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"DEMOCRATIZING" GLOBALIZATION: PRACTICING THE POLICIES OF CULTURAL INCLUSION

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Culture is constructed and reconstructed at speeds that differ from those of the workings of international institutions.
James H. Mittelman[1]

INTRODUCTION

Culture[2] and intellectual property[3] appear to have gotten a divorce during the latter decades of the Twentieth Century. They have at least obtained a legal separation that may last for quite

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1 JAMES H. MITTELMAN, THE GLOBALIZATION SYNDROME: TRANSFORMATION AND RESISTANCE 117 (2000).

2 There is no single agreed-upon definition of "culture." Like "art," "culture," to a certain extent, should be whatever the relevant group declares it to be. *Cf.* DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY (2000) (surveying diverse conflicts over who has the power to interpret cultural issues, including the present dispute over the ethno-cultural origins of the Kennewick Man); HENRY GIROUX, IMPURE ACTS: THE PRACTICAL POLITICS OF CULTURAL STUDIES (2000)(exploring the role of cultural politics in cultural protection debates). In fact, the potentially subjective nature of cultural determinations may be one of the contributing factors to the strong international disagreements about the extent to which "culture" and works of "cultural significance" or "cultural patrimony" should qualify for protection under intellectual property protection schemes. *See, e.g.,* Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N. C. J. INT'L L. & COM. REG. 229 (1998) [hereinafter "Long, *Impact*"]. For an excellent overview of some of the issues regarding the role, if any, of intellectual property regimes in protecting folklore, folk art and other forms of traditional knowledge, see UNESCO-WIPO World Forum on the Protection of Folklore (WIPO 1998). *See also*

Draft Report on the Protection of Traditional Knowledge, *available at* http://www.wipo.int/globalissues/tk/report/final/index.html (last visited June 12, 2002).

Many definitions have focused on "culture" as demonstrated through its objectification in relics or artifacts. *See, e.g.,* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C.A. § 3001(3)(D) (1997) (defining "cultural patrimony" as "an object having ongoing historical, traditional or cultural importance central to . . .[the] culture itself . . . and which . . .cannot be alienated, appropriated or conveyed by an individual"). *See also* The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289. By contrast, others have challenged the limitation of "culture" to tangible relics and have even challenged any attempt to compartmentalize the heritage of indigenous peoples into separate legal categories such as cultural, artistic or intellectual properties. *See, e.g.*, Erica-Irene Daes, *Study in the Protection of the Cultural and Intellectual Property of Indigenous Peoples,* U.N. Sub-commission on Prevention of Discrimination of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

Although an in-depth discussion of the relationship between "culture" and "intellectual property" is beyond the scope of this article, the history of the debate, in particular, its treatment in formal harmonization fora models one of the main disintegratory forces of globalization — the role of the so-called "indigenization" of peoples and the spread of "culture wars" as a result of such indigenization. *See* infra notes 56 – 61 and accompanying text. *See also* Doris Estelle Long, *"Globalization": A Future Trend or a Satisfying Mirage*? 49 J. COPYRIGHT SOC'Y 313 (2001). This disintegratory force has a direct impact on the nature and scope of the changes in formal harmonization procedures that I contend are required to assure a more effective harmonization process. *See infra* text at Part V.

[3] For purposes of this article, "intellectual property" is defined to include the "traditional" (or "Western-created ") forms of legal protection for works of creative or innovative endeavor. These forms, which have generally been protected under international treaty regimes, include copyright, patents, trademarks, trade secrets, and industrial designs and utility models. There is no single definition for the various forms of intangible property rights that are included within the scope of "traditional intellectual property." Nevertheless, based on widely accepted multinational IPR treaties, some commonly accepted parameters can be ascertained.

Copyright generally protects works of artistic, literary and musical *expression*, including, for example, novels, paintings, music, and choreography. *See, e.g.*, Berne Convention on the Protection of Literary and Artistic Works, *as revised* July 14, 1967, Art 2, 828 U.N.T.S. 221 [hereinafter "Berne Convention"] (defining copyrightable subject matter as "every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression"). *See also* Agreement on Trade Related Aspects of Intellectual Property Rights, April 15, 1994, Article 9, 33 I.L.M. 81 [hereinafter "TRIPS"] (incorporating by reference the definition of copyrightable works under Article 2 of the Berne Convention). Protection under copyright is limited to the expressions contained in the protected works and does not extend to the ideas contained therein. *See* TRIPS, Article 9(2) ("copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."). *See also* WIPO Copyright Treaty, Article 2, 36 I.L.M. 65 (opened for signature Dec. 1996)(using the identical language as Article 9(2) of TRIPS to describe the limitations of copyrightable expression).

Patent law generally protects novel, non-obvious and useful *inventions*. *See, e.g.,* TRIPS, Article 27 (establishing a tripartite test that requires patent protection for inventions which are new, demonstrate an inventive step and are capable of industrial application). Patent protection is extended generally to machines, articles of manufacture, processes, chemical or electrical structures and compositions, and the like, and in some

some time —- until a distrustful reconciliation or a division of the "cultural" furniture is agreed upon. On the surface, intellectual property would appear to be the ultimate tool for protecting a country's cultural works. At a minimum, copyright, with its protection of that most personal of works – a creator's expression – appears directly related to the goals of protecting the culture and heritage of a people or a nation. Books, music, painting, sculpture and dance all fall within the long-recognized scope of works which are subject to protection under international treaty regimes governing copyright.[4] Each appears to represent, at least in part, the cultural production of a particular group or nation. In fact, numerous treaty regimes have recognized this relationship — equating the protection of "cultural industries" with copyright exclusions

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countries, such as the United States and Japan, has been extended to include novel methods of doing business. *See, e.g, State Street Bank and Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (method for processing financial data in hub and spoke system for mutual funds accounting and administration subject to patent protection).

Trademark law generally protects corporate symbols, logos and other distinctive indicia of the origin of goods or services. *See, e.g.,* TRIPS, Article 15 (defining a trademark as "any sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings"). Among the types of source designators which are generally protected internationally are distinctive word marks, commercial logos, and other visible "signs."

Trade secrets generally protect confidential information that has some commercial or economic value as a result of its secret nature and for which the owner has taken reasonable steps to protect the secret nature of this information. *See, e.g.,* TRIPS, Article 29 (defining as "secret" protected confidential information having "commercial value because it is secret" and requiring the owner to take "reasonable steps" to protect its confidential nature).

Industrial designs and utility models generally include works and inventions which do not meet the requirements for patent or copyright protection, but which demonstrate some degree of novelty or originality, respectively, to warrant some level of protection. *See, e.g.*, TRIPS, Article 25 (requiring members to protect "independently created industrial designs that are new or original").

These categories of intellectual property have generally been protected internationally since at least the 1880's with the establishment of the Berne and Paris Conventions.

[4] *See, e.g.,* Berne Convention, *supra* note 3 at Article 2 (containing a non-exclusive list of copyright protectable works, including "books, pamphlets and other writings, . . . dramatic or dramatic-musical works, . . . musical compositions . . . cinematographic works . . works of drawing, painting, architecture, sculpture engraving and lithography. . ."); Universal Copyright Convention, Article I (defining copyrighted works as including "writings, musical, dramatic and cinematographic works, and paintings engravings and sculpture"); North American Free Trade Agreement, Article 1705 (incorporating Berne definitions for copyrightable works).

from free trade obligations.[5] Still others directly equate the protection of indigenous culture with intellectual property rights (IPR) protection.[6]

Despite the apparent connections between culture and intellectual property, since at least the negotiation of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS)[7] as part of the Uruguay Round[8] under GATT,[9] a growing divide between the forces of "traditional" copyright[10] and those who seek broader pro-

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[5] *See, e.g.*, Canadian Free Trade Agreement, Article 2005 (providing exceptions from free trade requirements for certain "cultural industries."). *See also* North American Free Trade Agreement, Article 2106 (incorporating earlier cultural industries exceptions from the Canadian Free Trade Agreement pursuant to Annex 2106). These "cultural industries" are loosely defined as those of book, music, television and film, or generally those industries whose products are most often protected under copyright law. *See, e.g.,* Canadian Free Trade Agreement, Article 2102 (defining "cultural industries" as including book, music, television and film) and NAFTA, Article 2107 (defining "cultural industries" as including the same basic industries). *See also* United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

[6] Thus, for example, the International Covenant on Economic, Social and Cultural Rights ("CESCR"), 993 U.N.T.S. 3 (Dec. 16, 1966), expressly requires States to "recognize the right of everyone . . . [t]o benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author." CESCR at Article 15(1)(c). *See also* International Convention on Civil and Political Rights, Article 19 ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . in writing or in print, in the form of art, or through any other media of his choice."); Universal Declaration of Human Rights, Article 27.2 ("Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." *See generally* Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development in* Intellectual Property and Human Rights (1998); Rosemary J. Coombe, *Intellectual Property, Human Rights and Sovereignty: New Dilemnas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity,* 6 Ind. J. Global Leg. Studies 59 (1998)(making a strong case that intellectual property rights already qualify as a human right).

[7] *See* TRIPS, *supra* note 3.

[8] The Uruguay Round was commenced in 1986. TRIPS was negotiated as one of several trade related multinational agreements, including agreements concerning Trade Related Investment Services, and Agriculture. Agreement was finally reached in 1994. For a brief history of the TRIPS negotiations, see the works cited in note 19 *infra*.

[9] General Agreement on Trade and Tariffs. *See* General Agreement on Tariffs and Trade, 55 UNTS 262 (October 30, 1947). The World Trade Organization, established under the Marrakech Agreement, is the successor to GATT and is responsible for administering TRIPS.

[10] "Traditional" copyright includes those works which fit within the traditional Western view of a copyright protectable work. Such works generally are original works of expression fixed in a tangible medium, created by an identifiable author for whom protection lasts for a limited period of time. *See e.g.*, 17 U.S.C. § 102 (limiting copyright protection to "original works of authorship fixed in a tangible medium of expression") *See also supra* note 3.

tection for all cultural works[11] has opened. Debates over the right to *protect* works of cultural patrimony or indigenous art or literature under "traditional" copyright, or even its *desirability* continue with no clear indication of when a satisfactory conclusion might be expected.[12] This division is merely one example of a much broader

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11 I have used the term "cultural works" to refer to a broader category of potentially copyright protectable works, including works of folklore, folk art and ritual dance. These works do not necessarily fit within the scope of traditional copyright protection as currently practiced by developed nations because they lack an identifiable author and/or originality. Yet such works undoubtedly represent the originality and creativity of their communal "authors" and should be acknowledged. *See* Long, *supra* note 3; Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the U.S.*, 48 AM. U. L. REV. 769 (1999). A complete discussion of the scope of such protection, including whether it should be based on intellectual property, or on *sui generis* principles based on the *cultural* value of such works is beyond the scope of this Article. The nature of this debate, including its growing political implications, however, presents one of the most intriguing clashes between "Western" and "non-Western" principles in the broad area of protection for creative endeavors. It serves as a microcosm for many of the current divisions in intellectual property regimes and, in my opinion, provides one of the most significant arenas for an international "correction" in the perceived lack of equal treatment for IPR issues of concern to developing countries.

12 The World Intellectual Property Organization has conducted a study regarding the relationship between IPR and the protection of "traditional knowledge." The term "traditional knowledge" is defined by WIPO in its report as referring to "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields." WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS (2001). WIPO goes on to define "tradition-based" as referring to "knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment." *Id.* Among the categories of traditional knowledge which it specifies in the report as being potentially included are: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. WIPO's report on traditional knowledge is notable for the demonstrated lack of a clear consensus on even a regional basis as to the need for, or desirability of, IPR protection for cultural works of indigenous peoples. *Id.* It is too soon in the process to determine whether such a consensus will emerge. I believe, however, that such an organized study is critical to facilitate discussions of these issues in an international forum notable for its long-standing expertise in the field of intellectual property rights. Recent failures to reach accord on international protection for databases or audio-visual works may presage a return to the 1970's when WIPO was largely deadlocked as a forum for international consensus building. Nevertheless, WIPO remains a powerful international IPR organization that continues to address newly emerging issues in the field of international IPR. Among the most notable examples are the conclusion of the WIPO Internet Treaties, the study of traditional knowl-

rift between developed and developing countries[13] regarding the standards and scope of works which should be subject to protection under domestic intellectual property laws.

To a certain extent disagreements are bound to erupt between countries that have different cultures, legal systems and levels of commercial and industrial development. Moreover, such disagreements are not limited to *developed* versus *developing* nations. To the contrary, present disputes over geographic indications[14] and

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edge and early efforts at exploring the issues involved in effective enforcement of intellectual property rights.

13 To a certain extent, the terms "developed" and "developing" are as unsatisfactory as the terms "First World" and "Third World," which they replaced, and the terms "industrial," "non-industrial" and "newly industrialized" that have replaced them to indicate levels of industrial and commercial development among nations. Admittedly, the terms "developed" and "developing" lack clear definitions and suffer from being both over- and under- inclusive. The term "developing" also suffers (like its previously mentioned alternative) from having a somewhat pejorative connotation *vis a vis* its "developed" counterpart. Despite these infirmities, I have chosen to use these terms, for two reasons. First, the terms "developed," "developing," and "least developed" appear in TRIPS. *See, e.g.*, TRIPS, *supra* note 3 at Articles 65 – 67. The term "developing" also appears in Article I of the Appendix to the Berne Convention where it is defined "in conformity with the established practice of the General Assembly of the United Nations." Berne Convention, *supra* note 3 at Appendix I(1)(a definition described by Sam Ricketson as "disturbingly vague." SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886 -1986 (1987).) Therefore, these terms have a certain relevance to the present discussion that is not apparent in the other terms. Second, these terms are no less clear than the other choices, and to a certain extent reflect international attitudes that add to the "undemocratic" nature of present intellectual property harmonization processes.

"Developed" countries, such as the United States, Japan, Canada and most of the members of the European Union, are generally perceived as owning or controlling most of the world's presently available technology that can be protected under intellectual property laws as traditionally applied. "Developing" countries, by contrast, are perceived as owning or controlling markedly less technology, and therefore benefiting less from strong IPR protection. It should be noted that for purposes of TRIPS compliance the categories are self-selecting.

14 Geographic indications are one of the new types of intellectual property rights recognized for protection under TRIPS. *See* TRIPS, *supra* note 3 at Articles 22-23. Such indications are defined as "indications which identify a good as originating in the territory of a Member . . . where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin"). Although appellations of origin and other geographic indicators of origin have previously been the subject of IPR treaty regimes geographic indications, at least as defined under TRIPS, is a new category of intellectual property rights. S*ee, e.g.*,. Lisbon Agreement for the Protection of Appellations of Origin, and Their International Registration, *available at* http.//www.wipo.int/clea/docs/en/wo/wo012.htm (*last visited* June 12, 2002). Their scope of protection has been the subject of heated debate and led to the United States commencing a dispute proceeding against the European Union before the WTO. The dispute involved the alleged failure of the EU to provide national treatment for geographic indications for agricultural products. The result of that dispute remains open. *See* Complaint, WT/DS174/1 (regarding the protection of

compulsory public performance licenses for musical works[15] demonstrate that the North-North debates[16] between the developed world over IPR remain as divisive as ever.[17]

Despite on-going and increasingly heated North-South debates,[18] the North-South debates remain the most problematic, however. Behind these debates lurks a power imbalance that makes any exchange nearly *a fortiari* unfair. When the United States and the European Union disagree in international fora, and fight for adoption of their own "domestic" standards, they are relatively evenly matched, at least insofar as economic development, and the ability to shape international opinion is concerned. By contrast, since the evolution of bargain linkage diplomacy under TRIPS, developing countries may have little but numerosity on their side.[19]

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trademarks and geographic indications for agricultural products and foodstuffs under EU Regulation 2081/92).

15 The European Union recently challenged the Fairness in Music Licensing Act of 27 October 1998, Pub.L. 105-298, 112 Stat. 2830, 105th Cong.,2nd Session (1998) of the United States, which extended the scope of uncompensated compulsory licenses for the public performance of music in certain shops and restaurants. The EU claimed that such uncompensated uses violated US obligations under TRIPS. The EU's complaint was ultimately successful and the US has been ordered to modify its laws to eliminate the violation. *See* United States – Section 110(5) of the US Copyright Act, WT/DS160/12 (January 15, 2001).

16 I am using the terms "North-North" and "North-South" in the same sense with which they were used to refer to debates during the Uruguay Round. Specifically, North-North refers to debates or disputes between developed countries. North-South refers to debates or disputes between developed and developing countries.

17 These two debates are merely illustrative of the many disagreements which occur between developed nations regarding IPR protection. They have been selected because each of these disputes led to the commencement of dispute resolution procedures before the WTO, thus, evidencing the perceived seriousness of the dispute to the parties involved. For an interesting history of other North-North debates during the Uruguay Round, *see* THE GATT URUGUAY RPUND: A NEGOTIATING HISTORY (1986-1992)(Terence Stewart ed., 1993). *See also* Doris Estelle Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?,* 22 AIPLA Q.J. 531 (1994) [hereinafter "Long, *Uruguay Round*"]; Frederick Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework,* 22 VAND. J. TRANSNAT'L L. 689 (1989).

18 Disputes between the EU and the United States, for example, have resulted in diverse dispute resolution proceedings before the WTO, including two which resulted in losses for the United States. *See United States – Section 110(5) of the U.S. Copyright Act*, DS/160R, *available at* http://www.wto.org/english/tratop_e/dispu_e.htm; *United States – Section 211 Omnibus Appropriations Act of 1998*, DS/176/R, *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.

19 This does not mean that developing nations are incapable of obtaining adoption of international standards that reflect their own concerns. To the contrary, Appendix II of the Berne Convention, adopted in early form as part of the Stockholm Protocol in 1967,

The North-South debates are also more problematic because behind this division is a history of economic, political and cultural imperialism that makes the power imbalance seem not only unfair, but, more importantly, an unfortunate continuation of past practices, albeit in a different guise.[20]

Current processes of international intellectual property harmonization threaten to exacerbate further the divisions between North and South by continuing to marginalize the participation of developing and non-industrialized countries. Such marginalization severely reduces the opportunity for "democratic"[21] participation in the IPR harmonization process. This marginalization calls into question the validity of any so-called international standards by raising the specter of "undemocratic" coercion. Ultimately such

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and later incorporated in revised form as an Appendix under the Paris Revision of 1971, clearly resulted from the power of the developing nations to obtain protection standards that met their needs for greater access to works of developed countries. *See* RICKETSON, *supra* note 14 at 592 – 664. However, the development of bargain linkage diplomacy in the IP arena with the Uruguay Round Negotiations severely restrained the ability of such countries to exercise this power. *See* MICHAEL RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY (Brookings Institute Press 1998). Coalitions that had previously been successful in pursuing a social welfare agenda disintegrated in the face of trade linked negotiations. *Id.* The recent failure of the Diplomatic Conference on the Draft AV Performance Treaty, however, and the inclusion of traditional knowledge protection in the WIPO Budget and Agenda is some evidence that developing nations are beginning to reassert their earlier political power to obtain IPR standards that reflect their concerns.

[20] *See, e.g.,* Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996)(noting the imperialistic nature of developed countries, imposition of western intellectual property systems on developing countries); Jerome Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 813 (1989)(calling imposition of foreign legal standard on unwilling states "a polite form of economic imperialism"). *See also* EDWARD SAID, CULTURE AND IMPERIALISM (Alfred A. Knopf 1993)(exploring the impact of colonial imperialism on modern relations).

[21] I am using the term "democratic" and "democratizing" in their broad sense to refer to processes that allow for broad based participation and equal access to fora so that diverse views can be heard. Admittedly, the level of participation may not achieve complete social justice on an international level. However, the process that I am proposing should allow for greater effective participation by nations. It should also continue to allow expanded participation by NGO's, thereby moving the process of IPR harmonization in the direction of greater equilibrium in the search for an international level of social justice.

By focusing on the participatory definition of democracy, I do not mean to ignore or denigrate the role of a civil society in affecting the choices made at both the domestic and international level of standard setting. Such civil society serves an important regulatory function in international standard setting and has been profoundly affected by the forces of globalization. *See generally* MITTLEMAN, *supra* note 2. *See also* DAVID HELD, et al, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (2000); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

coercion can only lead to international standards which are ineffective as countries, forced to accept an unwanted bargain, find ways to avoid the obligations of such coercive agreements.[22]

This Article examines current processes of international harmonization to determine the extent to which they contribute to the North-South division, and suggests methods to reduce this division. For purposes of this Article I have used the term "harmonization" in the broader sense of an attempt to achieve agreement on multinational universal concepts for the recognition, protection and enforcement of intellectual property rights. Harmonization for this purpose includes both efforts to alter domestic laws to "approximate" agreed-upon principles,[23] as well as efforts to establish universal standards (universalization). Realistically, I believe the focus of harmonization efforts must be directed to concepts and principles of protection as opposed to detailed "rules." I also believe that "harmonization" which approximates "universalization," so that variations in domestic treatment fall along a relatively limited range of options is preferable. Such "harmonization" improves predictability, but universalization in its purest sense, if such universalization is intended to mean *identity* of application, is an unrealistic goal. In a world composed of diverse cultures, histories, and political, economic and legal realities, a universal standard is not only incapable of achievement but also poses the greater risk of being an externally imposed standard. Historically, law has generally only been successfully transplanted when new (or external) concepts have some relationship to pre-existing cultural concepts.

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22 One good example of such avoidance techniques is the present level of IPR enforcement globally under TRIPS. Despite the agreement of over 135 countries to abide by the enforcement obligations imposed under Articles 41 through 61 of TRIPS, piracy levels remain high. *See, e.g.,* International Intellectual Property Association, 2001 Special 301 Report, www. iipa.com/special301_toc.s/2001_spec301_toc. html (2001) (*last visited* June 12, 2002) (reporting global losses in the US Copyright industry of approximately $20 to $22 billion in 1997). While there are many different explanations for such failures, including cultural opposition to individualized protection and lack of resources, *see, e.g,,* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE (1995), many enforcement problems exist due to an apparent lack of will on the part of domestic governments to enforce intellectual property rights. *See, e.g,* IIPA, 2001 Special Report. This lack of will, I believe, is based at least in part on a desire to avoid what countries claim is a "bad" or unworkable bargain under TRIPS. *See generally* Long, *supra* note 3.

23 *See, e.g.,* First Council Directive to Approximate the Laws of Member States Relating to Trademarks, 89/104/EC (Dec. 21, 1988).

Merely adopting "jargon" or rules, without anchoring such jargon to a cultural or political value results in no agreement at all.[24]

Because harmonization is so closely related to globalization,[25] particularly after TRIPS,[26] this Article will use the lens of present day economic globalization through which to examine the IPR harmonization process. It will employ the processes and trends of economic globalization as a predictive and analytical tool to assist in forecasting potential problems in harmonization processes and to suggest solutions designed to make such processes more "democratic," and ultimately, more effective.

This analysis necessarily relies on two fundamental premises. The first premise is that harmonization of certain intellectual property protection standards is a beneficial value to be encouraged in international fora.[27] The second premise is that for harmonization processes to be the most beneficial they must be designed to promote the creation of agreed-upon (as opposed to externally imposed) standards of protection.

In Part I, I briefly examine the current trends and problems apparent in the most recent phase of economic globalization. I use these trends and problems to establish a working hypothesis for examining the process of IPR harmonization. I demonstrate that among the developments that have the most resonance are the disintegratory trends of regionalism and indigenization which have developed in response to the integratory processes of globalization. In Part II, I establish the usefulness of the globalization paradigm in light of the growing international acknowledgment of the utilitarian nature of intellectual property rights and the existence of the same critical trends in globalization and IPR harmonization. In

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24 *See, e.g.,* First Council Directive to Approximate the Laws of Member States Relating to Trademarks, 89/104/EC (Dec. 21, 1988).

25 Globalization, like culture, has no single definition. *See* note 3 *supra.* I am using the term in its broadest sense to refer to an integratory process in which economic inputs, including, *inter alia*, capital, labor, production and distribution, are interrelated across borders to create global opportunities for commerce and industry. The integratory process of globalization cuts across borders to achieve a degree of interdependence and/or inter-relatedness that increases transnational flows of goods, services, information . . . and problems. *See generally* works cited in note 28 *infra.*

26 *See* text *infra* regarding the utilitarian nature of intellectual property protection under TRIPS.

27 *See, e.g.*, Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 15 UCLA PAC. BASIN L.J. 199 (1994); Vincent Chiapetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICHIGAN J. INT'L L. 333, 370 (2000); ALFORD, *supra* note 22.

Part III, I demonstrate the beneficial role of harmonization internationally, particularly in the post-TRIPS world. Part IV describes present international IPR harmonization processes and identifies some of the problems. Finally, Part V contains suggested procedural reforms which need to be implemented at the institutional level in order to correct present imbalances in the process. These corrections will, I believe, lead to a process which allows for greater international justice and a more effective method for identifying and resolving IPR protection issues. The process I recommend is designed to acknowledge and permit continued disagreements on key issues as needed. It is designed to make harmonization less coercive and ultimately more effective. It is only by establishing a "democratic" system that protects the interests of all parties that a truly effective harmonization process may be attained.

I. THE TEACHINGS OF GLOBALIZATION[28]

"Globalization," like its intellectual property counterpart "harmonization," has become a catch phrase of the 21st Century.

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28 This analysis is intended as a *brief* exploration of economic globalization. It addresses only in the most basic manner some of the more prominent trends of this multi-faceted, multi-dimensional, complex, transformative process in order to develop a predictive tool for analyzing potential IPR harmonization trends. It does not address the desirability of globalization or its relationship to liberalism, neoliberalism, or comparative free trade norms (to name only a few of the underlying philosophical issues implicated in current debates over the scope and desirability of globalization). The trends so identified may not be apparent in all countries or in all situations. They have been selected because they are generally agreed to be impacted by economic globalization on a general scale. For a more detailed analysis of globalization, *see, e.g.*, SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER (1996)(cultural studies); J.H. MITTLEMAN, THE GLOBALIZATION SYNDROME (2000)(economics); BENJAMIN BARBER, JIHAD V. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1996)(cultural studies); THOMAS FREIDMAN, THE LEXUS AND THE OLIVE TREE (1999)(economics); ROBERT KAPLAN, THE COMING ANARCHY: SHARING THE DREAMS OF THE POST COLD WAR (2000)(economics); PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION (2d ed. 1999); HELD, et al, *supra* note 21; WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1997). *See also* Leslie K. Skair, *Competing Conceptions of Globalization*, J. OF WORLD SYS. RES. 143 (1999); Long, *supra* note 3.

Although "globalization" studies can be divided into various categories of investigation, including those like the works of Huntington and Kaplan that focus on culture or geo-political relationships (as opposed to a purely economic analysis such as that undertaken by Mittelman or Freidman), I have not differentiated between such categories. To the contrary, the conclusions of culturalists such as Huntington regarding the development of indigenization and culture clashes that result from globalization are reflected in the works of the "pure" economists and play an essential role in such analyses. *See, e.g.*, FREIDMAN, *supra*.

Despite the current media hype regarding these two inter-related phenomena, neither is a particularly new development. Globalization, as an integratory market phenomenon, has existed at least from the days of the development of commerce in the later days of the Middle Ages, and has existed in its present form at least since the Industrial Revolution.[29] Harmonization of laws has similarly had a long and notorious history. In fact, some scholars have suggested that such harmonization has occurred since at least the days of the Roman Empire.[30] The international harmonization of intellectual property standards in its present form dates from at least the early 19th Century with the establishment of early bilateral agreements regarding the protection of copyright between Prussia and other German states.[31]

While neither globalization nor harmonization is a particularly new phenomenon, the present pace and scope of both has been unalterably changed in response to the impact of technological advances in both communications media and in the methods of production and distribution of goods and services.[32] The primary impact of present-day economic globalization has been the "inexorable integration of markets, nation-states and technologies to a degree never witnessed before— in a way that is enabling individu-

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While I have used Huntington and Kaplan's cultural analysis in my development of a predictive paradigm for analyzing IPR harmonization trends, I have not adopted or relied on the global chaos theories of either scholar in creating my paradigm. Like Sadowski, I seriously question the inevitability of such chaos. *See* YAHYA SADOWSKI, THE MYTH OF GLOBAL CHAOS (Brookings Institution Press 2000). At most, these theories, which predict an ultimate descent into violence and global chaos, born from increasing alienation and culture conflicts, serve as a warning of the potential evil that might arise should cultural differences be ignored in harmonization efforts. While recent terrorist attacks in New York City and on Washington, DC might give greater credence to the existence of Freidman's "Super Empowered Angry Man," Freidman, *supra* at 326, I still question the inevitability of such chaos.

29 *See, e.g.*, HIRST & GRAHAME *supra* note 28, at 18-61. Intercontinental trade dates back at least since 800 B.C. with trade between Mesopotamia and India. HELD, et al *supra* note 21, at 152. Rosemary Bray McNatt in "Read All About It: The Global Economy" describes slavery in the Americas as one of the results of earlier globalization efforts. *Cf.* Louis Uchitelle, *Some Economic Interplay Comes Nearly Full Circle*, N.Y. TIMES, April 30, 1998 at D6 (contending that the world's economies are "roughly as intertwined today as they were in 1913"). For a good historical review of prior globalization periods, *see* HELD, et al, *supra* note 21, at 416-435.

30 *See, e.g.*, Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method,* 13 UCLA PAC. BASIN L.J. 199 (1994).

31 RICKETSON, *supra* note 13, at 25 – 27.

32 *See generally* JAMES E. MCCLELLAN & HAROLD DAN, SCIENCE AND TECHNOLOGY IN WORLD HISTORY: AN INTRODUCTION (1999).

als, corporations, and nation-states to reach around the world farther, faster, deeper and cheaper than ever before."[33] This integration and penetration has been accelerated by the presence of the digital marketplace, represented by the Internet and the opportunities of e-commerce.

E-commerce, or at least the promise of electronic commerce,[34] has become the new paradigm for globalization. While figures on Internet growth and its global penetration remain subject to dispute, the reality is that the growth of the Internet as a global communication and marketing medium is unprecedented.[35] Moreover, such penetration is not limited to the so-called developed countries. To the contrary, of the ten fastest growing countries for Internet penetration for the year 2001, almost all of them are so-called developing countries.[36]

The pressure to jump on the bandwagon of cyberspace is not limited to the dot.com mania of the developed countries. Because of the Internet's perceived ability to lower barriers to entry so that small and medium enterprises (SME's) have the (theoretical) potential to compete with the largest multinational in the new global marketplace, countries which lack sophisticated commercial infra-

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33 FRIEDMAN, *supra* note 28, at 7-8.

34 The reality of e-commerce as a truly global phenomenon remains in the future given the high cost of infrastructure development, growing problems of the digital and culture divide, and the economic meltdown of diverse dot.com's. *See generally* National Telecommunications and Information Administration, *Falling Through the Net: Toward Digital Inclusion, http://*www.ntia.doc.gov/ntiahomepage/ttn00/contents00.htm (*last visited* June 11, 2002); Organ for Economic Cooperation and Development, The Digital Divide Widens: Warning for 2000 (February 4, 2000)(infrastructure costs, including local access fees remain high further dividing globe in ability to use the Net). Despite these problems, e-commerce remains a viable option for many small and medium enterprises to expand into the global marketplace. *See infra* notes 36-40.

35 It took 38 years for radio to reach 50 million viewers; it took television 13 years to reach 50 million sets in the United States. Yet in only four years, Internet penetration reached 50 million users in the U.S. alone. *See* WIPO, PRIMER ON ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY ISSUES, WIPO/OLOA/EC/Primer (May 2000). Estimates placed global Internet use at over 335 million users in 2001. Telecordia Technologies, INTERNET GROWTH REPORT, www. Netsizer.com. By 2002, estimated internet use had doubled. *Id.*

36 These countries, in order of highest internet penetration to the lowest, are Taiwan, China, Poland, Hong Kong, Argentina, Estonia, Romania, Italy and Uruguay. Telecordia Technologies, *Fastest Internet Growing Countries* from INTERNET GROWTH REPORT, www.netsizer.com (2001). The sole exception is Germany which is ranked ninth in growth. *Id.* By 2002, all of the fastest growing countries were developing ones, including in order from highest to lowest, Ukraine, India, Indonesia, Chile, Spain, Romania, Thailand, Brazil, Portugal and Mexico. *Fastest Internet Growth Countries*, *available at* www.netsizer.com (*last visited* June 12, 2002)

structures are exploring the ability to use the Internet to "leap frog" over their more developed brethren.[37] There is no question that infrastructure requirements remain daunting for non-industrial countries.[38] Yet the number of enterprises which are not affiliated with a large multinational and which are using the Internet for advertising and/or distribution of their goods and services continues to increase. E-Marketer claims that in 2001 over 78% of all U.S. small businesses will be connected to the Web, with over one-half of these companies owning "active, purposeful websites."[39] Foreign penetration is less, but is predicted to continue to grow at dramatic rates.[40] Admittedly, for most nations, the process of equal access via e-commerce and the Internet is only in its nascent stages. Yet, it is the pressure of these and other types of rapid technological changes, the lure of potentially "easy money" and the fear of being left behind that are the engines driving current globalization efforts.

The integratory aspects of globalization have been most noticeable in the capital markets.[41] Such integration, however, has not been limited to those markets but has expanded to include virtually every aspect of production, services and distribution. Portions of goods may be manufactured in one country, assembled in another, and advertised and distributed and sold in a third country.

While such integration has allowed developing countries to improve their industrial status by providing opportunities for greater participation in the process, the price of this integration has been the gradual erosion of nation-states as sovereign actors at the

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37 Thus, for example, India has devoted substantial resources to develop a burgeoning domestic computer and Internet industry while Malaysia has similarly devoted its resources to creating a high technology Supercorridor. Both of these efforts are helping to develop viable domestic technology-based industries to take advantage of the Internet and other digital technologies. *See, e.g.,* What's the MSC, www.mdc.com.my (2001).

38 These infrastructure requirements include both physical structures, such as telecommunications systems, and legal and judicial systems designed to regulate the Internet and the products and services that both operate the Internet and are marketed and distributed by it.

39 E-Marketer, The E-Commerce Snapshot Report for Small Business, *available at* www.emarketer.com/about_us/press_releases20010523_snap_sb.html (*last visited* June 12, 2002).

40 E-Marketer, THE EGLOBAL REPORT (2001) *available at* http://www.emarketer.com/ereports/eglobal/welcome.html (last visited Mar. 13, 2002).

41 The devaluation of the Thai baht in 1994 and the resulting financial crises that ripped through the Asian markets as a result of such devaluation amply, and powerfully, demonstrated the interrelationship between capital markets. *See, e.g.,* MORRIS GOLDSTEIN, THE ASIAN FINANCIAL CRISIS: CAUSES, CURES, AND SYSTEMIC IMPLICATIONS (1998).

systemic and institutional level.[42] One major factor in this evolution can be credited to the rise of multinational corporations ("MNC's") in the latter half of the 20th Century, the so-called "McWorld corporations" of Benjamin Barber.[43] The political and economic power of these MNC's integrates related business units across borders. These transnational "units" often incorporate affiliates, subcontractors, customers and other firms in the industry – creating geographically dispersed production and distribution processes.[44] While such geographically dispersed units may be subject to greater or lesser central control, depending on the level of autonomy-granted production or distribution units,[45] the integration across borders of such units, particularly for larger multinationals, often results in the creation by these MNC's of a separate cultural identity and a power base that appears to operate largely independent of the sovereign nations in which their corporate or physical assets are located.[46]

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42 It is beyond the scope of this Article to discuss in detail the various theories regarding the current role of nation states as international players in the 21st Century. Some scholars have strongly suggested that nation states are losing power and are being replaced by supra-state, sub-state and non-state actors. *See, e.g,* KAPLAN, *supra* note 28 (suggesting that regional and ethnic groups are taking the place of state actors, with the subsequent destabilization such groups present); Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFFAIRS 50 (1997)(claiming that "[t]he absolutes of the Westphalian system — territorially fixed states where everything of value lies within some state's borders; a single secular authority governing each territory and representing it outside its borders; and no authority above states - are all dissolving."). Others claim that the nation state is not disintegrating but is instead "disaggregating into its separate, functionally distinct parts" which are then being reconstituted into a new "transgovernmental" order. Anne Marie Slaughter, *The Real New World Order*, 76 Foreign Affairs 184 (1997). For a pithy analysis of the role of "stateness" and its relationship to economic globalism, see Peter Evans, *The Eclipse of the State? Reflections on Stateness in an Era of Globalization*, 50 WORLD POLITICS 62 (1997).

43 BARBER, *supra* note 28.

44 HELD ET AL., *supra* note 21 at 255 -70.

45 *Id.*

46 *See, e.g.,* KAPLAN, *supra* note 28; KENICHI OHMAE, THE BORDERLESS WORLD (1990); Kenichi Ohmae, *The Rise of the Region State*, FOREIGN AFF. (Spring 1993). Ohmae and Kaplan both see MNC's as acting in a borderless economy in which their growing economic power may serve to erode directly a nation-state's ability to mange its domestic economy. Kaplan warns that the power of the MNC's has becomes so diverse they have redefined cityscapes into "corporate enclaves that are dedicated to global business and defended by private security firms adjacent to heavily zoned suburbs." KAPLAN, *supra* note 28 at 84. Even university curricula is not safe from the entrepreneurial needs of these MNC's. *Id.* at 85. *But see* HIRST & THOMPSON, *supra* note 28, who contend that such borderless and stateless activity is in fact greatly affected by local concerns as such corporations reflect national strategies.

An even more potent source for the erosion of the sovereign power of nation states is the systemic trend toward the establishment, and, more importantly, empowerment of international organizations to resolve a variety of transborder and multi-border issues. These organizations, like the multinational corporations of "McWorld," operate without a domestic address or an organizational culture beyond that which they create for themselves.[47] In the arena of modern intellectual property protection in the modern world, such multinational organizations have been in existence since at least as early as the 1880's with the establishment of the Paris and Berne Unions. Yet the number of multinational organizations established to resolve transborder issues has grown exponentially in recent years. Even more importantly, the power ceded to these organizations has grown to include matters typically controlled by sovereign nations. These matters include domestic policy issues in connection with IPR protection, the scope of the public domain, and national enforcement priorities.[48]

The apparent ceding to such multinational organizations of sovereignty over areas that used to be the reserve of domestic (read "national") law and policy has not resolved the debate over the extent to which such ceded issues retain distinctly domestic elements which remain within the sole power of the individual nation states to decide. Whether framed as a question of "subsidiarity,"[49] public welfare,[50] or "residual sovereignty,"[51] the issue of the continued ability of nation-states to frame issues of public (read "free") access to protected works remains an area of vital concern and heated debate. For purposes of globalization analysis, these

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47 BARBER, *supra* note 28.

48 *See infra* notes 62-70 and accompanying text.

49 This term is often referred to in connection with the issue of intellectual property protection under the European Union and the extent to which, despite harmonization directives, individual members remain free to impose national deviations in the application of those directives. *See generally* Ulrich Loewenheim, *Harmonization and Intellectual Property In Europe*, 2 Colum. J. Euro. L. 481 (1996). *Cf,* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995)(raising the question of subsidiarity in the context of NAFTA and the right of local (states) government to participate in dispute settlement proceedings to make their concerns heard).

50 *See, e.g.,* Ruth Gana Okediji, *Toward an International Fair Use Doctrine,* 39 IND. J. TRANSNAT'L L. 2000 (2000).

51 J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for On-Going Public Private Initiatives to Facilitate World Wide Intellectual Property Transactions*, 9 DUKE J. COMP. AND INT'L L. 11, 22 (1998).

issues represent a strong backlash against integratory and sovereignty-eroding aspects of present globalization trends. Nothing in the nature of harmonization necessarily precludes the development of standards that take into account domestic welfare concerns,[52] or that allow for domestic variations within certain parameters. Many scholars, however, have questioned whether the power demonstrated by the developed nations during the Uruguay Round presages the practical impossibility of such a solution.[53]

The Disintegratory Trends of Indigenization

Like any radical dislocation in history, the forces of globalization have arguably carried the seeds of their own destruction. At the heart of present-day globalization is a fast food, fast information, consumer culture that seems largely based on the cultural icons of Western consumerism. CNN, McDonald's, Mickey Mouse, and MTV have arguably become among the most potent icons of a global consumer culture[54] that has an homogenizing effect as local traditions are replaced by MTV, Hollywood movies and American-logoed clothing. On its surface such homogenization might be perceived as a positive step in developing a new international commu-

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52 Article 13 of TRIPS, for example, permits countries to establish fair uses of copyrighted works so long as such uses conform to a tri-partite test that balances domestic welfare concerns against the normal exploitation rights of the copyright owner. TRIPS, *supra* note 3 at Article 13. *But see* Okediji, *supra* note 50 (suggesting that TRIPS Article 13 may be too narrowly crafted to allow broad social justice exceptions to copyright protection).

53 *See infra* note 87 and accompanying text. I don't believe harmonization necessarily precludes allowing some degree of local variation so long as such variations do not significantly undermine the purposes of the harmonized standard. In fact, as a practical matter, some of the more open-ended language in TRIPS, including for example "adequate compensation," "infringement" and "likelihood of confusion" (to name only a few) necessarily allow for a range of domestic variations within which nation states remain free to exercise domestic policy choices. Moreover, as I demonstrate below, under a revised harmonization process "differences" should be able to be clearly expressed, and be set forth for use in interpreting the agreement reached. This procedure would allow for a balance of international trade policy with domestic welfare concerns. *See* text *infra* at Part V.

54 This is not intended to denigrate the growing development of more localized products in the marketplace, including the development of specialized news by CNN for various markets. However, such development of localized products may be considered in part a response to collective identity "movements" that have arisen in reaction to the originally homogenized products that first marked the global news media. Culture becomes a commodity and apparel, ideology. BARBER, *supra* note 28 at 17. *See also* ROSEMARY COOMBS, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998)(detailing how cultures change commodities using trademarks and other symbols to express their own ideologies).

nity with shared values.[55] In reality, this potential leveling effect on culture and communities, however, contributes to a sense of isolation and alienation which generates its own backlash against the integratory demands of globalization.[56] Increased identification with, and greater valuation of, collective identities and their affiliated cultures and beliefs arise to combat the alienation of globalization. This localization or "indigenization"[57] of identity is accompanied by a growing consciousness of a collective "us" in the face of the imposing "them" of globalization – a recognition of the need for "new sources of identity, new forms of stable community,

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55 This thesis of harmonization has gone by numerous names, including Fordism (mass production), Coca-colonization (mass marketing), and McWorld (consumer homogenization) being a few of the more prevalent terms. Others disagree that any universal culture is being created by globalization. As Samuel Huntington emphasizes "through-out human history, fads and material goods have spread from one society to another without significantly altering the basic culture of the recipient society." Samuel Huntington, *The West Unique, Not Universal*, 75 FOREIGN AFFAIRS 28 (1996). While the leveling effect of present day global consumer culture may be exaggerated, I believe that both the overwhelming nature of such culture as well as the scope of its dissemination places this current culture beyond the category of a mere "fad." The precise impact of this globally oriented consumer (pop) culture on national identities is impossible to measure. Nevertheless, it is clear that at least within the West there is a degree of homogenization with regard to pop culture, which reaches to the affluent in Latin America and Asia. Such homogenization at least eliminates some domestic alternatives, even if it does not eradicate national identities. HELD ET AL., *supra* note 21 at 372-374. Moreover, the significance of this mass consumer culture lies in the reactions to such globalism, as individual groups struggle to maintain their own identities. Thus, for example cultural protection measures such as the Television Without Frontiers Directive of the European Union, Council Directive Concerning the Pursuit of Television Broadcasting Activities, 89/552/EEC (October 30, 1989), and the cultural industries exemptions of NAFTA and the Canadian Free Trade Agreement, *see supra* note 5 become increasingly popular. Even if national cultural identities have not been leveled by the forces of cultural homogenization, they appear to be undergoing a pronounced fragmentation. Powerful independence movements, including those involving such developed countries as the United Kingdom (Scotland and Northern Ireland), Spain (Basque and Catalonia), Belgium (Flemish and Walloon) and Canada (Quebecois), underscore such fragmentation, which aims directly at the unity of the nation-state. HELD et al., *supra* note 21 at 373-374.

56 This alienation arises from a variety of sources including the rapid urbanization of a society; the dislocation of peoples to take advantage of perceived economic advantages in urban (as opposed to rural) settings; the breakdown of traditional culture in the face of such dislocation; and the impersonalization that modernization can create. *See generally* HUNTINGTON, *supra* note 28 at 125-130. KAPLAN, *supra* note 28. *See also* HELD ET AL., *supra* note 28 at 327 – 374.

57 Samuel Huntington used the term "indigenization" in his seminal work *The Clash of Civilizations*, *supra* note 27, to describe the second generation modification of globalization trends to adapt such trends to local cultural norms. I have used the term in a somewhat broader sense, to refer to the *process* of adapting global developments to local culture and traditions.

and new sets of moral precepts to provide [people] with a sense of meaning and purpose."[58] This collectivism gives rise to powerful forces aimed directly at the catalyst that first unleashed them – economic globalization.

The "backlash" of indigenization takes many forms. For purposes of analyzing IPR harmonization processes, the most important appear to be those backlashes which are born from the search by the disaffected for a return to values based in their own culture. These "collective" identification groups have strong analogues in the culture and traditional knowledge movements in the international IP community.[59]

While the forces of indigenization may be "anti-globalization," they are not necessarily anti-economic or even anti-integratory. To the contrary, the emergence of a political movement based on the protection of indigenous culture and interests is directly related to the growing empowerment of these indigenization forces.[60] However, these forces of indigenization and collective interests (which includes forces for distributive justice in the form of heightened protection for user's rights and the public domain) unleash a different form of integration than that generally associated with globalization. This form of integration is focused more strongly on local and regional concerns as opposed to global or universal ones.

The Growth of Regional Solutions

The trend toward regionalism and the pursuit of regional as opposed to multi-regional solutions in the areas of intellectual property and trade has increased during the last decade of the 20th Century and shows no signs of abating. According to information contained in the 1999 Report of the Committee on Regional Trade

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58 *Id.* at 97.

59 The term indigenization tends to focus on collective identification groups of relatively long-standing (historical) duration. The rise of a potentially new collective identification group as a result of the "wired experience" in cyberspace appears to signal a different trend in group identification. This trend toward a sense of identity and affiliation that is "shifting, multiple, fluid and overlapping" may be at variance with the more inwardly focused concerns of cultural or religious collective identification groups. Yet such collective identity groups despite their purported "cosmopolitan" nature still reflect a more narrowly focused interest. *See, e.g.*, CASS SUNSTEIN, REPUBLIC DOT.COM (2001) Moreover, despite hopeful depictions of cyber occupants as somehow inhabiting a different realm than the physical world, with its own special set of working constructs, the same issues of racial, cultural and class identification, and the divides created by those identities remain. *See, e.g.*, RACE IN CYBERSPACE (Beth Kolko et al., eds. 2000).

60 *See* COOMBE, *supra* note 54.

Agreements to the General Council of the World Trade Organization, the WTO itself being a model of the *fin de si?cle* trend toward global institutional solutions to trade issues over domestic or regional responses, as of 1999, more than 118 regional trade agreements have been notified to the GATT/WTO.[61] Since 1995 alone 90 agreements covering trade in goods and services have been notified.

While some of the notified agreements have a relatively inactive status at present, others, such as NAFTA,[62] Mercosur,[63] CARICOM,[64] and the Andean Community[65] have established roles as "supraregional" entities with power to establish substantive standards for their member countries. Thus, the Andean Community, composed of Bolivia, Colombia, Ecuador, Peru and Venezuela, established Decision 344 of the Cartagena Agreement as the guiding standard for IPR protection for the member countries.[66] Decision

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61 Report of the Committee on Regional Agreements to the General Council of the World Trade Organization, WT/REG/8 (1999).

62 NAFTA was established on December 17, 1992. Its objective was to establish a free trade zone among Mexico, Canada and the United States. The Agreement establishing NAFTA contained extensive provisions regarding the protection of intellectual property rights. *See* North American Free Trade Agreement §§ 1701 *et seq*. *See also* North American Free Trade Agreement Implementation Act, P.L. 103-182, 107 Stat. 2057. *See generally* James Nafzinger, *NAFTA's Regime for Intellectual Property: In the Mainstream of Public International Law*, 19 HOUS. J. INT'L L. 807 (1997).

63 Mercosur was established on March 26, 1991, by the Treaty of Asuncion. Its central objective was the establishment of a customs union between the member states of Argentina, Brazil, Paraguay and Uruguay. In 1995 the member countries signed a protocol for the common treatment of trademarks and geographic indications, thus, moving, like the European Union, into intellectual property protection issues in order to promote the free circulation of goods within a free trade zone. *See generally* ROBERT M. SHERWOOD & CARLOS PRIMO BRAGA, INTELLECTUAL PROPERTY, TRADE AND ECONOMIC DEVELOPMENT: A ROAD MAP FOR THE FTAA NEGOTIATIONS, THE NORTH SOUTH AGENDA (1996); Laurinda Hicks & James Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769 (1997).

64 The Carribbean Community was established in 1973. Its members include most of the nations of the Carribbean region, including Antigua and Barbuda, the Bahamas, Dominica, Belize, Granada, Barbados, Grenada, Guyana, Haiti, Jamaica, Surinam and Trinidad and Tobago. Its members have established a common market and are participating in multilateral treaty negotiations as a single entity.

65 The Andean Community was created in 1969. In 1974 the Community adopted Decision 85 which established a common regime for the treatment of trademarks and patents. It has since adopted a wide variety of decisions concerning intellectual property issues, including patents, utility models, industrial designs, trade secrets, trademarks, copyrights, and plant varieties. *See, e.g.*, Decisions 313, 344, 345, and 351. *See generally* SHERWOOD & BRAGA, *supra* note 63.

66 The Andean Community has recently issued Decision 486 which replaces Decision 344.

344 was considered TRIPS-deficient by the United States government for its failure to provide, *inter alia*, pipeline protection for patents. Yet when Ecuador entered into a bilateral agreement with the United States to provide such protection, the Junta del Acuerdo de Cartagena initiated an action against Ecuador for non-compliance with the Andean regime. These actions ultimately proved effective when the Andean Court of Justice declared that patents granted in accordance with a pipeline procedure were void.[67] Thus, bilateral relations of a member country were directly affected by the decisions of the regional entity.

The supreme model of regionalism in the 20th Century is the European Union ("EU"). The EU (originally established as the European Economic Community in 1957)[68] was designed primarily to create a Western European free trade zone.[69] Over time, however, the EU determined that the free movement of goods within the Community required regional regulation in a wide variety of traditionally non-trade areas. The EU became increasingly active in establishing regional substantive standards through enactment of a broad array of directives and regulations. These directives and regulations cover a diversity of issues, from the adoption of a single currency to the scope of legal protection to be afforded trademarks, and impact the private lives of individual citizens directly. They in turn have served as models for domestic laws of non-EU

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67 *See, e.g.*, CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 116 (2000); Carlos Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT'L L. & POL. 109 (1997).

68 Strictly speaking the European Union was not created until 1992 when the Maastricht Treaty was established. See Treaty on European Union, 33 I.L.M. (February 7, 1992), as amended by the Treaty of Amsterdam (October 2, 1997). The EU is not precisely the successor of the EC. Instead, it absorbed the EC as one of its three pillars. *Id.* at Art G(A)(1). For the sake of simplifying issues, I have used the term EU to refer to the activities of the European Economic Community and the European Community since such actions now fall under the umbrella of the present EU, and any differences that exist between the EC and the EU are not relevant for purposes of analyzing the impact of regionalism under globalization on IPR issues. *See generally* LAW OF THE EUROPEAN UNION (Robert MacLean Ed., 1999).

The European Community (originally called the "European Economic Community") was created March 25, 1958. *See* Treaty Establishing the European Community, 298 U.N.T.S. 11 (1958).

69 *Id.*

countries, including — in the area of intellectual property protection— the United States.[70]

While such regionalism may appear antithetical to globalization,[71] it nevertheless forms an important part of an effective harmonization process. The fora for these regional organizations generally tend to share a common culture and tend to be more sensitive to local interests.[72] Such commonality facilitates the creation of effective harmonized standards. Despite the potential for greater regional harmonized standards, to a certain extent, the growth of these regional fora makes the likelihood of broader based accords less likely. Whenever intellectual property protection values are debated in a fora where diverse voices and interests may not be heard, the result is more likely to be a standard that is

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70 For example, the term of copyright protection in the United States was extended to life plus 70 years. *See* Copyright Term Extension Act, Pub.L. No. 105-298, 112 Stat. 2827 (1998). This extension was largely in response to the earlier European Directive, which extended protection in the European Union for an identical term. *See* Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98 (1993). See Copyright Term Extension Act of 1996, S.-Rep. 104-315 (1996) Similarly, efforts to craft a *sui generis* protection for databases in the United States was originally undertaken as result of a prior European Draft Directive that provided such protection. *See* Collections of Information Anti-Piracy Act, H.R. 354, 106th Cong. (1999).

Efforts at "harmonization" in a non-formal setting, such as a treaty negotiation or the adoption of soft law solutions to international protection issues, *see infra* note 165, are outside the scope of the formal harmonization process that I am examining in this Article. Nevertheless it is clear that such harmonization efforts can have a profound effect on domestic law. Moreover, such harmonized laws may be adopted without adequate appreciation of the harm they may cause, simply because they are "needed" to comply with international standards. *See, e.g*, Kenneth Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress*, 6 IND. J. GLOBAL LEG. STUD. 117, 136 (1998) (criticizing, *inter alia*, the adoption of the Copyright Term Extension Act on the grounds that such harmonizing efforts "represent not only a shift in the philosophical foundation of copyright and related law, but also a shift in the Constitutional foundation for congressional measures").

71 The precise role of regionalism in globalization has been hotly debated. As James Mittleman asked in his seminal work THE GLOBALIZATION SYNDROME, "Is regionalism merely a way station toward neoliberal globalization, or a means toward a more pluralistic world order in which distinct patterns of socioeconomic organization coexist and compete for popular support?" MITTLEMAN, *supra* note 1, at 111. Some perceive regionalism as a rejection of the transnational forces of globalization in favor of nativist solutions. *See, e.g.*, HUNTINGTON, *supra* note 27; KAPLAN, *supra* note 28. Others perceive regionalism as a potential first step in achieving global integration. *See, e.g.,* MITTLEMAN, *supra* note 1, at 111. To the extent that such regional efforts *replace* international (global) processes, or encourage the growth of indigenization, they are antithetical to the international integratory goals of globalization.

72 *See, e.g.,* HUNTINGTON, *supra* 28, at 91. *See also* MITTLEMAN, *supra* note 1, at 227.

not readily translatable to a universal or multi-regional standard.[73] As regional differences solidify, the desire or even ability to reach across differences may be severely weakened.

The Lessons of Globalization

The lessons of globalization derived from this admittedly brief review of some of its major trends seems relatively straightforward. Integration has the positive effect of increasing transnational production, distribution and financial processes, which in turn may give rise to a more rapid pace of economic development for countries involved in such integration. Such integration, however, is often purchased at the price of an erosion in sovereign autonomy and a deepening sense of disaffection or even alienation from integratory processes or institutions.[74] As this sense of disempowerment grows, countertrends to multinational integration arise with a focus on local problems and local or regional resolutions. If global integration is to continue and regionalism is to takes its place as a support (and not a counter) to globalization, "local" concerns must be addressed in global processes that acknowledge and give value to such concerns.[75]

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[73] *Id.*

[74] As Friedman recognized in his popularized treatment of globalization: " "If [the] participation [in the global economy] comes at the price of a country's' identity, if individuals feel their olive tree roots crushed, or washed out, by this global system, those olive tree roots will rebel. They will rise up and strangle the process." FRIEDMAN *supra* note 28 at 35. *See also* HUNTINGTON, *supra* note 28; KAPLAN, *supra* note 28; BARBER, *supra* note 28.

[75] Admittedly if Huntington is right and indigenization will naturally result from globalization, not in reaction to it, but as a evolutionary stage, then differences will not be completely addressed in a satisfactory manner. *See, e.g.*, Huntington, *The West is Unique, not Universal*, *supra* note 55. Huntington supports the theory of second-generation indigenization under which the second generation of people exposed to global culture by the first generation will naturally resent the power of the West and will turn to nativist movements. To a certain extent, this is the same development that colonial powers faced who educated local peoples in the value of democracy and were then faced with demands that the teachings of such democracy be extended to them. *See also* Ronald Dore, *Unity and Diversity in Contemporary World Culture, in* EXPANSION OF INTERNATIONAL SOCIETY (1984). To the extent that indigenization is a reaction to the perceived exclusionary nature of global processes, creating a more participatory process should help alleviate some of the problems raised by such indigenization. The object of harmonization, however, should not be to completely eradicate local (indigenous) differences, but to reduce such differences to areas of actual dispute.

II. THE TRENDS OF IP HARMONIZATION

Harmonization has so close a relationship to the forces of globalization that it may actually be a subset of globalization. Like its economic sister, harmonization of intellectual property standards has both an integratory and leveling aspect. Its general goal of creating a predictable, easily applied, international standard for the recognition, protection and enforcement of IPR seems directly related to the market integration goals at the heart of economic globalization.[76] In fact, the consumer culture of globalization cannot survive unless the icons and products of that culture can be protected and exploited. The protection of these icons and products is the touchstone of intellectual property harmonization.[77]

Intellectual Property as a Utilitarian Object of Trade

At a systemic level, the establishment of the TRIPS Agreement in 1994, like the fall of the Soviet Union and its impact on globalization,[78] marked the beginning of a reinvigoration of formal IP harmonization processes on both a multinational and regional basis. Since 1986 with the issuance of the September Declaration,[79] initiating the Uruguay Round and placing IPR on the agenda, intellectual property on the international stage has been plainly acknowledged to qualify as an item of trade.

Intellectual property protected works have a long historical relationship with economic (trade) issues. One of the earliest reported trademarks was found on pottery in Mesopotamia — an

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76 For a more complete discussion on the perceived goals of present harmonization efforts see *infra* notes 113 – 45 and accompanying text.

77 I take no stand on whether such global culture is valuable or worthy of protection. The point is that if any culture is to stand, its cultural symbols and artifacts must be protected. For the global culture, these symbols and artifacts are most often represented by works that fall within the traditional confines of intellectual property.

78 Many have treated the collapse of the Soviet Union as a triggering mechanism for present economic globalization efforts. *See, e.g.*, FRIEDMAN, *supra* note 28. *Accord* HELD ET AL., *supra* note 21 (equating the collapse of the Soviet Union with a new wave of liberal democracy).

79 The September Declaration formally placed IPR protection on the agenda of the Uruguay Round, thus, marking the beginning of formal acknowledgment of IPR as a trade issue. Prior to this development, discussions of IPR under GATT had generally been limited to developing an anti-counterfeiting code. *See* Long, *Uruguay Round*, *supra* note 17. *See also* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 3 (Terence P. Steward ed., 1993) [hereinafter Steward].

undoubted article of commerce.[80] One of the early multinational intellectual property treaty regimes, the Berne Convention, arose from the concerns of Victor Hugo and others over the lack of sufficient international protection for their creative endeavors.[81] More recently, efforts to establish an international anti-counterfeiting code as part of the Tokyo Round under GATT underscored the adverse impact lack of IP protection could have on items of trade, such as video games and software.[82]

Despite this historical relationship, multinational treaties such as the Berne and Paris Conventions which dealt with substantive protection issues for intellectual property did not treat intellectual property protection as a trade issue. To the contrary, both the historical and contextual bases of these treaties left the philosophical rationale for protection to the individual discretion of member countries. Neither treaty was negotiated under the auspices of a trade organization or administered by any such organization.[83] Even now, both treaties are administered by the World Intellectual Property Organization (WIPO), a non-trade agency of the United Nations. Moreover, although the problem of international trade in pirated works was one of the motivating factors behind the Berne Convention, neither treaty contains a chapeau, preamble or other provision that expresses directly or indirectly a relationship between intellectual property and trade protection.[84]

The history of revisions to these treaties further demonstrates that the primary concern of developing countries was in assuring adequate access to protected works to meet their needs for public

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80 FRANCK SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE MARKS (1925).

81 In 1878 the French Government organized an international literary congress in Paris, convened under the Presidency of Victor Hugo. These efforts eventually evolved into the convening in 1883 of a conference in Berne, whose efforts resulted in the establishment of the Berne Convention in 1886. One of the key issues addressed was the protection of works by foreign authors against a booming piracy business. *See generally* RICKETSON, *supra* note 13, at 46.

82 *See* Long, *Uruguay Round, supra* note 17; Steward, *supra* note 79.

83 *See generally* WIPO, HISTORY OF THE BERNE CONVENTION (1986); WIPO, HISTORY OF THE PARIS CONVENTION (1986).

84 In fact, it is arguable that the Paris Convention was not really a substantive harmonization treaty because the only harmonizing principle that it established was national treatment. Paris Convention, Article 2. If a country chose not to protect patents, so long as such lack of protection applied to both nationals and foreign inventors equally, the Convention was not violated.

welfare and development.[85] Thus, for example, the Appendix to the Berne Convention, adopted during the Paris Revision, granted limited translation and reproduction rights to developing countries to meet domestic needs.[86]

By contrast, TRIPS was negotiated wholly under the auspices of GATT – a trade organization. Its provisions were the result of bargain linkage diplomacy whereby intellectual property protection was expressly linked to trade concessions in non-intellectual property related areas such as agriculture and textile standards.[87] The apparent abandonment by developing countries of their earlier insistence on welfare enhancing protections during previous IPR treaty negotiations[88] appears to have been based in part on the perceived trade benefits obtained in other agreements simultaneously enacted with TRIPS.[89]

The trade-related nature of intellectual property rights under TRIPS was expressed textually in numerous provisions. The pre-

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[85] *See, e.g.*, Jerome Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 689 (1989); Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989); David Hartride & Arvind Subramaniam, *Intellectual Property Rights Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893 (1989); Marshall Leafler, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1989).

[86] As Sam Ricketson demonstrates, however, the rights granted under the Appendices were far more restrictive than those granted under the earlier Stockholm Protocol. Ricketson, *supra* note 13, at 593-64.

[87] See Abbott, *supra* note 17 (describing the range of concessions obtained in return for IPR protection under TRIPS, including reductions in agricultural subsidies, concessions on tropical product imports and quotas on textile products).

It is an open question whether in fact the bargained-for benefits that countries expected to receive in exchange for intellectual property concessions will actually be received. According to John Whalley, positive results in agriculture and textiles have been achieved by some developing countries in the form of increased prices. John Whalley, *Developing Countries and System Strengthening in the Uruguay Round in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES (1995). These higher prices, however, could have an adverse impact on net importers of agricultural products, such as many African countries, thus, making the overall benefits strongly country-dependent. *Id.*

[88] Among the types of welfare enhancing provisions that were sought were rights to translations, exceptions to protection for the purposes of teaching and public information, greater reservations rights and lesser periods of protection for copyrighted works. *See generally* RICKETSON, *supra* note 13.

[89] *See supra* note 87 and accompanying text. More sinister reasons have been posited for the abandonment by developing countries of their previous solidarity on IPR protection issues. *See, e.g.*, Chiapetta, *supra* note 24 (suggesting that the failure to agree on exhaustion standards represents a "last stand" by developing nations to maintain some level of domestic control over IPR in the face of the coercive tactics by developed countries under TRIPS.).

amble itself stresses that the reason behind the treaty was the members' "desire to reduce distortions and impediments to international trade."[90] Similarly, Article 40 recognizes that licensing practices may restrain competition, thereby "having an adverse effect on competition in the relevant market." This can be corrected by methods aimed to correct these trade distorting practices.[91] Even Article 31, dealing with conditions under which compulsory licensing of patents is permitted, addresses the concerns of adequacy in the domestic market of the licensed product.[92] Whatever other impact TRIPS may have on international harmonization efforts, it undeniably established that intellectual property protection is a trade matter. Whether or not intellectual property laws may be justified under theories of natural law,[93] labor,[94] or personality,[95] TRIPS establishes only one *international* philosophy for their protection —- utilitarianism, or more precisely *trade* utilitarianism.[96] This trade-based view of protection strongly supports the usefulness of economic globalization as a prism for predicting future harmonization trends.[97]

Integration and Regionalism in Harmonization Practices

The integratory process for IPR harmonization (at least in its formal, standard-making sense) is as old as the first international Author's Union established by Victor Hugo to consider the problem of book piracy in the 19th Century.[98] Like economic globalization, integratory IP harmonization is not a new creation. What has

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90 TRIPS, *supra* note 3 at Preamble.

91 TRIPS, *supra* note 3 at Article 40(2).

92 TRIPS, *supra* note 3 at Article 31.

93 *See, e.g.*, A. Samuel Oddi, *TRIPS- Natural Rights and a "Polite Form of Economic Imperialism"*, 29 VAND. J. TRANSNAT'L L. 415 (1996); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L. J. 517 (1990); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. R. 65 (1997). *See generally* ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY LAW (1997)

94 *See generally*, D'Amato & Long, *supra* note 93, at Chapter 6 and works cited therein.

95 *Id.*

96 *See infra* notes 115 - 123 and accompanying text.

97 *Accord* Brian Fitzgerald, *Trade-Based Constitutionalisms: The Framework for Universalizing Substantive International Law*, 5 U. MIAMI Y.B. INT'L L. J. 111, 147 (1997) (contending that the international trade regime whose "fundamental theme" is movement and communication in commerce between states has common purpose with international IP protection "which is itself premised on the notion of movement, the movement of information beyond borders.")

98 *See* Sam RICKETSON, *supra* note 13 and accompanying text.

changed, however, is the pace at which such international harmonization efforts occur. Indeed, if the past 10 years is any indication, harmonization (like globalization) has become the new "flavor of the month" in the IP community.

Within two years of the conclusion of the Uruguay Round, a diplomatic conference held under the auspices of WIPO led to the signing of the WIPO Copyright Treaty (WCT)[99] and the WIPO Performances and Phonograms Treaty (WPPT).[100] On their face, both of these can be considered TRIPS add-on agreements. They were negotiated by many of the same parties that had concluded the TRIPS negotiations. They also added definitions to the Berne Convention that had already been established under TRIPS, including, for example, the extension of the definition of a literary work under Article 2 of the Berne Convention to include computer programs,[101] and the extension of a tri-partite test to all potential fair uses of a copyrighted work.[102] Similar to TRIPS, the WCT and WPPT both included requirements of "effective" enforcement of their affirmative obligations.[103] They also, however, filled some of the gaps that had not been addressed by TRIPS, significantly, including the treatment of copyrighted works on the Internet.[104]

Harmonization efforts in the post-TRIPS era have not been limited to the negotiation of multi-national treaty regimes. Within the past two years, for example, the WIPO Standing Committee on Trademarks has established Joint Recommendations on famous

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99 WIPO Copyright Treaty, 36 I.L.M. 65 (hereinafter "WCT").

100 WIPO Performances and Phonograms Treaty, 36 I.L.M. 26 (hereinafter "WPPT").

101 Article 10 of TRIPS had previously extended the incorporated Berne Convention definition for a copyrightable work to include computer programs. TRIPS, *supra* note 3 at Article 10.

102 Article 9 of the Berne Convention had previously only addressed fair use in terms of the right of reproduction. Berne Convention, *supra* note 3 at Article 9.

103 WCT, *supra* note 99 at Article 14; WPPT, *supra* note 100 at Article 23. Unlike TRIPS, however, effective sanctions are not available for failures to meet these "effective enforcement" obligations, since no dispute resolution mechanism has been established. Presumably, parties may prosecute such failures before the International Court of Justice, just as treaty violations under Berne may be so prosecuted. Given the fact that no such cases have been filed in the 100+ years of existence of the Berne Convention, it is doubtful that the WCT and WPPT treaties will be subject to greater efforts through international enforcement of treaty obligations.

104 TRIPS is technology neutral and therefore applies in the digital environment of the Internet. Because it was concluded prior to widespread use of the Internet by general consumers, TRIPS did not contain any specific provisions devoted solely to Internet issues.

marks,[105] trademark licensing,[106] and the use of trademarks on the Internet.[107]

Even organizations which have not previously been concerned or involved in the development of IP harmonization standards have begun to devote time in their agendas to such topics. In calendar year 2000 alone, the issue of IP protection was discussed by such diverse organizations as APEC,[108] UNECE,[109] OECD[110] and the Council of Europe. Draft treaties concerning criminal enforcement of copyrighted works in cyberspace and jurisdiction over transnational suits involving trademark and copyright enforcement were being negotiated in the Council of Europe and the Hague Conference on Private International Law, respectively.[111]

III. THE BENEFICIAL VALUE OF IPR HARMONIZATION

Harmonization, or more precisely limited universalization of protection standards, is not in itself an evil, pernicious or unattainable goal. If globalization analysis teaches us anything, it is that the *method* by which harmonization is currently being pursued, and the goals *behind* these efforts may be at fault for any perceived evils harmonization poses.

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105 Joint Recommendations Concerning Provisions on the Protection of Well-Known Marks, *available at* www.wipo.int/sct (last visited Mar. 13, 2002).

106 *Id.*

107 Draft Provisions Covering the Protection of Industrial Property Rights in Relationship to the Use of Signs on the Internet, SCT/5/2 (September 2000). The Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks was subsequently adopted by a joint session of the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO) in 1999. The Joint Recommendations Concerning Trademark Licenses was similarly adopted in 2000. The process of establishing such recommendations are generally more rapidly resolved, thus accelerating the harmonization process. *See* text *infra* at Part V.

108 Asia Pacific Economic Cooperation. This association is composed of diverse member countries from the Asia-Pacific region as well as other developed and developing countries, including the United States, Russia, Mexico and Canada.

109 United Nations Economic Commission for Europe (UNECE). UNECE is a regional commission of the United Nations which has increasingly focused on IPR protection issues, among others.

110 Organ for Economic Cooperation and Development. OECD is an organ of the United Nations which has addressed diverse trade issues, including IPR protection issues.

111 These two treaties are the Draft Cybercrime Convention, *available at* www.conventions.coe.int (last visited Mar. 13, 2002), and the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *available at* http://www.hcch.net/e/workprog/jdgm.html (last visited Mar. 13, 2002), respectively. The Draft Cybercrime Convention was signed by the members in June 2001.

If intellectual property is an item of global trade, which I believe it is,[112] then effective globalization requires that the owner of such item be guaranteed a predictable level of protection for her works of innovation or creation. Such predictability ensures that rational decisions can be made regarding the creation of those works,[113] and any investment in their international production and marketing. Moreover, the simple global nature of the trade into which such works are being released requires a global standard for their protection. At a minimum, such global protection should assure that the owner can expect the grant of certain rights, and the ability to protect those rights in a predictable manner against unauthorized uses. These guarantees become even more important in a marketplace undergoing the rapid integration of economic globalization.

Numerous justifications have been offered for harmonization of intellectual property protection, including the facilitation of international dialogues on key issues of mutual interest,[114] externalities,[115] leakage and the inefficacy of unilateral rules, the need to assure fair competition on an international basis, economies of scale,[116] and transparency. They all play a significant role in the overall desirability of international harmonization. However, I believe the critical reason for such harmonization is the need to en-

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112 *See supra* note 96 and accompanying text.

113 At the heart of the debate over intellectual property protection is a concern about the extent to which such protection is required in order to encourage new works and inventions. *See, e.g,* Doris Estelle Long, *First,"Let's Kill All the Intellectual Property Lawyers!": Musings on the Decline and Fall of the Intellectual Property Empire,* 34 J. MARSHALL L. REV. 851 (2001) and the works contained therein [hereinafter "Long, *Musings*"]. As I have indicated in earlier writings, I strongly believe that such creation protection is absolutely required to ensure the creation of new works which require substantial investments of labor and/or capital. *Id.* Protection for the public domain must be balanced against a rational need for continued encouraged creativity.

114 David Leebron refers to this justification as "jurisdictional interface." *See* David Leebron, *An Analysis of Harmonization Claims*, 10 COLUM. J. ASIAN L. 308 (1996).

115 These externalities include costs that are imposed on trans-border trade as a result of differing regulations, and other non-tariff barriers to trade that may result from such inconsistencies. *See, e.g,* TRIPS, *supra* note 3 at Preamble (citing the need to avoid the imposition of such non-tariff barriers).

116 This also includes what David Leebron refers to as "political economies of scale." *See* Lebron, *supra* note 114, at 311. These political economies result when international organizations such as WIPO sponsor harmonizing activities. They can absorb part of the costs involved and provide a certain amount of "political cover" for harmonizing acts. Realistically, I think such international fora also help to apply a certain amount of pressure on participants to reach some sort of agreement in order to avoid being left out of the international community.

hance the international predictability of intellectual property protection, so that its use as an item of trade can be enhanced and the benefits of such protection can be distributed on a more equitable basis.

In a case study of the role of intellectual property protection on the development of Japan's domestic industrial development, Hisamitsu Arai clearly demonstrates that domestic wealth can be created, and industrial growth encouraged, through the aggressive use of intellectual property rights.[117] Shaid Alikhan, in his work *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*, has similarly demonstrated that IP-based industries, particularly the copyright industries, can provide domestic employment, tax, and market wealth that directly contribute to a country's gross domestic production.[118] Numerous other economists and scholars have similarly demonstrated that a positive relationship exists between IPR protection and economic development.[119] Moreover, foreign direct investment generally increases as domestic IP protection levels rise, further increasing domestic economic growth potential.[120] As Keith Maskus concluded in his recent study of the relationship between intellectual property

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117 HISAMITSU ARAI, INTELLECTUAL PROPERTY POLICIES FOR THE TWENTY-FIRST CENTURY: THE JAPANESE EXPERIENCE IN WEALTH CREATION (1999).

118 SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES (2000).

119 *See also infra* works cited in note 120.

120 *See, e.g.*, KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 236 (2000). *See also* Long, *Musings, supra* note 112; Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World in* GLOBAL DIMENSIONS IN INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY (1993); Carlos Primo Braga, *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES (1995) (demonstrating that FDI flows increase with the perceived strength of IPR regimes); Richard Rapp & Richard Rozer, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, J. OF WORLD TRADE 75 (demonstrating that there are substantial benefits in the form of investment and technology flows to countries that protect intellectual property); *Accord* Arvind Subramanian, *The International Economies of Intellectual Proprety Right Protection: A Welfare-Theoretic Trade Policy Analysis*, 19 WORLD DEVELOPMENT 945 (1991)(examining the impact of IPR protection on importers and exporters of technology); Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507 (1996); EDWIN MANSFIELD, INTELLECTUAL PROPERTY PROTECTION, DIRECT INVESTMENT AND TECHNOLOGY TRANSFER (International Finance Corporation Discussion Paper 1995)(demonstrates positive correlation between IPR protection and decision to engage in FDI); Evelyn Su, *The Winners and Losers: The Agreement on Trade Related Aspects of Intellectual Property Rights and its Effects on Developing Countries*, 23 HOUSTON J. INT'L L. 169, 216 (2000)(analyzing various studies regarding the impact of IPR protection

rights and economic growth: "[S]tronger IPRs have considerable promise for expanding flows of trade in technical inputs, FDI, and licensing. These in turn could expand the direct and indirect transfer of technology to developing nations."[121]

Realistically, stronger standards of protection may not always be welfare enhancing. As Carlos Primo Braga points out: "Patent races may lead to over-investment in R&D. Private returns may exceed social returns as protection increases and inventors can appropriate additional gains in assets that are complementary to the innovation."[122] Similarly, copyright protection may restrict the creation of new works by removing from the public domain the building blocks needed to create such works.[123]

Yet even if not all countries partake of the same benefits from IPR protection, there is no evidence that in all instances the impact of strong IPR protection is merely a transfer of rents from developing to developed countries.[124] Because of its potential benefits, IPR protection does not have to be seen as an insurmountable obstacle for developing countries to overcome. Appropriate levels of protection, which balance individual rights with community needs,

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on developing countries and concluding that strengthening IPR protection "may . . . increase[ ] . . .local innovation, foreign direct investment, and technology transfers").

Braga, *supra* note 63, at 398. *See also* S. WINTER, PATENTS IN COMPLEX CONTEXTS: INCENTIVES AND EFFECTIVENESS" IN OWNING SCIENTIFIC AND TECHNICAL INFORMATION (1989).

For articles which examine the economic desirability of IPR protection, *see, e.g.*, Robert P. Merges, *Of Property Rules, Coase and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); Martin Adelman, *The Supreme Court, Market Structure, and Innovation*, 27 ANTITRUST BULL. 457 (1982); William Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325 (1989); Alan Deardorff, Should Patent Protection Be Extended to All Developing Countries?, 13 WORLD ECON. 497, (1990) (advocating that patent protection will distribute wealth away from developing countries, who should therefore be exempted from such protection requirements).

121 MASKUS, *supra* note 120, at 236.

122 Braga, *supra* note 63 at 398. *See also* Winter, *supra* note 119.

123 In fact, some scholars have suggested that copyright serves little purpose in encouraging true creativity since every work is derivative. Therefore, copyright serves to cut off creativity by cutting off the ability to create derivative works without the permission of the copyright owner. *See, e.g.*, Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 218 (1983); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDIES 325, 332 (1989); David Lange, *Recognizing the Public Domain*, 44 L. AND CONTEMPORARY PROBLEMS 147, 171-73 (Autumn 1981).

124 *See, e.g.*, Abramin Subramanian, *TRIPS and the Paradigm of the GATT: A Tropical, Temperate View*, 13 WORLD ECON. 509 (1990).

developed through a harmonization process that assures democratic access and avoids marginalization of less politically powerful voices, can serve as a powerful force for *balanced*,[125] continued economic growth and development.

Moreover, the very nature of intellectual property — intangible, ubiquitous,[126] with no localized situs and no easy method for ascertaining or prohibiting its foreign expropriation — necessitates international standard of protection.[127] Without such standards, the economic value of such property can be easily destroyed through a few carefully placed pirate havens. Such pirate havens have always been a problem, but with today's technological advances in reproduction and distribution, such havens pose a far greater threat to an IP owner's ability to obtain a fair economic return on her creative endeavors.

I do not advocate universalization of all intellectual property standards. Aside from my conviction that any such attempted universalization would be wholly unsuccessful from a practical point of view, it would also be unwelcome. Some limited differences in IPR protection on a domestic basis are necessary to maintain local cultural values[128] and meet local sovereignty needs.[129]

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125 Such balance includes the development of realistic, achievable standards. Failure to develop such standards threatens to create segmented universality where "the culture of intellectual property protection" will be limited to the "industrialized (or perhaps liberal) states." Fitzgerald, *supra* note 97, at n. 131.

126 The information that is contained in an IP based product, such as a patented invention, is not limited to the tangible form of that invention. Thus, control over the tangible form does not prevent the spread of the information behind that form, with potential subsequent harm to the exploitation value of such information. *See, e.g.,* Fitzgerald, *supra* note 96.

127 Intellectual property is also inexhaustible. However, the simple fact that the physical embodiment of the work cannot be exhausted (because it has no physical attributes to be exhausted) does not mean that its economic value is similarly inexhaustible.

128 These local values do not, however, include a pirate culture such as currently flourishes in certain developing and least developed countries. *See, e.g.,* IPAA, 2001 Special 301 Report (2001). *See also* United States Trade Representative Report on Special 301 (2001), *available at* http://www.ustr.gov/html/special.html (last visited Mar. 13, 2002). Such pirate cultures do not reflect local values per se, beyond the value of expediency. Instead, cultural values such as protection of folklore, mediation, religious practices and communal creation and ownership are the types of values for which local differences should be allowed. Such differences, however, should be along a harmonized continuum of options.

129 Such sovereignty needs include a certain degree of autonomy in establishing domestic social welfare balances between protection and non-protection in the form of fair or compulsory uses of otherwise protectable works. TRIPS itself acknowledges in Article 31, in dealing with compulsory licenses for patented inventions under TRIPS, that there are certain domestic welfare issues, including national security, and public emergencies where

For example, in the area of enforcement each country has its own legal system and traditions which form part of its political-cultural identity. To require the adoption of a universal legal system would place unnecessary strain on domestic sovereignty, requiring countries to sacrifice local control over something as fundamental to its sovereign nature as its judicial system. Yet such strains are not necessary so long as countries adopt universal *principles* of enforcement, such as the right to an impartial, rational process, with decisions based on known evidence and applying known legal principles in a non-arbitrary fashion.[130]

Similarly, in the area of indigenous cultural works, countries should be free to protect works of folklore, folk art and other non-traditional works, particularly when the unauthorized use of such works in the view of the relevant local decision maker would cause harm to their cultural significance.[131]

The areas where universal standards may be required are those areas where the economic (utilitarian)[132] nature of the right at issue necessitates a single global standard. Thus, for example, in the area of sound recordings, a single standard recognizing the protectable nature of such works is required to permit and even support rational global dissemination (marketing) of the work. Whether such protection right is based on theories of copyright (such as in the United States)[133] or related rights (such as in Europe)[134] does not require a universal approach, so long as the philosophical bases for protection do not result in markedly different levels of protection.

The question of ownership of this right to protection similarly does not require universalization. Whether the owner of the performance right in a sound recording is the composer, the performer or the producer may be less significant to the effective global mar-

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intellectual property protection must give way to more significant domestic concerns. TRIPS, *supra* note 3 at Article 31.

130 *See, e.g.,* TRIPS, *supra* note 3 at Part III, Articles 41-61 (requiring member countries to adopt civil, criminal and border enforcement measures based on the rule of law, including "fair and equitable measures," an unbiased decision-maker and transparency of laws and procedures).

131 *See* Long, *Impact*, *supra* note 3; Kuruk, *supra* note 11.

132 For a discussion of the utilitarian nature of IPR protection post-Trips, see *supra* note 96 and accompanying text.

133 *See, e.g.* 17 U.S.C. § 102(7) (extending copyright protection to sound recordings).

134 *See, e.g.*, United Kingdom Copyright and Related Rights Regulations of 1996 (establishing protection for satellite broadcasts and sound recordings).

keting of the work, then the fact that protection is granted to at least one of them so that she will be encouraged to create and market the recording.[135]

By contrast, the concept of remedies for unauthorized uses should be a universal concept. This universal concept should include the right to a monetary award of damages sufficient to recompense the right holder for the unauthorized use of her work. Available remedies should be designed to minimize the harm caused by any such unauthorized use and to preclude future infringement. The precise amount of money damages awarded would vary depending on the circumstances of a particular case, as would the amount of any statutory damages that might be available. It is the concepts of recompense and deterrence, and the range of allowable variations that require universalization.

Admittedly, the line between utilitarian function, universal concept and harmonized ranges of protection is not an easy or precise one to draw. Yet the effort expended in debating these issues should lead to a more fulsome discussion with a resultant enhanced understanding of the limits of any "harmonized" standard. Some discussions would no doubt establish the absence of agreement on certain IP protection matters. Indeed, in some debates, the "agreement" reached may well be to continue to disagree. So long as the scope of such disagreements is clearly set forth,[136] predictability would still be enhanced.

Some have criticized harmonization as (correctly) leading to an elimination of differences.[137] This elimination of differences, particularly in the area of intellectual property standards, almost always involves a trade up from "no protection" to some level of protection. Such "trade up" is perceived as leading to disequilibria because sovereigns necessarily lose the ability to determine their own standards of protection. I fully agree that any international harmonization naturally leads to a lessening in the ability to determine domestic policy *in a vacuum*. Accession and ratification of

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135 Such treatment mirrors the proposed harmonization standards contained in the WPPT which provides that rights holders in sound recordings include performers and producers, and in certain instances, broadcast organizations. *See* WPPT, *supra* note 100 at Parts II, III and IV.

136 *See* text *infra* regarding the role of preparatory work in the revised harmonization process.

137 *See, e.g.,* Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEG. STUDIES 443 (1998).

treaties, however, demonstrate that a domestic policy choice *has* been made. The choice is to accept a certain subsidiarity in domestic control to the broader and sometimes contradictory goals represented by an agreed-upon international norm. Where such decision has been made in a fair process, and represents a truly agreed-upon standard,[138] then harmonization does not appear to be an unacceptable act of usurpation.

Others have challenged the concept of harmonization because of the potentially harmful effect that such harmonization may have on social welfare at an international level.[139] Briefly, because harmonization is focused on enhancing the trade nature of intellectual property rights, social justice and public welfare issues, including right of access by the marginalized sectors of society (at both a national and international level) are minimized, if not completely ignored. Such social welfare goals may only be achieved, or more readily achieved through *domestic* policy initiatives. These domestic policy initiatives are at a direct variance with the difference-elimination nature of harmonization and therefore suffer when harmonization processes take precedence.

I agree that as a general principle public welfare qualifies as a local issue which may be more vigorously protected in smaller, domestic fora. Nevertheless, just as human rights and the protection of culture have been raised to an area of international social justice, so too, the protection of the expressions of humankind's cultural creativity (intellectual property) is worthy of being protected as a matter of social justice, with all the requirements of access and fairness that such social justice requires. Harmonization does not, however, per se automatically preclude any local variation to fulfill important domestic policies. In fact, as a practical matter, some of the more open-ended language in TRIPS, including for example "adequate compensation,"[140] "infringement"[141]and "likelihood of

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138 *See* text *infra* Part V regarding the protections required to assure that such procedural fairness has been achieved.

139 *See, e.g.*, Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEG. STUDIES 117 (1999); Keith Aoki, *Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. LEG. STUDIES 11 (1998); Peter Jaszi, *Goodbye to All That - A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L 595 (1996). *See also* Ruth Gana Okediji, *Toward an International Fair Use Doctrine,* 39 IND. J. TRANSN'TL LAW 2000 (2000).

140 *See* TRIPS, *supra* note 3 at Article 45.

confusion"[142] (to name only a few)[143] necessarily allow for a range of domestic variations within which nation states remain free to exercise domestic policy choices. Moreover, under the revised harmonization process that I advocate, "differences" should be able to be clearly articulated and serve as interpretive guides. Such procedures would allow for a balance of international trade policy with domestic welfare concerns.

Any harmonization necessarily implicates a loss of sovereignty in its purest sense. As Arie Reich stated the matter: "An international trade agreement will always be in the nature of a compromise by each of the State Parties between each State's aspiration to attain the economic benefits introduced by the agreement, and each State's desire to preserve optimum sovereignty."[144] Yet so long as the processes for such harmonization are fair, *and* the country in question is able in a practical sense to reject the standard and refuse to ratify the treaty, any resultant loss of sovereignty is made as a domestic policy *choice* and *not* as an abandonment of choice.

I realize that to a certain extent this begs the question of the extent to which any nation can realistically refuse to participate in international harmonization efforts. Even a country as powerful as the United States has received sharp criticism in recent years for failing to agree to such broad based treaties as the Kyoto Protocol to the United Nations Framework Convention on Climate Change (dealing *inter alia* with greenhouse gases) and the UN Accord to Enforce the 1972 Biological Weapons Convention (dealing with weapons of mass destruction).[145] Yet nations participate in harmonization negotiations for a variety of reasons, not all of which can be laid on the doorstep of coercion. To assume *arguendo* that agreeing to a treaty that involves the loss of sovereignty demonstrates coercion is circular.

Finally, for good or naught, harmonization, like globalization is here to stay. The better approach is to create a process for har-

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141 *See* TRIPS, *supra* note 3 at Article 41.

142 *See* TRIPS, *supra* note 3 at Article 16.

143 *See also infra* note 189 and accompanying text.

144 Arie Reich, *From Diplomacy to Law: The Jurisdiction of International Trade Relations*, 17 J. INTERNATIONAL L. & BUS. 775, 775 (1997)

145 *See, e.g.*, Tony Czuczka, *Global Warming Deal Struck but US Remains Opposed, available at* http://more.abcnews.go.com/sections/world/dailynews/kyoto010723.html (July 23, 2001).

monization that is fair and effective, than to try to lock the gate after the IPR horse has escaped.

IV. THE PROCESSES OF IPR HARMONIZATION

International harmonization processes have undergone a profound change over the past thirty years. Whereas earlier aims of international law were directed primarily toward facilitating the peaceful co-existence of nations,[146] in recent years international law has aimed to implement international substantive standards directed at harmonizing the internal structures of nation-states.[147] Such expansion into the realm of substantive international rules, particularly rules that relate to trade, result in international law efforts that are distinctly different from prior international harmonization processes. One distinct difference according to David Kennedy is the lack of clearly identifiable universal standards.[148]

When the object of harmonization processes is regulating relations between nations to assure peaceful coexistence, international law is perceived primarily as a regulatory framework for mediating differences between sovereign nations.[149] Mediation of these differences lies within the public international law framework and is most clearly embodied in the workings of the United Nations.

By contrast, where the object of harmonization is in the realm of substantive laws, such as those governing trade or intellectual property, international law leaves the realm of mere regulation of relations between sovereigns and enters into a mixed public-private realm. While "[t]rade appears to be the one true universal substantive principle of the modern era,"[150] and the improvement

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146 *See* WOLFGANG FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 5 (1964) ("The principle preoccupation of the classical international law . . . was the formalization and the establishment of generally acceptable rules of conduct in international diplomacy.")

147 *See* Fitzgerald, *supra* note 97 (examining the move from peaceful coexistence to substantive harmonization as the focal point for international legal relations).

148 David Kennedy, *A New Stream of International Law Scholarship*, 7 WISC. INT'L L.J. 1 (1988).

149 *See, e.g.*, Fitzgerald, *supra* note 97, at 163.

150 *Id.* at 129. The guiding premise of GATT was that "liberal trade and other freedom for economic transactions would best promote the welfare of all in the world, based on well established economic theories of comparative advantage, gains from trade and economies of scale." John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round,* 14 U. ARK. LITTLE ROCK L.J. 429, 441 (1995). This premise is continued in the WTO. Despite general agreement on a liberal trade premise, both the desirability of such a regime and the scope of issues to be governed

of international trade relations a generally acknowledged universal goal[151] the regulations required to assure free movement of trade require the management of a greater number of domestic issues not originally perceived as trade issues, including intellectual property rights. With the greater number of issues for which accord is required, the greater the possibility that differences will arise to derail attempts at harmonization.

Prior to TRIPS, international harmonization processes on a multi-regional basis were achieved through typical public international law organizations. International organizations such as the World Intellectual Property Organization sought to regulate international substantive standards by regulating the conduct of sovereign nations. As a single focus organization, however, WIPO did not allow for the linkage of intellectual property protection with non-IP issues. Efforts at creating harmonized standards faltered under this traditional public law initiative, with the last major revision to either the Berne Convention or the Paris Convention occurring in 1971.[152]

The process of IPR harmonization was radically altered with the September Declaration that placed intellectual property protection firmly in a trade based forum.[153] Although GATT was still a public law organization, as a trade organization, the diversity of issues that needed to be addressed allowed for a multi-issue forum. This forum in turn allowed for the bargain linkage diplomacy that proved so effective in achieving the strong IPR regime that had been sought by the developed countries for decades.[154]

This change in harmonization processes from the single-issue WIPO forum to the multi-issue GATT forum is a direct contributor to the increasing North-South division that seems to plague current efforts to develop harmonized standards. Clearly, North-South di-

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under such a regime remains subject to heated debate. *See, e.g*, Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. OF GLOBAL LEG. STUDIES 117 (1999) (contending that welfare concerns of domestic copyright law are inconsistent with a liberal trade regime).

151 Recent protests in Seattle and Genoa, however, indicate that while trade may be a universal goal, the methods for reaching such trade, and more specifically, the social costs of this trade remain the subject of heated debate.

152 *See generally infra* note 86 and works cited therein.

153 *See generally* Long, *Uruguay Round, supra* note 17.

154 The creation of a positive link between intellectual property protection and trade, however, seems a natural development given the fact that as a general matter, the more trade in intellectual property, the more valuable such property generally becomes.

visions existed before TRIPS. The failure of the 1967 Stockholm Revision to the Berne Convention is ample evidence of the extent to which international harmonization processes had degenerated prior to TRIPS. What TRIPS appears to have accomplished, however, is to exacerbate the sense of alienation from the process, because of the allegedly one-sided nature of the decision reached in this accord. Numerous scholars have criticized TRIPS for being a bad bargain, obtained as a result of coercive power, for which the agreed-upon concessions have not been achieved.[155] It is beyond the scope of this Article to address the so-called bad bargain of TRIPS.[156] However, whether or not TRIPS represents a coercive agreement, even the appearance of such coercion should be avoided if harmonization is to achieve the goals of transparency and accord which are critical to the development of effective universal standards.

Present Mechanisms for IPR Harmonization

The most significant mechanism for the development of global (as opposed to regional) IPR standards is the negotiation of formal, multilateral, multi-regional treaty regimes such as the Berne and Paris Conventions, and TRIPS, through formal diplomatic processes. Regardless of whether such negotiations are undertaken under the auspices of a traditional IPR forum such as the

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155 *See, e.g.*, Chiapetta, *supra* note 24. *See also supra* and 88.

156 *See, e.g.*, Peter M. Gerhart, *Reflections: Beyond Compliance Theory – TRIPS as a Substantive Issue*, 32 CASE W. RES. J. INT'L L. 357 (2000); Martine de Koning, *Why the Coercion Based GATT Approach is Not the Only Answer to Piracy in the Asia-Pacific Region*, 19 EUR. INTELL. PROP. REV. 59 (1997); J. H. Reichman and David Lange, *Bargaining Around the TRIPS Agreement: The Case for On-Going Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11 (1998). *Cf* Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L & POL'Y 109 (1995) (examining the passive coercion of TRIPS). I should note, however, that I do not believe TRIPS necessarily represents a "bad" bargain. To the contrary, aside from the positive economic benefits that may be achieved as a result of such compliance with the stronger IP protection regime that TRIPS represents, see *supra* note 120 and accompanying text, TRIPS has served as part of a growing movement to establish the rule of law. This movement is not limited to rule of law treatment for intellectual property, but often serves as a basis for domestic efforts at overall reform of judicial processes. Finally, TRIPS contains many exceptions and exclusions that were designed, and have proven to be, particularly useful to developing countries in mitigating against some of the more harsher protection demands. *See, e.g,* Long, *Uruguay Round*, *supra* note 17. *See also* Anthony Sabatelli & J.C. Rasser, *Impediments to Global Patent Law Harmonization*, 22 KY. L. REV. 579, 616 (1995)(claiming TRIPS is "overly conciliatory to the developing countries of the world").

World Intellectual Property Organization, or other fora such as the WTO, Council of Europe or the Hague, formal negotiation processes tend to follow a set pattern. This pattern generally consists of a study of a problem, usually by a panel of experts, identification of a solution to the identified problem, creation of a draft treaty, exchange of position papers regarding the proposed draft, including proposed revisions to the draft, informal meetings between members in an effort to identify problems and narrow issues, and the convocation of a formal diplomatic conference during which the treaty is formally negotiated, final problems are resolved and an agreed-upon draft is signed by a majority of the participating members.[157]

These stages usually occur over a period of years, although formal negotiating rounds may be of relatively short duration. Thus, for example, the formal processes leading to the recently negotiated Draft Treaty on Audio-Visual Performances lasted approximately five years, from initial discussions to the opening of formal negotiations of the draft at a diplomatic conference in December 2000. Depending on the forum, variations may occur in the stages and, perhaps most importantly, in the amount of participation allowed to other than official representatives of member governments. The Hague Draft Convention on Foreign Judgments and Civil Jurisdiction has gone through several iterations, with drafts being made available for public comment at various stages in the drafting process.[158] By contrast, the agreed-upon version of the Draft Cybercrime Convention was not made publicly available until *after* it had been signed.[159]

Similar differences exist in the ability of non-governmental organizations to participate in diplomatic conferences and other formal negotiation processes. Recent diplomatic conferences held by WIPO for the WIPO Internet Treaties[160] and the Draft Audio-Visual Performances Treaty have been notable for the high level of outside participation by non-governmental organizations

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157 Diverse conversations with Michael Keplinger, Senior Counsellor, Office of Legislative and International Affairs, United States Patent and Trademark Office.

158 *See generally* Diverse Public Drafts and Materials posted at http://www.hcch.net/e/workprog/jdgm.html (*last visited* June 12, 2002)

159 *See generally* Public Drafts posted at http://www.convention.coe.int.

160 *See supra* notes 99 – 103.

(NGO's).[161] By contrast, proceedings before the World Trade Organization, including meetings of the TRIPS Council, responsible for oversight on TRIPS-related issues, have been criticized for their lack of transparency.[162]

In addition to processes for the creation of so-called "hard law" through formal diplomatic processes, increasingly harmonization efforts are being directed to "soft-law" alternatives. "Soft law" has been defined to include model laws, restatements, legal guides and model rules.[163] In the area of international intellectual property laws, model laws and rules have usually been issued by the World Intellectual Property Organization, often working in conjunction with UNESCO.[164] These "traditional" forms of soft law, however, are increasingly being supplemented by the work of substantive standing committees in WIPO. As noted above, in the area of international trademark law, the Standing Committee of Trademarks of WIPO has been increasingly involved in the promulgation of "Joint Recommendations" which are then approved by the WIPO General Assemblies.[165] Such Joint Recommendations do not qualify as multilateral "treaties" since they do not result from formal treaty negotiation processes, including the detailed examination and negotiation stages which are the hallmarks of such processes. Nevertheless, these "Recommendations" are increasingly being adopted into bilateral treaties as if they qualified as "hard law."[166]

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161 *See e.g.,* List of Participants, Diplomatic Conference, WIPO Copyright Treaty, CRNR/DC/INF2 (December 30, 1996); List of Participants, Diplomatic Conference, WIPO Audio-Visual Performances Treaty, IAVP/DC/INF1 (December 20, 2000).

162 *See, e.g,* Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM U. INT'L L. REV. 1223 (1999); *US Trade Policy and the World Trade Organization: Interview with Dr. Jagdish Bhagwati,* 5 GEO. PUBLIC POL'Y REV. 122 (2000).

163 *See, e.g.,* Loukas Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform — Some Fundamental Observations*, 34 INT'L LAWYER 1055 (2000).

164 Among the pertinent model laws issued in the area of international intellectual property law is the Tunis Model Law on Copyright for Developing Countries, UNESCO Pub. No. 92-3-101 463-3 (1976).

165 These "Joint Recommendations" include the Joint Recommendations Concerning Provisions on the Protection of Well-Known Marks, (adopted by the General Assemblies in September 1999), *see supra* note 105, and the Joint Recommendations Concerning Trademark Licenses, (adopted by the General Assemblies in September 2000), *see supra* note 107.

166 *See, e.g.,* Jordan-United States, Free Trade Agreement, Preamble (2000), *available at* http://www.ustr.gov/regions/eu-med/middleeast/US-JordanFTA.shtml (last visited Mar. 13, 2002).

V. DEMOCRATIZING HARMONIZATION: SUGGESTED PROCEDURAL REFORMS

An examination of the trends and counter-trends encountered by economic globalization raise warning signs about the effectiveness of current IPR harmonization efforts. The spread and breadth of economic globalization seems matched by the speed and breadth of current IPR harmonization efforts.[167] Similarly, regional efforts have "muscled" into the IPR arena just as they have intruded into globalization,[168] with a similar lessening in the ability of nation states to order their own affairs. Many scholars have criticized international harmonization efforts on the grounds that such international standards eliminate or severely reduce a country's ability to establish a domestic social welfare agenda.[169]

Most significantly, IPR harmonization efforts also threaten to give rise to divisive indigenization trends. The growth of the demand for protection for traditional knowledge and other "non-Western" forms of innovation[170] is one example of an increasing trend toward rejection of Western IPR harmonization, an "indigenization" of IPR protection at its most clearest. Like the growth of collective identity movements in response to economic globalization,[171] these demands for greater recognition of developing countries' needs is in direct response to the alienation caused by Western IPR processes. The coercive, "undemocratic" nature of the TRIPS negotiation process is often cited in new demands for a lessening of protection standards.[172] While these analogous trends demonstrate some of the most critical issues facing IPR harmonization, they also help predict the steps necessary to "democratize" the harmonization process. These steps are designed to respond to the forces of indigenization and collectivism in an inclusionary manner, thereby assuring that harmonization is not abandoned or strangled by the countertrends it engenders.

Harmonization processes should be designed to assist countries in ascertaining and establishing the requisite levels of IPR

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167 *See infra* notes 195-203 and accompanying text.

168 *See supra* notes 60-72 and accompanying text. In fact, the growth of regional IPR efforts seems to be increasingly tied to regional trade efforts with efforts by the EU and the Free Trade Area of the Americas as only two of the most recent tie-ins.

169 *See supra* note 139.

170 *See supra* notes 12-13 and accompanying text.

171 *See supra* note 57-60 and accompanying text.

172 *See supra* note 155.

protection. For harmonization to create effective standards, the powerlessness and disaffection that arises from the sense of standards being imposed by outside, imperialistic[173] powers must be minimized.[174]

The utilitarian nature of intellectual property post-TRIPS[175] further suggests that the effectiveness of harmonization standards should be judged at least in part through their ability to facilitate trans-border trade. While there are other theories of protection, which may implicate policies other than economic maximization[176] to be supported trade facilitation, or more significantly facilitation of the ability to exploit economically intellectual property rights, is a critical international issue, and I believe should be a significant basis for international decision-making.[177] Intellectual property gains value as it is exploited. Such exploitation occurs as a result of trade. Consequently, the economic impact of any IPR standard must be explored. Nevertheless, the trade facilitation role should be carefully balanced against competing concerns of equity and distributive justice to assure that economic criteria such as efficiency do not receive exclusive emphasis. Such assurance can be facilitated where international standard-setting processes are not only transparent, but are structured so that all voices are heard. Such transparency requires that decision-making documents (including reports, working papers, and draft conventions) be available for affective public comment. Releasing documents after agreement, such as in the case of the Cybercrime Convention, plainly flies in the face of this requirement. It also requires that the public to whom the information is released, and for whom participation

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173 *See supra* note 20 and works cited therein.

174 History and human nature preclude *elimination* of these feelings.

175 *See* text *supra* at note 96.

176 Thus, for example, protection of moral rights, required under Article 6 of the Berne Convention, is based on a perceived need to protect the personality of the author contained in the work. Such protection is *not* based on economic principles, but serves the critical goal of protecting the integrity of the work and the author's reputation. *See generally*, D'Amato & Long, *supra* note 93, at Chapter 6 and works cited therein.

177 Although there are clearly other policy considerations in establishing international standards, insofar as we are dealing with a globalized economy, economic theory should hold a superior claim to most other normative bases. To the extent that a standard is established which is contrary to economic interests, the justifications should be clearly articulated so that exceptions to such interests will be relatively clearly understand. Thus, for example social justice concerns regarding access to innovative works and inventions may take precedence in certain instances, but these concerns, and the scope of the factors to be included in determining the balance between economic and social welfare concerns should be clearly articulated to avoid undue confusion.

rights are granted, is broadly based. This means that NGO's representing industry and user groups must be allowed an active role in order to assure that the concerns of their constituencies are heard by member representatives and taken into account in determining the desirability of any proposed standard. For effective harmonization, the standards achieved must be based on reasoned analysis, after a thorough examination of all of the potential pitfalls and benefits. Nothing is served by a standard which is deemed unworkable by some members simply because they had failed to consider its impact on a particular use or segment of the economy.

A greater degree of transparency is also required to assure effective harmonization. While, as noted above, such transparency requires the maximum participation of both governments and NGO's, it also requires post-negotiation transparency of intent. Such transparency of intent can only be achieved if a complete record of the justifications for the standards being reached is maintained. In addition, the documentation of the terms and conditions of multilateral treaties should more closely resemble the legislative history practices of U.S. law or the commentary practices of model codes.

The United States has a long-standing practice of maintaining legislative histories of its federal statutes, and using those histories where issues concerning statutory interpretation arise. The use of *travaux preparatoire* in international treaty interpretation appears to be the exception. Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[178] on their face limit the consideration of any such preparatory works. Although terms are required to be interpreted "in their context," Article 31 limits such context to the text of the treaty and to related instruments.[179] Recourse to supplementary materials, including preparatory works, is limited to circumstances where such works are used to confirm a contextual interpretation under Article 31 or to clarify ambiguous or "manifestly absurd or unreasonable" interpretations.[180]

U.S. practice, at least as represented by the Restatement (Third) of Foreign Relations,[181] confirms that interpretation of

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178 Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (May 23, 1969) [hereinafter "Vienna Convention"].

179 Vienna Convention, *supra* note 178 at Article 31(2).

180 *Id.* at Article 32.

181 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

treaty provisions should be made "in light of [the] object and purpose" of the provision.[182] Comment (g), however, further amplifies the meaning of this "object and purpose" inquiry by indicating that an examination of *travaux preparatoire* may be included among the documents that can be used to determine the "object and purpose" of a particular treaty provision. It states, in pertinent part:

> The [Vienna] Convention's inhospitality to *travaux* is not wholly consistent with the attitude of the International Court of Justice and not at all with that of United States courts . . .. Courts in the United States are generally more willing than those of other states to look outside the instrument to determine its meaning. . .[183]

Several explanations exist for the reluctance of the states at the Vienna Conference to resort to *travaux preparatoires*, including lack of experience with such *travaux*, and a fear that lack of participation might deter later accession to a treaty.[184] Despite this reluctance, some courts, including The International Court of Justice, are fairly liberal in their use of such *travaux*.[185]

I believe that the potential usefulness of *travaux preparatoires* outweighs the fears underscoring their critical reception at the Vienna Conference. I do not advocate that a written record of all debates be maintained. While such a written record would undoubtedly be helpful in understanding the nature and scope of any concerns raised regarding a particular standard, such written records might also have a chilling effect on the open discussions of issues and positions that would be necessary to reach agreement. Certainly written records of working meetings should not be kept. Written records of formal discussions among delegates at publicly attended meetings (i.e., those attended by NGO's and other non-governmental observers), where a certain amount of formality is expected, pose less of a chilling effect on vigorous discussions, and would provide a helpful insight into the concerns expressed by the various delegates. If formal transcriptions are deemed too intrusive, then at least a paraphrasing of the delegates comments should be maintained.[186] Drafts, position papers and other formally pre-

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182 *Id.* at § 325(1).

183 *Id.* at §325, Comment G.

184 *Id.* at Reporter's Notes, Note 1.

185 *Id.*

186 Such paraphrasing techniques are already employed by the TRIPS Council of the WTO and could be used as a guide. *See* www.wto.org (TRIPS Council Minutes).

pared documents, should be included as part of the interpretive record which can be considered in determining the meaning of a treaty provision. These preparatory works, like Congressional reports and hearings, however, are of only contextual assistance in determining the meaning of a particular treaty obligation. In addition to these preparatory texts, comment sections or agreed-upon statements regarding the meaning of the obligations contained in a treaty should also be negotiated and made a part of the interpretive record.

The WIPO Internet Treaties were accompanied by negotiated agreed-upon statements which covered a number of topics, including the scope of the treaties in a digital environment, definitional issues and the consistency of treatment between these treaties and TRIPS.[187] These statements were not highly detailed. They also used language that is somewhat ambiguous. Despite these deficiencies, they serve as a useful model for subsequent commentaries.[188]

In order to create transparent, effective harmonization standards, problems of interpretation should not be glossed over for the sake of finalizing a treaty. To the contrary, such problems should be resolved or at least highlighted in a written record of the agreed-upon meaning of the obligations. There is no question that such a record itself would be heavily negotiated and would represent compromises. Yet such a public document would more completely assure a full and complete airing of the concerns and problems posed. Countries which had agreed to "effective enforcement" would understand what is required.[189] In the arena of international standards, waiting to "fill in the blanks" is not an acceptable alternative. Where agreement is not achieved a record of the basis for such disagreement is absolutely necessary. Such records would serve to narrow the focus of future efforts to achieve

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187 *See* Agreed Upon Statement to WIPO Copyright Treaty, CRNR/DC/96 (December 23, 1996); Agreed Upon Statement to WIPO Performances and Phonograms Treaty, CRNR/DC/97 (December 20, 1996).

188 *See also* Agreed Upon Statement to Patent Law Treaty, PT/DC/47 (June 2, 2000).

189 This phrase, which is the lynchpin of enforcement obligations under TRIPS, has been the subject of a great deal of heated debate internationally and remains a subject of dispute. *See* TRIPS, *supra* note 3 at Article 41.

accord, and be more valuable in helping to determine the scope of actual harmonization.[190]

Finally, transparency would require a greater clarity in the language used to establish international standards. Far too many treaty provisions are so wide-open they allow for inconsistent interpretations that cannot possibly assist in creating greater predictability of protection. For example, although TRIPS purportedly was designed to establish harmonized standards of enforcement, it uses broad language such as "adequate compensation"[191] and "crimes of corresponding gravity"[192] with no explanation of what factors should be considered in determining what remedies meet these standards. Similarly, although Article 16 of TRIPS provides that "reputation" and "knowledge" may be considered in deciding what qualifies as a well-known mark for purposes of heightened protection under Article 6 of the Paris Convention,[193] it fails to list what other factors, if any, should be included.[194]

Although a certain amount of ambiguity may be desirable in international standards to allow for cultural variations,[195] the ambiguity in TRIPS may be the result of a desire to "patch over" differences in an effort to achieve the appearance of agreement.[196] If true, such "patch work," impedes harmonization efforts by hiding differences under the blanket of apparent agreement.[197] Such sleight of hand can only lead to future application problems. Where agreement is not achieved, then the text should clearly indicate the range of acceptable alternatives. If no such alternatives exist, the commentaries should clarify the scope of the disagree-

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190 *Accord* Chiapetta, *supra* note 24 (suggesting that clear justifications and agreements to disagree should be used in resolving the issue of the international treatment of exhaustion).

191 TRIPS, *supra* note 3 at Article 45.

192 TRIPS, *supra* note 3 at Article 61. For other examples of open-ended language in TRIPS, see *supra* notes 140-42 and accompanying text.

193 TRIPS, *supra* note 3 at Article 16.

194 In fact, this failure was considered so significant that soft law initiatives before WIPO were required to address the problem of ambiguity. *See supra* note 165 and accompanying text. These are only a few of the many instances of open-ended language in TRIPS. *See also* Chiapetta, *supra* note 88 (discussing the problem of open-ended language in the context of the exhaustion debate under TRIPS); Long, *Uruguay Round*, *supra* note 17 (discussing the problem of open-ended language in TRIPS in connection with computer programs).

195 *See, e.g.*, Geller, *supra* note 24.

196 *See, e.g.*, Chiapetta, *supra* note 24.

197 *Id. See also* Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 DUKE J. COMP. & INT'L L. 69 (199).

ment. Such clarifications will provide guidance on available domestic options and help limit the range of future debates in future efforts to reach an accord on the question at issue.

The *pace* of formal harmonization should be *slowed* to permit maximum participation by all interested parties. While globalization seems to necessitate *more* harmonization, harmonization efforts that result in unenforced or unenforceable agreements are less desirable than fewer agreements that represent a true consensus, and which are consequently more likely to result in effective, *enforceable* standards. The rapid diversification of fora that are currently examining IPR issues is a testament to the growing recognition of the interrelationship between trade and IPR protection. Yet such diversification stretches the resources of countries beyond their ability to participate fully in the process. Their interests remain either unexpressed or underrepresented with the result that standards may be adopted which are, if not contrary to their interests, certain to fail to reflect adequately their tech-transfer needs.

Among the multinational IPR treaties which were under active negotiation in 2000 (including preparatory work) were the Patent Law Treaty,[198] the WIPO Draft Audio-visual Performances Treaty,[199] the Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,[200] the Free Trade Area of the Americas[201] and the Draft Cybercrime Convention.[202] In addition, such diverse multinational organizations as WTO, ASEAN,[203]OECD,[204] the Andean Group,[205] and Mercosur[206] addressed IPR protection within the context of their broader trade mandates. At the regional level, the European Union finalized or continued work on various intellectual property related directives and regulations governing such diverse issues as e-commerce and IPR enforcement.[207] WIPO continued its work in such newly emerging fields of e-commerce, traditional knowledge and enforce-

198 PT/DC/47 (June 2, 2000).

199 AVP/DC/4 (September 22, 2000).

200 *See supra* note 111.

201 *See generally* www.ftaa-alca.org.

202 *See supra* note 111.

203 Association of South Eastern Nations. *See generally* www.aseansec.org.

204 *See supra* note 108.

205 *See supra* note 66.

206 *See supra* note 63.

207 *See, e.g.*, Harmonization Directive on Certain Aspects of Copyright and Related Rights in the Information Society, 200/29/EC (May 22, 2001).

ment, while continuing work through its substantive committees on emerging areas in copyright and industrial property.[208] This snapshot of international efforts is by no means an exhaustive list of all international harmonization efforts last year. It does not even include bilateral negotiations, WTO accession activities or Dispute Resolution Proceedings or the myriad of conferences that were held by various organizations regarding present harmonization standards under TRIPS, WCT, WPPT and other IPR treaty regimes.

This shotgun approach to IPR protection threatens to undermine harmonization efforts by creating conflicting obligations. The current debate over the potential conflict between intellectual property rights and the Convention on Biodiversity[209] is only one example of what may be an increasing problem as IPR treaty obligations are debated and agreed upon in fora that have no particular expertise or focus on intellectual property issues.[210] Such conflicts become increasingly problematic when coupled with the uncertain interpretive role that such subsequently enacted treaties may have on TRIPS obligations.[211]

The shotgun approach to IPR harmonization also threatens to seriously undermine the ability of developing and least developed countries to participate in a meaningful manner in the creation of international standards to which they will be held accountable.

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208 Among the topics covered by these committees were the previously described joint recommendations on trademark licensing and internet usage, *see supra* note 165, and preparatory work for the Draft AV Performances and Patent Law Harmonization Treaties, *available at* http://www.wipo.int/eng/meetings/2000/iavp/pdf/iavp_pm6.pdf (last visited Mar. 13, 2002).

209 31 I.L.M. 818 (1992). *See, e.g.,* Jim Chen, *Diversity and Deadlock: Transcending Convention Wisdom on the Relationship Between Biological Diversity and Intellectual Property,* 31 ENVTL. L. REP. 10625 (June 2001).

210 The Cybercrime Convention is another example of a treaty which contains IPR provisions that may raise serious problems of conflict with other treaties, including potentially the criminal enforcement provisions of TRIPS and the WIPO Internet Treaties. *See* Convention on Cybercrime, Art 10 *available at* http://conventions.coe.int/treaty/en/treaties/word/185.doc (last visited June 12, 2002).

211 *See, e.g,* Neil Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441 (1997) (exploring some of the interpretive choices which might be made in connection with the relationship of the WCT to TRIPS); Okejidi, *supra* note 50 (exploring some of the present interpretation problems faced by the WTO in deciding the scope of TRIPS obligations). The issue of the potential "conflict" between TRIPS and the Convention on Biodiversity is one of the issues raised for consideration in the TRIPS Council under the Doha Ministerials. *See* Ministerial Declaration WT/MIN(01)/DEC11, IP19 (14 Nov. 2001).

Given the myriad of fora and issues currently being debated, it is difficult enough for developed countries to muster the resources necessary to cover such proceedings. Developing countries, which necessarily have less resources to devote to such issues, *a fortiari* are strongly pressed to participate fully in all but those proceedings which they perceive to be of the greatest importance. The loss of their effective participation can only result in the creation of harmonization standards which lack the necessary consensual nature to make them effective.

Globalization appears to require rapid changes at breathtaking speed. This aura of speed necessitates equally rapid changes in IPR standards in order to keep pace. Yet such speed becomes a mirage when the standards are ill-advised, coercive and ultimately divisive because they do not represent the concurrence of the parties against whom such standards will be applied. Slowing down the pace of *apparent* harmonization may actually increase the pace of *actual* harmonization by increasing the level of agreement, and consequently (hopefully) the level of compliance.

In selecting fora in which to focus harmonization efforts, at least on a multinational/multiregional basis, those fora which already have a demonstrated expertise in IPR matters, such as WIPO, should be the focus for such initial efforts. Like subjects in a law school curriculum which do not reside in an isolated "box" but continually intersect one another, intellectual property crosses many borders and impacts many subjects on the international legal stage. It can never be fully restrained into a few selected fora. Nevertheless, organizations which undertake harmonization efforts that impact on intellectual property rights should be required to coordinate their efforts with WIPO or other IPR fora so that the issues can be addressed in a forum which has the necessary expertise, and in which developing and least developed countries are already actively involved. Such limitations would help alleviate some of the demand on a country's limited resources.

Finally, the trend toward "Joint Recommendations" (the so-called "soft law")[212] may be a useful adjunct to the harmonization process. Such recommendations may help to fill gaps in coverage in hard law alternatives, particularly where such gaps arise as a re-

[212] Although soft law is generally defined to include model laws, restatements, legal guides and the like, *see supra* note 164, the WIPO Recommendations fall within an interesting middle ground since they are more than mere model laws, and yet are not the result of diplomatic conferences to qualify as hard law.

sult of new or unexpected legal or technological developments since the negotiation of the treaty at issue. But its potential for abuse should be carefully guarded against. The creation of such recommendations are not subject to the same level of interchange or formal debate as its hard law alternatives. Consequently, the likelihood that numerous voices or viewpoints will be heard during the discussions of such recommendations" is greatly reduced. Moreover, since these recommendations result from the actions of standing committees, the likelihood that developing nations will participate in such committee meetings is even less than for full diplomatic conferences. Such lack of participation may result from a lack of resources, or from an unfortunately erroneous perception that such recommendations are merely suggestive in nature, and are of, therefore, less concern.

The fact that these recommendations are adopted by the General Assembly of WIPO does not alter the fact that they are not generally subject to a complete discussion and may not, therefore, represent a truly international accord. If these soft law recommendations are to have the force of hard law treaties, they should be subject to the same protections I have recommended for traditional hard law treaties. Only when these recommendations are subject to a full discussion of the issues, and the creation of the types of interpretive documents whose use I have advocated in connection with formal harmonization processes, should they have the force of such treaties. Otherwise, these soft law alternatives will present the same coercion issues faced under present hard law treaties.

CONCLUSION

In the first decade of the 21st Century, information and information-based products and services have become among the most significant items of international trade – the *lingua franca* of the Information Age. Given the close relationship to transborder commerce of these "infogoods," it is, perhaps, unremarkable that efforts to "internationalize" (harmonize) their protection should suffer the same fate and face the same problems as the globalization forces that gave them their value. Just as it is too late to stop globalization (if such a goal were even desirable), it is too late to stop IPR harmonization. It is not too late, however, to stop (or at least reduce) some of the evils that harmonization has caused. The coercive nature of the process, its general failure to consider domestic social justice and cultural protection goals, and its creation

of ambiguous standards that serve to increase divisiveness can only be reduced if the process itself is altered. Such alterations must be crafted to assure greater *effective* participation by all interested parties. They must also assure that standards created through the process represent actual, *consensual* standards among the parties.

"Democratizing" harmonization may slow down the process, but the end result will ultimately increase actual effective harmonization. With the growing complexity of issues and the exponentially increasing transborder nature of trade, the global community needs to act now before Western-non-Western divisiveness grows beyond our ability to remedy it.