions, by implication, would not apply to unpublished works, leading to an author's right to control first publication. However, a proposal to introduce a right of publication at the Rome Revision of 1928 was rejected: see World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva: World Intellectual Property Organization, 1978) at 41 [hereinafter *Guide*].

[31]*Guide, ibid.* at 43.

protection of moral rights after the author's death.

i. Limitations

Article 6*bis*(2) is weakened, however, by an important exception. Countries whose legislation did not provide for the protection of all the moral rights described in Article 6*bis*(1) at the time of their accession to the 1971 revisions of the Berne Convention may cease to protect some of these rights after the author's death. In effect, member countries must provide for the protection of either the right of attribution or the right of integrity until the author's copyright expires, but they are not required to provide full protection for both.[32] This exception was introduced to accommodate common law traditions, where moral rights protection has often been accomplished through the tort of defamation. An action for defamation cannot generally be brought after the death of the person defamed.[33] In essence, however, the Berne Convention stipulates that moral rights cannot be extinguished in their entirety after the author's death.[34]

ii. Perpetual Protection

In recognition of the special status of moral rights, and in spite of the Berne Convention's neutrality in defining the relationship between moral and economic rights,[35]

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[32]See Ricketson, *supra* note 1 at para. 8.114.

[33]*Guide, supra* note 29 para. 6*bis*.10.

[34]*Ibid.* para. 6*bis*.2; see also *Intellectual Property, supra* note 2 at para. 14.31.

[35]See Ricketson, *supra* note 1 at 8.113: the observes that "the Convention adopts a neutral line on the critical basis of moral rights, that is, whether these are intimately linked with the economic rights and should therefore expire when the latter do, or whether of moral rights exist quite independently of economic rights."

member countries may choose to extend the term of protection for moral rights beyond the expiry of economic rights. Many countries have introduced perpetual protection for moral rights in their legislation.[36]

b. Inalienability

Article 6*bis* provides that the moral rights of attribution and integrity may be exercised "even after the transfer" of economic rights in the work. The legislation of many countries provides that moral rights cannot be assigned, waived or sold. In practice, however, waivers of moral rights are a common feature of the copyright industries of Western countries.[37] It is interesting to note, however, that some developing countries, including those which have a common-law heritage, such as India and Nigeria, do not allow moral rights to be waived.[38]

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[36]Ricketson identifies France and French-influenced countries, such as Senegal and Benin: *ibid.* at para. 8.105, n. 510. See also *Guide, supra* n. 30 at para. 6*bis*.8.

[37]Legislation in France and Mexico traditionally provides for inalienable and imprescriptible moral rights. However, even in France, waivers of moral rights appear to be allowed in practice: see Fraser, *supra* note 12 at 292-93. Waivers are widely granted in common-law countries, including Canada, the United Kingdom, and, to some extent, the United States, as well as Germany: *ibid.* at 295. Dworkin, *supra* note 4 at 18-19, citing Vaver, points out that the capacity to waive moral rights seriously affects the usefulness of these rights, while compulsory moral rights considerations may make commercial treatments of literary and artistic works prohibitively expensive or high-risk. Fraser discusses this particular issue in relation to the disadvantages experienced by French film producers: see Fraser, *ibid.* at 293-94.

[38]See Dworkin, *ibid.* at 32-33.

c. Exercise of Moral Rights After the Author's Death

Paragraph 2 of Article 6*bis* also provides that moral rights shall be exercised after the death of the author by "the persons or institutions authorized by the legislation of the country where protection is claimed."[39] In practice, the moral rights of an author are usually exercised by his descendants after his death.[40] However, they could also be exercised by public institutions, such as agencies which are concerned with the protection of culture and the conservation of cultural heritage.[41]

d. Institutional Framework for Moral Rights Protection

It is interesting to note that Article 6*bis* does not require moral rights protection to be available through copyright law. Article 6*bis*(3) provides that the exercise of moral rights depends on the domestic legislation of the country where protection is sought. As a result, common-law actions for the vindication of the interests of attribution and integrity, for example, may meet the requirements of Article 6*bis*. Other types of legislative schemes, for example, linking moral rights protection to public or cultural agencies, or within a broader framework of cultural heritage law, could also satisfy the standards set out in Article 6*bis*.[42]

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[39]*Ibid.* at 43.

[40]See *Intellectual Property, supra* note 2 at para. 14.31.

[41]See Ricketson, *supra* note 1 at para. 8.113.

[42]Ricketson *ibid.* at para. 8.115 draws attention to this important feature of Art. 6*bis*.

B. The Special Importance of Moral Rights for Developing Countries

An examination of copyright legislation and judicial development of copyright doctrines in developing countries shows that a number of these countries are already attempting to integrate moral rights into their national cultural policies.[43] However, the application of the TRIPs Agreement will bring a new importance to moral rights, and will call for the refinement of their approaches to moral rights protection.

From the perspective of developing countries, the effective exclusion of moral rights from the TRIPs regime has some potentially interesting consequences. First, the fact that moral rights are not subject to the trade disciplines which the TRIPs Agreement imposes on other areas of copyright makes them an area of unusual flexibility and independence. Moral rights remain a domain in which countries can generate laws that respond to meaningful national policies. For developing countries, a degree of flexibility in domestic policy with respect to moral rights creates an important opportunity to develop a solid foundation for fully modern cultural policies.

At the same time, the TRIPs requirement that countries should recognize, at a minimum, the moral rights protections in Article 6*bis* of the Berne Convention suggests that a certain type of basic standard for moral rights protection exists and is generally

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[43]Examples of developing countries which have moral rights legislation include India and Nigeria: see Dworkin, *supra* note 4 at 32-33, for his discussion of "other 'common-law' jurisdictions." Mali also includes moral rights in its copyright legislation: see *Copyright Statute: Ordinance Concerning Literary and Artistic Property* (No. 77-46CMLN), July 12, 1977 in Copyright Laws of the World Supplement 1979-1980 [date of entry into force, July 15, 1977], and *Journal Officel de la République du Mali,* No. 525, of August 1, 1977, for the official French-language text.

recognized in the international community. This minimum standard of moral rights protection provides some advantages to developing countries who want to establish a certain level of recognition for national authors, and who are able to integrate the Berne provisions with other elements of domestic cultural policy.

Nevertheless, the failure of the TRIPs Agreement to apply the same rigor to moral rights which it has generally shown in relation to copyright protection may involve a loss of strength and prestige for these rights at the international level. For example, influential United States statements on moral rights protection, and the American approach to integrating domestic law with international standards, have ultimately had the effect of obscuring basic realities about moral rights in the international copyright community.[44] Notably, there has been an international failure to recognize that moral rights are a matter of culture, and that the concepts of authorship and work underlying moral rights potentially have an important contribution to make to the preservation of culture in the international sphere. In the final analysis, the commercial emphasis of the TRIPs Agreement in relation to copyright weakens the conceptual and practical link between copyright and culture in the international trading arena, and limits the potential contribution of the international copyright regime to world cultural heritage.[45]

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[44]Nimmer examines the U.S. position in detail from the perspective of U.S. objectives in joining the Berne Convention. He argues that the U.S. approach to moral rights offends the American desire "to exert moral leadership in the world copyright community," and implies that " it is legitimate to play both sides of the Berne game." See Nimmer, *supra* note 20 at 95-96.

[45]It is interesting to note that there is a similar lack of correspondence between the commercial and non-commercial aspects of the international "trade" in cultural property.

Current international developments in copyright law have generated renewed concerns about the moral rights of authors, and their proper role within modern frameworks for copyright protection.[46] These issues call for a reexamination of the place of moral rights in the international trade regime, on the one hand, and for domestic cultural policy, on the other. Concerns about moral rights lie at the heart of our present understanding of copyright law and its functions. At the same time, moral rights provide an important window onto the development of coherent and effective cultural policies at the national level.[47] This is especially true in relation to developing countries, whose copyright legislation, due to international developments, is currently in a state of flux.[48]

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[46]For example, during WTO negotiations, the film industry became an area of fundamental conflict between the United States and European countries, led by France. Fraser analyzes this controversy through a consideration of different approaches to culture in the United States and France, based on their different treatments of author's moral rights. He also deals more generally with the conflict over "cultural exemptions" between the United States and some of its trading partners, including Canada: see Fraser, *supra* 12 at 288-90, 297-304, 311-20. See also E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge and Kegan Paul, 1980) at 32-34, for detailed discussion of some of the special copyright problems associated with film production.

[47]See Ploman & Hamilton, *ibid.* at 178-79. Their analysis seems to imply that moral rights are among the most important goals of copyright; at the same time, they consider, in detail, Breyer's argument that moral rights are insufficient to justify a system of copyright protection, as a whole. Breyer's critique of the "noneconomic goals served by copyright" is highly persuasive: see S. Breyer, "The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84:2 Harv. L. Rev. 281 at 284-91.

[48]These concerns are equally applicable to the formerly Communist countries who are now attempting to modernize their economies and legal systems. For a discussion of approaches to copyright in these countries prior to the fall of Communism, see Ploman & Hamilton, *ibid.* at 24-29.

The present significance of moral rights for developing countries may be traced to three sources. First, in their representation of the non-economic interests underlying copyright protection, moral rights provide an opportunity to deal with the protection of culture in terms that are, at least superficially, non-economic.[49] By exploring the possibilities of moral rights protection, a country may be able to assign priorities to culture on the basis of its non-economic value to society, through copyright legislation. Because of its non-economic focus, moral rights doctrine may allow a clearer perspective on the commitments involved in preserving and promoting domestic culture.

An examination of the concepts of authorship underlying moral rights, and of the basic separation between the privileges of authorship and the rights associated with the ownership of copyright, may also clarify the appropriateness of applying authors' moral rights to broader cultural objectives in developing countries. Scholars have traced the development of moral rights to the rise of an individualistic conception of authorship in Western Europe as one aspect of the growth of Romanticism.[50] As a result, the implications of authorship for cultural policy in developing countries are quite complex.

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[49]For an analysis of the economic implications of moral rights, see Dine, *supra* note 3 at 577-82. He points out that, while moral rights are not directly connected to questions of the economic returns from creative works, they perform an important risk- and cost-allocating function, by balancing the risk associated with the misuse of a creative work between the author and the user, or distributor.

[50]The link between modern concepts of authorship and the historical forces of Romanticism, particularly in the context of early developments in Germany, is examined in detail by M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425 at 427-38, 444-48.

Not only does the vision of authorship informing moral rights law reflect the "individualization" of the creative function in Western society,[51] but this construction of authorship is also a product of historical forces which appear to be quite specific to the European cultural context of the eighteenth century.[52] The question of whether these culturally-specific factors affect the validity of applying moral rights to developing countries must be considered.

Finally, the flexibility of moral rights protection under the TRIPs Agreement is an important factor making moral rights attractive to developing countries. The potential contribution of moral rights to culture in these countries is particularly interesting and important in the current climate of fundamental change in international copyright developments.

1. Moral Rights and the Commodification of Culture

Copyright protection in developing countries must respond to complex circumstances and attempt to fulfil objectives whose consequences are subtle and far-reaching. As Ploman and Hamilton point out:

[Among] the large number of developing countries [,]... the distinction between

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[51]This formulation of authorship is put forward and developed by M. Foucault, "What Is an Author?" in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) 101.

[52]The study of authorship and its connotations in developing countries, however, does not yet appear to be well-developed. For a consideration of some of the characteristics and qualities associated with authorship in the Indian context, see S. Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (New Delhi: Sterling, 1977) at 106-21.

> domestic and foreign copyright policy is of... [great] importance.... The major reasons are the special requirements of economic and social development and the fact that developing countries in most cases are net importers of intellectual property....[T]hese countries, therefore, have to design copyright policies suited to their particular and varied needs...[53]

The ancient traditions and historical richness of culture in developing countries require an approach to copyright that is rooted in history, while meeting the challenges of contemporary international developments. The operation of these dual objectives in the intellectual life of developing countries is aptly expressed by Krishnamurti:

> [C]an we take stock of the past and present and combine the good elements of both to bring into being a system which can on the one hand restore the author to the pedestal he ought to have but hardly has and on the other provide for a better dissemination of his work amongst the public on whose weal the author depends as much as the public depends on the author[?][54]

The expression, "copyright," generally designates a legally-conferred right to control the dissemination of literary and artistic works to the public. It has also come to include intellectual creations which are considered in law to be analogous to creative works, such as computer programs.[55] Dissemination occurs through the distribution of reproductions of literary and artistic works. Copyright is, in essence, a proprietary right.

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[53]*Supra* note 45 at 29. They go on to consider some of the issues related to economic development, participation in the international economy, and the growth of technology which developing countries must confront: *ibid.* at 28-30.

[54]T.S. Krishnamurti, "Copyright - Another View" (1968)15:3 Bull. Copyright Soc'y U.S.A. 217 at 221. It is interesting to note that, although Krishnamurti was writing in 1968, the same concerns confront developing countries today.

[55]For an overview of the ways in which copyright protection has been extended to computer programs as "literary works," see D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks,* Essentials of Canadian Law Series, with a Foreword by Madam Justice Beverly McLachlin (Concord, Ontario: Irwin Law, 1997) at 27-29.

The key feature of copyright, as in other property rights, is the owner's ability to exclude others from access to the work.[56] This right of exclusion is enshrined in law, and failure to respect the owner's exclusive right of access will lead to various forms of legal sanction.

Seen from this perspective, it is apparent that copyright is concerned with restricting the communication of intellectual works to the public. Indeed, the legal framework for copyright stands at the nexus between the creation and dissemination of products of intellectual labor, or, in another sense, at the juncture between creative work and the commercialization, or commodification, of its products. As Ploman and Hamilton point out:

> Copyright is used as a legal mechanism for the ordering of social and cultural life, or, put another way, copyright is one method for linking the world ideas to the world of commerce.[57]

The distinction between the creation of intellectual work and its dissemination is a basic feature of modern, industrial culture. In non-industrial societies, the link between creative activity and its publication may have been more direct: a poet may have read his work to his public, and a composer may have sung his compositions to his audience.[58] To some extent, these opportunities for public exposure are still available to contemporary

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[56]The concept of literary property as a "natural" right in property is typically associated with Locke: see Ploman & Hamilton, *supra* note 45 at 13-18.

[57]*Ibid.* at 1.

[58]Eisenstein, cited in Rose, points out the basic distinction between "composing" and "reciting" a poem, or "writing a book and copying one": see Rose, *supra* note 4 at 3.

artists. The main method through which their works are publicized, however, is through technologies which make the products of their creative work impersonally available to a mass audience.[59] These technologies are deployed within an industrial complex whose proportions match the magnitude of the public which they are designed to serve.[60]

Indeed, it is the importance of copyright industries for commerce, both in their contribution to domestic economic activity and as commodities in international trade, which provided the impetus for the development of TRIPs.[61] It is hardly surprising that the most technologically-advanced country in the world, the United States, was the driving force behind TRIPs. American interests in copyright are not only strong in the area of new technologies which fall under copyright protection, such as computer-related innovation, but they are equally important in relation to cultural industries, such as film, since the United States is the world's leading producer of mass culture.[62]

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[59]In the process of publication, the work becomes a commodity; it is the ultimate product. This applies, not only to "works," in the classical sense, but, thanks to technology, to performances, as well. In some non-Western traditions, however, the process of creation and the experience of the audience are actually the creative products: see Pandit, *supra* note 51 at 63, 89, 111. It is especially interesting to note that the role of the audience is "an active mental revival or reproduction and not a passive appreciation or critical appraisal": *ibid.* at 89.

[60]On the economic and social scale of present-day "arts industries," see S.S. Madeja, "The Arts as a Cultural and Economic Factor in World Trade" (1994) 14 N. Ill. U. L. Rev. 439 at 451-52.

[61]For a discussion of the economic importance for industrialized countries of linking intellectual property with trade, see R.L. Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735 [hereinafter "Prospects"] at 741-42.

[62]See Fraser, *supra* note 12 at 318-20.

The distinction between creation and dissemination which is characteristic of industrial society generates a crucial point of tension between the economic and non-economic interests involved in creative and intellectual work.[63] The process of making creative works available to the public is distinct from the process of creation. Where different parties are involved in the two groups of activities, as is generally the case in modern society, they are united by a common interest in the economic success of the publication venture.[64] However, the common interest uniting author and publisher may not extend beyond these economic considerations. The non-economic aspects of creative work may actually divide creators from those responsible for disseminating their work, and even place them in situations of bitter opposition to one another.[65]

Moral rights are situated at this curious conjunction of interests. In a sense, the content and adjudication of moral rights determine the nature of the equilibrium among these economic, social, and ethical forces. The ways in which a society chooses to deal with the interests protected by moral rights reflect its values and its approach to cultural issues at a deeper level.

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[63]Woodmansee, *supra* note 49 at 437-43 shows how the patterns of growth and development in the publishing industry were set during the eighteenth-century, and identifies some of the reasons why publishers became indispensable to writers.

[64]For example, piracy poses a problem for the interests of both publishers and authors: see *ibid.* at 439-41 for a discussion of some of the ways in which opposition to piracy has historically united authors and publishers.

[65]Ploman & Hamilton, *supra* note 45 at 1 refer to the "problem of how best to reconcile the partly shared, partly contradictory interests of 'authors who give expression to ideas; publishers who disseminate ideas; and members of the public who use the ideas.'"

Moral rights are a product of the relationship between society and its creators, and the social values which are associated with art and artists. At the same time, legislative and judicial recognition of moral rights create important opportunities for the development of coherent cultural policies. In developing countries, moral rights provide a degree of flexibility in the implementation of copyright systems, and allow these countries greatly expanded opportunities to incorporate their traditions into copyright legislation, and, at the same time, to renew their traditions in the light of present needs.

2. Culture and the Recognition of a Non-Economic "Copyright"

Moral rights represent the recognition of non-economic interests associated with artistic and intellectual creation. They are generally understood to be a product of the view that a creative work is an expression of its author's personality. As such, the treatment of a work may affect the author in ways which transcend economic gains and losses.

Some of the non-economic interests which an author may have in his work include the protection of his professional reputation and the preservation of the integrity of his work. For example, the form in which a work is distributed to the public will have implications for the author's reputation. Moreover, the nature of an author's involvement with his work may be deeply personal and emotional, and perhaps, closely connected to his self-perception and self-esteem. All of these interests in the work may be present both before and after its publication and commercialization. Indeed, these kinds of interests are particularly vulnerable to the kinds of errors and mishaps which mass distribution may involve. Through the accidents of the publication process, as well as the deliberate actions

of people who come into contact with the work,[66] the author may suffer damage which is non-economic in essence, but which may ultimately have both economically quantifiable and other, less easily defined effects on the author.

Through moral rights doctrine, legal systems which deal with authors' rights attempt to provide a framework for protecting the various types of non-economic interests which an author may have in his work. Moral rights represent a particular understanding of the nature of creative work, and of the relationship between the creator and his work. More generally, moral rights also reflect a view of the place of art and artists in society. They are the focal point for a basic tension in copyright law between the economic and non-economic interests of authors, the creation and dissemination of creative work, and the commercialization, or commodification, of the products of intellectual and artistic labor.

For developing countries, the right of integrity also extends beyond the importance of an individual work or, in its broader sense, the importance of a work as one element of a body of work belonging to a particular author. Rather, developing countries may be interested in the preservation of the work as part of their cultural heritage, as a whole. This is especially true where works of major importance are involved, or where the author is an important cultural figure. In this way, the author's moral right of integrity can

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[66]Damage may occur through use even where the user has the best intentions, since damage depends, in the first instance, on the author's subjective reaction, which leads him to seek redress. In this regard, the somewhat obvious point that copyright can only attempt to redress damage that has already been done, as Krishnamurti's analysis, *supra* note 53 at 220 implies, is especially interesting.

make an important contribution to the preservation of a country's cultural heritage.

Moreover, the idea of non-economic rights represented by moral rights need not be restricted to the author's interests. An examination of the right of integrity, a widely-recognized moral right, demonstrates some of the ways in which the author's personal interest in his own work may broaden to include the interests of society in his work. The subject-matter of the right of integrity is the preservation of the integrity of the work, and it may also encompass a general right of preservation.[67] The public also has an interest in the preservation of the work, and in the maintenance of its integrity. As Berryman points out:

> The rights of paternity and integrity denote a collective cultural interest in preserving the work itself; otherwise, why would a state enact provisions specifically protecting integrity when artists have defamation weapons at their disposal? The public has a legitimate interest in ensuring that its cultural works are preserved as their creators intended so that their inherent cultural value will not be lost or distorted. Some states recognizes interest by directly creating a public cause of action for integrity violations.[68]

It should also be noted that the recognition of a right of integrity in copyright law and jurisprudence potentially has major, indirect implications for culture. It may contribute to the creation of a general attitude of respect towards works of importance for national culture and their creators, and assist in reviving a sense of value associated with

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[67]The right of integrity is generally not believed to prevent outright destruction of the work: see *Intellectual Property, supra* note 2 at para. 15.57, n. 48.

[68]See C.A. Berryman, "Toward More Universal Protection of Intangible Cultural Property" (1994) 1 J. Intell. Prop. L. 293 at 319. Berryman is primarily interested in an integrity right that is not based on authorship, which would be capable of protecting anonymously authored works of folklore.

one's own culture.[69] It may also be a first step in generating an awareness of how creative and intellectual works should be treated by the public. This approach to the preservation and promotion of culture, since it is fundamentally legislative in nature, emphasizes the duties of governments towards the preservation of cultural works. This aspect of legislative action is particularly important in developing countries, where governments have unparalleled access to resources, and control over their allocation. A recognition of the important role which government will inevitably play in relation to the maintenance of cultural works in developing countries will also have consequences for the treatment of cultural works in the public domain. While the public domain is, internationally, the most important repository of culture, it plays an especially important role in providing public access to culture in developing countries, where the financial means of the general public are extremely limited.[70]

At a conceptual level, it is important to note that moral rights, through their emphasis on the non-economic features of artistic and intellectual creation, open

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[69]The problem of the deterioration of cultural values in developing societies, and its wide-ranging consequences, should not be underestimated. See C.F. Sayre, "Cultural Property Laws in India and Japan" (1986) 33 UCLA L. Rev. 851 at 875. See also L.V. Prott & P.J. O'Keefe, *Law and the Cultural Heritage,* vol. 3, *Movement* (Oxford: Professional Books, 1984) at 14: they point out that the commercialization of cultural objects leads to a loss of respect for cultural values in source countries and, "in many cases,... engenders a contempt for one's own cultural traditions."

[70]For example, these considerations may be at the root of certain special features of copyright law in India. Ploman & Hamilton, *supra* note 45 at 133 observe: "Distinguishing Indian law from European and Anglo-American legislation are several provisions that, under certain circumstances, allow the governments to plan active role in encouraging the exploitation of needed intellectual property."

possibilities for diverse cultural attitudes to be accommodated within the framework of copyright law. In the traditions of many developing countries, the economic aspect of artistic creation has historically been subordinate to the non-economic objectives which it accomplishes. The weakness of the connection between the arts and financial gain does not, however, suggest that the economic value of the work of artists is not recognized in traditional societies.[71] Rather, economic gain is not the defining feature of the relationship between the artist and society. This perspective presents a strong contrast to modern, Western views of the place of the arts in society, and the incorporation of this perspective into modern copyright legislation.

The most important contrast between modern and traditional societies in relation to the arts may be the open recognition, in traditional societies, of a relationship of interdependence between artists and society. The social role played by artists, and the value of the social functions which their work fulfills, are widely accepted and understood. Rather than emphasizing economic gain, the culture of art in developing countries often emphasizes other values, from the Indian focus on "duty," the basic ethical concept which has given Indian society its cohesion for millennia,[72] to the Chinese

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[71]On the contrary, artistic activity in these societies was often rewarded lavishly, and even extravagantly: see Krishnamurti, *supra* note 53 at 220 for details of some of these practices in the Indian context. For example, in ancient times, an artist might be showered with gold coins in the "Kanakabishekam" ceremony.

[72]The Sanskrit term for this is *dharma;* Krishnamurti, *ibid.* at 220, calls it, "the concept of virtue." The idea is central to ancient Indian literary and religious texts, such as the *Bhagavad-Gita.*

preoccupation with art as the ultimate expression of intellectual quality.[73] It may prove to be impossible to reconcile a model of cultural policy based on the commercialization of the arts and intellectual labor with such deeply-rooted social and ethical structures. However, the concept of moral rights suggests one method of incorporating a traditional emphasis on the non-economic value of artistic and intellectual work into contemporary copyright systems. The coming together of traditional and modern values in copyright may also prove to be a special contribution that developing countries can make to copyright concepts in the international arena.

3. The Place of "Western" Traditions of Authorship and Ownership in Developing Countries

The development of moral rights doctrine is commonly traced to the same constellation of historical forces that generated a new understanding of the nature of creative work, and the place of creative artists in society, in continental Europe.[74] In particular, the growth of literacy and the development of book publishing as an industry during the eighteenth century created a need for a re-assessment of the social and economic status of authors. These uncertainties eventually came to be resolved through

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[73]See Ploman & Hamilton, *supra* note 45 at 141. They describe "the contempt for professionalism and commercialization" in Chinese culture, dating back to the eleventh century and before.

[74]These were the currents of Romanticism: Woodmansee, *supra* note 49 at 430-48 discusses these developments in the context of eighteenth-century Germany, while P. Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 Cardozo Arts & Ent. L.J. 293 at 294-99, draws together studies of Romantic authorship in various European contexts to inform his discussion of current American copyright law.

the legislative recognition of an author's special, proprietary rights in his creation.

The vision of authorship which emerged from these developments continues to be known as the Romantic concept of authorship.[75] According to this view, a creative work is the product of qualities of its author's mind which are unique and beyond ownership by any other person.[76] The distinctive quality of the author's function is the creation of an original work, which is, by definition, the product of his unique mental attributes and capabilities - his "individuality."[77] The development of an individualistic construction of authorship, with the establishment of "originality" as the fundamental characteristic of creative work, presents an important departure from earlier views of authorship and literary value in Europe.[78]

One of the consequences of the special status of the author is the recognition of a relationship of privilege between the author and his work. Fundamentally, it is this relationship which is protected by moral rights doctrine. It is interesting to note the origins of moral rights in adjudication, rather than legislation, a marked contrast to copyright. This trend suggests that the recognition of a special relationship between authors and their works tends to follow naturally from the special social status assigned to

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[75]*Ibid.*

[76]Woodmansee, *ibid.* at 442-43.

[77]*Ibid.* at 445; see also Foucault's analysis of the "author function," *supra* note 50 at 103-13, 117-20.

[78]For a detailed discussion of the movement from the idea of the author "as craftsman" to the "inspired" author, see Woodmansee, *supra* note 49 at 427-31. Foucault, *ibid.* at 101, observes that "it would be worth examining how the author became individualized in a culture like ours."

authors and their abilities.

An examination of the historical circumstances surrounding the development of modern, Western ideals of authorship provides a clearer understanding of some of the consequences of moral rights for the abilities of authors to control the use of their works in ways which transcend the economic exploitation of a copyright. A closer consideration of the historical development of authorship also serves to illustrate trends in social values about the place of the arts and artists in society. Romantic authorship is inevitably associated with the expansion of literacy and the development of a mass-market for culture which has allowed a transformation of the arts into professional fields in their own right.[79]

Ultimately, the concept of Romantic authorship has come to dominate perceptions of creativity in Western, industrial society. The essence of the creative process, as it is presently viewed, is individual genius. At the same time, the essence of a creative work is its "originality." Attempts to analyze current views of authorship in the light of their Romantic heritage have been successful in placing authorship in its proper historical, economic, and social context.[80]

This conceptual clarity about authorship, however, is not matched by a corresponding depth of vision in relation to the phenomenon of creative "authorship," itself. Like creativity and aesthetic experience the "real" phenomenon of authorship

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[79]For a discussion of some of the consequences of market developments for culture, and the difficulties experienced by writers who wanted to support themselves through their writing in eighteenth-century Germany, see Woodmansee, *ibid.* at 430-437, 441.

[80]For example, see *ibid.*; see also Jaszi, *supra* note 73, Foucault, *supra* note 50, and Rose, *supra* note 4.

remains poorly understood.[81] This phenomenon manifests itself in the abundance of cultural life and its forms which human society everywhere continues to enjoy.[82] The books, music, paintings, sculptures, carvings, designs and other artistic and intellectual works which constitute our growing cultural patrimony are the products of human creative activity and, ultimately, of "authors."

In view of the difficulties involved in tracing the connection between concepts of authorship and the social phenomena of creativity, it may be preferable to accept the Romantic concept of authorship as simply one aspect of the many simultaneous and overlapping realities underlying culture. Rather than attempting to deal with authorship in abstract terms, it is perhaps more important to examine the practical implications of authorship. A pragmatic focus can soften the ironies inherent in attempting to generate effective copyright laws, whose ultimate policy goal is the promotion of creative activity in society, while our understanding of literary and artistic processes remains, at best,

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[81]For example, see E. Dissanayake, *Homo Aestheticus: Where Art Comes From and Why* (New York: The Free Press, 1992) at 199-225. Her discussion of the post-modern approach to artistic phenomena implies a strong criticism of post-modernists' failure to engage with phenomenological reality. Her own analysis of art resolutely attempts to anchor itself in natural reality, by arguing that art is a "biological necessity." She points out that "it may be time down to turn from these [theories of the arts] to the human 'reality' as expressed in species nature; that is, to perennial human needs, aspirations, constraints, limitations, achievements that along with 'art' have been veiled, distorted, atrophied, or erased by the excesses of modern literate life." *Ibid.* at 223.

[82]See R.L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 Denv. J. Int'l L. & Pol'y 109 at 127-28, and points out the "continued vitality of creative expression" in the Third World.

contradictory.[83]

Finally, it is the challenge posed by the diverse phenomena of authorship which copyright law must meet successfully.[84] This is particularly true in relation to developing countries, whose ancient and varied traditions are not defined by a single, monolithic view of authorship. Moreover, the extent to which the "individualization" of authorship has actually occurred in developing countries is difficult to assess. In relation to moral rights, these issues become still more intense because of the apparently intimate link between Romantic authorship and moral rights. In attempting to implement and follow through on extensive moral rights protection as part of their copyright laws, developing countries may face the possibility of institutionalizing cultural constructions of authorship which will privilege the legal recognition of certain cultural forms over others. In particular, the cultural forms which are associated with Western, individualistic ideals of authorship may be favored over the creative manifestations of community or group authorship, or anonymous authorship.

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[83]Foucault's analytical approach, with its applied, historical focus, is also a sort of "pragmatism." For a concise discussion of the practical outcomes which intellectual property rights, including copyright, are traditionally believed to favor, see Vaver, *supra* note 54 at 3-13, and his critique of these justifications at 274-75. See also Krishnamurti, *supra* note 53 at 225; he advocates a " pragmatic approach" to author's rights, based on "the separation of the philosophical and economic aspects of copyright."

[84]In the context of the United States, for example, Jaszi, *supra* note 73 at 301-02, argues that the main challenge to concepts of authorship underlying copyright comes from "the realities of contemporary polyvocal writing practice – which increasingly is collective, corporate, and collaborative." He goes on to point out that, "the law is not so much systematically hostile to works that do not fit the individualistic model of Romantic 'authorship' as it is uncomprehending of them. Such works are marginalized or become literally invisible within the prevailing ideological framework of discourse in copyright..."

The problems of Romantic authorship give rise to two fundamental questions about the appropriateness of employing moral rights doctrine within frameworks for cultural policy in developing countries. First, what are the creative phenomena which correspond to "authorship" in developing countries? Secondly, are moral rights sufficiently flexible to accommodate the realities of authorship in developing countries, and through authorship, their unique cultural realities?

The discovery of a positive role for moral rights in the copyright laws of developing countries depends on a consideration of the current status of moral rights doctrine. Like any legal concept, moral rights must evolve to meet the particular needs of the society which they serve, in terms of both time and place. A number of important social effects flow from the doctrine of moral rights. These effects have broad implications for the state of cultural heritage, extending beyond their immediate effects on the author. In a sense, moral rights allocate the responsibility for acting in the interest of cultural works, an important social function, to the artistic and intellectual community, through its individual members.

The coexistence of moral rights with other tools of cultural policy also has the potential to contribute to the flexibility and effectiveness of moral rights in dealing with broad cultural concerns. Due to the ancient and vast cultural heritage of the developing world, authorship in developing countries is a diverse and complex phenomenon. While some cultures appear to be dominated by community or group frameworks for creativity,

other traditions are strongly individualistic.[85] Moreover, in many developing countries, including those with dominant community traditions, individual authors have presently become an important cultural reality. Whether or not this development is a feature of Westernization, or modernization, the protection of this aspect of cultural development in the evolving cultures of developing countries is important.[86] Indeed, the protection of individual authors through copyright may be especially valuable in developing countries in the context of contemporary economic and political realities. Artists and intellectuals in developing countries may be particularly weak in the face of government and industrial power.

C. New Opportunities for Developing Countries in the Meeting of "New" and "Old"

A consideration of the status of moral rights under the TRIPs Agreement suggests that the doctrine of moral rights has, in large part, successfully met the challenges of the new international copyright regime. The exemption of moral rights from the TRIPs system represents a solid conceptual victory for the non-economic, culturally-oriented

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[85]Ploman & Hamilton, *supra* note 45 at 4-5 discuss the "much admired and artistically lively culture" of Bali, Indonesia, and point out that the traditional society of Bali is based on a community-centered model of creativity. In contrast, the early medieval rise of the religious movement in India known as *bhakti*, or a new emphasis on the direct relationship of an individual with the divine, represents a strongly individualistic thread in Indian approaches to creativity. For a historical discussion of these developments, see R. Thapar, *A History of India,* vol. 1 (Baltimore: Penguin Books, 1966) at 185-93, 304-10.

[86]In view of the depth of existing traditions, it seems improbable that individualistic concepts of authorship threaten other forms of creativity. It is perhaps for this reason, as J. Tunney, "E.U., I.P., Indigenous People and the Digital Age: Intersecting Cirles?" [1998] E.I.P.R. 335, citing Deloria, observes, that indigenous peoples may "thrive" in the "digital age."

approach to author's rights embodied in moral rights protection. It may be argued that the U.S. resistance to moral rights converts this potential triumph into a pyrrhic victory, at least from the perspective of authors' groups in the United States.[87] However, the TRIPs requirement that all members of the WTO must provide legal recognition for moral rights is likely to flow into American jurisprudence on authors' rights issues and, ultimately, soften the U.S. approach to moral rights. As Dworkin points out:

> There are those, of course, who support the spirit and purpose of Article 6*bis* and are critical of the way the United States has handled moral rights. Nevertheless, for a country such as the United States, which has such a dynamic and developing common law system, it is difficult to believe that some courts will not be influenced by the Berne background when deciding how its domestic law should be applied and developed.[88]

The growing international interest in moral rights also reflects a greater awareness of their potential to enrich discourse on cultural matters in diverse cultural environments. In particular, moral rights protections have increasingly come to be accepted by countries with a common-law legal heritage, and by the relative "newcomers" to the international copyright system, developing countries.[89] As a result of these developments, moral rights have been an important factor in tempering the economic and trade orientation of

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[87]In the same vein, Fraser, *supra* note 12 at 289, observes that, "the United States has at the same time succeeded and failed in recent trade negotiations to have copyrighted content treated like any other goods subject to trade."

[88]*Supra* note 4 at 16.

[89]For a detailed discussion of attitudes and approaches towards moral rights in common-law jurisdictions, see *ibid.* Dworkin analyzes the treatment of moral rights in Canada, the United Kingdom, Australia, and the United States, and he also mentions moral rights in "other 'common-law' jurisdictions," such as Nigeria, India, and Malaysia: *ibid.* at 32-33.

international copyright law, and in encouraging a renewed focus on cultural matters per se. These trends should eventually generate a more integrated international system, where the copyright and author's rights approaches of the Anglo-Saxon and Continental European traditions complement each other more fully.

1. Modern International Pressures on Moral Rights

While the doctrine of moral rights may benefit from the growing internationalization of copyright, moral rights face another, greater challenge presented by contemporary technological developments. Technological change has profound implications for both the conceptual integrity and continued practical relevance of moral rights. Many scholars of copyright have observed that industrialized countries appear to be undergoing a fundamental transition from an "information age" to a "digital era," where new technologies promise to become deeply integrated into social and cultural life, as well as affecting economic performance.[90] These changes potentially affect the status of copyright principles and standards in three fundamental ways. They involve a radical loss of the ability to control the dissemination of information and knowledge, the disintegration of the traditional relationship between the author and the work, and a breakdown of

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[90]See A. Christie, "Reconceptualising Copyright in the Digital Era" (1995) E.I.P.R. 522 at 526. In considering proposals to integrate moral rights into Australian copyright law during the mid-1990s, Christie is careful to draw a distinction between the experience of information-technology to date, and the projected evolution of these technologies and their application in the future. In view of the rapidity of technological growth and development in these areas, it is especially important to be aware of the distinction between present and future experiences. Christie observes: "The danger is that the consideration of this issue is taking place in the context of the immediate past information age, not the new digital era which is just commencing."

established concepts of authorship.

Clearly, the consequences of these developments are not restricted to industrialized countries. Attempts to respond to these changes by legislators in industrialized countries will ultimately drive the evolution of international copyright law and practice. However, these changes also create an unprecedented opportunity for developing countries to generate approaches to copyright protection which are basically compatible with their cultural traditions, and, in the process, to become fully integrated into the mainstream of international copyright. By a marvellous irony, the directions in which established notions of copyright must evolve in order to meet the challenges of current technological change may prove to be inherently compatible with the cultures of developing countries, in ways which have not yet been possible. The problems for copyright which flow from the concepts of cultural life traditionally held by the peoples of developing countries closely resemble the challenges to copyright raised by new technologies. Many characteristic aspects of the cultures of developing countries are also shared by aboriginal peoples, so that the future of copyright holds greater promise for their cultures than their historically awkward fit with the intellectual property regimes of the past. In this context, Tunney argues:

> Just as solutions in the I.P. domain are needed at the cutting edge of new technology, the momentum of the indigenous people's movement will also expose the failings of orthodox I.P. It could be argued that solutions to I. P. problems associated with the oldest and the newest are conceptually closer than might be thought, and that the convergence and confluence characteristic of the emerging political, economic, technological and legal landscapes creates opportunities for coherence....the E.U. has the opportunity to adopt a proactive approach to the coherent development of I.P., by adopting a common approach which is capable of dealing with concerns associated with both indigenous people and the digital age,

which focuses on underlying concepts rather than dominant socio-dynamic forces.[91]

a. Technological Innovation

Current technological developments have created an unprecedented capacity for the dissemination of information and knowledge. This is not only due to the increasing sophistication of technologies for reproducing literary and artistic works, but it is also a product of the growth of communications technology. The speed, ease, and breadth with which current communications technologies can distribute knowledge threaten to overwhelm the capacity of regulators to control the flow of information. Since copyright is fundamentally based on controlling the dissemination of knowledge and restricting the ability of the public to use this knowledge, these developments have the potential to make copyright protection, in some measure, redundant. The continued relevance of copyright in this environment will depend on remedial measures to restrict the flow of information, whether it is through further technological developments, or through public education.

This decline in the ability to control the dissemination of works also challenges moral rights. The speed and scale on which dissemination may potentially occur imply a corresponding decline in the ability of authors to control the quality of distribution. Once a work has been released to the public, the author may no longer be able to correct errors or false information. He may not be able to maintain the identity of the work, as a unified

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[91]Tunney, *supra* note 85 at 335. He explains his use of the terms, "old" and "new," in the sense that "indigenous people are connected to the oldest traditions of humankind, and the digital revolution is associated with the newest developments." His point applies equally to the peoples of developing countries, whether they are indigenous or non-indigenous peoples.

structure, or even, his connection with the work. It is extremely unlikely that an author will be able to keep track of all, or even the most important, uses of his works, or references to them. These realities affect the author's rights of both attribution and integrity, and potentially make it impossible for the author to assert them.

In these circumstances, protection of the author's moral rights depends on the knowledge of his public, and on their willingness and ability to assist him in maintaining the quality of his work. Here, moral rights concerns meet traditional concepts of the relationship between artists and society in developing countries. The author is no longer an isolated individual, perhaps placed on a pedestal, but, as a result of his privileged position, potentially alienated from his public. Rather, the author and his public may meet with a new degree of closeness and a new potential for exchange, through the possibilities for cultural democratization offered by communications technologies.[92]

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[92]Christie, *supra* note 89 at 525, points out that, "there is a trend towards subject-matters in which the user plays a role in determining the ultimate nature of the work." It is also interesting to consider the interactive possibilities of technology for the art of classical music as they were imagined by Canadian pianist, Glenn Gould. He called the technologically-implicated and empowered listener the "New Listener": see G. Payzant, *Glenn Gould: Music & Mind* (Toronto: Van Nostrand Reinhold, 1978) at 29-32, 42, 70. The importance of the listener's function in music, or the spectator's function in art, in traditional Indian thinking oddly parallels these speculations about technology: "The entire qualification for and imaginative recreation on the part of the spectator is artistic sensibility of the same kind the artist possesses. Such an ideal spectator is... one possessing a heart similar to that of the creator, that is, a 'poetic heart.' It is the *rasika* [the one who experiences] alone who is capable of tasting *rasa* [essence, in this case, the essence of experience] as the artist alone is capable of producing it." Pandit, *supra* note 51 at 88-89.

b. In Pursuit of an Elusive Author

The development of new technologies, and the growth of the skills, knowledge, and abilities required to use them and to participate in their growth, have brought about important changes in the traditional understanding of the relationship between an author and his work. The extension of copyright protection for literary works to products of new technology, including programs for computer software, brings new elements to this relationship. Computer programs appear to be inherently different from the creative works which copyright, at its origins, was intended to control. The concepts of internally-generated inspiration and the originality of the creative or intellectual genius,[93] which traditionally constitute the core of copyright protection, do not appear to be applicable, in the same sense, to computer programs.[94] Moreover, the corporate environment in which computer programs are typically generated reflects the realities of group, collaborative, and corporate authorship, all of which contradict the monolithic view of the author as an individual, inspired genius.

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[93]As Woodmansee, *supra* note 49 at 427 points out, the "internaliz[ation of] the source of...inspiration" is a key element in the Romantic understanding of authorship underlying copyright law. Prior to the historical experience of Romanticism, the idea of inspiration meant inspiration "by some muse, or even by God." Woodmansee observes: "'Inspiration' came to be expertise in terms of *original genius,* and the consequence that the inspired work was made peculiarly and distinctively the product - and the property - of the writer."

[94]This is equally true in relation to other types of works which have acquired copyright protection - from a "list of instructions on the side of a tin of herbicide," to a "well-drawn straight line or circle." Mr. Justice Laddie, "Copyright: Over-strength, Over-regulated, Over-rated?" (1996) 5 E.I.P.R. 253 at 259-60, argues that these extensions of copyright protection, though well-established, are equally dangerous for the coherent development of copyright principles.

As a result of these factors, moral rights protections become uncertain. Is it appropriate to extend moral rights to accommodate the special relationship between a creator of a computer program, and the program?[95] The expanded realities of authorship which are associated with technological change find interesting parallels in traditions of authorship in developing countries. Historically, the model of individual authorship has not been dominant in the great majority of these cultures, where authorship has been understood in broader social and community terms. The shortcomings of copyright in accommodating the development of technology, and the appropriate extent of moral rights protection in these circumstances, are mirrored in the many facets of authorship, and the personal rights which should be associated with it, in developing countries.

c. The Problem of Unravelling Identity

Current technological changes introduce new factors into the equation between author and work. However, they also bring about fundamental changes in established concepts of the work and the author. Technology becomes a new means of production for recognized creative works, and as such, it intervenes in the creative process, itself. New technologies may also appear as an element of a new literary or artistic work, as a product of the creative process. In both of these situations, the element of technology requires a revised legal construction of the author and the work.

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[95]The approach in the United Kingdom legislation has been to restrict the application of moral rights to situations where the personality of the author is implicated in the work, and where creation is driven by personal motivations, rather than business considerations: for a detailed description of these provisions, see M. Franzosi & G. de Sanctis, "Opinion - Moral Rights and New Technology: Are Copyright and Patents Converging?" [1995] 2 Eur. Intell. Prop. Rev. 63 at 64-66.

Where technology is used in creation, the identity of the author may actually be brought into question. The role played by computer hardware and software, or, in the case of "multimedia" works, of other, pre-existing works, may be sufficiently important to deprive the human author of the element of "originality" which makes it possible for him to justify controlling the work through copyright.[96] In this case, the question becomes whether the relationship between the author and the work is direct enough to continue to consider the work an embodiment, or extension, of the author's personality. The extension of moral rights protection depends on the establishment of this link between the author and the work. However, new creative methods which intervene between the two, by virtue of their sophistication, may break this link.

Where technology, itself, is the product of the creative process, establishing the identity of the work according to traditional concepts becomes a complex endeavour. What are the defining characteristics of a literary or artistic work? Fundamentally, this question brings us to the basic problem of attempting to define what culture is. In fact, this effort to "reify" culture has historically been the essence of copyright protection in Western countries. However, the actual variety of artistic, cultural, and intellectual forms and creative methods in the contemporary copyright universe suggests that this feature of copyright threatens to limit its future relevance in important ways. Rather than attempting to define works and authors in ever more precise, comprehensive, and, ultimately,

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[96]Christie, *supra* note 89 at 5-6 discusses some of the implications of new kinds of works, including "multimedia" and "virtual reality" works, for concepts of authorship in copyright law. He concludes that, "a new concept of authorship may be required for copyright law in the digital era."

complex ways, copyright must remain responsive to the requirements of technological evolution, on the one hand, and international expansion to include developing countries and other "new" groups, on the other. Law reform and the ongoing development of copyright concepts should ultimately aim at a simplicity and structural elegance which will allow copyright to maintain its practical importance and usefulness.[97]

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[97]Christie, *ibid.* at 527-30 makes some suggestions towards "a tentative framework for a new, simplified law of copyright." He identifies the simplification of the subject-matter of copyright and the content of the right, itself, as being two feasible areas of basic reform and re-conceptualization.

Chapter IV

Moral Rights in Developing Countries: The Example of India

Like most developing countries, India faces two basic challenges in relation to its copyright law. First, to the greatest extent possible, Indian copyright law must promote public access to information and knowledge. The Indian public requires access to both foreign and domestic works for scientific, educational, cultural, and intellectual development. The broad availability of information and knowledge is essential, not only for industrial growth, but also, for the promotion of literacy, in the broadest sense of the word.

The second objective which Indian copyright law must fulfil is the promotion of domestic cultural activity. Copyright law can favour the growth and development of artistic and intellectual activities within India. It can also contribute to the protection, and publicizing, of India's existing cultural heritage, in both its material and intellectual forms. In order to accomplish this objective, Indian copyright law must succeed in accommodating the range of interests associated with a diversity of cultural forms, both ancient and modern.[1]

Ploman and Hamilton draw attention to these features of the Indian cultural scene, which are common to many developing countries, but which are particularly prominent in the Indian context. They observe:

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[1]It is interesting to note that India's Hindi film industry is the largest film industry in the world. It is known as the Hollywood of Bombay, or "Bollywood." This author would argue that the name is an effective indication of the kind of quality which the popular film industry in India aims for, and is successful in achieving.

> There is thus a great variety of expression from the most traditional to the most modern. This mixture and juxtaposition of the traditional and the modern would by itself pose a number of specific copyright problems. At the same time, the development needs of the country require access to and wide dissemination of intellectual works, particularly scientific and technical. As a result, India's attitude towards intellectual property rights has to take into account the need to promote and encourage indigenous creation of expression in both the traditional and the modern sector, and also to provide for an active public role in the widespread dissemination of intellectual property. Indian copyright policy might therefore be seen as founded on two basic principles: encouragement of authorship through protective copyright, and provision of safeguards against undue barriers to the exploitation of works.[2]

In a more general sense, the basic policy objectives of copyright law are represented, in their most extreme forms, in the situations of developing countries. The two purposes of copyright law which are universally recognized are the protection of the authors of intellectual creations, on the one hand, and the promotion of the dissemination of ideas, knowledge, and information, on the other. Copyright law in developing countries requires a recognition that these policy objectives, rather than acting as competing bases for copyright protection, are, in fact, two facets of a single goal. It is apparent that authors have an interest in the broad dissemination of their ideas, and in having access to leading intellectual and artistic works. At the same time, the public has an important interest in maintaining the best possible quality of information and knowledge in society, by promoting the accuracy and reliability of reproductions and adaptations, and by cultivating an attitude of respect towards intellectual endeavour. In practice, however, how can these policy objectives be made to work together effectively?

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[2]E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge and Kegan Paul, 1980) at 132.

This is the pragmatic problem which Indian copyright law attempts to address.

The area of moral rights is, in a sense, the meeting point for these two sets of interests. Moral rights provide a valuable tool for protecting authors' interests in their work, and perhaps, for cultivating the cultural phenomenon of authorship in developing countries. However, moral rights protections involve additional restrictions on the use of copyrighted works. They also impose new risks on use. In particular, moral rights introduce an important element of risk into the activities of translating and adapting copyrighted works into new languages and media.

The functions of translation and adaptation generally have a greater importance in developing countries than in Western countries, not only in order to improve public access to foreign works, but for cultural exchange within the country. This is particularly true in the case of India, which is probably one of the most culturally diverse nations in the world.[3] In contrast to the relatively homogeneous countries of Western Europe, translation and adaptation in India, far from being at the periphery of creative activity, are the essence of creative development.[4] Indeed, this has been the case in India for

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[3]Ploman & Hamilton, *ibid.*, point out that "India not only is one of the world's most populous countries but also possesses one of the longest and most varied cultural traditions in the world.... The range of cultural expression is wider than in the more homogeneous industrialized countries." Indeed, in the period leading up to independence, one eminent scholar of Indian literature referred to the scarcity of translations of Indian literary works into Indian languages as a situation of "mental *purdah.*" See K.R. Srinivasa Iyengar, *Literature and Authorship in India,* with an introduction by E.M. Forster, P.E.N. Books, ed. Hermon Ould (London: George Allen & Unwin, 1943) at 10-11.

[4]See Srinivasa Iyengar, *ibid.* on the importance of translation for Indian cultural unity.

millennia, as a consideration of social and literary phenomena such as the Ramayana demonstrates.[5]

Copyright law in India, as in many developing countries, additionally faces the problem of enforcement. The costs associated with litigation, and the time involved in obtaining an authoritative judicial decision, are major obstacles to the effectiveness of the courts in developing copyright principles. At the same time, the governments of developing countries often represent a major concentration of power and resources, and they are often the ultimate de facto authority on cultural issues. Government corruption and the government's capacity for violence have a serious impact on cultural development, and are realities which must be taken into consideration in the cultural sphere[6]. At the

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[5]The Ramayana is one of two celebrated ancient epics in Sanskrit, which is ascribed to the authorship of Valmiki, but is believed to incorporate, directly and indirectly, ancient traditional knowledge and folklore. The Sanskrit text has been adapted into most of India's regional languages by leading classical poets. These adaptations are not only translations of Valmiki's text into regional languages, but represent intense creative efforts to recreate the Ramayana story in the cultural and historical context of the region. Examples include the Kambar Ramayanam of Kamban in Tamil, and Tulsidas' Ramayana Manaćarita Manas in Hindi. The diffusion of the Ramayana throughout India was also associated with the development of a movement in Indian history known as *bhakti,* which represented a revolutionary new understanding of spirituality in terms of a direct relationship between the individual and the Divine Being, and which produced a number of remarkable minds in Indian philosophy, literature, and music. For a detailed discussion of the growth and development of the *bhakti* movement, see R. Thapar, *A History of India,* vol. 1 (Baltimore: Penguin Books, 1966) at 185-93, 304-10.

[6]For example, government power can affect artists and intellectuals through the practices of censorship and bribery. Fundamentally corrupt governments can act even more drastically against artists, as the killing of the Nigerian writer, Ken Saro-Wiwa, illustrates. It is a grim and enduring paradox that, while government policy often fails to recognize the value of culture and its creators, states are quick to perceive the dangerous power of literary and artistic work over public opinion, values and behavior.

same time, the relative power of cultural industries can present a stark contrast to the weakness of the individual author in developing societies. For example, the Indian film industry is a wealthy and powerful force for any author to confront.[7]

Indian copyright law attempts to take into consideration the special powers and abilities of the government in relation to matters of intellectual property. A consideration of Indian jurisprudence in this area also reveals an awareness among Indian judges of the special role of government in relation to intellectual property.[8] As Ploman and Hamilton observe:

> Distinguishing Indian law from European and Anglo-American legislation are several provisions that, under certain circumstances, allow the government to play an active role in encouraging the exploitation of needed intellectual property.[9]

A. Traditional Approaches to Copyright and "Moral Rights" in India

The problem of "literary theft" has long been recognized in Indian culture. Its widespread occurrence is documented in writing as early as the seventh century. It has been the subject of both complaint and investigation by Indian poets and philosophers of aesthetics. For example, Anandavardhana, a ninth-century poet, undertakes a detailed analysis of this phenomenon, identifying three distinct categories of theft, with only the

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[7]One of the interesting features of the *Mannu Bhandari* case, which is discussed below, was the author's success in taking on the Hindi film industry: see *infra* note 63 and accompanying text.

[8]Writing in 1988, Ramaiah points out that, "although the present Copyright Act was passed in 1957, Indian case law has yet to be developed on many of its provisions." See S. Ramaiah, "India," in *International Copyright Law and Practice,* ed. P. Geller and M. Nimmer (New York: Matthew Bender, 1988) at IND-10.

[9]*Supra* note 2 at 133.

last of the three, "the similarity between two individuals" being "permissible" conduct for authors.[10] Moreover, in Indian tradition, the author was believed to have rights and interests in his ideas which were equivalent to his interests in the final work. As Krishnamurti points out, plagiarism in tenth-century India was defined as "an appropriation by a writer of words *and ideas* - I emphasize, and ideas - from the work of another and passing them off as his own."[11]

1. Legal Approach to "Literary Theft"

In spite of the common occurrence of literary theft, and the analytical treatment of the problem by leading scholars and poets from ancient times, the problem was never dealt with by legal authors as a matter of law. A characteristic feature of the Indian cultural tradition is its rich and highly developed legal tradition, based on Sanskrit texts and treatises on law. The fact that the problems of appropriation and exploitation faced by literary and artistic authors are not considered by ancient legal scholars is puzzling. It also suggests that the rights, interests, and obligations of authors, in traditional Indian society, were not matters of law, at all.

Indeed, it is commonly believed by Western scholars that the traditions of the

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[10]See T.S. Krishnamurti, "Copyright - Another View " (1968) 15:3 Bull. Copyright Soc'y 217 at 218 for a description of Anandavardhana's approach. However, Krishnamurti does not explain what is meant by "permissible" - whether similarity was aesthetically acceptable, or whether it was allowed on grounds of social acceptance. A discussion of Anandavardhana's role in the development of aesthetic philosophy in India can be found in S. Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (New Delhi: Sterling, 1977) at 10-11. Pandit identifies his main contribution as lying in his recognition of the special and distinct quality of aesthetic experience.

[11]Krishnamurti, *ibid.*; he cites Rajashekhara, another poet.

developing world do not recognize the issues which flow from the appropriation of literary and artistic works in legal terms. However, this perspective is basically flawed. The societies of developing countries are aware of the value of knowledge in all its forms, often, like India, in keen and sophisticated ways. However, the way in which this awareness manifests itself depends on the social circumstances of the country. As Gana points out:

> [T]he mistaken premise of [United States] negotiations with China and...with most other developing countries is that these countries lack intellectual property laws.
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> A cursory study of indigenous approaches to the protection of intellectual goods reveals that most cultures recognized the material value engendered by the results of intellectual labor. The way that value is protected, however, differs significantly from what modern categories of intellectual property laws provide.[12]

With respect to India, Krishnamurti points out that the absence of discussion among legal authors of issues arising from the misappropriation of knowledge is a matter of culture.[13] In keeping with Indian tradition, Krishnamurti identifies the value of "*dharma,*" which may be loosely translated into English as "duty," as the basic value of Indian civilization. Society and the creators of artistic and intellectual works have mutual

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[12]R.L. Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735 [hereinafter "Prospects"] at 765-66.

[13]See Krishnamurti, *supra* note 10 at 219-24. Gana, citing Bickel, also makes the interesting point that the forms in which law manifests itself ultimately reflect social values: "Intellectual property law, like other law 'is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values.'" See R.L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 Denv. J. Int'l L. & Pol'y 109 at 112.

obligations towards one another. The structure of Indian society reflects this basic understanding of the relationship between society and its creators, and it has not been necessary for Indian thinkers to define this relationship in terms of written law.[14] As Krishnamurti points out:

> It was the duty of the State and the people to look after the authors. That one side might stray from its duty or its obligations was not considered sufficient justification for the other to give up its duty. So far as I understand, it was more or less the same in Europe till about three centuries ago.[15]

2. The Relationship between Artists and Society

Krishnamurti limits his discussion of the impact of culture on concepts of "copyright" to *dharma*. However, the Indian social ethos surrounding art played a key role in defining the way in which authors' rights were dealt with in ancient Indian society. Hindu thought traditionally attributes a value to art which is more than aesthetic, in the sense of the enjoyment of beauty, and is fundamentally concerned with metaphysical values. The Hindu view of art implies a certain understanding of the relationship between art and society, and the social role of the artist. The functions of the artist are recognized as being concretely useful to society, and stand in contrast to the potential elitism and emptiness of purpose in the affirmation that art's value lies in its "uselessness."[16] As Pandit observes:

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[14]See Krishnamurti, *supra* note 10 at 220-21.

[15]*Ibid.* at 220.

[16]This point is made by Pandit, *supra* note 10 at 128-35, with reference to the view of "art for art's sake."

> [T]he true nature and purpose of art... is [as] a means of relating human life to the creative cosmic life, to the essential vitality and movement which underlies the universal system. The artist discovers this universal creative process by an actual participation and essential identity of experience.[17]

This view of art implies a focus on the work rather than the artist. In a subtler way, the experience created by the work represents the essence of artistic achievement, rather than the physical object, per se. Seen from this aesthetic perspective, the reasons why the Indian concept of appropriation extended to ideas become apparent. At the same time, it is clear that the protection of expressions and ideas occurred through artistic and social conventions, arguably a distinct form of "law" in themselves. As Coomaraswamy observes:

> Themes are repeated from generation to generation and pass from one country to another; neither is originality a virtue nor "plagiarism" a crime, where all that counts is the necessity inherent in the theme. The artist as maker, is a personality much greater than that of any conceivable individual; the names of even the greatest artists are unknown.[18]

A closer examination of the complex Indian understanding of law reveals that authors' rights and obligations were a matter of "law" in traditional Indian society. Modern and traditional societies are widely divergent in their understanding of the place of culture in society, both in relation to cultural property and with respect to the artists and

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[17]*Ibid.* at 111; he goes on to relate this Indian concept of the creative process and the artistic work to Chinese thought, and quotes Kuo Jo-hsu, a 12th-century Chinese painter, who affirms that, "The secret of art lies in the artist himself."

[18]Quoted in Pandit, *supra* note 10 at 134. See also R. Oliver, *Communication and Culture in Ancient India and China* (Syracuse: Syracuse University Press, 1971) at 21, who points out: "Strikingly and significantly, early Indian history is the history of societies rather than persons. Even the great literary and philosophical masterpieces are all anonymous. Not who said it, but what was said - this was what mattered."

artisans who create it. Law, in the form of legislation, adjudication, and social custom, is an embodiment of these relationships.

The relationship between artists and society has traditionally been one of mutual dependence and, potentially, mutual suspicion. Artists play a fundamental role in developing social values, since their works are essentially reflections of the societies in which they were produced. Both the laudatory and the critical aspects of artists' work are of value to society. At the same time, artists are dependent on society to value their work and to participate in it as audience, spectator, and critic.

Law is the main mediator between artists and society. It accomplishes this function in a number of ways, from allowing censorship to protect society from the excesses of art, to institutionalizing the right of artists to express their ideas beyond the normal reach of social values and public comprehension. In Western society, legislation and case law in an adversarial context reflect the traditional tensions in the relationship between artists and society. In contrast, the role of artists in traditional cultures is somewhat different, due to a degree of common awareness of the social needs filled by the arts, and a recognition of the social value of the artistic function. As Pandit points out:

> The traditional Indian theory of art assumes an integral relation between art and society.... The point of difference between this approach... and other art theories lies basically in its refusal to isolate art from human purposes and to make a distinction between the utilitarian and the beautiful.... To seek for art a function away from society and to try and create beauty without meaning and utility is to reduce art to a mere superficiality . By introducing art to serious living, the quality of disciplined spontaneity and organised pleasure is brought to everyday life and work is transformed from drudgery into a creative fulfilment. The primary function of art in society is to effect this transformation and thereby to help

integrate the social order.[19]

Perhaps as a result of this difference in the perception of the relationship between artists and society, traditional cultures, including those with a long tradition of written law, such as India, often maintain a degree of flexibility and informality in their systems of law, particularly in relation to art. Notably, social custom and traditional rules are an important source of "law" relating to the arts in these societies. Pandit observes:

> As a tangible phenomen[on], art is subject to the laws and rules of society, and its making is not merely an occasion for aesthetic contemplation, but does something for human needs.... [T]he outward restrictions imposed upon the artist are not designed to stultify and choke him, but rather to provide the guidelines within the framework of which he can achieve a more profound expression. The goal of art is not a vagrant spontaneity but a disciplined expression. Freedom in art as in any other human activity is achieved, when the universal principles are understood by the subject so completely that their manifestation in a specific form becomes effortless and spontaneous.[20]

3. Indigenous Theories of Copyright

A brief consideration of pre-colonial theories of the arts, creative endeavour, and the nature of creators' rights in their creation reveals some important differences from modern copyright concepts. Modern copyright is a product of the historic rise of individualistic theories of creativity, an essential aspect of Romantic ideals of authorship and original genius. The close link between the Romantic concept of authorship and the ever-increasing possibilities for public access to knowledge during the eighteenth century

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[19]Pandit, *ibid.* at 122-23, 132-33.

[20]*Ibid.* at 133-34.

lies at the heart of the historical development of the arts as professional fields.[21] Copyright law reflects the individual author's attempt to secure the economic returns from his work by controlling its dissemination.[22]

In a culture which did not conceive of the author in primarily economic and professional terms, however, the problem of the misappropriation of knowledge was dealt with as a matter of ethics, custom and convention. The focus of thinking on "intellectual property" was on the work, rather than the identity of the author, allowing an important degree of diversity to flourish in relation to artistic and literary forms. This conceptual orientation also favored the development of different forms of authorship, including group and community authorship.[23]

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[21]The historical development of the concept of the author as an independent, original genius is traced by M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 Eighteenth-Century Studies 425 at 427-41. In her study of the early stages of German Romanticism, Woodmansee emphasizes the new potential for the practice of the arts as a profession arising from the growth of literacy during the eighteenth century. It is interesting to note that the concept of the artist as original genius, preeminent in society and almost god-like in his abilities, depended on the democratization of culture for its existence.

[22]*Ibid.* See also M. Foucault, "What Is an Author?" in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) 101 for a discussion of the "individualized" "author function" from a more abstract point of view.

[23]An interesting example of culture where community authorship appears to have been the basic model of creativity is Bali. Balinese culture shares some important features with Indian culture, including the emphasis on rules and traditions of craftsmanship, but, in contrast to Indian thinking, it does not recognize the individual or proprietary aspect of creative knowledge, at all. As Ploman & Hamilton, *supra* note 2 at 5 observe, "In the community-oriented Balinese culture, artistic property cannot exist; the expression of any new idea is there to be used by all." This perspective on Balinese traditions provides an interesting background to Indonesia's decision to withdraw from the Berne Convention in 1959.

These considerations also demonstrate some interesting similarities between modern ideas of copyright and Indian cultural traditions. Notably, moral rights, which emphasize the integrity of artistic and literary works and the preservation of an accurate historical context for these works share, perhaps paradoxically, the fundamental cultural concerns of Indian tradition. No doubt, this is also the case in other developing countries which share India's cultural mixture of individual and community values.[24] This juxtaposition of values is also at the heart of the extensive acceptance of moral rights in the Indian context, especially by the judiciary.

Indian judges are well aware of the difficulties of situating a modern framework for copyright protection in Indian tradition, and at the same time, of the necessity of doing so for the establishment of viable legal and social practice. The Indian ambivalence in relation to copyright concepts is pointed out by Ramaiah who offers contrasting quotations from two Indian courts on the judicial approach to copyright. While the High Court of Madras stated, in 1959 that "India was and continues to be a member of the Copyright Union and in that sense the conception of copyright is not repugnant to her ideas," a Bombay court later determined that, "if historically some roots of this legislation are to be

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[24]For example, Mali's copyright legislation includes moral rights in its basic definition of copyright: Art. 29 of Mali's *Copyright Statute,* under "Nature of the Rights," provides that, "Copyright includes attributes of an intellectual, moral and economic nature." Art. 30 goes on to define " Attributes of an intellectual and moral nature" as being "imprescriptible and inalienable." See *Copyright Statute: Ordinance Concerning Literary and Artistic Property* (No. 77-46CMLN), July 12, 1977.in Copyright Laws of the World Supplement 1979-1980 [date of entry into force, July 15, 1977]. The official French text is published in the *Journal Officel de la République du Mali,* No. 525, of August 1, 1977.

found in English statutes, they may be cited as an aid to thinking."[25]

B. History of Indian Copyright Legislation

Copyright in India is governed by the *Copyright Act, 1957.*[26] Like copyright legislation in other former colonies of Britain, the *Copyright Act* has its origins in British copyright law. India has also been a member of the Berne Convention since its inception, first as a Dominion of Great Britain, and later, as an independent country.[27] Indian copyright law has consistently provided protection for the moral rights of authors.[28]

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[25]*Blackwood & Sons* v. *Parasuraman,* (1959) A.I.R. (Mad. 410) at 417, and *J.N. Bagga* v. *A.I.R. Ltd.,* (1969) A.I.R. (Bom. 302) at 308, respectively, quoted in Ramaiah, *supra* note 8 at IND-10.

[26]Act 14 of 1957 [hereinafter *Copyright Act*].

[27]See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Center for Commercial Law Studies, Queen Mary College, 1987) at paras. 11.3-11.5; he describes the decision which faced newly-independent nations to continue as Berne members, or to withdraw from the Convention. India reaffirmed its membership in 1958: see *ibid.* at 594, n. 16 for a list of former European colonies and when they joined Berne.

[28]Moral rights have been protected in the Indian *Copyright Act* from its inception in 1957: see S. Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale - Etude de droit comparé,* t. 1, *Première Partie: L'Evolution historique et le Mouvement international* (Stockholm: P.A. Norstedt & Söners Förlag, 1967) at 419-20, and Ploman & Hamilton, *supra* note 2 at 133. Students of Indian intellectual property law are not always aware of this fact; for example, one author claims that, "Indian copyright legislation did not protect such non-economic [moral] rights before 1994. But the *Copyright Act* was amended in December 1994 and such moral rights are protected." See B. Debroy, "Intellectual Property Rights: Pros and Cons" (1998) 48:4 Social Action: A Quarterly Review of Social Trends 349 at 358. In contrast, moral rights were not protected in the United Kingdom *Copyright Act 1956.* The protections traditionally available under British law for authors' non-economic interests in their works are tort actions, such as "passing off," defamation, and unfair competition: see Ricketson, *supra* note 27 at paras. 8.3-8.4.

1. British Copyright Statutes

The first British statute which was supposed to apply to India was the *Literary Copyright Act, 1842,* which ostensibly applied to all the British Dominions.[29] Because of doubts as to the applicability of British statutes to territories administered by the East India Company, an *Act* was passed by the Governor- General of India in Council in 1847. This *Act* specifically provided rules of copyright for India.[30] In the words of one commentator, the purpose of the *Act* was to "encourag[e]... learning in the Territories subject to the Government of [the] East India Company by defining and providing for the enforcement of copyright therein."[31] Under the *Act* of 1847, the duration of copyright protection was the life of the author and seven years after his death, or forty-two years, whichever term was longer.[32]

The *Act* of 1847 was replaced in 1914 by the *Indian Copyright Act.*[33] The *Indian Copyright Act* essentially adopted the *British Copyright Act, 1911.* However, it provided some modifications which were thought to be appropriate in the Indian context. Notably, Section 4 of the *Indian Copyright Act* provided that the exclusive right to translate a work

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[29]5 & 6 Vict., 45.

[30]Act XX of 1847 [hereinafter the *Act*].

[31]R.R. Dadachanji, *Law of Literary and Dramatic Copyright in a Nut-Shell* (Bombay: Rustom R. Dadachanji, 1960) at 7.

[32]See Ramaiah, *supra* note 8 at IND-8.

[33]Act III of 1914; passed by the Governor-General of India in Council.

would subsist for only ten years following first publication.[34] This provision would not apply if the author, or a person authorized by him, published a translation of the work into any language within a ten-year period.[35]

The *Indian Copyright Act* of 1914 continued to be law in India until the passage of the *Copyright Act* of 1957. Several factors made it important for independent India to have a new copyright statute. These included India's membership in the Berne Copyright Union as a newly-independent country, since the current revisions to the Berne Convention required levels of copyright protection which the 1914 *Act* did not satisfy.[36] Technological and social developments, which were bringing about increased access to intellectual creations, as well as a "growing public consciousness of the rights and obligations of authors," also called for a new approach to copyright protection.[37] Finally, the practical difficulties of applying the 1914 *Act* were additional factors mandating change.[38]

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[34]See Ramaiah, *supra* note 8 at IND-9.

[35]*Ibid.*

[36]*Ibid.*: the legislation was also inadequate to meet the standards of the new Universal Copyright Convention, of which India was a member.

[37]*Ibid.* Ramaiah quotes from the Statement of Objects and Reasons appended to the bill leading to the enactment of the new *Copyright Act*.

[38]*Ibid.*

2. The Indian *Copyright Act* of 1957[39]

The *Copyright Act* of 1957 introduced major innovations in several areas. It extended the term of copyright protection to the lifetime of the author and fifty years after his death. It also dispensed with the limitation on translation rights imposed by the *Act* of 1914. In addition, the *Copyright Act* established a number of organs concerned with the administration of the *Act,* including a Copyright Office, a Registrar of Copyrights, and a Copyright Board. The Copyright Board was empowered to adjudicate disputes related to public performance, and also, to grant compulsory licences, including those involving translation rights.[40] At the same time, the *Act* provided that the registration of copyright was not a prerequisite to infringement proceedings.[41]

The *Copyright Act* of 1957 continues to govern copyright in India to the present time. However, various amendments to the *Act* have been made. These include a series of amendments in 1983, which sought to make Indian copyright law compatible with the Paris revisions of the Berne Convention; amendments in 1984 to make the *Act* applicable to video films and computer programs; and amendments in 1992 which extended the duration of copyright protection to the life of the author and sixty years after his death.[42]

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[39]*Supra* note 26.

[40]See Dadachanji, *supra* note 31 at 9.

[41]See Ramaiah, *supra* note 8 at IND-14.

[42]See P. Narayanan, *Law of Copyright and Industrial Designs,* 2d ed. (Calcutta: Eastern Law House, 1995) at para. 1.32, c. 9. The term of sixty years runs from the date of the author's death or from the date of first publication, depending on the nature of the work.

A major series of amendments to the *Copyright Act* was undertaken in 1994. Among the most important of these are the introduction of performers' rights, and the creation of a *droit de suite,* which allows authors to share in the proceeds from resales of original objects and manuscripts.[43] The 1994 amendments also provide copyright protection for composers of Indian classical music. Protection for composers of Indian music was not available under previous legislation, which required music to be written down before it could be protected. However, as a general rule, composers in India do not write down their compositions in a form analogous to Western music.[44] The 1994 amendments also restrict the scope of protection for moral rights.

Currently, Indian copyright law provides the basic degree of protection for authors required under the Paris revision of the Berne Convention. In some cases, Indian copyright protection exceeds the Berne requirements. Moreover, in spite of the Anglo-Saxon origins of Indian copyright legislation, Indian law includes many of the most modern concepts in Continental copyright law.[45] As Ramaiah argues, "With . . . [its current] amendments, Indian law incorporates the most advanced copyright concepts."

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[43]See *ibid.* at paras. 1.29-1.33 for a detailed list of the changes introduced into the *Copyright Act* in 1994, and for a description of the changes made by the *Copyright Cess Bill, 1992.*

[44]*Ibid.*

[45]Ploman & Hamilton, *supra* note 2 at 133 draw attention to "the Indian utilization of a wide variety of copyright principles in order to formulate a law uniquely suited to its needs." They observe that Indian law includes both Anglo-Saxon and Continental concepts of author's rights.

C. Treatment of Moral Rights in the *Copyright Act, 1957*[46]

Moral rights are protected by section 57 of the Indian *Copyright Act,* under the heading of "authors' special rights." While moral rights protection in India is based on the understanding of moral rights set out in the Berne Convention, Indian law has also developed distinctive features which respond to Indian cultural realities.

1. Relationship to the Berne Convention

It is apparent that section 57 is based on Article 6*bis* of the Berne Convention. Like Article 6*bis*, section 57 provides authors with protection for the moral rights of attribution and integrity.[47] It does not explicitly provide for the protection of other moral rights. While a right of publication appears to be implicit in the Indian *Copyright Act*, an author does not have the right to withdraw a published work from public availability, in recognition of an overriding public interest in continued access to the work.[48]

The Indian legislation embodies some interesting interpretations of the rights set out in Article 6*bis*. These features of section 57 reflect a cultural perspective on moral

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[46]*Supra* note 26.

[47]S. 57(1) of the *Copyright Act* protects the right of attribution, while sub-sections 57(1)(a) and (b) provide for the protection of the right of integrity.

[48]But see P. Anand, "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 Copyright World 35 at 37: he says that "[t]he author may also exercise other rights, such as the right to withdraw from circulation copies of the work under a contractual provision." While the right of withdrawal enjoys only a limited recognition even in Western countries, Indian copyright law includes compulsory licensing provisions to promote the broadest possible public availability of copyrighted works: see Ploman & Hamilton, *supra* note 2 at 133-34. India is typical of developing countries in this respect: see Ricketson, *supra* note 27 at para. 11.71.

rights that is influenced both by Anglo-Saxon and Continental approaches, but also reveal some innovations in thinking which appear to be inherently Indian.

2. Scope of the Right of Integrity

Section 57(1)(a) allows the author to assert a violation of his right of integrity in relation to "any distortion, mutilation or other modification of the...work." In contrast to common interpretations of Article 6*bis*, the language of section 57(1)(a) clearly indicates that an integrity violation on the basis of these acts does not depend on prejudice to the author's honor or reputation. Rather, section 57(1)(b) protects the author against "any other action in relation to the...work which would be prejudicial to his honor or reputation."[49]

The scope of protection for the right of integrity under section 57 significantly exceeds the extent of the right of integrity in Article 6*bis*. Section 57 appears to support the theory that any distortion, mutilation or modification of a literary artistic work is, in itself, prima facie evidence of prejudice to the author's honor or reputation. In this sense, section 57 follows the strongest approach to the right of integrity, typically associated with France, which "treat[s] it as an absolute right against alteration."[50] The Indian legislation

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[49]It is interesting to note that the structure of s. 57 is consistent with the traditional importance accorded to the work, independently of its creator, in Indian thinking on the arts. On the relationship between the artist and his creation in Indian thought, see Pandit, *supra* note 10 at 134 and Coomaraswamy, *supra* note 18.

[50]See S. Ricketson, *The Law of Intellectual Property* (Melbourne: The Law Book Company, 1984) at para. 15.57, n. 53 [hereinafter *Intellectual Property*]; this view is particularly French. For example, German and Italian law both provide that the author must provide "proof of some identifiable injury" to his honor and reputation.

implicitly allows the author to be the ultimate judge of quality in relation to his own work. Section 57 does not appear to support a defence to claims of integrity violations based on the argument that the changes to the author's work are an improvement to the original.

3. Independence from Economic Rights

In keeping with the Berne Convention, section 57 recognizes authors' moral rights to be "independent" of their economic rights. An author continues to be able to assert his moral rights even after the assignment of his economic rights, either wholly or partially, in his work.[51] However, Indian copyright legislation does not explicitly address the question of whether moral rights may be transferred or waived. It is generally accepted that section 57 allows an author to waive his moral rights.[52]

4. Term of Moral Rights Protection

Section 57 of the Indian *Copyright Act* does not set out a fixed duration for moral rights protection. However, section 57(2) provides for the exercise of moral rights claims by the legal representatives of the author. Since this provision deals with the assertion of moral rights after the author's death, the moral rights in section 57, by implication, continue to be protected after the author's death.[53] Article 6*bis* of the Berne Convention provides that, where full moral rights protection is available, it must continue for at least

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[51]*Copyright Act, supra* note 26, s. 57(1).

[52]Anand, *supra* note 48 at 36 argues that, "[m]oral rights under Indian law are not transferable, although under an agreement an author may waive his rights under section 57."

[53]See Ramaiah, *supra* note 8 at IND-46, and Strömholm, *supra* note 28 at 420.

the duration of the author's copyright. Until 1992, copyright protection was available in India for the author's lifetime and fifty years after his death, the term of protection stipulated in Article 7 of the Berne Convention. In accordance with the 1992 amendments to the *Copyright Act*, moral rights protection in India, like copyright, has been extended to the author's lifetime and sixty years after his death.[54]

It may also be argued that Indian copyright law leaves open the possibility of perpetual moral rights protection. Perpetual protection is not openly rejected by Indian law. Moreover, this question may deliberately have been left open by the specialists who drafted the Act, in order to allow the Indian courts to decide the issues associated with perpetual protection on a case-by-case basis, and to develop a coherent jurisprudence related to the term of moral rights protection. In the case of copyright in works of outstanding cultural importance, the perpetual protection of moral rights would provide a valuable means of supervising the treatment of these works. Perpetual protection could help to ensure the maintenance of their integrity, and of the integrity of the historical, cultural, and social record which they represent. However, the question of who should exercise perpetual moral rights is an important one. Should these interests and obligations be entrusted to the author's personal descendants, his legal representatives, cultural organizations, or the government?

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[54]See *Copyright Cess Act, 1992* (Bill No. 95 of 1992) [hereinafter *Copyright Cess Act 1992*], reproduced in Narayanan, *supra* note 42, Appendix 12 (at 615-16).

5. Rights of Legal Representatives

Section 57 on author's special rights includes an unusual provision in paragraph (2). Section 57(2) states that the author's legal representatives may assert his moral rights on his behalf, but that they may not "claim authorship of the work." The meaning of this section is somewhat obscure. The provision appears to draw a distinction between the assertion of the author's moral rights by his descendants or legal representatives on his behalf, and the capacity of these agents to claim authorship of his work.

It does not seem logical that this provision would restrict the ability of the author's descendants or representatives to assert attribution rights on his behalf, after his death.[55] Strömholm identifies this problem as the question of whether the author's descendants act in their own name, or as agents of the author. However, a determination of the legal or policy reasons for making this distinction, in relation to moral rights, would require extensive analysis, not only of Indian copyright law, but also, of Indian law and traditions related to inheritance. As Strömholm observes:

> Quant à la règle suivant laquelle le droit de revendiquer la paternité de l'oeuvre ne passe pas aux héritiers, son sens exact paraît dépendre de la réponse qu'il convient de donner à la question de savoir si les héritiers sont censés agir en leur propre

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[55]Strömholm, *supra* note 28 at 420 points out that, "il serait singulièrement arbitraire de refuser aux héritiers le droit de défendre la paternité du *de cujus* en leur laissant le droit de s'opposer aux modifications, car si celles-ci deviennent souvent désirables après la mort de l'auteur,...l'usurpation de la paternité ne paraît pas justifiée par le fait que le créateur de l'oeuvre est mort."("It would be exceptionally arbitrary to deprive the descendants of the right to vindicate the paternity of the *de cujus* while allowing them to retain the right to oppose modifications [of the work]...While modifications often become desirable after the author's death,...taking over the right of paternity does not seem to be justifiable on the grounds that the creator of the work is dead.")

nom en intervenant contre les atteintes portées au droit moral ou s'ils sont considérés en quelque sorte comme des mandataires. Pour trancher cette question, il faudrait posséder des informations précises sur la conception indienne du droit des sucesseurs *mortis causa*. Si la première alternative est la correcte, la disposition est parfaitement logique: les héritiers ne peuvent pas réclamer *pour eux* la paternité de l'oeuvre. Dans cette hypothèse, il paraît possible de leur accorder, en revanche, le droit de s'opposer au moins à certaines atteintes portées au droit à la paternite et notamment d'intervenir contre la suppression du nom de l'auteur sur les exemplaires d'une oeuvre publiée pendant la vie de son créateur sous sa signature...[56]

6. Remedies

Section 57 makes specific remedies available to the author in case of a violation of his moral rights. Paragraph (1) provides that the author has "the right to restrain, or claim damages in respect of" any violations of his integrity interests in his work. Indian courts have the authority to fashion both corrective and compensatory remedies, an important freedom in view of the nature of the damage which a moral rights violation may inflict on the author or his work.

7. Current Amendments to the *Copyright Act*

The Indian *Copyright Act* has gone through two major series of amendments during the last decade. These changes were enacted by the *Copyright Cess Act 1992* and the

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[56] "As for the rule which provides that the right to assert paternity of the work may not be exercised by the [author's] descendants, its precise meaning appears to depend on the proper answer to the question of whether the descendants are perceived to be acting in their own capacity against offenses to the moral right, or if they are considered to be acting as representatives [of the author]. To resolve this question, it would be necessary to have exact information on the Indian concept of the right of successors *mortis causa*. If the first possibility is correct, the provision is perfectly logical: the descendants cannot claim *for themselves* paternity of the work. In this case, it would appear to be possible to allow them, on the other hand, the right to oppose at least some attacks on the right of paternity and, notably, to intervene where the author's name does not appear on copies of a work published during his lifetime under his name." *Ibid.* at 420.

Copyright (Amendment) Act 1994.[57] Amendments to the *Copyright Act* include three important changes to the moral rights provisions of section 57. First, the new moral rights provision provides that the copying or adaptation of computer programs for certain purposes will not lead to a violation of the author's moral rights.[58] Secondly, the explanatory notes to the new section 57 provide that failure to display a work, or to display it in accordance with the author's wishes, will not constitute a violation of the author's moral rights.[59] As Anand points out:

> The natural consequence [of this amendment is]... that the [artist]... would be unable to prevent his work from being displayed in an environment alien to the one for which it was created. This change has been criticized for being insensitive to the rights of artists by various artists' forums in India.[60]

Finally, the amendments to section 57 include a major change to the structure of the section, making the moral right of integrity applicable only to situations where the treatment of the author's work causes prejudice to his honor or reputation. This amendment makes the coverage of section 57(1), in relation to the right of integrity,

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[57]*Supra* note 54 and Act No. 38 of 1994, respectively [hereinafter *Copyright (Amendment) Act 1994*].

[58]S. Ahuja, "Latest Amendments to the Indian Copyright Act" (1994) 44 *Copyright World* 38 at 44 points out that this provision seeks to make "debugging" possible without potential copyright and moral rights violations: the provision acts in conjunction with an addition to s. 52 of the *Copyright Act* allowing the copying and adaptation of computer programs as "fair dealing" with computer programs under the Act. For a more detailed description of how s. 57 and s. 52(1)(*aa*) affect each other, see Narayanan, *supra* note 42 at para. 7.10.

[59]See *Copyright (Amendment) Act 1994, supra* note 50, s. 20, reproduced in Narayanan, *ibid.* at 612-13.

[60]*Supra* note 48 at 36.

identical to Article 6*bis*(1) of the Berne Convention.[61]

Through these amendments, the Indian government has attempted to restrict the scope of legislative protection for the moral rights of authors.[62] In this respect, Indian legislative authorities have moved in a somewhat different direction from the Indian courts. Since 1987, India has begun to develop a solid jurisprudence around moral rights issues, and the provisions of section 57, in particular. Indian courts have generally favored strong protection for the moral rights of authors, on a variety of grounds, ranging from the ideological to the economic.

Indeed, amendments to the treatment of moral rights in the *Copyright Act* are, to a significant degree, a reaction to the courts' expansive treatment of moral rights. This apparent tension between legislative and judicial approaches to moral rights is currently the main dynamic driving the development of moral rights in India. While Indian courts appear to see a primary social role for themselves as guardians of civil liberties and individual rights, the government's main concern may well lie with economic policy, and in particular, India's position in the international trading regime. The Indian government may see the expansion of moral rights protection as a potential threat to India's international competitiveness, on two grounds.

On the one hand, India's participation in the Berne Convention and the WTO will

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[61]Also see s. 20 of the *Copyright (Amendment) Act 1994,* in Narayanan, *supra* note 42.

[62]Ahuja, *supra* note 58 at 43 aptly points out that the amendments seek to "scale down the remedies available to authors," particularly with respect to the moral right of integrity.

compel it to extend any moral rights protections which it grants to its own authors to foreign authors, as well. Not only would this restrict Indian access to foreign materials, by requiring Indian users to observe additional precautions when using foreign works, but it might also make India a less attractive destination for foreign investment in creative enterprises, such as film, by increasing the risks associated with these activities in India. On the other hand, the extension of moral rights protection to Indian authors would bring new considerations to bear on a number of economically and culturally important activities within India, such as the making of adaptations of existing works in new media, and the translation of works among regional languages, and into English.

While the concerns which may be at the heart of the Indian government's reluctance to expand moral rights protection are legitimate, the approach of the courts is also firmly grounded in Indian social realities, and may eventually prove to be the more far-sighted view. The process of industrialization in India has seen the development of economically and politically powerful entertainment industries, especially the commercial Hindi-language film industry. Moreover, India, like most countries, has a fascination with the forms of American popular culture, which enjoy increasing prominence in India, perhaps at the expense of traditional cultural perspectives. At the same time, the development of less highly-commercialized activities, such as creative writing in regional languages, is haphazard, and does not appear to enjoy the benefits of governmental support. In upholding moral rights protections, Indian courts have, in a sense, become the champions of individual creative efforts and non-commercial artistic endeavor - arduous and potentially underrated activities in present-day India. Through moral rights, their

focus on the relationship between authors and their works has also allowed them to avoid the pitfalls of attempting to assess artistic quality, in an objective sense, in the courtroom.

D. Judicial Development and Interpretation of Moral Rights

The Indian courts have decided three major cases on moral rights. These are *Smt. Mannu Bhandari* v. *Kala Vikas Pictures Pvt. Ltd.* (1987),[63] dealing with the film adaptation of a novel; *Amar Nath Sehgal* v. *Union of India* (1992),[64] which involved the mistreatment of a sculpture by the Indian government; and *Statart Software Pvt. Ltd.* v. *Karan Khanna,* a case about improvements to a program for computer software.[65]

These three decisions have been reported and discussed by international observers of Indian legal developments, as well as Indian scholars.[66] In these judgments, the courts attempted to develop moral rights doctrine in the Indian context, based on the framework for moral rights protection set out in section 57. In all three cases, the courts' application of section 57 revealed the comprehensiveness and extensive reach of moral rights legislation in India. All three decisions have led to major amendments to the text of section 57.

In view of these considerations, these cases appear to be broadly representative of

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[63](1986), 1987 A.I.R.(Delhi 13) [hereinafter *Mannu Bhandari*].

[64](1992) Suit No. 2074 (Delhi H.C.) [hereinafter *Amar Nath Sehgal*].

[65]This case is cited in Anand, *supra* note 48 at 35-36 [hereinafter *Statart*].

[66]For example, see Anand, *ibid.*, Ramaiah, *supra* note 8, Narayanan, *supra* note 42, who are Indian scholars; see also J. Dine, "Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls" (1995) 16 Mich. J. Int'l L. 545, for an example of an American scholar's writing on Indian law.

Indian national trends on moral rights issues. However, a consideration of these cases raises some interesting questions about the judicial treatment of moral rights in India. For example, all three cases are North Indian cases, and two out of the three cases were decided by the High Court of Delhi. Have moral rights been considered to any great extent by judges in other parts in India, notably, by courts in South India?

The following discussion will be limited to the conclusions which can reasonably be drawn from an examination of these leading cases.[67] In addition, the analysis will consider two more cases on moral rights which have been less widely publicized, but reflect important aspects of Indian moral rights jurisprudence. These are *Ved Prakash* v. *Manoj Pocket Books* (1990)[68] and *Garapati Prasada Rao* v. *Parnandi Saroja* (1992).[69]

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[67]It is extremely difficult to locate more detailed information on the treatment of moral rights in India from outside the country. Some of the dangers facing international scholars who attempt to study Indian law are illustrated by Dine's treatment of Indian copyright law and his discussion of the *Mannu Bhandari* case: see Dine, *ibid.* Dine at 582, n. 111 cites s. 57 to a 1989 source, and goes on to state: "Although the copyright law has since been amended, the moral rights provision has not changed....the law was amended in May 1994 to provide stronger protection for computer software." However, as discussed above, s. 57 was extensively modified by s. 20 of the *Copyright (Amendment) Act 1994,* the same provision which introduced software-related changes: see Narayanan, *supra* note 42 at 612-13 for a reproduction of the section, and of the new s. 57.

[68](1990) Suit No. 1869 [hereinafter *Ved Prakash*], also discussed by Anand, *supra* note 48 at 34-35.

[69](1992) A.I.R. at 233 (AP 230) [hereinafter *Garapati*]; this case is from the South Indian state of Andhra Pradesh, and it is cited in Narayanan, *supra* note 42 at para. 7.10. Due to the impossibility of having access to the All India Reports, the following discussion is based on the detailed reports of these five cases, and the principles which they represent, found in Anand, *ibid.*, Ramaiah, *supra* note 8, Narayanan, *ibid.,* and Dine, *supra* note 66.

1. *Mannu Bhandari:* Inalienability of Moral Rights

In many ways, *Mannu Bhandari* is the seminal Indian case on moral rights, particularly with respect to the right of integrity. Mannu Bhandari is a well-known Indian author of novels in the Hindi language. Kala Vikas Pictures, a production company, purchased the rights to make a film adaptation of one of her novels, entitled, in Hindi, *Aap Ka Bunty.*[70] In the agreement between Bhandari and Kala Vikas, the novelist agreed to allow the director and screenwriter of the film to make appropriate changes to the novel for the production of a "successful" film.[71] Bhandari, however, would still be credited as the author of the original novel.

As production of the film progressed, Bhandari became dissatisfied with the quality of the adaptation of her work. She objected to the film's title, which was changed to "The Flow of Time," the portrayal of the characters, the dialogue, and changes to the ending of the film.[72] She brought a complaint against Kala Vikas, alleging that these changes amounted to a violation of her moral right of integrity under section 57 of the *Copyright Act*. Bhandari and Kala Vikas eventually settled their dispute. However, in view of the "complete lack of precedent in the area," they requested the High Court of Delhi to

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[70]See Dine, *ibid.* at n. 17: he translates the title into an English as, "Your Bunty," where Bunty is the name of the main character in the novel.

[71]See Dine, *ibid.* at 561: he quotes the clause in the contract as allowing "'certain modifications in [her] novel for the film version, in discussion with [her,] to make it suitable for a successful film.'"

[72]These grounds for the author's dissatisfaction with a film are identified by Dine, *ibid.* See also Dine, *ibid.* at n. 144, for a detailed description of what these changes involved.

release its decision.[73]

The High Court supported Bhandari's claim.[74] In doing so, it considered the issues of the extent to which authors' moral rights may be waived under Indian law, the meaning of "modifications" under section 57 of the *Copyright Act*, and the social context which gives author's moral rights their importance in India.

a. Inalienability

In the contract between the producer and the author for the making of the film, Mannu Bhandari had agreed to allow certain "modifications" to her novel in the interest of creating a "successful" film adaptation. The High Court found that Bhandari's contractual consent to some modification of her work did not deprive her of the moral rights protection in section 57. Rather, the terms of the contract for the assignment of copyright must be read in conjunction with the provisions of section 57. As a result, an author's moral rights in Indian law may override the provisions of the contract. In effect, the court suggests that moral rights are generally inalienable under the *Copyright Act*. As Ramaiah

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[73]Dine, *ibid.* Dine describes the details of the settlement: the film producers agreed to remove all references to Bhandari and her novel from the film, and from advertising for the film. Bhandari's copyright in her novel was also released to her. In return, Bhandari would not object to release of the film, or "claim any right or interest" in the film.

[74]See Dine, *ibid.*: in fact, Bhandari was unsuccessful at trial, where the judge found that, "a bad film reflects poorly only on the filmmakers," and not on the original author of the work. Interestingly, the holding of the trial court in Bhandari's case was explicitly rejected by the High Court, which found that distortions in a work of adaptation can also offend the original author's moral rights: see Ramaiah, *supra* note 8 at IND-46. Clearly, the High Court viewed the nature of the relationship between an original work and an adaptation somewhat differently from the trial court, and saw the adaptation as being, in essence, a reproduction of the original work, rather than a new creative work in its own right.

points out:

> ... the author's special rights as provided in Section 57 of the *Copyright Act* may override the terms of contract of assignment of copyright. To put it differently, the contract of assignment of copyright has to be read subject to the provisions of Section 57, and the terms of contract cannot negate the special rights and remedies granted by Section 57.[75]

b. "Modifications"

At the same time, the High Court appeared to recognize that inalienable moral rights could pose serious obstacles to the adaptation of literary and artistic works, by substantially increasing the risks which the producer of the adaptation must bear.[76] The High Court went on to consider the specific question of the meaning of "modifications" under section 57(1)(a). It attempted to find a balance between the interests of the author and the producer, by determining the extent of modifications to an original work which would be permissible under the *Copyright Act*. The court observed that modifications should be read *ejusdem generis* with the expressions, "distortion" and "mutilation" which also appear in section 57(1)(a) of the *Copyright Act*.[77] However, the modification need not be obviously "negative" to cause a violation of the authors moral rights. Rather,

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[75]Ramaiah, *ibid.*

[76]See Dine, *supra* note 66 at 577-82 for a detailed discussion of some aspects of the "important cost- and risk-shifting function" of moral rights. He observes that moral rights have the effect of "reducing or preventing users of copyrighted materials from externalizing the costs of violating the integrity of the work or failing to credit the author": *ibid.* at 582.

[77]Anand, *supra* 48 at 36 observes: "[T]he court stated that the expression, 'other modification,' must read *ejusdem generis* with the words, 'distortion and mutilation'."

"necessary" modifications to an original work are allowed under section 57.[78] As Anand points out:

> Thus, in this case, even though the author had permitted the film producer under a written agreement to make modifications, the court held that there was a breach of section 57 as the extent of the modifications was more than necessary for converting the novel into a film version or for making the film a successful venture.[79]

c. Social Context

The High Court's decision represents an interesting attempt to reconcile the interests of the original author and the person who undertakes a creative adaptation of her work. This aspect of the *Mannu Bhandari* case is particularly significant in the Indian context, where adaptations have a special social and cultural importance. Adaptations of literary and artistic works not only allow knowledge to cross language and "cultural" barriers, but film, in particular, allows knowledge and ideas to transcend the barrier of illiteracy, as well.

At the same time, the court attempted to balance the interests of a film production company against those of an individual author. Its establishment of a high threshold which must be met in relation to adaptations favors authors in a context where, as a group, they are relatively weak, both economically and socially. Moreover, the court recognized that, in these circumstances, there is an important connection between the integrity of an

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[78]See Narayanan, *supra* note 42 at para. 7.10, n. 12, n. 13. The court interpreted s. 57(1)(a) to mean that an intellectual work is "inviolable."

[79]Anand, *supra* note 48 at 37. See also Dine, *supra* note 66 at 564: "The court appears to have made moral rights inalienable, while placing outside the prohibition on modifications such changes as are necessary to make the transition to a different medium."

author's work and the maintenance of her reputation. The court appears to indicate that, in the case of popular film adaptations of creative works, there may be a prima facie link between prejudice to the author's reputation and modifications of her work. The Court's approach suggests that, even where modifications are qualified by the requirement of prejudice, as in the case of the current section 57, Indian authors may have extensive moral rights protection in relation to film adaptations. Dine refers to these considerations as "the unique conditions of the Indian film business bearing upon... damage to the author's reputation."[80] The court says:

> It is widely believed that there are investments and collections of crores of rupees in a successful Hindi movie and the heroes and heroines are paid fabulous amounts for their services. If the complaint of the author (of mutilation and distortion of the novel) is correct[,] the lay public and her admirers are likely to conclude that she has fallen prey to big money in the film world and has consented to such mutilation and distortions. The apprehension of the author cannot be dismissed as imaginary. It is reasonable. Her admirers are likely to doubt her sincerity and commitment and she is likely to be placed in the category of cheap screenplay writers of the common run [of] Bombay Hindi films.[81]

2. *Amar Nath Sehgal:* Duties of the Government

The case of *Amar Nath Sehgal* extends the moral right of integrity in two interesting ways. Sehgal, a respected Indian sculptor, created a mural cast in bronze to

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[80]Dine, *ibid.* at 565. The Indian popular film industry is not only the largest in the world, but it also relies on formulaic film-making for its success, based on popular music, the exploitation of current trends in fashion, conventional values and a blatant appeal to the viewers' sentiments. Harsher critics, including the present author, will not hesitate to point out that Indian popular films and Indian art films come from different worlds. The meaning of quality, of course, is fundamentally different in each.

[81]*Mannu Bhandari, supra* note 63 at 18; quoted in Dine, *ibid.*

decorate a public building.[82] The mural was an extraordinary piece of work, massive in scale, which represented several years of work for Sehgal.[83] It became a famous work which was considered to be a national treasure of India. In 1979, however, the government took the mural down and placed it in storage. Due to carelessness and neglect in moving and storage, the mural was seriously damaged. Some parts of the mural were lost, including the piece where the sculptor had put his name.[84] Sehgal brought a suit against the government before the High Court of Delhi. The sculptor asked the court for an injunction to prevent the government from causing further harm to the mural. The court granted the injunction.

a. Right to Prevent Destruction

The *Sehgal* decision established that, in Indian law, the moral right of integrity can protect an artistic work from outright destruction. This is in contrast to the dominant strand of international thinking on moral rights, which holds that the right of integrity can only protect a work from being mistreated while it remains in existence; it cannot intervene to prevent a work from being destroyed.[85] In the Indian context, the moral right of integrity can, at the very least, prevent the government from destroying works of

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[82]See Anand, *supra* note 48 at 36: the sculpture decorated the walls of the Vigyan Bhavan.

[83]Anand describes it as being 140 feet long and 40 feet high: see Anand, *ibid.*

[84]*Ibid.*

[85]See Ricketson, *supra* note 27 at para. 8.109. Anand, *ibid.* at 36 points out that the rationale underlying this view is that, where work is destroyed, "there would be no subject-matter left to affect the author's reputation."

cultural importance.[86]

b. Duties of the Government

It may be argued that the judgment of the High Court also had the important effect of establishing that the government has a duty to protect works of art which are under its care. This finding is especially important in the context of developing countries such as India, where governments generally represent the main concentration of resources in the country, financially and otherwise. Where the powers of government are extensive, it is important to recognize the potential for both good and harm in government action.[87] In countries like India, the judiciary can play an important role in defining the extent and nature of governmental power. As Anand observes:

> [T]his case raised . . . [an] important issue, namely, the right of every citizen to see that works of art which belong to the government, being national wealth, are treated with respect and not destroyed by the government.[88]

c. *Sehgal* and Amendments to the *Copyright Act*

The *Sehgal* case was decided by the Delhi High Court in 1992. Subsequent amendments to section 57 of the *Copyright Act* were a direct reaction to the findings of the court in *Sehgal*. While the events in *Sehgal* appear to be a clear case of infringement of

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[86]Anand, *ibid.*

[87]Frazier points out the power of governments, and their ability, not only to generate cultural developments, but even to define what is and is not art. Following Frazier's line of argument, it is equally true that governments may influence social attitudes towards art. See J.A. Frazier, "On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law" (1995) 70 Tulane L. Rev. 313 at 330-54.

[88]*Supra* note 48 at 36.

both moral rights set out in section 57, Sehgal was obviously concerned with the treatment of his sculpture, rather than the government's failure to attribute the sculpture to him. On the basis of revisions to section 57, Sehgal, if his case were to be considered now, would have to show that the damage to the mural would be prejudicial to his honor and reputation. Sehgal could not protest the partial or total destruction of the work by the government as a violation of his moral right of integrity.[89] Moreover, under the new legislation, Sehgal could not object to the government's failure to display the work, or to display it properly, as a violation of his right of integrity.

The *Sehgal* case demonstrates how these amendments are a step backwards for the protection of moral rights in India, especially in relation to the integrity of artistic works. The state has an interest in protecting national culture for the benefit of the public. However, the amendments to section 57 represent a short-sighted view of the government and public interest in artistic works.

The Indian government's approach to the right of integrity allows it to avoid the financial and ethical consequences of a serious commitment to preserving cultural heritage. It may also reflect a general concern with limiting the government's potential responsibility towards foreign cultural property which comes into India. Nevertheless, the interest of a state in protecting the integrity of cultural works is at least as great as an

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[89]Sehgal actually claimed a violation of the moral right of integrity on both grounds: see Anand, *ibid.* From Anand's discussion, it appears that the court's findings implied that the outright destruction of a work could also be considered prejudicial to the creator's honor and reputation.

author's interest in protecting his own reputation.[90] This point cannot be refuted by the recognition that the benefits to the public from the protection of cultural works are not as easily quantifiable as the material and non-material benefits to an individual from the maintenance of his own reputation.

3. *Statart:* Moral Rights in Computer Software

The *Statart* case raised the issue of moral rights in relation to improvements to a computer software program. The program, which enabled users to create personalized letters by dictation,[91] was owned by Statart, an Indian software company. The dispute arose when Statart attempted to market an improved version of the program. Two former employees claimed that Statart's improvements to the program were a violation of their moral right of integrity, and that they were also entitled to be credited for their role in creating the program, in relation to the new version.

Like *Mannu Bhandari,* the *Statart* case was eventually settled. However, the parties' submissions in court raised some interesting issues concerning the extent of moral rights protection which would be available to the designers of computer software. Statart argued that the former employees should not be able to object to improvements to the program, but only to negative modifications. Otherwise, the computer industry would be compelled to bear the risk that any improvements to software might face obstacles from

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[90]This point is emphasized by C.A. Berryman, "Toward more Universal Protection of Intangible Cultural Property" (1994) 1 J. Intell. Prop. L. 293 at 300.

[91]See Anand, *supra* note 48 at 35: the program was called "MyScript," and it "converted a dictated letter into the user's own handwritten letter."

employees who were involved in developments at an earlier stage of the process.

The Indian government appears to have taken these concerns very seriously. Its modifications to the *Copyright Act* specify that authors of computer programs are not entitled to moral rights protection under section 57, in the case of lawful adaptations of their programs.[92] Not only is the computer industry a major, growing industry in India, but it is also an industry which is particularly dependent on the continuing ability to adapt earlier technologies, a reality which is well-recognized by United States industry experts and legislators.

In the process of restricting the applicability of moral rights to computer software, Indian legislators have, perhaps, succeeded in preserving a degree of purity in the Indian application of moral rights doctrine. Moral rights are supposed to protect the special relationship between creative authors and their works. The Indian approach to moral rights in computer software implies that there is a qualitative difference between the rights of authors in artistic and technological works.

Moreover, the split between art and technology in a developing country such as India inevitably implies a distinction between national works and works which are imported from industrialized countries. By restricting moral rights protections specifically to the authors of creative works, this legislative change supports the dual objectives of

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[92]S. 20 of the *Copyright (Amendment) Act 1994, supra* note 50 provides that, under the new s. 57, "the author shall not have any right to restraint or claim damages in respect of any adaptation of the computer program to which clause (*aa*) of sub-section (1) of section 52 applies." Clause (*aa*) was added to s. 52 to allow copies or adaptations of computer programs to be made for certain purposes: see s. 17 of the *Copyright (Amendment) Act 1994, ibid.*; see also Narayanan, *supra* note 42 at para. 7.10.

promoting creative endeavours at the national level, while maintaining a greater degree of freedom and access in relation to international technological innovation.

The Indian ambivalence towards moral rights protection for computer programs parallels broader trends in the industrialized world, as well. The applicability of moral rights doctrine to software has grown into a serious practical and conceptual issue in countries which are on the leading edge of computer innovation. Indeed, the potential incompatibility between concepts of authorship inherent in moral rights and the realities of creativity in the technological context threaten the validity of Western copyright concepts at their core. It will be interesting to see whether the specialization of moral rights in India proves to be a viable approach to the rights of authors as technology grows in scale and importance for Indian society.

4. Other Cases

A brief consideration of two other moral rights cases contributes to a more complete picture of the status of moral rights in Indian jurisprudence. The case of *Ved Prakash* involved an author who had consented to produce a certain number of novels over a five-year period for a publisher. When the author ceased to supply the novels, the publisher hired another writer to write the novels, which continued to be marketed under the original author's name. The author complained that his reputation was being damaged by the association of his name with poor-quality work. In deciding the case, the High Court of Delhi established that section 57 encompasses both the positive and negative aspects of the right of attribution, effectively allowing the author to object to the false

attribution of his name to work which is not his.[93]

Another case, *Garapati,* addressed the issue of evidence in moral rights cases. *Garapati* established that an author may have to provide evidence to support his allegations of distortions or modifications.[94]

E. Moral Rights and Development

Section 57 of the Indian *Copyright Act* of 1957 made effective use of the principles in Article 6*bis* of the Berne Convention to establish a system of moral rights law which provided for the protection of internationally-recognized moral rights. However, the Indian legislation was more flexible and broader in scope than Article 6*bis*. The greater reach of section 57 reflected Indian cultural values and traditions with respect to artistic and intellectual work. It was also a response to Indian concerns with cultural heritage and cultural development, especially in the initial years of Indian independence.

Over the past decade, India has seen the development of a significant jurisprudence in relation to moral rights issues. Indian courts have demonstrated a willingness to extend moral rights protections for Indian authors of literary and artistic works, while maintaining a degree of specialization in their thinking on moral rights. In particular, Indian courts are not likely to favour the application of expanded moral rights protection to computer

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[93]For a detailed discussion of the facts of the case, see Anand, *supra* note 48 at 34-35.

[94]The case is mentioned by Narayanan, *supra* note 42 at para. 7.10 in his discussion of moral rights under Indian law.

software.[95] This judicial trend is mirrored by Indian legislative amendments to sections 57 and 52 of the *Copyright Act*, restricting moral rights in software.

The approach of Indian courts to moral rights is indicative of the growing sophistication of Indian legal methods in the copyright field. Indian courts have shown themselves to be remarkably advanced in the development of an analytical approach to moral rights doctrine, legislation, and precedent, and there has been a general recognition among the Indian judiciary of the need for a comprehensive body of precedent in relation to moral rights. Equally important, however, are the efforts of Indian judges to take broader policy considerations into account, especially in relation to cultural concerns. Moral rights cases have seen Indian courts attempting to balance the economic power of key cultural industries and the political power of government against the weaker bargaining position of the author of a literary or artistic work. These efforts reflect the larger and more complex challenge of balancing the forces affecting India's international economic competitiveness against the localized and smaller-scale interests of individual creators. At the same time, it is the status of the individual author before Indian courts which will demonstrate both the cultural awareness and sensitivity of Indian leaders, and the extent of India's political sophistication and modernity.

Fundamentally, Indian courts are involved in navigating India's transition from a "traditional" to an industrial society, by weighing the interests of preserving cultural

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[95]Although the *Statart* case was settled outside court, this author agrees with Anand's view that moral rights in software have effectively been curtailed by the appearance of the case, and subsequent amendments to the *Copyright Act*.

heritage and maintaining cultural standards against the economic drive to commercialize and commodify Indian culture, for both domestic and international audiences. In addressing these issues, Indian judges have routinely favored the interests of the author, and in doing so, they have substantially expanded legal protection for moral rights in India.

The Indian legislature has responded to these trends by seeking to limit the scope of moral rights protection under section 57 of the *Copyright Act*. It has attempted to remove the features of section 57 which exceeded the protections offered by Article 6*bis*, and which were, in certain cases, unique to India. Currently, the text of section 57 meets minimum Berne requirements.[96]

The policy concerns which may have motivated the changes to section 57 include the promotion of the adaptation and translation of literary and artistic works, the encouragement of the growth of cultural industries which may make increasingly important contributions to the Indian economy, and a desire to limit government and industry liability in the exploitation of works. The Indian parliament must have been concerned about the expansion of risks associated with the use of literary and artistic work. These issues reflect the social need for access to knowledge, a pressing need in all developing countries, as well as a cultural tradition which emphasizes the social utility of artistic and literary work, rather than the direct gains to the author, whether economic or "moral," from his contribution to knowledge.

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[96]See Anand, *supra* note 42 at 36: modifications to the integrity right are, of course, most significant in this regard.

F. Directions for Change

The balancing of interests required in the Indian situation is delicate and subtle. The development of moral rights protection in India, and of copyright principles, generally, depends on maintaining a high degree of flexibility, in order to accommodate the ever-shifting social equilibrium of a developing society in relation to cultural issues. Judge-made law offers the most flexible and adaptive mechanism for the development of moral rights principles. However, the limits of the judicial system and the process of litigation, including cost and time delay, emphasize the need for a basic legislative framework for moral rights protection that provides secure legal recognition of the interests of creators.[97]

The desire of the Indian legislature to restrict moral rights protection is understandable. However, moral rights potentially have an important role to play in the promotion of creative and intellectual activity in the sub-continent. Rather than attempting to restrict moral rights protection along the lines of Western industrialized nations,

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[97]Interestingly, while the Indian Constitution provides that copyright falls within the exclusive legislative jurisdiction of the Indian Parliament, it does not provide an entrenched, constitutional basis for copyright protection: see Indian Constitution, Art. 246(1), online: The Indian Parliament <http://alfa.nic.in/welcome2.htm> (date accessed: 12 August 1999) [hereinafter Indian Constitution]. On the other hand, freedom of speech and expression is protected as a Fundamental Right in the Indian Constitution: *ibid.*, Art. 19(1)(a). This situation provides an interesting parallel to the U.S. approach to copyright: for a close examination of the interplay between the First Amendment rights to free speech and the " marketplace of ideas," which copyright in the American framework is intended to promote, see S. Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm. & Ent. L.J. 287 at 297-304. Unlike the American Constitution, however, the Indian Constitution does not address the role of copyright in promoting the development of the "arts and sciences."

legislative change in India should be undertaken with a view to exploring the potential contribution of moral rights to cultural development. In particular, future legislative change should take into consideration the unique features of the Indian cultural tradition, as well as India's cultural objectives for the future.

Some questions which Indian experts might want to address in relation to moral rights include, who should be responsible for litigating moral rights claims, and what types of works moral rights should protect. For example, moral rights can be asserted by professional associations on behalf of their members, or cultural associations representing the public. Moral rights can be extended to protect community, group, or other types of corporate creation. They can be extended to inanimate objects, or the protection of anonymous works of folklore.[98] These considerations are especially significant in view of the general rigidity of the new international copyright regime under TRIPs, a situation from which the area of moral rights remains, effectively, exempt.

While the Indian legislature should develop new principles for special industries like information technology, it is also important to maintain a sufficiently broad framework for moral rights protection in relation to artistic and literary works, in order to promote cultural activities. Moreover, government in India plays a central role in developing social values, and legislative provisions on moral rights should reflect the

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[98]In this regard, see the interesting cultural property dispute between the government of India and a Canadian oil company over title to a South Indian bronze, originally made to serve as an object of worship. The British court allowed legal standing to the statue: *Bumper Corporation* v. *Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362 (C.A.).

importance of protecting the integrity of the Indian cultural heritage. Here, Indian legislators confront the classic dilemma of copyright law. However, future legislative change in relation to copyright must find an appropriate balance between protection and use. Both the history of culture and its future depend on the maintenance of standards of integrity in relation to artistic and intellectual works. It is equally important to encourage an attitude of social respect towards those individuals and groups who are engaged in the cultural and intellectual development of knowledge.

The importance of protecting the creative drive of individuals, and of creating conditions which favour its expression, may be seen by some observers as the excessive pursuit of a single creative model which is not traditionally dominant in Indian culture. However, the promotion of individual creativity is related to the process of modernization in India. Whatever the role of copyright may be in the industrialized countries, the protection of authors' economic and moral interests in developing countries is likely to stabilize the position of creators in situations of general poverty and uncertainty. In India's case, the diversity of Indian culture, and its profound respect for the products of the intellect and the spirit, can certainly provide a basis for the protection of individual cultural enterprise. Arguably, India has more to gain than to lose from pursuing this potential line of cultural development. The drive and ambition of India's artists and intellectuals is undeniable, and is potentially one of the most important forces underlying the country's drive to modernize. The words of an Indian National Poet express the aspirations of India's creators:

"What has been shall yet be." Her music will yet be recognized as the most

> marvellous in the world; her literature, her painting and her sculpture will yet be a revelation of beauty and immortality to the wondering nations; her life and acts will yet be ennobling examples for a grateful humanity...[99]

It is the unique challenge of Indian law-makers to promote the achievement of this goal through the effective development of cultural policy. Copyright law, and the area of moral rights, in particular, can make an important contribution to these efforts.

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[99]C.S. Bharati, "Rasa - The Key-Word of Indian Culture" in *Agni and Other Poems and Translations & Essays and Other Prose Fragments* (Madras: A. Natarajan, 1980).

Chapter V

Conclusion: Moral Rights in the Global Economy

The TRIPs Agreement represents the beginning of a new era in international copyright law. While the Agreement builds on the standards for copyright protection established in the Berne Convention, the TRIPs copyright system differs from the Berne Union in three key respects.

First, the TRIPs Agreement brings intellectual property into the wider international trade arena. This structural shift makes intellectual property subject to the same kinds of disciplines which govern other areas of trade. The creation of a "link" between intellectual property and trade also makes the enforcement of intellectual property rights through trade-related measures involving trade in goods and services, more broadly, possible.

Secondly, the TRIPs Agreement brings intellectual property within the jurisdiction of the Dispute Settlement Body of the WTO. The dispute-settlement mechanism represents the first opportunity for the adjudication of international disputes related to intellectual property in a rule-based, potentially objective forum. As a result, dispute settlement procedures at the WTO present an unprecedented opportunity for fairness in international trade matters, especially with respect to developing countries. At the same time, the power of the DSB to enforce intellectual property rights through the authorization of trade-related measures in broader areas of trade introduces an important element of coercion into the TRIPs copyright system.

Finally, the TRIPs Agreement represents a new approach to the harmonization of

international copyright standards. While the Berne Union was based on a certain degree of international consensus in relation to copyright, the TRIPs Agreement was largely negotiated by industrialized countries, and substantially reflects their interests. In particular, the TRIPs Agreement seeks to accommodate the competitive needs of the technologically-innovative industries of the industrialized world, as a priority. While the Agreement also attempts to provide some recognition of the special interests and concerns of developing countries in relation to intellectual property and international trade, the economic and cultural interests of these countries have not been a major force driving the development of TRIPs.

In view of these factors, it may be argued that the TRIPs Agreement establishes the first true international copyright regime. Virtually every country in the world is a member of the WTO, and, as such, must adhere to the TRIPs Agreement. The impact of the Agreement on intellectual property is potentially enormous. At the same time, the TRIPs Agreement is qualitatively different from the international copyright system under the Berne Convention. By "linking" intellectual property with international trade, TRIPs has re-oriented the focus of the international copyright system towards trade and the economic role played by intellectual property industries, and away from the traditional, conceptual link, at both the international and national levels, between copyright and culture.

In this sense, the exclusion of moral rights from the ambit of the TRIPs Agreement is a defining feature of the new international copyright regime. Moral rights remain an area of copyright in which members of the WTO may continue to develop culturally-specific policies and laws. An examination of the law and jurisprudence of moral rights in

India reveals that developing countries may benefit substantially from developing an awareness of moral rights as a basic tool of cultural policy.

A. Impact of the TRIPs Agreement on Culture in Developing Countries

The TRIPs Agreement potentially has a significant negative impact on the state of culture in developing countries. The Agreement represents an important movement towards an increasingly homogeneous treatment of the cultural domain among member countries. The model of "culture" which the Agreement must ultimately impose on these countries is based on Western, industrialized concepts of creativity and the arts, intellectual life, and cultural development. The TRIPs Agreement not only imposes current, Western views of cultural life on non-Western countries, but it also brings the historical processes underlying these values to bear on the course of development in developing countries. The most important limitation of the TRIPs copyright regime with respect to developing countries is the narrowness with which it inevitably defines the forms of creativity and cultural life.

B. Moral Rights and Cultural Policy in Developing Countries

In view of the commitment of developing countries to full participation in the international trading regime, it is important for them to attempt to explore means of using the international framework for copyright protection to promote their cultural objectives. Alternatively, they may seek to minimize the influence of the TRIPs regime on their cultural sphere.

In the case of either approach, the area of moral rights can make an important contribution to the development of culturally-specific approaches to culture in developing

countries. It is true that moral rights doctrine as it is developed in the Berne Convention has its origins in Western concepts of authorship and the relationship between society and its creators. However, moral rights find important parallels in the cultures of many developing and non-Western countries. At the same time, the concepts inherent in moral rights can potentially assist developing countries in the broader process of social modernization. The traditionally important relationship between this doctrine and the preservation of cultural heritage through copyright law makes moral rights particularly attractive to developing countries, at this juncture.

A consideration of the Indian example demonstrates some of the objectives which moral rights can promote in developing countries. The development of Indian moral rights law in the Indian *Copyright Act* shows how moral rights can be adapted to non-Western cultural contexts through innovative provisions, for example, by extending moral rights to protect works of cultural importance from destruction. The approach of Indian courts to moral rights suggests that jurisprudence may provide an important means of balancing social interests, and redefining the social position of creators in the light of contemporary requirements. For example, Indian courts have championed the rights of authors and the protection of their works from damage or destruction, in the face of the potentially overwhelming power of big business and government.

The conflict between Indian courts and the Indian government over the extent and nature of moral rights protection, however, reveals some of the limitations which moral rights confront in the economic and social context of development. The government's interest in promoting India's economic and political position in the international arena has

contributed to its attempts to restrict moral rights protections for Indian authors. It should also be noted that the government's failure to take responsibility for India's cultural heritage, whether through inability, lack of desire, or the influence of corruption, is a factor affecting the legislative treatment of moral rights.

All of these concerns are generally applicable to developing countries. While they may be particularly acute in larger, wealthier and developing countries who are struggling to establish a place for themselves in the international arena, they also arise in the case of less-developed countries. The world's poorest countries will have the greatest difficulty in undertaking systematic measures for the protection of cultural heritage. However, even they may benefit from the Indian example, by considering the ways in which moral rights doctrine accommodates cultural diversity within India, and how moral rights relate to the preservation of cultural heritage in the Indian context.

The present limitations of moral rights in India also suggest that developing countries should seek to mould the doctrine as closely as possible to their objectives in the cultural sphere. The Indian legislation is very superficial in its exploration of the flexibility of moral rights doctrine and its potential to protect a variety of forms of creative expression, including those which are anonymous or improvised. Further development of moral rights in the Indian Copyright Act, however, depends on a change in the attitude and approach of the Indian government to cultural issues.

C. Directions for the Future

Contemporary developments in international copyright law raise the question of whether copyright will ultimately prove to be useful and effective in promoting cultural

development in developing countries. While a full consideration of this issue in its complex dimensions is beyond the scope of the present study, two important observations can be made.

First, the trend towards the internationalization of copyright which has culminated in the TRIPs Agreement is matched by regional developments in the copyright sphere. Regional harmonization efforts may ultimately seek to integrate regional concepts and practices in relation to intellectual property with broader developments at the international level. At the same time, the growth of regional approaches to copyright may also prove to be a significant counterweight to international trends, and may eventually bring about a diversification of copyright concepts in the international arena. In this regard, it will be particularly important to monitor developments in the European Union, which is currently an area of intense activity with respect to the harmonization of copyright standards among European countries. However, developments in NAFTA, and also among other organizations for international cooperation in diverse parts of the world, may contribute to a greater acceptance of diversity in the international copyright community.

A second, and potentially critical, area which requires attention is the impact of cutting-edge technological developments on copyright law and practice. Ironically, as international copyright law is extending its reach in unprecedented ways throughout the world, it is also facing profound challenges to its authority which grow out of current technological innovation in industrialized countries, and the rising practical inability to control the flows of knowledge and information generated by these changes. Many of the fundamental questions about copyright which are raised by these developments have

parallels in the ancient cultural traditions of the developing world.

The seriousness of these challenges to copyright cannot be overemphasized. At precisely the moment of its widest reach and greatest power, the fate of copyright as an institution has become strangely uncertain. It may prove to be a matter of survival for copyright law to evolve in order to accommodate creative and cultural variety, on the one hand, and a growing ease of dissemination which calls the fundamental copyright concept of "fixation" into question, on the other. From the perspective of developing countries, history, at least in the world of copyright and culture, has come full circle. The paradox confronting Western cultural life in the coexistence of modern technology and traditional concepts of culture lies at the heart of current developments. Paradoxically, it is within this dilemma, itself, that developing countries may find new and greater hopes for development and cultural survival.

Table of Terms and Abbreviations

Berne Convention

Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 828 U.N.T.S. 221, online: World Intellectual Property Organization (WIPO) <http://www.wipo.org/ eng/iplex/wo_ber0_.htm> (date accessed: 15 May 1999).

DSB

Dispute Settlement Body

DSU

Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the *Agreement Establishing the World Trade Organization,* 15 April 1994, online: WTO <http://www.wto.org/wto/legal/finalact.htm> (last modified: 21 April 1999) (entered into force 1 January 1995).

TRIPs Agreement

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement, 15 April 1994, 33 I.L.M. 1197 (entered into force 1 January 1995).

WIPO

World Intellectual Property Organization

WTO

World Trade Organization

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