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Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*

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Abstract. Many national intellectual property laws contain provisions that reflect cultural values and have trade significance. Although cultural value defenses have generally been rejected by GATT and WTO panels, they may be more likely to succeed in intellectual property disputes because many culturally-laden rules are widely accepted in the international intellectual property arena. Moreover, intellectual products are less completely commodified than other products. Cultural economists can provide valuable insights to aid WTO in distinguishing between those culturally-laden intellectual property rules that should be or should not permitted when they have an impact on trade.

Key words: intellectual property, TRIPS, world trade, copyright

1. Introduction

When the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was added as an annex to the agreement establishing the World Trade Organization (WTO) in 1994,[1] little attention was given to the possible effects that this agreement would have on cultural dimensions of national intellectual property laws. Nor has this subject received much attention since then. Most commentators have focused on the implications of TRIPS for particular national intellectual property rules and enforcement practices, sometimes with attention to the concerns of developing nations regarding improvement of their intellectual property rights policies and practices.[2] This article will consider the implications of TRIPS for cultural dimensions of national intellectual property laws, as well as the potential for cultural economists to make an important contribution to the coming debate on these issues.

At first blush, it might seem as though TRIPS would have little effect on cultural aspects of intellectual property laws. This is partly because the substantive provisions of TRIPS largely derive from earlier international intellectual property treaties, principally the Berne Convention for the Protection of Artistic and Literary Works and the Paris Convention for the Protection of Industrial Property which tolerated culturally diverse rules.[3] TRIPS resembles the Berne Convention in establishing some minimum substantive standards for national laws.[4] But all

three treaties mainly regulate national laws by requiring member states to abide by "national treatment" principles (i.e., innovations of foreign nationals must be treated no less favorably than those produced by a country's own nationals) insofar as their laws differ.[5]

However, the TRIPS Agreement goes beyond previous treaties in several respects. First, it sets forth a number of substantive minima not included in earlier treaties.[6] Second, it goes beyond requiring substantively adequate laws and insists on adequacy and effectiveness of remedies and enforcement practices when intellectual property rights have been violated.[7] Third, it provides a dispute resolution mechanism by which countries aggrieved by the failure of a WTO member to adequately protect the intellectual property from other nations will have a forum in which to seek resolution of the dispute and, if necessary, obtain meaningful sanctions against that member.[8] Fourth, it puts a trade "spin" on intellectual property rules that have in the past been guided by a host of other principles, including those related to cultural policies embodied in national laws.[9] This last difference from earlier agreements may, in the long run, have a profound impact on national intellectual property laws in part because it may push national laws toward greater commodification of intellectual property products.

2. Goals of TRIPS

One goal of TRIPS is to stop nations from adopting blatantly protectionist intellectual property rules akin to the nontariff barriers to free trade that the General Agreement on Tariffs and Trade (GATT) has regulated for many years. An example of blatantly protectionist intellectual property rules was the long-lasting, though now defunct, "manufacturing clause" of U.S. copyright law. It provided that foreign authors were ineligible for U.S. copyright protection unless they agreed to use American firms to print their works for U.S. markets.[10] This insulated U.S. printers from competition by foreign printers until 1986. Another blatantly protectionist rule in U.S. law until recently was a patent provision that conferred a benefit on U.S. inventors unavailable to foreign inventors when engaged in a contest over priority of invention.[11] Such a contest might arise if a foreign inventor filed for a patent as of a particular date, but a U.S. inventor claimed to have invented the same machine or process at an earlier date. The discriminatory rule enabled a U.S. inventor, but not a foreign inventor, to offer documentary proof that he had conceived or reduced an invention to practice on a date prior to the application-based priority date on which a foreign applicant was relying. In any contest between a U.S. and foreign inventor over who was, in fact, the first inventor and thus the person entitled to the patent, this rule meant that the U.S. inventor would almost certainly win. TRIPS provides a forum for challenging these kinds of blatantly protectionist rules so that they cannot distort or impede free trade.

Banning such protectionism is not the only, or even the main, goal of the TRIPS Agreement. The major trade distortion that TRIPS is intended to address is piracy

of intellectual property products in the international marketplace which undermines incentives to invest in innovation and distorts trade. Such piracy confers unfair advantages on those who free-ride on the investments of others, and causes some businesses to be unwilling to operate in areas where intellectual property rights are not respected.[12] Disrespect for intellectual property rights may be evidenced in three ways: by inadequate substantive laws that allow pirates to operate legally; by inadequate procedural or remedial rules that impede effective enforcement of intellectual property rights; and by lack of enforcement of facially adequate laws and procedures.[13] The WTO dispute settlement process will provide a forum for resolving controversies over all three kinds of distortions and impediments to trade.

TRIPS will have achieved much if it deters countries from adopting blatantly protectionist intellectual property rules and if it contributes to a substantial diminishment in commercial piracy of intellectual property products in the world marketplace. However, some hope that TRIPS may also bring about harmonization of national intellectual property laws over and above the minima which TRIPS itself establishes.[14] They believe that harmonization of national intellectual property rules is desirable to facilitate global markets in intellectual property products and services.

TRIPS will almost certainly bring about some harmonization in national intellectual property rules when WTO panels issue decisions that will clarify whether certain national intellectual property rules are consistent with TRIPS.[15] However, in the long run a more important source of harmonization may result from oversight of national intellectual property laws and practices by the Council for TRIPS.[16] To facilitate this oversight, TRIPS requires WTO members to report regularly on their intellectual property laws and enforcement practices.[17] The TRIPS Council may also offer advice to nations about how they might make adjustments in their laws and practices to bring them into greater compliance with TRIPS.[18] Depending on how activist the Council chooses to become, considerable pressure could be brought to bear on members to harmonize their laws along lines that the Council approves.

3. Cultural Defenses Before the WTO

It may be wise for WTO dispute panels and the TRIPS Council to exercise restraint in pushing for harmonization of national intellectual property laws, especially copyright laws, because national intellectual property policies are often intertwined with cultural values and policies that are deeply connected to national identity. How eager any one nation may be about harmonizing intellectual property rights on an international scale may depend on how consistent it thinks this harmonization will be with its own cultural values and policies. The U.S., for example, may favor further harmonization because it perceives a benefit from further international acceptance of the “freedom imperialism” already embedded in TRIPS.[19] However, in contrast to the goods and services that GATT and WTO have usually

monitored, intellectual property products, such as artistic and literary works, are incompletely commodified and likely to remain so for the foreseeable future.[20] Because of this, substantial harmonization of national intellectual property laws may be difficult to achieve, and may even be undesirable unless one wishes to bring about a homogenized global culture in which commodification and free trade are the dominant values.

Yet, the WTO may be inclined to take a dim view of claims that cultural values should override trade policy if prior GATT and WTO decisions are any guide.[21] In general, claims that a particular product should be excepted from free trade norms because of its special cultural significance have been given short shrift in GATT and WTO proceedings. Some years ago a GATT panel rejected Japan's claim that its nationals' alcohol products were imbued with special cultural significance justifying a deviation from free trade principles.[22] A very recent WTO dispute panel decision ruled against the U.S. for discriminating against another nation's shrimp products because the shrimp had been caught in nets that the U.S. deemed to be environmentally unsound because of their destructive effects on sea turtles.[23] These GATT-WTO decisions might indicate that a similar fate would befall claims that cultural values in intellectual property laws should be deferred to when they conflict with free trade principles.

However, there may be a sound basis for distinguishing between cultural policies embedded in intellectual property policies from those asserted in earlier GATT and WTO cases. Products such as alcohol, although they may be imbued with special significance in a particular nation, are, in general, highly commodified on the world market. In contrast, culturally laden intellectual property rules are common and widely accepted in the international community. This indicates that intellectual property products are less completely commodified than products generally dealt with by GATT and WTO. In view of this, WTO dispute panels may be more receptive to defenses based on cultural values in the intellectual property context, although these panels will probably need to develop criteria for determining which culturally-laden rules should be deemed acceptable and which should not.

The work of cultural economists may be of assistance to WTO panels as they grapple with future disputes over culturally-laden intellectual property rules. After all, the field of cultural economics has long limned the difficulties of applying standard market economy models to the production of cultural and aesthetic works.[24] In this volume, for example, Mark Schuster discusses the desirability of certain kinds of indirect subsidies to enable the production of cultural and aesthetic works.[25] Martin Shubik and David Throsby recognize non-commodifed values in national policies aimed at promoting cultural preservation and appreciation of cultural heritage.[26] Shubik shows that the art markets are more commodified now than they were twenty years ago, yet these markets are still not fully commodified.[27] Along similar lines, Günter Schulze's work identifies differences among categories of artistic goods, some of which are more commodified than others, and factors that help to explain when a less commodified approach is desirable.[28] As these

and other writings in cultural economics indicate, nations have varying policies to promote artistic and cultural production that include, but are not limited to, copyright.

To help assess how much variance should be tolerated under TRIPS, it is important to understand that at the time TRIPS was adopted, national intellectual property rules were not only highly diverse, but that much of the diversity had cultural dimensions.[29] TRIPS clearly anticipates there will continue to be substantial differences in national approaches to intellectual property. Article 1 of TRIPS, for example, authorizes member states to adopt more extensive protections than TRIPS itself requires and to implement the treaty's requirements in their own way.[30]

4. Moral Rights Rules Affecting Trade

A prime example of a cultural value rule in continental European copyright law that has trade implications is the rule that grants authors not only economic but also "moral" rights in their creations.[31] Moral rights provisions of continental European laws reflect a deep cultural belief in the value of authors to society and in the desirability of providing authors with rights in their works as a way to reward them for their contributions to the enrichment of the cultural lives of the citizenry. Indeed, to distinguish their approach to authorship from the Anglo-American approach, continental Europeans do not use the utilitarian term "copyright" to characterize the nature of their law. Rather, they speak of "droit d'auteur" (the law of authors' rights).[32]

While the economic rights of droit d'auteur systems accord with trade principles embodied in TRIPS, moral rights can and do impede or distort trade. Moral rights allow authors to control the integrity of their work, even after a particular instance of it has become an item of trade.[33] For example, an artist may have sold a sculpture to someone who thinks its marketability would be improved by putting a fig leaf over its nether region. However, the sculptor can insist on removal of the fig leaf if this modification would be detrimental to her reputation as an artist, as long as she asserts her interest in a jurisdiction where moral rights are recognized.[34] Authors may even assert moral rights against those who acquire copyright ownership in their works. For instance, a French court once enjoined commercial exhibition of a colorized version of a motion picture based on a complaint brought by the heirs of the film's director who argued that the colorization was a mutilation of the black-and-white version. This argument was successful, even though the motion picture company holding copyright in the film had authorized the exhibition.[35] France takes the moral rights of authors so seriously that it has decided that moral rights are not waivable by contract, a stance that trade-oriented U.S. officials find highly objectionable as an impediment to trade.[36]

Even if moral rights provisions of some national copyright laws interfere with trade, that does not automatically mean these provisions violate the TRIPS Agreement. Moral rights are safe, at least for now, because during the first five years of

TRIPS, only "violation complaints" – that is, complaints that a country has violated a particular provision of TRIPS, such as Article 10(2) which requires copyright protection for computer databases – can be brought before WTO dispute panels.[37] There is no current provision of TRIPS that would be violated by the protection of moral rights. By the year 2000, the TRIPS Council is supposed to announce standards for bringing "nonviolation" complaints – that is, complaints alleging that national laws or policies impede or interfere with accomplishing the free trade goals of TRIPS, even if there has been no explicit trespass on a TRIPS norm.[38]

However, even after the five year moratorium on nonviolation complaints expires, it is unlikely that national moral rights rules will be subject to a TRIPS challenge because many nations consider moral rights to be such an important manifestation of their cultural values. Indeed, the Berne Convention explicitly requires members of the Berne Union to respect the moral rights of authors.[39] It is, then, an international norm for countries to respect moral rights. While the moral rights provision of the Berne Convention was omitted from the TRIPS Agreement,[40] this was not done in order to allow trade principles to override it. No country adhering to TRIPS thought that this treaty would mean that nations would have to abandon their moral rights traditions. Indeed, the TRIPS provision referring to the Berne moral rights provision would seem to envision that nations who continue to respect moral rights would not violate TRIPS.[41]

Moral rights rules are only one example of national copyright rules where deep-rooted cultural values are evident. Cultural values are also present in many rules about classes of protectable subject matter. These too can have significant impacts on trade. Some countries, for example, use copyright law to protect aesthetic designs for manufactured goods (e.g., chairs or lamps) because they value artistic expression however it is embodied, while other countries deny protection to such works because their cultures place a higher value on competition in manufactured product markets.[42] Some countries protect folklore by copyright; others do not.[43] Some countries protect performances of creative works, even if those performances have not been "fixed" in some tangible form (e.g., recorded on audio or video tape); others do not.[44] Some countries protect broadcasts through copyright law; some countries have an entirely different form of law to protect broadcasts.[45] Cultural assumptions, values and norms are embedded in these rules, and each has trade implications.

5. Cultural Values in Exceptions and Limitations

Among the other parts of national copyright laws that embody deeply held cultural values are the exceptions to and limitations on the scope of rights granted to copyright owners in national laws. U.S. copyright law, for example, has provisions granting public interest exceptions to author rights for libraries, educational institutions, veterans, agricultural and horticultural groups, and visually impaired persons.[46] These provisions limit the power of copyright owners to extract com-

pensation for specific activities performed by members of qualifying institutions or groups, even though copyright owners might prefer to exercise full control over all uses of their works.

U.S. copyright law also contains a fair use provision that enables a defendant charged with copyright infringement to raise an affirmative defense asserting that upon weighing several factors together, his use of the copyrighted work was fair. These factors include:

1. the purpose and character of the use (e.g., criticism, education, news reporting, and the degree of commercialization in the use);
2. the nature of the copyrighted work (e.g., entertainment products tend to have a narrow scope of fair use by comparison with factual works);
3. the amount and substantiality of the appropriation in relation to the work as a whole;
4. the extent to which the use will harm actual or potential markets for the work.[47]

These factors are illustrative, rather than exhaustive. Other factors bearing on the fairness of the use may also be considered.[48]

A good example of a culturally-laden exercise of the U.S. fair use defense is the *Campbell* v. *Acuff-Rose* case, in which the singing group known as "2 Live Crew" asserted a fair use defense in response to a complaint that its song, "Big Hairy Woman", infringed copyright in the well-known Roy Orbison song "Pretty Woman". The group characterized the rap song as a parody of "Pretty Woman". In some jurisdictions, this rap parody would have been treated as a violation of Orbison's moral rights, if not of his economic rights.[49] However, the U.S. Supreme Court, in recognition of free speech considerations embedded in U.S. copyright policy, decided that parodies are critical commentaries on existing works that contribute to achieving the larger public policy purposes of copyright and should be allowed notwithstanding the highly commercial nature of the 2 Live Crew recording.[50]

When the United States decided to join the Berne Convention, it asserted, and members of the Berne Union seemed to accept, that the exceptions and limitations of U.S. copyright law were consistent with all Berne Convention requirements, including Article 9(2) of the Berne Convention.[51] Article 9(2) permits nations to adopt exceptions and limitations to the reproduction right "in certain special cases provided that [the excepted] reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author".[52] WIPO and the Berne Union have long tolerated a wide range of national exceptions and limitations within the framework of Article 9(2), deferring heavily to existing state practice and even allowing countries to adhere to the Convention while at the same asserting a minor exception on one or more rules. It is fair

to observe, however, that the Berne Convention lacked an effective enforcement mechanism. This meant that even if a Berne Union member were in violation of Article 9(2), there would be little that copyright owners injured by an overly broad exception could do about it.

The TRIPS Agreement now provides a means to challenge overly broad exceptions and limitations in national copyright laws. In addition, Article 13 of TRIPS broadens the scope of Article 9(2) by extending it beyond the reproduction right to regulate all exceptions to the exclusive rights granted to copyright owners.[53] Similarities in the wording of Berne 9(2) and TRIPS 13 might suggest that Article 9(2) and TRIPS Article 13 have the same meaning insofar as they regulate limitations on or exceptions to the reproduction right, but do they? The U.S. fair use defense may have been accepted as consistent with Article 9(2) of Berne, but does that mean it is automatically acceptable under TRIPS? Some representatives of copyright industries seem to regard TRIPS as adopting a tougher standard. Fair use, they may argue, is often not limited to "certain special cases", and it often deprives publishers of revenues that they regard as within the normal exploitation of their works.[54]

It remains to be seen how controversies of this sort will be resolved in future WTO dispute settlement proceedings. It is easy to imagine a major Dutch publisher pressing its government to mount a challenge to the U.S. fair use defense, and a major U.S. publisher returning the favor by pressing its government to challenge the Dutch private use copying privilege.[55] There is some reason to doubt that such high protectionist strategies will be successful, at least in the near term.[56] For one thing, domestic constituencies whose cultural values favor a particular exception or limitation will likely exercise counter-pressure to block the high protectionist tactic before the matter reaches the WTO.[57] For another, WIPO's guide to the TRIPS Agreement suggests that existing limitations and exceptions to author rights have essentially been grandfathered into TRIPS, for it assures readers that limitations and exceptions permitted by the Berne Convention should not violate Article 13 as long as they are correctly applied.[58] Moreover, a diplomatic conference held at the World Intellectual Property Organization (WIPO) headquarters in Geneva in December 1996 rebuffed an effort to restrict further national authority to adopt exceptions and limitations in national copyright laws.[59] An agreed upon statement of interpretation to the copyright treaty concluded at this conference affirms that national limitations and exceptions to copyright that have long been accepted as appropriate under the Berne Convention can continue to be applied, including to works in digital form.[60]

However, astute nations concerned about fending off challenges to their exceptions or limitations may find it worthwhile to ground their arguments regarding TRIPS compliance on more than WIPO's assurances. They may find in Articles 7 and 8 of TRIPS new possible bases for justifying exceptions and limitations that achieve legitimate national goals. Article 7, which sets forth the objectives of TRIPS, provides that "[t]he protection and enforcement of intellectual property

rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".[61] Article 8 affirms that member states may "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".[62] Article 7 recognizes the importance of balance in intellectual property laws, and Article 8 provides some leeway for nations to tailor national intellectual property laws to promote what they regard as the public interest.[63]

6. Conclusion

It is too early to know how TRIPS will affect cultural dimensions of national intellectual property laws. Some culturally laden rules will likely come under attack as violations of TRIPS, and some of these challenges may be successful. No WTO member could expect to justify denying copyright protection to the works of foreign authors on the ground that the denial would advance a deeply held cultural value of promoting low-cost education and dissemination of knowledge, as the U.S. did in the nineteenth century. It is a closer question, however, whether TRIPS will permit a nation to deny patent protection to new life forms based on the culture's genuinely held religious belief against such ownership should a WTO panel be convened to challenge it.

Culturally laden intellectual property rules will be under pressure as a result of the adoption of TRIPS, although it is unlikely they will disappear altogether. It will be difficult for WTO panels to develop criteria for distinguishing cultural-based rules that are consistent with free trade principles and those that are not. Cultural economists are well-positioned to make significant contributions to formation of these criteria, particularly if they work with legal professionals and translate their insights into the vernacular understood by the legal community.

Notes

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1. See "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", April 15, 1994, reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* 2–3 (GATT Secretariat ed. 1994); Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994 (hereinafter "WTO Agreement"), Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS"), reprinted in *Results of Uruguay Round*, *supra*, at 6-19, 365–403.
2. See, e.g., Abbott (1989).

3. See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris, July 24, 1971, and amended in 1979, 828 U.N.T.S. 221 (hereinafter "Berne Convention"); Paris Convention for the Protection of Industrial Property, March 20, 1883, 13 U.S.T. 1, revised July 14, 1967, 21 U.S.T. 1583, 823 U.N.T.S. 305 (hereinafter "Paris Convention"). See also TRIPS, *supra* note 1, Art. 9(1) (incorporating Articles 1–21 of Berne) and Art. 2(1) (requiring adherence to certain provisions of the Paris Convention).
4. TRIPS, *supra* note 1, Arts. 9–39. Many of the Berne Convention provisions incorporated by reference in Art. 9(1) of TRIPS are substantive minima required of all Berne Union members. See Reichman (1995).
5. TRIPS, *supra* note 1, Art. 3.
6. See, e.g., id., Art. 10 (dealing with computer programs and databases).
7. See, e.g., id., Arts. 41–48.
8. Id., Art. 64. See, e.g., Dreyfuss and Lowenfeld (1997) (discussing WTO dispute settlement process); Geller (1995).
9. See, e.g., Dreyfuss and Lowenfeld (1997); Geller, (1990).
10. 17 U.S.C. sec. 601 (pertaining to pre-1986 activities).
11. 35 U.S.C. sec. 104 (now applied only to non-WTO, non-NAFTA members).
12. See, e.g., Smith (1996) (discussing TRIPS as a tool to fight international copyright piracy).
13. See,.e.g., Dreyfuss and Lowenfeld (1997).
14. See, e.g., Abbott (1996, pp. 387–409).
15. See, e.g., Dreyfuss and Lowenfeld (1997).
16. See generally Otten and Wager (1996, pp. 409–413) (discussing this oversight).
17. TRIPS, *supra* note 1, Art. 63.
18. See, e.g., Otten and Wager (1996).
19. See, e.g., Hamilton (1996) (characterizing TRIPS as "freedom imperialism" as forcing conformity with U.S. trade and social values).
20. One sign of the incompleteness of the commodification of one major intellectual property sector is the frequency with which nations undertake to subsidize the production of artistic works, such as by establishing entities like the National Endowment of the Arts for making grants to artists. Subsidies in highly commodified sectors, such as those pertaining to manufactured goods, are viewed with skepticism or hostility in the international trade community as another kind of distortion of free trade principles. Yet subsidies of artistic activities are widely accepted in the international community. See, e.g., Schuster (1998). This is not to say that trade controversies have not occurred over subsidy-related issues in the cultural sector. National rules that limit the proportion of foreign content that may be disseminated in local markets, and taxes levied on foreign works in order to fund the production of art in the local culture have sometimes been highly charged trade issues. Indeed, controversies over these issues almost prevented the successful conclusion of the TRIPS Agreement.
21. Conversation with Professor John Yoo, March 3, 1998, Berkeley CA.
22. See Japan Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, October 13, 1987, GATT B.I.S.D. (34th Supp.) at 106 ¶3.12, 119 ¶5.9(b) (1987).
23. See 1998 WL 256632.
24. See, e.g., Heilbrun and Gray (1993).
25. Schuster (1999).
26. Shubik (1999); Throsby (1999).
27. Shubik (1999).
28. Schultze (1999).
29. Id., Art. 3.

30. The primary reason that national treatment rules are so common in international intellectual property treaties is because of the diversity of intellectual property laws and traditions. See, e.g., TRIPS, *supra* note 1, Art. 3.
31. See, e.g., Roeder (1940).
32. Id.
33. See, e.g., Berne Convention, *supra* note 3, Art. 6bis (obliging Berne members to protect the moral right of integrity).
34. U.S. law has finally embraced the integrity right for certain works of visual art, such as individually crafted sculptures. See 17 U.S.C. sec. 106A.
35. See, e.g., Ginsburg (1988).
36. See, e.g., Lehman (1995) (complaining about non-waivability of moral rights).
37. See, e.g., Dreyfuss and Lowenfeld (1997) (discussing the distinction between violation and non-violation complaints).
38. Id.
39. Berne Convention, *supra* note 3, Art. 6bis.
40. See TRIPS, *supra* note 1, Art. 9(1).
41. "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have the rights or obligations *under this Agreement* in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom". (emphasis added) This suggests that countries cannot challenge another nation with a violation of TRIPS for failing to adopt moral rights rules under Article 6bis of the Berne Convention. However, abiding by Article 6bis would not seem to violate the TRIPS Agreement.
42. See, e.g., Reichman (1983).
43. See, e.g., Weiner (1987).
44. U.S. copyright law, for example, does not protect live performances unless they have been "fixed" in a tangible form of expression. See 17 U.S.C. sec. 102(a). TRIPS now requires countries to protect performers against unauthorized fixations of their performances. TRIPS, *supra* note 1, Art. 14(1).
45. The U.S., for example, protects broadcasts by copyright law as long as the broadcast is simultaneously recorded. See, e.g., H.R. Rep. No. 94-1476. 94th Cong., 2d Sess. 52–53 (1976), reprinted in 1976 U.S. Code Cong. and Ad. News 5659, 5664–5666. Other countries use "related rights" laws to protect broadcasts.
46. See, e.g., 17 U.S.C. sec. 110.
47. See 17 U.S.C. sec. 107.
48. See, e.g., *Harper and Row Publishers., Inc.* v. *Nation Enterprises,* 471 U.S. 539 (1985) (use of "purloined" manuscript weighed against fair use).
49. See *supra* notes 31–35 and accompanying text concerning the moral right of authors to protect their works against mutilations that will be harmful to their reputations.
50. *Campbell* v. *Acuff-Rose Music, Inc.*, 114 S.Ct. 1164 (1994).
51. See, e.g., Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in 10 Colum./VLA J.L. and Arts 513 (1986).
52. Berne Convention, *supra* note 3, Art. 9(2).
53. Cf. TRIPS Agreement, *supra* note 1, Art. 13; Berne Convention, *supra* note 3, Art. 9(2).
54. See, e.g., Samuelson (1997) (discussing the potential for this sort of challenge).
55. See, e.g., Smith (1996) (anticipating challenges to exceptions and limitations in national laws).
56. See, e.g., Netanel (1997).
57. See, e.g., Samuelson (1997) (discussing lobbying in favor of fair use in the U.S. prior to the WIPO conference).

58. World Intellectual Property Organization, Standards Concerning Intellectual Property Rights at 22 (1996).
59. See, e.g., Samuelson (1997) (discussing the more restrictive proposal).
60. See WIPO Copyright Treaty, adopted by the Diplomatic Conference, WIPO Doc. CRNR/DC/89 (December 20, 1996); Agreed Statements Concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996, WIPO Doc. CRNR/DC/96.
61. See TRIPS, *supra* note 1, Art. 7.
62. Id., Art. 8(1).
63. Nations should be able to rely on Article 8 of TRIPS to justify adoption of an exception to the reproduction right to enable decompilation when necessary to promote interoperability of computer programs. See, e.g., McManis (1996).

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