Creative Industries in Developing Countries and Intellectual Property Protection

I. BACKGROUND
   A. A Brief Summary of the Evolution of International IP Law
   B. International IP Law from the Perspective of Developing Nations
   C. The Disagreement over International IP Laws and Developing Countries
      1. Intellectual Property Protection Benefits Developing Countries
      2. Intellectual Property Protection Does Not Address the Needs of Developing Countries

II. ANALYSIS
   A. One Size Does Not Fit All for IP Laws
      1. The Costs and Benefits of Stronger IP Laws
      2. The Prerequisite Institutional Capacity for Strengthening IP Laws
   B. TRIPS Obsoletes Many Prior Success Stories Utilizing Non-Western Style IP Laws
   C. The Solution: Tailored Systems and Tangible Benefits for Developing Countries who Strengthen IP Laws

III. CONCLUSION

International intellectual property law (hereafter referred to as IP law) has an increasingly important significance for international trade and relations. From the music industry to the drug industry, intellectual property is a lucrative market, and both individuals and corporations have a lot to lose from the infringement of intellectual property rights. For example, music is a $40 billion worldwide industry. According to the Recording Industry Association of America (RIAA), the music industry loses approximately $4.2 billion

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each year to worldwide piracy.\textsuperscript{2} Although these facts bring to light the economic losses of industries and individuals from IP infringement, the global community is far from reaching a consensus on how to address these issues.

As explained by the Commission on Intellectual Property Rights, the schism in international IP law scholarship begins with the basic characterization of IP rights.\textsuperscript{3} “Some see IP rights principally as economic or commercial rights, and others as akin to political or human rights.”\textsuperscript{4} Still others view IP rights as a creation of Western societies that are not applicable, or not appropriate, for developing countries.\textsuperscript{5} Various international agreements, such as the Universal Declaration of Human Rights and the Berne Convention, reflect these distinct characterizations, but the most recent and dominant treaty, the Trade Related Aspects of International Property Rights (TRIPS) agreement, treats IP rights as economic rights.\textsuperscript{6} Due to the ubiquity of the TRIPS agreement in international IP law, this note largely analyzes the various perspectives through the lenses of economics and case studies.

Since the implementation of the TRIPS agreement, the debate has turned towards what options are economically viable for developing countries. One side of the debate suggests that IP laws should be implemented as they currently stand, with the same laws and levels of protection in both developed and developing countries.\textsuperscript{7} Another perspective suggests that developing countries should be able

\begin{itemize}
\item \textsuperscript{4} Id.
\item \textsuperscript{6} COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, \textit{supra} note 3 at 12-13 (listing the typical intellectual property rights given to creators); Jean Raymond Homere, \textit{Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries}, 27 Colum. J. L. & Arts 277, 282 (2004) (noting TRIPS “harmonize[s]” laws “by outlining the minimum standards that each nation must provide in its national law for each form of intellectual property”).
\end{itemize}
to use piracy to obtain a broader knowledge base and domestic capacity before implementing IP laws currently in place in Western societies.\textsuperscript{8} Some scholars also suggest that IP laws should incorporate non-Western ideals, such as benefit-sharing.\textsuperscript{9}

In Senegal, Lebanon, and other developing countries, toying with these various perspectives is a dangerous game. The potential costs and consequences of “getting the IP system ‘wrong’ in a developing country” may be far higher, and the impact much greater, than in the rest of the world.\textsuperscript{10} Currently, Senegal is working to develop a music industry to diversify its economic base and strengthen the cultural solidarity of the country, looking to Nashville for inspiration.\textsuperscript{11} Lebanon has an entertainment industry poised to explode onto the international scene, fed by a “large pool of creative talent.”\textsuperscript{12} In these two examples, the future of each country’s economy may rest with those who are shaping the IP laws, and a failed IP regime could take the wind out of the sails of these growing industries.

This note explains the history and current status of this schism in international IP law, focusing specifically on the efforts of the Africa Music Project and several other case studies involving creative industries. Part I of this note briefly discusses the history leading up to the current split in IP law scholarship, including the birth and evolution of intellectual property laws. Part II analyzes the two main arguments and proposes a solution to the current IP law regime that acknowledges the realities of modern globalization while respecting the economic disadvantage of developing countries.

I. BACKGROUND

Although music and other creative endeavors “touch[ ] every person of every culture on the globe,”\textsuperscript{13} there are differences between the role of international IP law in developed and developing countries.

\textsuperscript{8} See Brenner-Beck, supra note 5, at 84.


\textsuperscript{10} Commission on Intellectual Property Rights, supra note 3, at 4.


\textsuperscript{13} RIAA, Marketing Data, supra note 1.
In order to understand the current situation, this section explores 1) the evolution of international IP law, 2) international IP law from the perspective of developing nations, and 3) the current debate about the role of international IP law in developing countries.

A. A Brief Summary of the Evolution of International IP Law

International IP law began emerging as an important tool for trade between Africans and Europeans long before the intellectual property developments of the nineteenth century. Pre-colonial trade “involved Africans and Europeans in complex relationships that required them to hammer out systems of accountability and processes of dispute.” In the beginning of colonialism, European states were involved in fierce competition for “spheres of influence,” and towards the end of the nineteenth century, “European powers penetrated the African interior.” European ideals of IP law became a part of their African colonies as well, setting the stage for international IP law.

On March 20, 1883, during both the Industrial Revolution and the peak of European influence over Africa, the Paris Convention for the Protection of Industrial Property was created (hereinafter the Paris Convention). The object of the document was to protect “patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.” The contracting parties were primarily European countries. Shortly after the Paris Convention, on September 9, 1886, the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention) was held. The mission of the Berne Convention was to

15. Id. at 14-15.
16. Id. at 3, 9, 14 (noting that “[i]ndustrialization had widened the material and technological gap between” Africa and Europe, and stating that at the end of the nineteenth century, European power was more widespread in Africa, “profoundly” affecting the legal order in Africa).
18. Id. art. I(2).
protect “the rights of authors in their literary and artistic works.”\textsuperscript{21} Again, the contracting parties were primarily European countries.\textsuperscript{22}

With the end of colonialism in the nineteenth century, the international intellectual property system entered uncharted territory. The former colonies became sovereign states and therefore came face to face with the challenges of integration into the international framework.\textsuperscript{23} These developing countries also came from backgrounds that were significantly different from the European nations that created the treaties.\textsuperscript{24} To ease their transition, the international community softened the obligations of developing countries within the international framework, including their obligations under international IP law.\textsuperscript{25}

Changes made to the Berne Convention reflected the importance of addressing developing countries’ needs within international IP laws. The Berne Convention was modified in Stockholm in 1967, but the changes were soon seen as too controversial; many developed countries failed to ratify these changes, and the Berne Convention was again revised in 1971.\textsuperscript{26} The Paris Revisions of 1971 yielded the incorporation of an appendix describing the “Special Provisions Regarding Developing Countries” into the Berne Convention.\textsuperscript{27} The provisions applied to:

\begin{quote}
[A]ny country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, . . . and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act. . . .\textsuperscript{28}
\end{quote}

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} art I.
\item \textsuperscript{22} The contracting parties from 1886-1900 were Belgium, France, Germany, Italy, Japan, Luxembourg, Monaco, Norway, Spain, Switzerland, Tunisia, and the United Kingdom. \textit{See} World Intellectual Property Organization, Contracting Parties, Berne Convention, 1886-1900, \url{http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=1886&end_year=1900&search_what=C&treaty_id=15} (last visited Nov. 8, 2006).
\item \textsuperscript{23} \textit{Id.}, supra note 9, at 326.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 327. For example, developing countries are allowed “more favourable treatment” under the General Agreement on Tariffs and Trade (GATT), including allowance of reduced tariffs in favor of developing countries. \textit{Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries}, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.).
\item \textsuperscript{26} \textit{Id.}, supra note 9, at 327; \textit{see also} Irwin A. Olian, Jr., \textit{International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris}, 7 CORNELL INT'L L.J. 81, 103 (1974).
\item \textsuperscript{27} \textit{See} Berne Convention, \textit{supra} note 20, app.
\item \textsuperscript{28} \textit{Id.} app., art. I (1).
\end{itemize}
The appendix from the Paris Revisions, however, was “generally acknowledged as a failure in terms of its utility to and by developing countries.”

In the mid-twentieth century, international IP law was the focus of yet another international convention. The Universal Copyright Convention, completed on September 6, 1952, was created to “ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts.” The underlying rationale in the Universal Copyright Convention differed from the Berne Convention in that copyright was treated as a “license granted by the state in order to stimulate artistic creation,” whereas the Berne Convention treated copyright as the “inherent or natural right of the author.” The Universal Copyright Convention established the obligation of contracting parties “to provide for the ‘adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific, and artistic works’” but did not describe the protection itself in detail.

The major international agreement affecting developing countries today has radically changed the face of IP law. The Trade Related Aspects of International Property Rights (TRIPS) agreement was signed in Marrakesh, Morocco on April 15, 1994 and incorporated into the agreement creating the WTO. The TRIPS agreement “made compliance with intellectual property laws an economic imperative” for developing countries and served to “upgrade, update and reshape the laws of those countries.” The TRIPS agreement also incorporated large portions of the Berne Convention, which in turn pushed the Universal Copyright Convention outside of the central international framework. Although TRIPS now dominates

29. Okediji, supra note 9, at 328. “The Revisions adopted a complex Appendix, much less radical than the Stockholm Protocol, designed to facilitate access by developing countries to copyrighted works through a compulsory license system.” Id.
31. Olian, supra note 26, at 85.
32. Olian, supra note 26, at 85 (quoting UNIVERSAL COPYRIGHT CONVENTION, supra note 30, art. I).
33. See TRIPS, supra note 7.
34. Okediji, supra note 9, at 336-37.
35. See, e.g., TRIPS, supra note 7, Part II, art. 9.
36. The Universal Copyright Convention and the Berne Convention had very different views on intellectual property. See Olian, supra note 26, at 85 (noting, for example, that the Berne Convention was more explicit in the level of protection required, whereas the Universal Copyright Convention was vague in this regard). TRIPS adopted the Berne Convention’s general framework of specific, universal obligations, and therefore
international IP law, there are still many unresolved issues, as
evidenced by the recent outcry over intellectual property rights in
regards to the AIDS crisis in developing countries,\(^\text{37}\) as well as the
recent crackdown on piracy of music, software, and movies by the
entertainment industry.\(^\text{38}\)

**B. International IP Law from the Perspective of Developing Nations**

International IP law has largely been created and promulgated
by developed countries. When taken from the perspective of
developing nations, the formation, evolution, and current status of
international IP laws are extraordinarily different. J. Michael Finger,
the editor of *Poor People’s Knowledge: Promoting Intellectual Property
in Developing Countries*, describes the prevailing attitude in
international IP law as found in the TRIPS agreement:

> [The TRIPS] agreement . . . is about the knowledge that exists in *developed*
countries, about developing countries’ access to that knowledge, and particularly
about *developing* countries paying for that access.\(^\text{39}\)

Finger insists that the “knowledge that exists or might be created in
developing countries” has been largely overlooked by international IP
laws; when it has been addressed, it is to protect “‘traditional
knowledge’ against misappropriation by industrial country interests”
and police “‘biopiracy’ on the part of the industrial country interests.”\(^\text{40}\)

Some scholars believe that international IP law surged during
the Enlightenment, when “[p]olitical and social attitudes in Europe
were consequently informed by a sense of superiority in all spheres,
and culminated in the desire to spread this enlightenment to non-
Europeans.”\(^\text{41}\) The development of IP law is often considered part of
the power struggle between European countries “to secure national

\(^{37}\) See, e.g., Elizabeth Olson, *Drug Issue Casts a Shadow on Trade Talks*, N.Y.
TIMES, Nov. 2, 2001, at W1 (discussing the disagreements about drug patent protection).

\(^{38}\) See, e.g., David Scharfenberg, *Defying a Music Industry Crackdown*, N.Y.
TIMES, Jan. 15, 2006, at 14WC3 (describing the recent crackdown of the music industry on
pirated music).

\(^{39}\) J. Michael Finger, *Introduction and Overview*, in *POOR PEOPLE’S KNOWLEDGE:
PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES*, supra note 11, at 1, 1.

\(^{40}\) Id. (defining biopiracy as “the exploitation of the biodiversity that exists in
developing countries to develop agricultural products, healthcare products, and so forth,
without proper compensation to the ‘traditional communities’ that first discovered the
usefulness of such genetic material”).

\(^{41}\) Okejiji, *supra* note 9, at 322.
economic interests against other European countries in colonial territories.”

Starting with the decolonization of Africa and other colonies, developing countries entered the international legal framework and became involved with international IP laws. When this occurred, there was a brief scramble to ensure the continuity of IP laws in order to protect foreign interests in those developing countries. One scholar writes:

> Even at the decisive moment of independence [of former colonies in Africa], intellectual property laws were not directed at the domestic innovation environment, but were rather projected outwards to foreign nationals who would benefit from protection. Developing countries, in essence, service the international system and not vice-versa.

Many scholars view intellectual property rights as a “means for all the European countries to control competition from former colonies as global rights became an entrenched feature of international economic relations.” To ensure this continuity and accession to international treaties, developing countries were allowed a lower set of obligations under international treaties. This lower bar for compliance also meant a lower level of power within the international intellectual property framework, and many of the changes made in the twentieth century reflected this trade off.

During the twentieth century, developing countries were able to band together to make slight changes to international IP law, such as forcing a “North-South stalemate” over strengthening some of the Paris Convention’s “conditions on compulsory licensing of patents.” However, the power of developing countries within the international organizations was weaker than developed countries, and the relatively ineffective Universal Copyright Convention and Paris Revision to the Berne Convention demonstrate this imbalance of power.

42. Id. at 325.
43. See id. at 326.
44. See id. at 331.
45. Id.
46. Id. at 335.
47. Id. at 328-29.
48. Paul Salmon, Cooperation Between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), 17 St. John’s J. Legal Comment 429, 433 (2003). The “North-South” stalemate occurred when the developed countries (“North”) argued for strengthened conditions on compulsory licensing of patents, and the developing countries (“South”) all took the other side, and argued for a weakened Convention. Id. The stalemate resulted in a draw and no changes were made to the Paris Convention. Id.
49. See generally Universal Copyright Convention, supra note 30; Berne Convention, supra note 20.
Today, the TRIPS agreement and the ubiquitous bilateral intellectual property treaties form the central framework of international IP law. Negotiations for the TRIPS agreement were an exhaustive process, and in the end both developed and developing countries compromised. Nonetheless, TRIPS radically changed the face of international IP law. The TRIPS agreement provided “minimum standards for legal recognition of intellectual property rights” that were basically the standard levels already in place in most developed countries. In 1996, one scholar wrote:

Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPS attempts to remake international copyright law in the image of Western copyright law. If TRIPS is successful across the breathtaking sweep of signatory countries, it will be “one of the most effective vehicles of Western imperialism in history.”

C. The Disagreement over International IP Laws and Developing Countries

The evolution of international IP laws has caused a schism within legal scholarship. On one side of the divide, scholars feel that intellectual property protection is necessary for the advancement of developing countries. Within this debate are those who argue that interacting with developed countries will stimulate developing countries and others who argue that innovation from within

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50. Okediji, supra note 9, at 338 (pointing to the large number of bilateral agreements as evidence of this compromise).
51. Finger, supra note 39, at 3.
53. See Finger, supra note 39, at 4 (summarizing a traditional argument for increasing intellectual property protection). Finger states:

There would be benefits for developing countries from [increasing IP protection in developing countries], the industrial negotiators contended. If developing countries enforced [intellectual property rights] as the TRIPS Agreement specifies, they would attract considerable foreign investment. Furthermore, industrial country companies would have an incentive to create products aimed at problems, such as tropical diseases, that were of particular concern to developing countries.

Id. See also Carsten Fink & Keith E. Maskus, Why We Study Intellectual Property Rights and What We Have Learned, in INTELLECTUAL PROPERTY AND DEVELOPMENT, LESSONS FROM RECENT ECONOMIC RESEARCH, supra note 12, at 12-13 (although not advocating either side of this debate, compiling economic research on the economic benefits of increased IP protection from various studies, pointing out that “a reformed legal regime is likely to be necessary but not sufficient condition for local technology development,” and concluding that although there are many costs and other factors to consider in increased intellectual property protection, “there is an important development dimension to the protection of [intellectual property rights]”).
developing countries will provide the stimulus. On the other side of the debate, some scholars feel that current international IP laws do not properly serve developing countries’ needs. Proponents of this view offer many alternatives, including allowing an economic threshold before IP laws apply to a country and incorporating developing countries’ and traditional communities’ values into intellectual property protection.

1. Intellectual Property Protection Benefits Developing Countries

Many of the arguments within the intellectual property debate intertwine both patent protection and copyright protection. These two types of intellectual property protection are combined in today’s international IP laws, and therefore the arguments provided by scholars often apply to both. Dru Brenner-Beck summarizes the arguments supporting intellectual property protection in developing countries below (often deemed the” developed countries’ argument”):

[P]rotection of intellectual property is essential to the successful operation of a system that promotes global innovation, and thus benefits all. . . . [P]rotection of intellectual property rights directly benefits [developing countries’] development by: 1) promoting the transfer of technology from the developed nations to [developing countries]; 2) encouraging direct foreign investment . . . in the [developing countries]; 3) stimulating First World R[esearch] & D[evelopment] into problems specific to [developing countries]; and 4) strengthening the incentive for domestic innovation and creativity.55

In support of the first argument that protection promotes “global innovation,” developed countries suggest that, due to the “economic nature of intellectual property,” providing protection for intellectual property rights “add[s] the fuel of interest to the fire of genius.”56 This assumes that additional intellectual property right protection increases both creativity and technological innovation because the economic gain is greater for the originator.

The second argument is that protection promotes developing countries’ development by sharing technology, encouraging foreign direct investment (FDI), increasing research and development into developing countries’ problems, and stimulating domestic innovation

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54. See generally Brenner-Beck, supra note 5, at 97-100 (outlining the arguments of developing countries that stronger intellectual property protection does not necessarily benefit their development); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69 (2005) (arguing that cultural protection should be based in the indigenous groups themselves, not through a top-down system).

55. Brenner-Beck, supra note 5, at 91 (footnote cf omitted).

56. Id. (internal quotation marks omitted) (quoting RESPECTFULLY QUOTED 288 (Suzy Platt ed., 1989) (quoting Abraham Lincoln)).
and creativity. This is supported by a 1987 survey where seventy-five percent of participating companies saw “inadequate protection of intellectual property rights as a strong disincentive to license technology to developing countries.”

Developed countries also often state that stronger protection would encourage these companies to invest in production facilities in the developing countries. The final argument, indicating that protection stimulates domestic innovation and creativity, is supported by the idea that a “copy-cat” mentality destroys [the developing countries’] ability to sustain domestic innovation and escape their ‘lesser developed’ status. One argument takes this a step further, pointing to “an intimate link between respect for individual human rights and respect for a copyright system that values and promotes individual human creative achievement.”

Another group of scholars has focused more intently on how intellectual property protection benefits indigenous creativity in developing countries. In particular, the World Bank instituted the Africa Music Project as an “ongoing effort . . . to help Africans to advance the business and cultural potential of their music.” The underlying idea of the project is that “[t]he music industry has the potential to be an important symbol as well as a substantive element in bringing a poor society forward.” The focus is on Africa because of the business potential, as well as the pervasiveness of music in African life. A member of Rafrache, a Senegalese band, explains: “When you are born, there is music, when you die there is music, and when you are happy there is music.”

The Africa Music Project takes part of its influence from Nashville, Tennessee, relying on the fact that Nashville transformed from a relatively poor, indistinguishable city to the successful, bustling seat of the U.S. country music industry. It envisions that, like Tennessee, “African countries would create their own Nashvilles”

57. Id. at 93.
58. Id. at 94.
59. See id.
60. Id. at 95.
61. Hamilton, supra note 52, at 618.
62. Penna, supra note 11, at 95.
63. Id.
64. Id.
65. Id. (internal quotation marks omitted).
66. Id. at 97.
and produce their own music, keeping the jobs, success, and profits within the African countries.67

Along with a host of infrastructure problems, including electricity, the traditional barter system, and free space to perform, one of the main obstacles facing the success of this project is piracy. Almost all African countries have a piracy level over twenty-five percent, with some estimates reaching eighty-five to ninety percent.68 One of the methods promulgated in both Senegal and Ghana to combat piracy is the use of holograms on copyrighted music, combined with a public relations campaign to encourage buying music with holograms.69 Although the Africa Music Project is ongoing, thus far the “major success . . . has been to assist musicians in Senegal in recognizing that they can help themselves.”70 Home studio owner Lamine Faye expresses his hope for the future of the project, saying “[n]ow is the time to organize ourselves because I am sure it is something that will last for the next generation and will truly help the development of the country.”71

One of the most unique aspects of the Africa Music Project is that it offers tangible support to the “indigenous creativity” argument in favor of international IP laws. Up until this work, the argument was theoretical. Time will tell whether it in fact improves the economies of Senegal and other African countries. If it does, it will be a strong argument in support of the strict application of TRIPS and other IP laws to developing countries.

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67. Id.
68. Id. at 101. Piracy is the “unauthorized copying and selling of recordings.” Id. “Piracy level” is measured by the IFPI (a recording industry organization that conducts many of the piracy level studies relied on by scholars) using various methods, including how many music discs sold each year are pirated copies. See, e.g., INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI), THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT 3-5 (2005), available at http://www.ifpi.org/content/library/piracy2005.pdf [hereinafter IFPI] (discussing piracy levels in terms of how many pirated discs were sold each year).
69. Penna, supra note 11, at 104. The holograms are “difficult-to-counterfeit,” and a hologram placed on a “cassette or compact disc (CD) verifies that the distributor has paid royalties.” Id. This strategy has been combined with TV, radio, and flyer campaigns “to inform the public of the importance—and legal obligation—of buying ‘hologram’ music.” Id. Ghana implemented the same hologram campaign, and piracy subsequently fell “from 80 percent to 20 percent.” Id.
70. Id. at 111.
71. Id. at 112 (internal quotation marks omitted).
2. Intellectual Property Protection Does Not Address the Needs of Developing Countries

On the other side of the debate, there are scholars who cry out against the current level of intellectual property protection as “old-fashioned, Western-style imperialism” and argue that international IP laws do not take developing countries’ cultural values into account. This is often touted as the “developing countries’ arguments.” In 1952, scholar Irwin Olian, Jr. expressed his concern for developing countries:

Of the many problems facing developing countries, none is more urgent than the need for wider dissemination of knowledge, for ultimately this will act to further the educational, cultural, and technical development of their people.

This problem persists today, and some developing countries claim that effects of intellectual property protection, “such as higher prices and limited access, can adversely affect the [developing countries’] ability to educate its population and develop.”

One suggested alternative to imposing the current system of international IP law on developing countries is to allow a “threshold level of economic development” before increasing intellectual property protection. The rationale is that piracy helps lay the foundation for a developing country’s infrastructure, and, once in place, the “developed infrastructure enables the [developing country] to benefit from increased protection.” Using the Africa Music Project to illustrate, this argument would allow piracy of both the music and the technology behind the music until the infrastructure for the music industry is in place, but would then require increasing intellectual property protection. By that point, the developing society theoretically should be able to bear the costs of intellectual property protection, and the gains to society should outweigh these costs.

Another argument on this side of the debate focuses on the intrinsic cultural differences between developing countries, including traditional communities, and developed countries. One author explains this argument, called the “cultural narratives”:

The cultural narratives seek to maintain and sustain the legitimacy of difference, not overcome or manage those differences. The argument starts generally with the

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72. Hamilton, supra note 52, at 615.
73. Id. at 615-17.
74. Olian, supra note 26, at 88.
76. Id. at 103.
77. Id. at 102.
78. See id.
proposition that developing countries have different value systems, engage in creative endeavor for different reasons and are organized communally or through kinship ties rather than as individuals. These differences in values, organization, and heritage . . . require different considerations for intellectual property rights to be meaningful in developing countries.79

A number of developing countries retain traditional communities, so this argument often turns towards the protection of indigenous creativity or traditional knowledge. The World Intellectual Property Organization (WIPO) has drafted “Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore” and “Revised Provisions for the Protection of Traditional Knowledge” in an attempt to address these issues.80

Proponents of this position often suggest, among other possibilities, *sui generis* intellectual property protection for traditional communities and the incorporation of traditional laws into international intellectual property protection.81 Within music, there are two examples used by scholars to bolster their arguments that current laws do not address the needs of developing countries and traditional communities. One is the OutKast performance at the 2004 Grammy Awards, which opened with the “sacred Navajo (Dine) ‘Beauty Way’ song . . . . ‘meant to restore peace and harmony,’” and then continued with backup dancers using a “traditional Plains-tribe war cry” during the performance of the Outcast song “Hey Ya!”82 The second example is the use of the traditional Ami “Song of Joy” in the popular song “Return to Innocence” by Enigma.83 In neither example did the pop group receive permission to use the traditional music from the indigenous group.84 Some scholars think that incorporating group rights and other ideals from traditional cultures would alleviate this

79. Okediji, supra note 9, at 354.
81. See Gervais, supra note 5, at 138-39 (stating “if current intellectual property norms are found to be inappropriate, we may need to consider new international norms, including a sui generis right”); Angela R. Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 CARDOZO ARTS & ENT. L.J. 175, 178 (2000) (proposing incorporation of a “communal property rights” regime within the existing intellectual property framework). *Sui generis* is defined as “constituting a class alone: unique, peculiar.” Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/sui%20generis (last visited Oct. 29, 2006).
82. Riley, supra note 54, at 70-71.
83. See Riley, supra note 81, at 175-76.
84. See id. at 176-77 (Enigma); Riley, supra note 54, at 71-72 (OutKast).
II. ANALYSIS

A. One Size Does Not Fit All for IP Laws

One side of the current schism in the IP law debate argues that Western-style protection of intellectual property rights stimulates creativity and innovation by providing economic incentives to the originator. The report by the Commission on Intellectual Property Rights (hereinafter the Commission), which was presented to the British government in 2002, summarizes the rationale underlying this argument:

Some argue strongly that intellectual property rights are necessary to stimulate economic growth which, in turn, contributes to poverty reduction. By stimulating invention and new technologies, they will increase agricultural or industrial production, promote domestic and foreign investment, facilitate technology transfer and improve the availability of medicines necessary to combat disease. They take the view that there is no reason why a system that works for developed countries could not do the same in developing countries.

This section critiques the argument above by first examining both the costs and the benefits of stronger IP laws in developing countries, and then discussing the implicit assumption of “institutional capacity” contained in this argument.

1. The Costs and Benefits of Stronger IP Laws

A significant number of studies and scholarship have aimed to determine the costs of implementing stronger IP laws. The short term costs for developing countries to implement IP laws are substantial, and many developing countries may not be able to overcome this barrier. Many assume that “there is a latent supply of innovative capacity in the private sector waiting to be unleashed by the grant of

85. Riley, supra note 81, at 178.
86. See Brenner-Beck, supra note 5, at 91-92.
87. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 1.
88. See generally id. at 137-53 (discussing institutional capacity).
protection” from a system of IP laws in a developing country.\textsuperscript{90} Although this may be true for certain industries in a handful of developing countries, developing countries vary widely in their current domestic capacity, and some countries may have decades of education, infrastructure building, and investment in front of them before achieving a self-sustaining level of domestic innovation.\textsuperscript{91}

The transaction costs of implementing a system of IP laws include “[e]stablishing the infrastructure of an [intellectual property rights] regime, and mechanisms for the enforcement of IP rights,” as well as the post-implementation costs such as “the costs of scrutinizing the validity of claims to patent rights . . . and adjudication upon actions for infringement.”\textsuperscript{92} The costs imposed on a developing country by requiring protection of copyright and creative works are slightly different than those for patents.\textsuperscript{93} After strengthening IP laws, the cost of textbooks and other educational materials may inflate dramatically.\textsuperscript{94} With respect to technology, most developing countries import goods such as movies, music, and educational material, resulting in very high access costs.\textsuperscript{95} These costs could put the goods out of reach to many consumers and exhaust the budgets of schools and universities.\textsuperscript{96}

A quantitative illustration of implementation costs for a developing country is available through the United Nations Conference on Trade and Development (UNCTAD). In 1996, UNCTAD released a report estimating the cost of compliance with the TRIPS agreement in developing countries.\textsuperscript{97} The study estimated the costs of compliance in Egypt to be $800,000 initially with annual recurrent costs of around $1 million.\textsuperscript{98} Bangladesh had initial estimated costs of $250,000, with annual recurrent costs of $1.1 million.\textsuperscript{99} In Global Economic Prospects and Developing Countries 2002, the World Bank estimated costs of $1.5 to $2 million to upgrade the IP laws of a developing country.\textsuperscript{100} To recoup these costs,
developing countries may charge fees for certain services.\textsuperscript{101} Chile, for example, generated $6 million in fees in 1995 with an annual expenditure of $1 million.\textsuperscript{102} However, it is likely that most countries will generate only a fraction of that in revenue each year.\textsuperscript{103}

The benefits of stronger IP laws for developing countries are often listed as: 1) increased technology transfer from developed countries to developing countries; 2) an increase in the amount of FDI in the developing countries; 3) research and development focusing specifically on developing countries’ needs; and 4) greater incentives for domestic innovation and creativity.\textsuperscript{104} There have been various economic studies attempting to determine the link between IP laws and the benefits listed above, some of which are summarized in a research paper published in 2005 by the World Bank.\textsuperscript{105}

Examining the first two benefits, technology transfer and increased FDI from developed to developing countries, there appears to be “a positive role for [intellectual property rights] in stimulating formal technology transfer, through FDI in production and [research and development] facilities. . . .”\textsuperscript{106} However, the studies have also found that a country’s IP laws are only one factor among many influencing FDI.\textsuperscript{107} In fact, evidence suggests that “countries that strengthen their [intellectual property rights] regimes are unlikely to experience a sudden boost in inflows of FDI.”\textsuperscript{108} In a study by Keith E. Maskus, strong IP laws alone were “insufficient for generating strong incentives for firms to invest in a country.”\textsuperscript{109} Maskus explained that if strong IP laws in turn generated strong incentives, FDI “would have

\begin{itemize}
\item \textsuperscript{101} “In most developing countries, [intellectual property rights] administration agencies charge various fees for services related to processing applications for IP rights and also for renewing those rights once awarded.” \textit{Id.}
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} Brenner-Beck, \textit{supra} note 5, at 91.
\item \textsuperscript{105} See Fink & Maskus, \textit{supra} note 53 (compiling approximately twelve articles studying the effects of stronger IP rights on various economic indicators in developing countries, including trade flows and foreign direct investment); \textit{id.} at 2 (explaining that the book is a compilation of studies “conducted by economic researchers at or affiliated with the World Bank,” and noting that empirical studies are particularly important in this context because “many effects of stronger [intellectual property rights] standards are theoretically ambiguous”).
\item \textsuperscript{106} \textit{Id.} at 8.
\item \textsuperscript{107} \textit{Id.} at 7.
\item \textsuperscript{108} \textit{Id.} at 8 (emphasis added).
\item \textsuperscript{109} Keith E. Maskus, \textit{The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, in INTELLECTUAL PROPERTY AND DEVELOPMENT, LESSONS FROM RECENT ECONOMIC RESEARCH, supra} note 12, at 41, 54.
gone largely to Sub-Saharan Africa and Eastern Europe.”

In reality, there has been a “sizable disinvestment” in Africa since the early 1990s. Other factors, such as the long-term stability of a country, trade competition rules, and taxes, also play a large role in a firm’s decision to invest in a developing country because these factors can “affect[ ] the firm’s perception that it will be able to earn higher return on its protected knowledge-based assets through FDI . . . .”

Not all scholars agree that increased research and development in developed countries focusing on developing countries’ needs is actually beneficial for the developing country. Carsten Fink and Carlos A. Primo Braga describe the ideal situation between a source country (exporting goods) and a destination country (importing goods) as follows:

"The introduction of [intellectual property rights] stimulates innovation in the source country and thus increases future trade flows. That effect is beneficial for both trading economies, assuming that social returns on the innovations exceed private returns. The international recognition of [intellectual property rights] also can be seen as an adjustment mechanism that guarantees dynamic competition between countries. Through [intellectual property rights], innovation-producing countries have an incentive to develop new technologies, which in their next generation are manufactured by follower countries."

However, the study authors admit that “[m]ost studies conclude that the destination country loses from tighter protection, whereas the source country is usually better off.” As explained earlier, most developing countries are net importers of everything from technology to entertainment. Although a developing country may benefit because its needs are addressed by the research and development, stronger IP laws can cause other problems, such as monopolies and shifts of production from the developing country, where pirated goods were manufactured before the new laws, to a developed country.

The fourth possible benefit to developing countries, an increase in domestic innovation and creativity, is currently being studied by the Africa Music Project. As previously discussed, the aim of the

110. Id.
111. Id. at 48. Africa’s share in investment decreased from 2.6 percent to 0.9 percent in the 1990s. Id.
112. Id. at 54.
114. Id.
115. See COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 17.
116. See id. at 21-22.
Africa Music Project is “to help Africans to advance the business and cultural potential of their music.”\(^{117}\) This is a program designed to go hand-in-hand with stronger IP laws.\(^{118}\) In effect, domestic industry would strengthen and supplant the piracy industry as stronger IP laws decrease piracy.\(^{119}\) One method for combating piracy is to place holograms on copyrighted music.\(^{120}\) Because the project is a recent endeavor by the World Bank, a progress report is not yet available. However, unconfirmed reports have indicated a substantial increase in royalties for Senegalese musicians, and there are also reports that piracy may have decreased dramatically since then.\(^{121}\) However, The Recording Industry 2005 Commercial Piracy Report claims Senegal is still an area with a large number of piracy production facilities, and no changes in piracy levels were reported.\(^{122}\)

This benefit has also been studied by Maskus, who published an in-depth analysis of the effects of stronger IP laws on the Lebanese entertainment and media industries.\(^{123}\) Similar to the Senegalese music industry, the entertainment industries in Lebanon benefit from

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117. Penna, supra note 11, at 95.
118. See Finger, supra note 38, at 3-4. Finger expresses that the TRIPS agreement basically requires implementation of the level of intellectual property protection “in place in the most advanced countries.” Id. at 3. Additionally, “to pass and enforce the laws that create the . . . obligation [to protect developed countries’ intellectual property] is a bound obligation. . . .” Id. at 4. The Africa Music Project operates with this understanding.
119. See, e.g., Penna, supra note 11, at 98-99 (noting that “[p]irates have more means at their disposal than those responsible for policing them,” there is currently little infrastructure in Senegal’s music field, and “[b]ecause of piracy, musicians are forced to depend on revenue from outside the country”); id. at 99 (noting possible solutions to the problems faced by the Senegalese musicians, including “[t]raining of backup staff” and that “[t]he legal environment should not be imposed from the outside”); id. at 104 (noting that holograms, one of the methods implemented in the Africa Music Project, reduced piracy in Ghana from 80 percent to 20 percent). Gerard Seligman has noted that “[t]he great limiting factor on the sales of music within Africa is piracy,” due to piracy levels of at least 50% some countries. Gerard Seligman, The Market for African Music, in WORKSHOP ON THE DEVELOPMENT OF THE MUSIC INDUSTRY IN AFRICA (2001), available at http://siteresources.worldbank.org/INTCEERD/Resources/CWI_music_industry_in_Africa_synopsis.pdf. Seligman stated that “a good, strong system of collection societies which ensure that royalties are collected and paid” could provide the much-needed income to artists and composers. Id.
120. Penna, supra note 11, at 104.
122. IFPI, supra note 68, at 18.
123. See Maskus, supra note 12, at 259.
a “large pool of creative talent” in Lebanon and enjoy success, especially in the Middle East.\textsuperscript{124} The Lebanese film industry enjoys copyright protection, although the enforcement of copyright protection is limited, and still suffers from piracy.\textsuperscript{125} In the wake of stronger IP laws, the industry claims it would increase production of films,\textsuperscript{126} Maskus characterizes potential losses from stronger IP laws in Lebanon as job loss for those employed at counterfeiting firms, rising costs due to decreased domestic competition, and increased costs for products that are not part of a strong domestic industry.\textsuperscript{127} Potential gains includes higher quality products, the possibility of counterfeiting firms becoming legitimate producers of foreign products (due to licensing of foreign products to domestic firms), and increased revenues for the domestic film, television, and broadcasting industry as a result of increased demand for Lebanese-produced film and television.\textsuperscript{128} Maskus suggests that with stronger IP laws, the greatest benefit in Lebanon would be domestic innovation and production.\textsuperscript{129} There could be greater product development by domestic companies as a result of stronger IP laws.\textsuperscript{130} Although the products developed probably would not be globally competitive, they may be able to serve Lebanon and other local markets.\textsuperscript{131} Film production is one of the industries that could gain a foothold on the regional market with stronger IP laws.\textsuperscript{132}

The World Bank studies found an increase in total trade as another possible benefit of stronger IP laws in developing countries.\textsuperscript{133} However, the authors found that, contrary to expectations, “the stringency of a country’s patent regime” was not tied to trade in “high-technology products.”\textsuperscript{134} This is surprising because many assume that trade of knowledge-intensive products (such as high-technology products) increases dramatically with stronger IP laws.\textsuperscript{135}

\textsuperscript{124} Id. at 263 (“Despite limited copyright enforcement, Lebanon has established a clear competitive advantage within the Middle East as a producer and distributor of literary and creative works... Unauthorized copying of videotapes and music recordings is common...”).

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 266-67.

\textsuperscript{128} Id. at 266-67, 286.

\textsuperscript{129} Id. at 289.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} Fink & Maskus, supra note 53, at 7.

\textsuperscript{134} Id.

\textsuperscript{135} Fink & Primo Braga, supra note 113, at 28.
authors attributed this ambiguity to various factors including: 1) transnational firms’ realization that the local threats of reverse engineering may not be particularly strong in some developing countries; 2) the relatively large importance of IP laws in large developing countries compared to small developing countries; 3) the uniqueness of these findings to high-technology products; and 4) the tendency of some firms to increase FDI and licensing instead of exports to developing countries when there are stronger IP laws.136

Overall, studies have found that many of the purported benefits of strengthening IP laws in developing countries are ambiguous. The benefits are highly dependent on the preexisting conditions of the country, such as the presence of strong domestic industry, and the laws may only benefit certain industries while negatively affecting others. However, there are other benefits that cannot be calculated through costs or studies. For instance, the development of a particular industry, such as the music industry, combined with the strengthening of IP laws may add a sense of cultural solidarity to a developing country.137 At the World Bank’s Workshop on the Development of the Music Industry in Africa, Nobel Laureate Amartya Sen described the effects of strengthening the music industry in Africa.138 Although the contribution of creative arts “to the richness of human lives” is not reflected in the gross national product, the creative arts are an “inexpensive but effective” source of joy in developing countries.139 Sen expressed that the importance of this source of joy by saying, “[m]usic and the creative arts will never, of course, replace the need for food and water, but nor would food and medicine replace the need for creative arts.”140

The growth of an industry may benefit many non-economic characteristics of a developing country. The burgeoning music industry in Senegal and elsewhere in Africa has created hope that it can contribute to “economic development, social change, political cohesion, and cultural progress in that struggling continent.”141

138. See Sen, supra note 137.
139. Id.
140. Id.
141. Id.
2. The Prerequisite Institutional Capacity for Strengthening IP Laws

Another critique of this argument is that there is a high prerequisite institutional capacity to support the implementation of increased IP laws. The World Bank Report Intellectual Property and Development addresses this issue in passing, stating that a country hoping to attract FDI “would be better advised to improve its overall investment climate and business infrastructure” than strengthen its IP laws. The Commission on Intellectual Property Rights (the Commission) delved more deeply into the problem and proposed that developed and developing countries coordinate to “ensure that national IP reform processes [coincide] with related areas of development policy.” The Commission also urged donors and developed countries to provide experts, offer legal advice, and establish and expand the local institutional capacity in order to identify these areas of policy.

The Commission’s proposition reflects the need for a prolonged effort in assisting developing countries to form and implement IP laws. An illustration of this for the Africa Music Project is explained by Maskus at the Workshop on the Development of the Music Industry in Africa.

The issue is as much one of institutional capabilities as of talent. The [private] institutions include music publishers who put together studio performance musicians and acquire song rights, record companies who make the master recording, and then manufacture and distribute it locally and, possibly, globally. . . . Coordinating such a complex set of players and incentives is beyond the reach of unsupported private markets. . . . One cannot build a music business in a vacuum. Establishing better economic environments, macro stability, creating vibrant financial markets, better education, and so on are not just specific to music, but they are ultimately the determining factors in building almost any industry in Sub-Saharan African countries.

Endeavors such as those in Senegal and Lebanon will not succeed without the infrastructure to support them. A one-size-fits-all theory of IP law is destined to fail because of the diverse array of domestic capacity and economies that exist in developing countries.

142. Fink & Maskus, supra note 53, at 7.
143. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 140.
144. Id.
B. TRIPS Renders Obsolete Many Prior Success Stories Utilizing Non-Western Style IP Laws

On the other side of the schism is the argument that Western conceptions of IP law do not serve the needs of developing countries.\textsuperscript{146} This includes the proposal either to allow traditional laws to control IP in the country,\textsuperscript{147} or to allow a period of weak IP protection in developing countries.\textsuperscript{148} Some suggested alternatives are “[having a] system of group rights that places traditional knowledge in a permanent condition of cultural protection,” “[r]esisting the expansion of TRIPS-plus type legislation at the international level,” and even “[e]liminating copyright.”\textsuperscript{149} As stated, an additional alternative is the acceptance of piracy until a certain level of institutional capacity is achieved.\textsuperscript{150}

Many scholars on this side quickly point out that current IP laws benefit the owners of the rights, not necessarily the creators.\textsuperscript{151} The TRIPS agreement manifests this modern trend by treating intellectual property rights as economic and commercial rights.\textsuperscript{152} Comparatively, the Universal Declaration on Human Rights from 1948 describes intellectual property rights as a human right, stating “[e]veryone has the right to the protection of the moral and material

\textsuperscript{146} See Hamilton, supra note 52, at 615-17 (discussing the imposition through TRIPS of Western values such as individualism and reward upon developing countries with non-Western value structures).

\textsuperscript{147} See Gervais, supra note 5, at 138-44.

\textsuperscript{148} See Brenner-Beck, supra note 5, at 101.


\textsuperscript{150} Brenner-Beck, supra note 5, at 102.

\textsuperscript{151} See Copy/South Research Group, supra note 149, at 17-18 (arguing that the concern over IP protection is to protect corporate profits, not creativity, because corporations are generally the owners of the IP rights); id. at 23 (discussing how IP protection primarily benefits the owners of IP rights, often large companies, while “royalties and other earnings from intellectual property rights constitute only a fraction of the income of most active professional artists,” and expressing concern that the inequality between the owners and the creators “has often resulted in creators being cheated by the system while they were alive”); see also COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 6 (discussing the nature of current intellectual property rights and the implications of treating IP rights as economic or commercial rights, which are often owned by companies rather than inventors).

\textsuperscript{152} See TRIPS, supra note 7; see also COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 6.
interests resulting from any scientific, literary or artistic production of which he is the author.”

It is significantly more difficult to analyze this side of the argument, because many of the arguments are ideological and not based on costs, benefits, or other economic indicators. There is little hard evidence to support this argument because the global economy, with international organizations such as the WTO, does not leave much room for experimentation with IP law regimes. However, one area where there has been a wider array of IP law approaches is the area of traditional knowledge. IP laws regarding traditional knowledge have not been harmonized on an international level. By examining different approaches to traditional knowledge, evidence may come to light about the advantages and disadvantages of rejecting Western-style IP laws.

The Philippines is an example of a country with a legislative approach to protecting traditional knowledge utilizing non-Western styles of intellectual property protection. In 1997, the Philippines enacted legislation giving indigenous communities rights over their traditional knowledge, as well as certain land rights. The legislation incorporated customary laws of the indigenous communities as well as equitable sharing of the benefits. Although the passage of the bill was a huge step for indigenous rights, the implementation of the legislation has remained a problem. For example, the legislation conflicts with other laws, such as the


154. WIPO defines traditional knowledge as “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.” World Intellectual Property Organization, Glossary of Terms, http://www.wipo.int/tk/en/glossary/index.html#tk (last visited Oct. 30, 2006) (internal quotation marks omitted).


157. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 79.

Philippine Mining Act of 1995, resulting in much confusion.\textsuperscript{159} There has also been difficulty combining the preexisting legal system with the customary laws, primarily because “t]he two bodies of law originate from disparate contexts that involve different histories and views on land issues and land rights.”\textsuperscript{160} This difficulty points to an underlying issue with many of the suggested \textit{sui generis} systems on this side of the argument: there is already a legal system in place in developing countries, and adding elements of another legal system based on different norms may cause a much broader problem of integration and instability.

Australia has taken a different approach to traditional knowledge of the Aboriginal people and has not incorporated customary law into copyright.\textsuperscript{161} \textit{Milpurrurru v. Indofurn Pty Ltd.} is a case that illustrates how Australia deals with this issue.\textsuperscript{162} In \textit{Milpurrurru}, rugs were imported from Vietnam that reproduced Aboriginal artwork.\textsuperscript{163} Finding that this constituted copyright infringement under the Australian Copyright Act, the Federal Court of Australia admitted that “[t]he statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law.”\textsuperscript{164} However, the Court considered the cultural environment when determining damages, explaining:

In the present case the infringements have caused personal distress and, potentially at least, have exposed the artists to embarrassment and contempt within their communities if not to the risk of diminished earning potential and physical harm. The losses arising from these risks are a reflection of the cultural environment in which the artists reside and conduct their daily affairs.\textsuperscript{165}

Although there is not legislative recognition of the Aboriginal laws regarding copyright, this case provides some evidence of judicial consideration of the customs.

These two examples illustrate another problem underlying the traditional knowledge debate: in countries without the infrastructure discussed in the previous section, implementation of any IP law

\textsuperscript{160} \textit{Id.} at 295.
\textsuperscript{161} See AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET G082: INDIGENOUS ARTISTS 1 (Jan. 2006), available at http://www.copyright.org.au/specialinterest/indigenous.htm (follow “Indigenous Artists”). “Copyright law applies to Indigenous artistic works in the same way as it applies to other artistic works. There are no special provisions for Indigenous works, and no recognition of customary or traditional Indigenous laws.” \textit{Id.}
\textsuperscript{162} See \textit{Milpurrurru v. Indofurn Pty Ltd.} (1994) 54 F.C.R. 240, 272 (Austl.).
\textsuperscript{163} \textit{Id.} at 240.
\textsuperscript{164} \textit{Id.} at 272.
\textsuperscript{165} \textit{Id.} at 277.
system, Western or otherwise, will be difficult. This is the mutual problem underlying both sides of the IP law debate. A certain level of institutional capacity is necessary for success under either argument.

Also, rejecting Western-style IP laws outright does not necessarily mean a desirable local system will step in. For instance, many traditional systems of government are male-dominated, limit participation of the general population, and have a limited scope and capacity.\(^{166}\) Whereas the customary laws or local system may have methods for handling disputes or dealing with land rights, they may not be as well-equipped to deal with issues such as intellectual property protection for musicians and distribution rights.\(^{167}\)

Furthermore, some scholars assume that traditional communities have property rights that are very different than Western-style ideals.\(^{168}\) One example contrary to this assumption is the South African San community, where “only the author of the song was entitled to sing it and only the poet was allowed to recite the poem.”\(^{169}\)

With regard to the suggested alternatives of resisting TRIPS-style approaches and allowing piracy, there are several real world examples of success utilizing this formula. Both Taiwan and Korea utilized “imitation and reverse engineering as an important element in developing their indigenous technological innovative capacity” from 1960 to 1980.\(^{170}\) India granted weak IP protection to pharmaceuticals, and the scope of Korea’s patent laws initially excluded pharmaceuticals, as well as foodstuffs and chemicals.\(^{171}\) All three countries experienced economic growth during those periods and later increased, to varying degrees, the strength of their IP laws.\(^{172}\)

The global economic climate has changed significantly, however, since all of these case studies. With the implementation of TRIPS, countries have considerably less flexibility, and therefore arguments suggesting otherwise ignore the realities of today’s global economy.\(^{173}\) TRIPS is nearly impossible for developing countries to

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167. See id. at 16-17.
168. Id. at 17.
169. Id. at 13.
170. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 20 (citation omitted).
171. Id.
172. Id.
173. Id.
avoid; at least 149 countries are members of the WTO.\footnote{World Trade Organization, Understanding The WTO, Members and Organizations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 30, 2006).} Resisting TRIPS, offered as an alternative by many scholars, is now more of a concept than a practical solution.

\textit{C. The Solution: Tailored Systems and Tangible Benefits for Developing Countries who Strengthen IP Laws}

Instead of the extreme positions—one-size-fits-all and outright rejection of Western-style IP law—there are many shades of gray allowed under the current international agreements.\footnote{See, e.g., Berne Convention, supra note 20, art. 9(2) (allowing exemption of artistic or literary works from copyright in certain situations).} The proposed solution to this current schism is threefold: 1) implementation, in phases, of IP laws that are tailored to a country’s needs; 2) greater guidance and involvement by international organizations to help a country build on its strengths and pre-existing industries; and 3) a mandatory level of investment or involvement by developed countries in the creation and development of these IP law regimes and industries in the developing countries.

This solution combines many of the characteristics of the two extremes, and it also implements a number of the issues highlighted by the Commission on Intellectual Property Rights. Some of the Commission’s concerns include: the homogeneity of IP laws compared to the heterogeneity of developing countries\footnote{COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 4-5.}; the high cost associated with “getting an IP system ‘wrong’ in a developing country”\footnote{Id. at 4.}; the costs to developing countries of strengthening IP laws compared with the benefits\footnote{Id. at 5.}; and the need to increase the institutional capacity of developing countries.\footnote{Id. at 137.}

As discussed, while there are many benefits attributed to stronger IP laws, studies indicate that these benefits are at best ambiguous.\footnote{See generally Fink & Maskus, supra note 53.} Therefore, there must be a concerted effort to make the costs of implementing IP laws in a country as small as possible, and tailoring the IP laws to each country’s needs is an important step in achieving this. For instance, in the Africa Music Project, there was significant investment in developing the music industry, but there was
not a strong enough effort to streamline and update the Copyright Office; as a result the advances have been difficult to track.\textsuperscript{181} In Lebanon, where the entertainment industry is poised to emerge as a dominant industry, a limited reorganization of the copyright office is planned but has not yet been implemented.\textsuperscript{182} In countries with stronger technological capacity, such as China or India, the needs are different from a country in sub-Saharan Africa where there is little domestic technological innovation.\textsuperscript{183} Costs associated with this particular endeavor would probably include research on the domestic industries, analysis by experts of how to best maximize the country’s potential, and the other costs of implementing IP laws. Although this prong may include extra costs at the front end, it will help avoid “getting [the] IP system ‘wrong,’” which would result in even greater costs long-term.\textsuperscript{184}

The second prong of this solution is intertwined with the first prong. In order to tailor a system of IP laws to a country’s needs, experts and representatives with experience in IP laws must be involved. These experts may come from the World Bank, the WTO, WIPO, or any of the various developing countries that have been at the forefront of the push for stronger IP laws. The World Bank is involved with the Africa Music Project, and its involvement has been instrumental in recognizing the potential of the Senegalese music scene. It recognized the possibility of having one or two “Nashvilles” in African countries and the long-term effects this would have on diversifying their economic base.\textsuperscript{185} Without such insight, a seemingly non-essential industry such as music might not be promoted within a country.

The third prong of the solution recognizes that developed countries are often pushing for stronger IP laws, not to reduce poverty in developing countries, but to protect their own interests in capitalizing on their own innovations and creations. Therefore, a mandatory requirement could be imposed, similar to a community service requirement at some universities. For example, when the Recording Industry Association of America discusses its war on piracy, there is no explicit mention of helping artists in developing countries, but there is much reference to the threat of international piracy to the

\begin{itemize}
\item \textsuperscript{181} Compare \textit{The Music Industry in Senegal}, \textit{supra} note 121, at 28, \textit{with} IFPI, \textit{supra} note 122, at 18.
\item \textsuperscript{182} Maskus, \textit{supra} note 12, at 261.
\item \textsuperscript{183} \textit{Commission on Intellectual Property Rights}, \textit{supra} note 3, at 2.
\item \textsuperscript{184} \textit{Id.} at 4.
\item \textsuperscript{185} \textit{See generally} Maskus, \textit{supra} note 145 (explaining that close proximity of industries can create agglomeration that could stimulate creation).
\end{itemize}
American music industry’s profits. As the Commission’s report points out, “commercial companies are responsible to their shareholders . . . [and] . . . are not charities.” Instead, companies expect governments and international organizations to represent both the rights and responsibilities of developed countries. As explained earlier, there has been little more than a tenuous link proven between FDI and stronger IP laws in developing countries. If this is going to be used to entice developing countries into stronger IP laws, then some sort of investment should occur. A mandatory level of involvement, requiring developed WTO members to work with developing WTO members, would be a step towards counteracting the flow of capital from developing countries to developed countries within intellectual property.

Although this solution does not address all of the arguments of each side of the schism, in the end it strengthens IP laws in developing countries while ensuring developing countries get tangible benefits instead of the elusive benefits that are commonly associated with stronger IP laws.

III. CONCLUSION

A three-pronged solution, combining characteristics of both extreme positions in the international IP law debate, would help developing countries such as Lebanon and Senegal survive the difficult process of strengthening their IP laws. This solution accepts that IP law must be strengthened in developing countries to meet their obligations in the TRIPS agreement. However, it also respects the vast knowledge gap, institutional capacity, and unique industries and values in developing countries all over the world.

Tailoring a country’s domestic IP laws before implementation would take into account the specific needs of each country, by considering which domestic industries could thrive and what products would necessarily be imported. These unique IP regimes would require the guidance of experts from international organizations and developing countries. One important aspect to be considered by the experts is a careful assessment of the cultural attitudes and values of each country before formulation of a plan. These experts must be seen

186. See http://www.riaa.org for a discussion of the costs of piracy and RIAA’s collaboration with the International Federation of the Phonographic Industry (IFPI) to work against piracy in all areas of the world.
187. COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, supra note 3, at 102.
188. Id.
189. See Fink & Maskus, supra note 48, at 7.
not as representatives of the former colonizers or Western ideology, but as persons invested in the strengthening and stabilization of each country.

Finally, requiring a mandatory level of investment by developed countries in the developing countries would be the most controversial aspect of the solution. However, it could also be seen as a necessary compromise between developed and developing countries. If developed countries push for stronger IP laws in developing countries, and will benefit from the strengthened IP laws, then it is a small concession to insist on educational assistance, expert guidance, and perhaps even technology transfer.

In a globalized economy, people from all corners of the world are finding increased commonalities. Music, “touch[ing] every person of every culture on the globe,” is one of those shared understandings. If the Africa Music Project succeeds, someday the Senegalese band Rafrache will also be streaming from stereos in Nashville, London, and Hong Kong. By incorporating and accepting the unique circumstances of IP in Senegal and other developing countries, domestic industries and artists such as Rafrache may flourish on the global stage.

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190. RIAA, Marketing Data, supra note 1.

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