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## The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade

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# The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade

Peter K. Yu

## **Abstract**

In the recent World Men's Basketball Championships in Indianapolis, Team USA found out painfully that the international game is very different from what they play at home and that the gap between USA Basketball and the rest of the world has been closing. While the United States' losses might have a significant impact on how the country will prepare for the 2004 Olympics in Athens and on how Americans train youngsters to play basketball, their teachings go beyond basketball. The international harmonization process is a game with different rules, different officials, and players with different visions and mindsets. By watching how players interact with rules, officials, and other players, one therefore could gain insight into globalization and the international harmonization process. Team USA's recent loss might be a painful lesson to Americans, but it provides a beneficial lesson to all of us who are involved in intellectual property and international trade.

## ARTICLES

# THE HARMONIZATION GAME: WHAT BASKETBALL CAN TEACH ABOUT INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE

*Peter K. Yu\**

### INTRODUCTION

The United States finally lost! After winning fifty-eight consecutive games over ten years with stars from the National Basketball Association (“NBA”), Team USA finally lost to Argentina, a team consisting mainly of players who would be deemed unqualified to play in the NBA.<sup>1</sup> Showcasing fundamentals and teamwork, the Argentines beat the U.S. men’s basketball team by running flawless pick-and-rolls and backdoor cuts. No spectacular dunks. No shake and bake. No in-your-face crossovers. Pure basics.

A game later, in the quarterfinals, the U.S. team lost again to Yugoslavia, blowing a ten-point lead with three minutes left in regulation time.<sup>2</sup> What was once idolized as the Dream Team has now become the “nightmare team.” Before exiting the tournament, Team USA lost again to Spain, leaving the players in shock, disappointment, embarrassment, and shame.<sup>3</sup> For the first time since NBA players represented the red, white, and blue, Team USA failed to earn a medal in international competition. Worse still, the recent team produced the worst finish ever

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1. See Mike Wise, *U.S. Team Is Big on Hype, Not Results*, N.Y. TIMES, Sept. 5, 2002, at D1; Harvey Araton, *The Inevitable Finally Happens*, N.Y. TIMES, Sept. 5, 2002, at D2.

2. Harvey Araton, *U.S. Is Eliminated from World Championships*, N.Y. TIMES, Sept. 6, 2002, at D1.

3. *U.S. Loses to Spain This Time*, N.Y. TIMES, Sept. 8, 2002, Sec. 8, at 6.

by a U.S. basketball team, sixth place, and the United States must qualify in order to participate in the 2004 Olympics.<sup>4</sup>

To many, the United States' losses were difficult to accept and even more difficult to explain.<sup>5</sup> The game was not marred by politics, as was the infamous USA-USSR final in the 1972 Olympics in Munich.<sup>6</sup> It also was not affected by the NBA strike, as were the 1998 World Championships, in which CBA, overseas, and college players replaced the original NBA selections and lost in the semifinals.<sup>7</sup> The U.S. players could not even complain of other teams having home court advantage, for the championships were held in Indianapolis, deep in the heart of the American basketball kingdom.<sup>8</sup>

True, some of the marquee players in the NBA, like Kobe Bryant, Tim Duncan, Kevin Garnett, Jason Kidd, Allen Iverson, and Shaquille O'Neal, did not play in the championships.<sup>9</sup> It is

4. See Tom Enlund, *Poor Finish Creates More Work*, MILWAUKEE J. SENTINEL, Sept. 10, 2002, at 8C (noting that "[o]ne of the consequences of finishing a disappointing sixth in the World Basketball Championship is that the United States . . . will have to qualify to play in the 2004 Olympics").

5. *But see* Alexander Wolff, *The Decline of U.S. Dominance*, SPORTS ILLUSTRATED ONLINE (Sept. 9, 2002), at [http://sportsillustrated.cnn.com/inside\\_game/alexander\\_wolff/news/2002/09/09/hoop\\_life/](http://sportsillustrated.cnn.com/inside_game/alexander_wolff/news/2002/09/09/hoop_life/) (tracing the decline of U.S. dominance in basketball).

6. See USA Basketball, *Games of the XXth Olympiad*, at [http://www.usabasketball.com/history/olyhistory\\_1972.html](http://www.usabasketball.com/history/olyhistory_1972.html) (describing the controversial USA-USSR final in the 1972 Olympics).

7. See Malcolm Moran, *Tough Task Ahead for USA*, USA TODAY, Sept. 6, 2002, at 2C.

8. Araton, *supra* n.1.

9. One commentator criticized the recent U.S. team for its lack of championship experience:

Of the dozen on the roster, only Indiana's Reggie Miller has played for a championship. Jay Williams, Chicago's first-round pick from Duke, hasn't played an NBA game, and Andre Miller never won more than 30 games as a Cavalier. Jermaine O'Neal joined the Pacers after they went to the NBA Finals, and Antonio Davis was discarded the year before.

Phoenix's Shawn Marion and the Los Angeles Clippers' Elton Brand were unable to play Thursday night because of injuries. But again, neither has enjoyed significant team success in the NBA.

Essentially, USA Basketball pulled 12 guys together and told them to go play for Bucks coach George Karl, who had never run an operation like this but believed he deserved the opportunity.

Jeffrey Denberg, *USA Can't Assume Wins Will Be Easy*, ATLANTA J.-CONST., Sept. 8, 2002, at 4F. Other commentators disagreed:

Seven guys on this roster (Antonio Davis, Baron Davis, Elton Brand, Reggie Miller, Paul Pierce, Michael Finley and Jermaine O'Neal) have all been in at least one NBA all-star game. Ben Wallace was the NBA's defensive player of the year. Duke's Jay Williams was the NCAA national player of the year. An-

also true that the team did not have enough practice, playing only two exhibition games before the tournament.<sup>10</sup> However, compared with the 1992 Dream Team that beat every team by an average margin of 43.8 points<sup>11</sup> with similar preparation,<sup>12</sup> the losses tell us more about the reducing gap between U.S. basketball and the rest of the world<sup>13</sup> than about the U.S. team's lack of preparation. In fact, as Coach George Karl acknowledged, the defeat represents, in a strange way, "a celebration of basketball . . . [and] America should be proud of that."<sup>14</sup>

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dre Miller led his Utah team to the Final Four. Only Raef LaFrentz and Shawn Marion are what you'd call undecorated. Everybody else has credentials. Whether they're into this competition is another story.

Michael Wilbon, *Basketball's New World Order*, WASH. POST, Sept. 6, 2002, at D1; *see also* J.D. Adande, *It's a Flop by U.S. Against Yugoslavia*, L.A. TIMES, Sept. 6, 2002, at 1 (noting that the current U.S. team "still included three NBA All-Stars (Paul Pierce, Baron Davis and Elton Brand), the league's defensive player of the year (Wallace) and the most improved player (Jermaine O'Neal)"); Barbara Barker, *A Collapsing Zone*, NEWSDAY, Sept. 15, 2002, at C4 ("It's not about talent. There was enough talent on that team to win it all. How many of those guys from Argentina and Yugoslavia would even make the U.S. team?" (quoting Bill Walton, ESPN analyst and former National Basketball Association ("NBA") player)); Bob Ryan, *There's No Longer a World of Difference*, BOSTON GLOBE, Sept. 7, 2002, at E1 (contending that the U.S. team consisted of virtually all those players who could have played for the United States when one accepted the fact that the ultra-marquee players would not participate in the tournament).

10. Marc J. Spears, *What's Ahead for USA Basketball? Rebound*, DENVER POST, Sept. 8, 2002, at C1.

11. USA Basketball, *Games of the XXV Olympiad*, at [http://www.usabasketball.com/history/olyhistory\\_1992.html](http://www.usabasketball.com/history/olyhistory_1992.html) (reporting the statistics of the 1992 Dream Team).

12. *See* Jonathan Feigen, *What's Next?*, HOUSTON CHRON., Sept. 7, 2002, at 4: The original Dream Team was blessed with many of the most intuitive players — Magic Johnson, Larry Bird, Michael Jordan, John Stockton, Karl Malone, Charles Barkley — in the history of the sport. Their genius was so great they could easily make up for a lack of training for the international game. Their heirs increasingly have not.

*Id.*

13. This gap generally refers to the dominating performance of the U.S. men's basketball team. Although the U.S. women's basketball team is one of the best in the world and has not lost in international competition since 1994, the gap between the U.S. and foreign teams in the women's competition is not as great as that in the men's competition. For example, in the recent World Women's Basketball Championships, the United States beat Russia in the final by only five points. Joseph Kahn, *U.S. Defeats Russia to Win World Title*, N.Y. TIMES, Sept. 26, 2002, at D6.

14. Moran, *supra* n.7 (quoting George Karl, coach of the 2002 USA Men's Basketball Team):

I'm not sure it's the end of an era as much as it's a celebration of basketball. A lot of the countries now love the game and play the game with a great deal of passion and a great deal of spirit. In a strange way, America should be proud of that.

*Id.*

No doubt, these recent losses will be a wake-up call to the U.S. basketball community. They will have a significant impact on how USA Basketball prepares for the 2004 Olympics in Athens. These losses also might affect how America trains its youth to play basketball, probably by reemphasizing fundamental skills and teamwork principles<sup>15</sup> and by relaxing restrictions on the time coaches can spend on training players.<sup>16</sup> However, the losses teach us more than basketball. They offer valuable lessons on globalization and the international harmonization process.

### LESSON 1: THE RULES

Harmonization is different from Americanization.<sup>17</sup> Policy-

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15. Coach George Karl criticized the manner in which American youth was taught basketball and explained the difference between the U.S. and international basketball players:

European and international basketball players have been shown that their attitude and professionalism and intensity has maybe surpassed our young players' intensity. How do we wake up American basketball? This year's draft woke up some. The reason we're drafting international players is because of their professionalism, their maturity at a young age, their work ethic in being in the gym 10-11 months out of the year where our AAU babies don't even go in the gym half the year. The more we play the all-star American street game, flash, and style, the more chance we have of getting beat by a fundamentally solid basketball team that is going to give you the work ethic, intensity, going to get the extra possession, going to outwork you.

Peter May, *There Are Good Reasons for US' Bad Showing*, BOSTON GLOBE, Sept. 8, 2002, at C13; see also Jim Alexander, *Back to Basics for U.S.*, PRESS-ENTERPRISE, Sept. 10, 2002, at C8 (questioning whether "basketball's Holy Trinity — the dunk, the three-pointer and the crossover — come back to bite [the U.S. players]" and arguing that USA Basketball "must take more of a proactive role in development of young players"); Marty Burns, *Now What?*, SPORTS ILLUSTRATED ONLINE (Sept. 6, 2002), at [http://sportsillustrated.cnn.com/inside\\_game/marty\\_burns/news/2002/09/06/burns\\_nowwhat/](http://sportsillustrated.cnn.com/inside_game/marty_burns/news/2002/09/06/burns_nowwhat/) (questioning whether U.S. players learn to play the game the right way); Isean Deveney, *How to Put the Dream Back in Team USA*, SPORTING NEWS, Sept. 16, 2002, at 74 (criticizing National Collegiate Athletic Association ("NCAA") for being "so bogged down in its focus on rules that it lost sight of one of its most important duties: to ensure that its players are properly taught the game"); Jonathan Feigen, *World Championships Fiasco Has U.S. Seeking Remedies*, HOUSTON CHRON., Sept. 9, 2002, at 2 [hereinafter Feigen, *World Championships Fiasco*] (noting that "[m]uch of the blame has been placed on the entire system that covets, rewards and encourages individual skills at the expense of fundamentals and team principles"); Brian Meehan, *Basketball Is a Better Game Outside the NBA*, OREGONIAN, Sept. 17, 2002, at D1 (criticizing the flaws of the NBA game); Sam Smith, *U.S. Goes Down Again*, CHI. TRIB., Sept. 6, 2002, Sports Sec., at 1 (quoting the Spanish coach's remarks that Pau Gasol, a Spanish import to the NBA, is no longer as complete a player as he was before he joined the NBA).

16. See Deveney, *supra* n.15 (contending that "[r]estrictions on practice time in the offseason and during the season are hurting coaches' ability to teach fundamentals").

17. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the*

makers sometimes confuse national policy preferences with international norms.<sup>18</sup> The fact that the game of basketball originated from the United States<sup>19</sup> does not mean that the international community will follow American rules.

Undeniably, the International Basketball Federation (“FIBA”), the international governing body of basketball, has instituted changes to harmonize its game with that of the NBA. For example, in the 1992 Olympics in Barcelona, the ban on alley-oops in international games was confusing and counterintuitive to U.S. players and the American audience. Taking note of this difference, the FIBA suspended the ban in the 1994 World Championships and subsequently eliminated the ban.<sup>20</sup> Most recently, the FIBA made revolutionary rules changes to speed up its game and to meet the needs of television broad-

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*Twenty-First Century*, 50 AM. U. L. REV. 131, 233-34 (2000) [hereinafter Yu, *From Pirates to Partners*] (noting that one should not confuse an international intellectual property regime with a universalized Western intellectual property regime); see also Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1, 84 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*].

18. David M. Lampton, *A Growing China in a Shrinking World: Beijing and the Global Order*, in *LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 120, 133 (Ezra F. Vogel ed., 1997) (criticizing the American government for confusing its national policy preferences with international norms); Yu, *From Pirates to Partners*, *supra* n.17, at 234 (criticizing the U.S. government for ignoring the interests of other countries, in particular less developed countries); Yu, *Piracy, Prejudice, and Perspective*, *supra* n.17, at 84 (same); see also ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES* 80 (1996) (noting that “the U.S. drive for stronger protection of IP is more in the direction of devising a new legal regime that answers to its needs than to accommodate within the present conventions upcoming global trends in technology, creation, and use”); Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, in *INTELLECTUAL PROPERTY AND ETHICS* 195, 198 (Lionel Bently & Spyros M. Maniatis eds., 1998) (noting that the Western approach toward China “fails to respect other voices and other traditions and instead posits the moral superiority of a value system which is far more recent than the tradition it seeks to condemn”).

19. See Naismith Memorial Basketball Hall of Fame, *James Naismith Biography*, at <http://www.hoophall.com/halloffamers/Naismith.htm>. In 1891, Dr. James Naismith invented the game of basketball while working at the School for Christian Workers. *Id.* The game started with eighteen men in a YMCA gymnasium in Springfield, Massachusetts. *Id.*; see also WALTER LAFEBER, MICHAEL JORDAN AND THE NEW GLOBAL CAPITALISM 33-41 (1999) (discussing James Naismith’s legacy).

20. See David Aldridge, *NBA Players Learn New Rules, Each Other*, WASH. POST, June 23, 1992, at E5 (describing the prohibition of alley-oops in International Basketball Federation (“FIBA”) rules); Phil Taylor, *Yes, It Was a Joke*, SPORTS ILLUSTRATED, Aug. 22, 1994, at 38 (stating that FIBA suspended its prohibition of alley-oop passes for the 1994 world championships).

casts.<sup>21</sup> Under the new rules, an international game no longer has two twenty-minute halves, but four ten-minute quarters, thanks in part to the NBA.<sup>22</sup> In addition, the shot clock was reduced from thirty to twenty-four seconds,<sup>23</sup> and only one free throw, instead of two, is awarded for every technical foul committed.<sup>24</sup>

Notwithstanding these changes, there are limits to the NBA's ability to export its rules. In the past decade, the NBA has made repeated attempts to amend its rules to accelerate offense, encourage ball movement, and increase its appeal to fans.<sup>25</sup> In 2001 alone, it instituted four major rules changes,<sup>26</sup> including elimination of illegal defense rules,<sup>27</sup> institution of a more stringent defensive three-second rule,<sup>28</sup> reduction of time during which a team can bring the ball up to the front court,<sup>29</sup> and re-

21. See *FIBA's New Rule to Speed Up the Game*, HINDU, Oct. 12, 2000 (discussing the FIBA rules changes in 2000).

22. See *id.*; see also FIBA, Official Basketball Rules for Men and Women art. 17.1 (2000) [hereinafter FIBA Rules], available at <http://www.fiba.com> (stipulating that "[t]he game shall consist of four (4) periods of ten (10) minutes").

23. See *FIBA's New Rule to Speed Up the Game*, *supra* n.21; see also FIBA Rules, *supra* n.22, art. 39.1.1 (stipulating that "[w]henever a player gains control of a live ball on the court, a shot for a field goal shall be attempted by his team within twenty-four (24) seconds").

24. See *FIBA's New Rule to Speed Up the Game*, *supra* n.21; see also FIBA Rules, *supra* n.22, art. 49.2.2 (stipulating one free throw as the penalty for committing a technical foul).

25. See, e.g., Michael Arace, *New Rules Are Radically Changing the NBA*, L.A. TIMES, Nov. 5, 1994, at C10 (discussing NBA rules changes in 1994); Chris Young, *NBA Rules Changes for 1997-98*, TORONTO STAR, Oct. 30, 1997, at J2 (discussing NBA rules changes in 1997); David Wharton, *Trying to Stop a Holding Pattern*, L.A. TIMES, Nov. 2, 1999, at S3 (discussing NBA rules changes in 1999); *NBA Changes Rules and Approves New Owners*, AGENCE FRANCE PRESSE, Apr. 12, 2000 (discussing NBA rules changes in 2000); *NBA Announces Rule Changes*, UNITED PRESS INT'L, Aug. 15, 2000, (discussing further NBA rules changes in 2000); Mark Heisler, *NBA Goes into Zone of Its Own*, L.A. TIMES, Apr. 13, 2001, at D1 (discussing NBA rules changes in 2001).

26. See Heisler, *supra* n.25; see also NBA, *Rush on Rule Changes*, at [http://www.nba.com/preview2001/rush\\_newrules.html](http://www.nba.com/preview2001/rush_newrules.html) (presenting an interview with Ed Rush, Director of Officiating of the NBA, who discussed the 2001 NBA rules changes).

27. By eliminating the rules on illegal defense, the league reduced isolation plays and permits a wide variety of defensive strategies, which range from man-to-man coverage to zone defense and from box-and-one to 2-1-2.

28. See Official NBA Rules of the National Basketball Association, Rule 10, Sec. VIII (2002) [hereinafter NBA Rules], available at [http://www.nba.com/analysis/rules\\_index.html](http://www.nba.com/analysis/rules_index.html) (instituting the defensive three-second rule). The rule prohibits a defensive player from staying in the lane for more than three seconds unless he is within six feet of an offensive player. *Id.*

29. See NBA Rules, *supra* n.28, Rule 10, Sec. IX (instituting the eight-second rule).

definition of “incidental contact.”<sup>30</sup> While the NBA justified these rules changes in light of the large number of low-scoring games and reduced viewership, the international game does not have similar needs nor does it require similar changes. In fact, some of the NBA rules changes might not be suitable for countries abroad, as these countries do not have as many slashers and dunkers as the NBA does.

Harmonization is a two-way street. While the NBA is actively exporting its concepts and style of play abroad, it also has imported some aspects of the international game, sometimes to the league’s disappointment. A case in point is the reduction of the three-point line.<sup>31</sup> The league soon found the change disappointing and reverted the three-point line back to its original dimension three years later.<sup>32</sup> Most recently, the league eliminated the rules on illegal defense and permitted, for the first time, zone defense, which until now was one of the major differences between the NBA and the international game.<sup>33</sup> Because the change has been in effect for only a year, it is hard to assess its impact on the league or to predict whether this change will be permanent.

So far, many of the international rules remain different from those used in the NBA.<sup>34</sup> For example, the international game uses only two referees, as compared to three in the NBA.<sup>35</sup>

The eight-second rule gives teams only eight seconds, as compared to ten in the old rules, to bring the ball up to the front court. *Id.* The goal of this rule is to prevent players from slowing down the game by “walking” the ball up the court. *Id.*

30. See NBA Rules, *supra* n.28, App. II (stipulating that “[t]he mere fact that contact occurs does not necessarily constitute a foul”). By doing so, the league cut down on touch fouls, thus rewarding offensive players who demonstrate quickness, speed, and balance. *Rush on Rule Changes*, *supra* n.26.

31. Arace, *supra* n.25 (noting that the NBA has moved the three-point line from twenty-three foot nine at the top of the key and twenty-two feet in the corners to a uniform twenty-two feet).

32. Young, *supra* n.25.

33. Dick Scanlon, *Rules Changes Haven’t Affected the League*, LEDGER, Feb. 3, 2002, at C4 (noting that the abolition of rules against zone defense “seemed like the most drastic rules change in a half century”).

34. The international rules are also different from those used in the National Collegiate Athletic Association (“NCAA”). For a comparison of the rules between an international game and the NBA and the NCAA, see *Rules of the Game*, INDIANAPOLIS STAR, Aug. 28, 2002, at 28H.

35. Compare FIBA Rules, *supra* n.22, art. 4.1 (requiring officiating by a referee and an umpire while permitting the use of an additional umpire), with NBA Rules, *supra* n.28, Rule 2, Sec. I(a) (requiring officiating by a crew chief and two referees).

The three-point line is closer to the basket than the one used in the NBA, making long-distance shooting a more important aspect of the game.<sup>36</sup> The three-second lane is trapezoid-shaped<sup>37</sup> and therefore penalizes post-up players who have limited shooting range.<sup>38</sup> Due to the shorter duration,<sup>39</sup> the international game allows only five fouls, with personal and technical fouls counting toward the maximum limit.<sup>40</sup> By contrast, the NBA rules permit six personal fouls,<sup>41</sup> do not include technical fouls in the calculation,<sup>42</sup> and cover monetary penalties.<sup>43</sup> Moreover, the FIBA requires players to shoot free throws within five seconds, while the NBA doubles the time given to a free-throw shooter.<sup>44</sup> Compared to the NBA, the international game has more lenient rules on goal tending and basketball interference, allowing players to touch the ball after it hits the rim.<sup>45</sup>

In light of these differences, the U.S. players were understandably confused by the international rules and affected by the style of play of which international teams are capable.<sup>46</sup> How-

36. Compare FIBA Rules, *supra* n.22, art. 2.4.5 (stipulating that the three-point field goal area consists of “[a] semicircle of 6.25 m from the outer edge to the centre”), with NBA Rules, *supra* n.28, Rule 1, Sec. I(d) (stipulating that the three-point field goal area “has parallel lines 3’ from the sidelines, extending from the baseline and an arc of 23’9” from the middle of the basket which inter-sects the parallel lines”).

37. Compare FIBA Rules, *supra* n.22, art. 2.4.3 (situating the dimensions of the trapezoid-shaped restricted area), with NBA Rules, *supra* n.28, Rule 1, Sec. I (stipulating the dimensions of the rectangular-shaped restricted area).

38. Wilbon, *supra* n.9 (noting that “trapezoid lane leaves [an American player] posting up a defender three to four feet farther from the basket than he is in the NBA, and therefore out of his limited range”).

39. The international game is eight minutes shorter than an NBA game.

40. See FIBA Rules, *supra* n.22, art. 54.1 (stipulating that “[a] player who has committed five (5) fouls, either personal and/or technical, shall be informed thereof and must leave the game immediately”).

41. See NBA Rules, *supra* n.28, Rule 3, Sec. I(a) (disqualifying players upon receiving the sixth personal foul).

42. See *id.* Rule 12 (differentiating between technical and personal fouls).

43. *Id.* Rule 12, Sec. VIII (stipulating monetary penalties).

44. Compare FIBA Rules, *supra* n.22, art. 57.4.3 (requiring that free-throw shooters “release the ball within five (5) seconds from the time it is placed at his disposal by the official”), with NBA Rules, *supra* n.28, Rule 9, Sec. III (situating that “[e]ach free throw attempt shall be made within 10 seconds after the ball has been placed at the disposal of the free-thrower”).

45. Compare FIBA Rules, *supra* n.22, art. 41.2.2 (forbidding players from touching the ball only when it “is in contact with the ring” or “whilst [it] is within the basket”), with NBA Rules, *supra* n.28, Rule 11(b) (forbidding players from touching the ball “when it is above the basket ring and within the imaginary cylinder”).

46. As one commentator explained:

ever, until U.S. players understand and master these rules or until USA Basketball is able to induce the FIBA to change the rules in its favor, U.S. teams will have to struggle in a game whose rules go against their favor or intuition. Perhaps the proposals to adopt international rules for the NBA are not as outrageous as they sound.<sup>47</sup>

Like rules in a basketball game, intellectual property laws differ across the world due to the diverging levels of wealth, economic structures, technological capabilities, political systems, and cultural traditions.<sup>48</sup> Although the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement" or "the Agreement")<sup>49</sup> successfully induces countries, in particular less developed countries, to model their intellectual property laws in the American image,<sup>50</sup> the United States also

If this tournament had been played under NBA rules, maybe the results would have been different. That's not an alibi. That's reality. The international game is a very different game from the NBA, and the Yanks have never fully adapted to it over the last 15 years. (They still haven't grasped the concept of legal goaltending and they have no clue how to read the officials.) And two weeks isn't nearly enough prep time. There may never be enough time because it's a temporary thing anyway and the players know it.

May, *supra* n.15; Adande, *supra* n.9 (noting that the current U.S. team "wasn't enough to beat teams that had . . . more familiarity with the international rules"); Wilbon, *supra* n.9 (considering arrogant and outdated the American notion that "the U.S. can send a group of all-stars that has barely practiced together and is unfamiliar with the international rules and style of play").

47. May, *supra* n.15 (proposing to adopt international rules in the NBA).

48. MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 191 (1998); Yu, *From Pirates to Partners*, *supra* n.17, at 239; Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 84; Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 569 (2002) [hereinafter Yu, *Toward a Nonzero-sum Approach*].

49. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

50. Commentators discuss extensively the coercive nature of the TRIPS Agreement. See, e.g., Ruth L. Gana (Okediji), *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 112 (1995) (examining the implications of the TRIPS Agreement "as a form of passive coercion"); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 614 (1996) [hereinafter Hamilton, *TRIPS Agreement*] ("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."); Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in VALUING

has implemented changes that harmonize its intellectual property laws with those of the international community. Among the examples include copyright<sup>51</sup> and patent term extension,<sup>52</sup>

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LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 305, 316 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that the TRIPS Agreement “universalize[s] the U.S. system of intellectual property rights”); Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 636-37 (criticizing the TRIPS Agreement for its coercive provisions). Some even consider the Agreement “imperialistic.” See, e.g., Burrell, *supra* n.18; Hamilton, *TRIPS Agreement*, *supra*, at 614 (contending that the TRIPS Agreement could become “one of the most effective vehicles of Western imperialism in history”); *id.* at 617 (equating the TRIPS Agreement with “freedom imperialism”); A. Samuel Oddi, *TRIPS—Natural Rights and a “Polite Form of Economic Imperialism,”* 29 VAND. J. TRANSNAT’L L. 415 (1996); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT’L L. 747, 813 (1989) (arguing that the “[i]mposition of foreign legal standards on unwilling states in the name of ‘harmonization’ remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism” (citing 1 STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975))); see also SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 184 (1996) [hereinafter HUNTINGTON, CLASH OF CIVILIZATIONS] (noting that “[w]hat is universalism to the West is imperialism to the rest”); Susan Strange, *Cave! hic dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES 340 (Stephen D. Krasner ed., 1983) (arguing that the American policy is a form of “nonterritorial imperialism”).

51. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. Sec. 304 (2000)) (extending the copyright term for twenty additional years); see also *Eldred v. Ashcroft*, No. 01-618 (U.S. Jan. 15, 2003); Marci Hamilton, *Bringing the People into the Copyright Arena: How the New Awareness of Copyright Law Issues Can Help in Guarding the Public’s Domain*, FINDLAW’S WRIT: LEGAL COMMENTARY (Mar. 29, 2001), at <http://writ.news.findlaw.com/Hamilton/20010329.html> (discussing the difficulties of the *Eldred* litigation); Peter K. Yu, *Free the Mouse*, IP WORLDWIDE, Oct. 2002, at 24 (discussing the potential implications of the *Eldred* decision). For discussions of copyright term extension, see generally ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENTION, THE EUROPEAN UNION AND THE MAKING OF COPYRIGHT POLICY (1998); EXTENDING MICKEY’S LIFE: *ELDRED V. ASHCROFT* AND THE COPYRIGHT TERM EXTENSION DEBATE (Peter K. Yu ed., forthcoming 2003); Michael H. Davis, *Extending Copyright and the Constitution: “Have I Stayed Too Long?”* 52 FLA. L. REV. 989 (2000); Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 170-75 (1999); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); Peter A. Jaszi, *Goodbye to All That — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595 (1996); Dennis S. Karjala, *The Term of Copyright*, in GROWING PAINS: ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY (Laura N. Gasaway ed., 1997); Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skin*, 54 STAN. L. REV. 1, 70-74 (2001); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYR. SOC’Y U.S.A. 19 (2002); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223 (2001); J.H. Reichman, *The Duration*

adoption of the “intent to use” concept in trademark law,<sup>53</sup> early publication of patent applications,<sup>54</sup> and protection against circumvention of copy-protection technologies.<sup>55</sup> Had there not been serious constitutional problems, database protection might become another area in which the United States harmonizes its laws with those abroad.<sup>56</sup>

Today, harmonization is still at a very early stage. Although

of *Copyright and the Limits of Cultural Policy*, 14 *CARDOZO ARTS & ENT. L.J.* 625 (1995); Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 *CARDOZO ARTS & ENT. L.J.* 651 (2000); Symposium, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*, 36 *LOYOLA L.A. L. REV.* 1 (2002); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 *J. INTELL. PROP. L.* 315 (2000).

52. Uruguay Round Agreements Act, Pub. L. No. 103-465, Sec. 532(a)(1), 108 Stat. 4809, 4990 (1994) (extending patent term from seventeen to twenty years). For discussions of patent term extension, see generally, Ochoa, *supra* n.51.

53. Trademark Law Revision Act of 1988, Pub. L. No. 100-667 Sec. 134, 102 Stat. 3935, 3947 (amending the trademark definition to allow for the use of “intent to use” as a basis for applying for trademark registration); see also Michael H. Davis, *Death of a Salesman’s Doctrine: A Critical Look at Trademark Use*, 19 *GA. L. REV.* 233 (1985) (tracing the evolution and decline of the trademark use doctrine in U.S. trademark law); Kenneth L. Port, *The Congressional Expansion of American Trademark Law: A Civil Law System in the Making*, 35 *WAKE FOREST L. REV.* 827 (2000) (criticizing the recent efforts to harmonize American trademark law with that of civil law nations for undermining the common law nature of the United States’ trademark system and ignoring third parties’ equal but countervailing right to compete).

54. See Symposium, *Early Patent Publication: A Boon or Bane? A Discussion on the Legal and Economic Effects of Publishing Patent Applications After Eighteen Months of Filing*, 16 *CARDOZO ARTS & ENT. L.J.* 601 (1998); see also John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 *BERKELEY TECH. L.J.* 685 (2002) (discussing the costs and benefits of international harmonization of patent laws).

55. See Digital Millennium Copyright Act, Pub. L. No. 105-204, 112 Stat. 2860 (1998).

56. For discussions of the European Union (“EU”) Database Directive and recent development concerning U.S. database legislation, see, for example, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 *BERKELEY TECH. L.J.* 535 (2000); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 *U. CIN. L. REV.* 151 (1997); Marci A. Hamilton, *A Response to Professor Benkler*, 15 *BERKELEY TECH. L.J.* 605 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 *CARDOZO ARTS & ENT. L.J.* 47 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 *VAND. L. REV.* 51, 97 (1997); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 *BERKELEY TECH. L.J.* 793 (1999); Peter K. Yu, *Evolving Legal Protection for Databases*, GIGALAW.COM, at <http://www.gigalaw.com/articles/2000/yu-2000-12.html> (Dec. 2000). See also Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 *U. CIN. L. REV.* 1283, 1294-95 (1998) (discussing the tension between the EU Database Directive and the TRIPS Agreement).

it is certain that harmonization will continue, it is difficult to predict how the process will play out, for harmonization is not easy.<sup>57</sup> Although developed countries “claim[. . .] that stronger intellectual property protection will benefit developing countries, this relationship has yet to be demonstrated in either economic theory or empirical proof.”<sup>58</sup> Equally questionable is the presumption that a universalized regime would maximize global welfare<sup>59</sup> and that the current level of intellectual property pro-

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57. See Yu, *From Pirates to Partners*, *supra* n.17, at 239 (noting that harmonization is not an easy process); Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 737 (2001) [hereinafter Dinwoodie, *Development and Incorporation of International Norms*] (“As more recent efforts at intellectual property harmonization in the European Union (the EU) have demonstrated, achieving comprehensive unification of laws is extremely difficult in areas where divergent national jurisprudence has already taken root.”). See also *id.* at 737 n.16 (noting that “[i]nternational agreement is easier to forge in areas of new social (and hence legislative) activity, such as the allocation of domain names, that arise first in an inherently non-national setting”). See generally PHILIP LEITH, *HARMONISATION OF INTELLECTUAL PROPERTY IN EUROPE: A CASE STUDY OF PATENT PROCEDURE* (1998) (discussing efforts to harmonize patent protection throughout the EU). Indeed, as Professor Dinwoodie pointed out, due to the various differences among countries, conflicts will continue to exist despite the recent harmonization attempts. As he explained:

The standards found in international agreements typically are minimum standards; states are free to grant higher levels of protection. Thus, notwithstanding international minimum standards, differences in national laws persist. Moreover, in certain crucial areas, the treaties allow member states significant latitude to adopt rules that are tailored to their own social and economic priorities and philosophies. For example, states signatory to international copyright conventions may generally define the central concept of “author” in different ways that reflect quite divergent philosophical groundings of copyright (and which thus identify different authors of a work). This conscious, and valuable, concession to national autonomy and the value of diversity creates potential conflicts issues.

Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought*, 49 AM. J. COMP. L. 429, 436 (2001) [hereinafter Dinwoodie, *International Intellectual Property Litigation*].

58. SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 221 (1998); see also Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 89, 90 (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS*] (“There is little in economic theory to support convergence of [intellectual property rights] systems on a cross-country basis, particularly if convergence means an increase in the level of protection in developing and industrializing countries.”). But see Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE 75 (1990) (asserting that the level of economic development is closely correlated to the existing level of intellectual property protection).

59. See Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT’L L. & POL. 109, 126 (1997);

tection has struck “the right balance between incentives to future production, the free flow of information and the preservation of the public domain in the interest of potential future creators.”<sup>60</sup> Indeed, many Americans disagree on the proper balance between intellectual property and public access to information.<sup>61</sup> Some also are dissatisfied with the current intellectual property regime, which, they argue, protects the copyright industries at the expense of the general public.<sup>62</sup>

So far, many less developed countries are reluctant to Westernize (or Northernize) their intellectual property regimes, because a Western regime might contradict their existing eco-

Frischtak, *supra* n.58, at 103-05 (urging countries to develop their intellectual property rights regime according to their own needs); see also Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 152 (Stephen D. Krasner ed., 1983) (arguing that an international regime may not yield overall welfare benefits and that actors outside the regime may suffer).

60. JAMES BOYLE, *SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY* 124 (1996); see J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11, 24 (1997) [hereinafter Reichman, *From Free Riders to Fair Followers*] (arguing that policymakers in many developed countries take the existing levels of innovative strength for granted and mistakenly promote protectionism); see also F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (W.W. Bartley III ed., 1988) (“While property is initially a product of custom, and jurisdiction and legislation have merely developed it in the course of millennia, there is then no reason to suppose that the particular forms it has assumed in the contemporary world are final.”).

61. William P. Alford, *How Theory Does — and Does Not — Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 22 (1994) [hereinafter Alford, *How Theory Does — and Does Not — Matter*]; see also Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33 (1987) (arguing that policymakers and the judiciary should not automatically apply the existing copyright paradigm to computer software); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents & Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 84 (arguing against the need for copyright in digital media).

62. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) (lamenting how the media and software industries are stifling innovation in the New Economy); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001) (showing how increased domination of interest groups in lawmaking processes has made copyright law anti-public and incomprehensible); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001) (describing how increasing corporate control over the use of software, digital music, images, films, books and academic materials has steered copyright law away from its original design to promote creativity and cultural vibrancy); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (advocating the use of Justice Brandeis' conception that information should be “free as the air to common use” as a conceptual baseline to limit property rights in information products).

economic policies.<sup>63</sup> Involving a fundamental debate about economic development strategy,<sup>64</sup> a new intellectual property regime also might threaten the established relationships of businesses and the government<sup>65</sup> and put the ruling elites in a precarious position.<sup>66</sup>

Moreover, as many commentators pointed out, the Western intellectual property regime does not necessarily embody universal values.<sup>67</sup> Rather, the Western system becomes universal because it is backed by great economic and military might.<sup>68</sup> From

63. Yu, *From Pirates to Partners*, *supra* n.17, at 237.

64. See LESTER C. THURLOW, *BUILDING WEALTH: THE NEW RULES FOR THE INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* 128 (1999) (arguing that countries with different levels of economic development desire, need, and should have, different intellectual property systems); Reichman, *From Free Riders to Fair Followers*, *supra* n.60, at 25 (“[A]dherence to the TRIPS Agreement requires [less developed] countries to reconcile their own economic development goals with their international intellectual property norms.”); see also Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 89 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) [hereinafter *GLOBAL CONSENSUS, GLOBAL CONFLICT?*] (examining whether intellectual property protection is of net benefit to less developed countries); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 *DUKE L.J.* 831 (arguing that the Paris Convention incurs significant costs to less developed countries); J.H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT’s Uruguay Round*, 20 *BROOK. J. INT’L L.* 75, 81 (1993) (“[P]olicymakers concerned to promote investment in important new technologies often overstate the supposed benefits of specific intellectual property regimes while ignoring the negative economic functions of these regimes in relation to the complementary operations of competition law generally.”).

65. See RYAN, *supra* n.48.

66. See SELL, *supra* n. 58, at 215 (noting that “if they succumb to U.S. pressure, they are subject to criticisms of selling out sovereignty to foreign interests”); Burrell, *supra* n.18, at 207 (“Clearly no Chinese leader could be seen bowing to pressure from the United States without being in danger of undermining his own position, a difficulty which goes some way towards explaining much of the brinkmanship which has characterised the negotiations between China and the United States on the issue.”); see also HELEN V. MILNER, *INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS* 33 (1997) (“The structure of domestic preferences holds a key to understanding international cooperation.”); *id.* at 246-47 (arguing that international cooperation is the continuation of domestic politics by other means); Ronald Rogowski, *Institutions as Constraints on Strategic Choice*, in *STRATEGIC CHOICE AND INTERNATIONAL RELATIONS* 115 (David A. Lake & Robert Powell eds., 1999) (arguing that the domestic political institutions affect the formation of foreign policy and the strategies actors choose); Renato Ruggiero, *Whither the Trade System Next?*, in *THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL* 123, 139 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) (arguing that the post-Cold War international system “is blurring the distinction between foreign and domestic policies”).

67. Yu, *From Pirates to Partners*, *supra* n.17, at 235.

68. Alford, *How Theory Does — and Does Not — Matter*, *supra* n.61, at 17; see also

the standpoint of less developed countries, the Western system is flawed for its failure to recognize the value of raw materials used in the creation of intellectual property.<sup>69</sup> By doing so, the Western system also “disproportionately . . . favor[s] the developed countries’ contributions to world science and culture”<sup>70</sup> and ignores the interests of less developed countries which supply the raw materials. Small wonders less developed countries are pushing for a more balanced regime that offers stronger protection to folklore, traditional knowledge, and indigenous creations and inventions.<sup>71</sup>

### LESSON 2: THE OFFICIALS

International “officials,” whether judges or referees, behave differently. We often take for granted our interpretation of rules, ignoring others’ tradition and cultural background, until a foreign judge applies a wholly different interpretation. Our shocks are no different from what the U.S. basketball players experienced when they were confused by the international referees and the style of international play.<sup>72</sup> What they had expected to

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ENDESHAW, *supra* n.18, at 93 (“[W]hether or not [intellectual property] was consciously designed to serve economic policies in any of the [industrialized countries], it has always evolved in response to economic and political necessity.”); Rosemary J. Coombe, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 247 (1998) (“The range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world’s peoples.”). Indeed, as Professor Samuel Huntington explained, Western culture and ideology are sometimes attractive because they are backed by hard economic and military power:

[Culture and ideology] become attractive when they are seen as rooted in material success and influence. . . . Increases in hard economic and military power produce enhanced self-confidence, arrogance, and belief in the superiority of one’s own culture or soft power compared to those of other peoples and greatly increase its attractiveness to other peoples. Decreases in economic and military power lead to self-doubt, crises of identity, and efforts to find in other cultures the keys to economic, military, and political success.

HUNTINGTON, *CLASH OF CIVILIZATIONS*, *supra* n.50, at 92.

69. BOYLE, *supra* n.60, at 126.

70. Bellagio Declaration (1993), in BOYLE, *supra* n.60, at 195. The Bellagio Declaration was drafted at the 1993 Bellagio Conference on “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era.”

71. See generally Symposium, *Traditional Knowledge, Intellectual Property, and Indigenous Culture*, 11 *CARDOZO J. INT’L & COMP. L.* (forthcoming 2003).

72. See Oscar Dixon, *Determined U.S. Women Set Gold Standard*, *USA TODAY*, Sept. 12, 2002, at 6C (“I’m sure a lot of guys who played in the world championships for the first time were probably in shock because of the physicality of the game, the style, the rules,

be a call had become a non-call, and what they had expected to be legal had become a foul.

True, basketball is just a game, and we, the audience, could criticize the referees as much as we want, just like how some commentators did during and after the games. However, if Team USA were to return to its former glory, its players must not only understand the different rules, but also the different interpretations. David Stern, the NBA Commissioner, was quick to recognize this need. After the defeat, he suggested that U.S. players would benefit from a much longer training period with more exhibition games with FIBA referees.<sup>73</sup> Perhaps, the results of the tournament could have been much different had USA Basketball paid more attention in this area earlier.

Like referees, foreign judges, in particular those who have been trained in civil law countries, tend to interpret laws differently,<sup>74</sup> especially in areas where fundamental philosophical dif-

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the zone and the sagging man-to-man defense.” (quoting remarks of Lisa Leslie, WNBA player and member of U.S. Women’s Basketball Team)); Dick Weiss, *U.S. Misses World Piece*, DAILY NEWS, Sept. 15, 2002, at 75 (noting that “the Americans struggle to adjust to the international style” and that the U.S. team “was baffled by the simple 2-3 zones international teams play”).

73. Feigen, *World Championships Fiasco*, *supra* n.15 (quoting David Stern, the NBA Commissioner).

74. See generally George C. Christie, *Some Key Jurisprudential Issues of the Twenty-First Century*, 8 TUL. J. INT’L & COMP. L. 217, 218-23 (2000) (discussing the different approaches to judicial interpretation by common law and civil law judges). See also *id.* at 217 (noting that “the decisions in concrete legal cases will be influenced as much by what we believe to be the proper method for deciding legal disputes as by the views that we entertain on the merits of the controversies before us”); *id.* at 221-22 (noting that “when difficult questions of interpretation of international instruments arise, how they will be resolved will often be affected as much by the style of legal reasoning as by the deciding court’s views on the substantive issues involved”); Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57, at 436 (noting that “even identical rules of law may lead to different results when applied in different social contexts by different tribunals”).

Professor Christie attributed the differences between the American and the European model of statutory interpretation to the U.S. system of government. As he explained:

The United States does not have a parliamentary system of government. The executive cannot control the legislative process. More often than not, in recent times, the same political party has not controlled the executive and the two co-equal branches of the American legislature. Even when the Presidency, the House of Representatives, and the Senate have been controlled by the same party, the lack of strong centralized parties, along the European model, has meant that the executive branch has not been able to control the legislative process to the same extent that its European counterparts normally can. Although there is a legislative drafting service available to help representatives

ferences are involved. Unless the litigants (and their lawyers) were able to grasp these different philosophies, they would unlikely be able to reconcile the differences before a tribunal<sup>75</sup> or to convince the judge that a particular philosophy would be more influential in light of the circumstances at issue. Even when identical laws are involved, different outcomes might result,<sup>76</sup> for laws are normally applied by reference to national market conditions, social contexts, and local practices.<sup>77</sup> After all, factual differences in social practices, competitive conditions, or consumer attitudes usually lead to different legal conclusions that rest on factual findings.<sup>78</sup>

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and senators draft legislation, much legislation is not subjected to that professional screening. Indeed, many important elements of legislation are inserted as amendments in an ad hoc manner. In operation, the whole American system functions as a device for forcing compromises at every step in the legislative process, with the result that there are many compromises. What the United States Supreme Court may be doing is respecting the compromise-seeking nature of the legislative process. The almost obsessive search of U.S. courts for congressional intent, as revealed in the committee reports and debates of Congress, clearly reflects an appreciation of the fact that legislation is the product of compromise, and that the courts exist to make those compromises effective. In so doing, the courts, with good reason, presuppose that the American public accepts the fact that government in a democracy is government by compromise, and that this public applauds the courts' attempts to facilitate the compromises reached in the legislative forum. In short, the ideal legislature as conceived in American political theory is one committed to compromise, and not one always seeking to give voice to the highest standards of rationality and to further the most noble aspirations of the society for which it legislates.

Christie, *supra*, at 222-23.

75. Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57, at 443 (noting that "[r]econciling instrumentalist economic philosophies with personality-based notions of rights, for example, requires a real grasp of these different philosophies" (citing *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976))).

76. Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57, at 436 (noting that "even identical rules of law may lead to different results when applied in different social contexts by different tribunals").

77. *Id.* (noting that "[n]ational laws — including harmonized national laws — are normally applied by reference to national market conditions").

78. *Id.* at 436. As Professor Dinwoodie elaborated:

For example, the meaning of a word or other symbol claimed as a trademark may vary from one country to another because of both linguistic denotation and social connotation, and thus the application of the same trademark rule may generate a different result because the word or symbol operates as a trademark in only some of those countries. Numerous intellectual property concepts reflect underlying determinations of the appropriate balance between ensuring competition and stimulating innovation; but different competitive climates may subsist in different national markets, warranting a different

Moreover, judges in different jurisdictions classify claims and disputes differently. For example, a U.S. court would classify the scope of a grant of copyright law as a contract law question, whereas a German court would classify the issue as a matter of substantive copyright law.<sup>79</sup> Likewise, for a work that was pub-

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balance and thus divergent interpretation of the (supposedly harmonized) concept in question. Whether an unauthorized use of a copyrighted work is fair use may in part depend upon whether a market for such uses is “traditional, reasonable, or likely to develop,” which in turn may hinge on nationally distinct social practices and technological capabilities. Consumers in different national markets, subjected to different marketing practices, may be confused by the use of an allegedly similar trademark in different circumstances.

*Id.* at 436-37. Professor George Fletcher provided an insightful analysis of how foreign judges’ conception of fairness differs from that of American judges:

A slightly different mode of linguistic influence comes to light in the way Americans and other English-speaking peoples talk about fairness. We have coined the phrases “fair play” and “fair trial” and have bequeathed them to the Western world — both in law and in daily speech. Many of our neighboring cultures simply adopt the word “fair” into their vocabularies as an untranslatable American idea. Thus you can hear Germans and Israelis using the American word “fair” as though it were their own. Others like the French try in vain to translate the notion of fairness as “equitable” or “just” but these and other cognates in other Romance languages overlook the procedural bedrock of fair dealing.

Americans learn the notion of fair play as soon as they begin playing with other children. Enter any kindergarten and watch children playing with a single ball or Lego set. Sooner or later one of them will complain that another is not sharing, that he or she is “not fair.” The charge of unfairness is a tool that children quickly learn to protect their interests. Not sharing is paradigmatic unfairness. So is not playing by the rules.

The best explanation for this faith in fairness lies in our cultural roots. To appreciate the uniqueness of English-language culture, we need only pause to reflect upon the sporting metaphors that abound in everyday speech. A fair competition is one in which the playing field is level, the dice are not loaded, the deck not stacked. Fairness consists of playing by even-handed rules. Neither side hits below the belt. No one hides the ball. You don’t sandbag the opposition by passing on the first round and then raising your opponent’s bet. In a fair competition, both sides retain an equal chance of winning. And the winning side should gain the upper hand without cheating, without playing dirty, without hitting the other when he or she is down. These idioms pervade the English language. No other European language relies so heavily on sporting metaphors to carry on the business of the day. This is a striking feature of English and American culture. We cannot think about human relations without thinking about sports and the idiom of fair play and foul play. This is not true in French, German, Russian, Italian, or any other major language or culture of the West. This correlation provides powerful evidence of the strong link between culture and language.

George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 699-700 (1998).

79. See Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copy-*

lished in the 1950s, a Brazilian court would find the contract determinative of the duration of a grant effected by a Brazilian author under Brazilian law, while a U.S. court would apply the United States Code to determine whether the same author properly executed its grant of the second term.<sup>80</sup>

In general, companies are able to secure more preferable forums through contractual arrangements<sup>81</sup> or by mounting choice-of-law arguments.<sup>82</sup> However, governments do not have

*right Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y U.S.A. 265, 280 (2000) [hereinafter Ginsburg, *International Copyright*].

80. *See id.*

81. *See id.* at 280-82. As Professor Ginsburg described:

Choice of law and of forum clauses offer a primary means of sidestepping the potentially applicable norms of other countries (subject to exceptions such as *ordre public*). Choice of law clauses can be especially relevant to resolution of disputes concerning copyright ownership when the work involves the participation of multiple authors from many different countries. Similarly, choice of law clauses may simplify issues concerning the scope of a grant of multiteritorial rights under copyright.

Choice of forum clauses are also important. The choice of the forum does not, by itself, determine the applicable law. But, because each forum applies its own conflict rules to characterize the nature of the claim and to designate the choice of law rule that applies to that kind of claim, forum selection can favor some laws over others. For example, some fora may consider some features of the national copyright law, such as moral rights, to be mandatory even in international situations; choosing a forum that does not impose its own laws as laws of immediate application (or "lois de police") can amount to avoiding a specific set of mandatory national rules regarding copyright.

*Id.* at 280-81.

82. For discussions of choice-of-law issues in intellectual property litigation, *see generally* EUGEN ULMER, *INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS* (1978); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1 (1999); Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575 (2000); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000); Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57; Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 DUKE J. COMP. & INT'L L. 69 (1998) [hereinafter Geller, *From Patchwork to Network*]; Paul Edward Geller, *Mastering Conflicts of Laws in International Intellectual Property Litigation*, IPL NEWSL. ("ABA"), Summer 2000, at 7; Paul Edward Geller, *International Intellectual Property, Conflicts of Laws, and Internet Remedies*, 22 EUR. INTELL. PROP. REV. 125 (2000); Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153 (1997); Jane C. Ginsburg, *Extraterritoriality and Multiteritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587 (1997); David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L.

this luxury where intellectual property matters are concerned. The TRIPS Agreement requires all governments to resolve intellectual property conflicts through the dispute resolution process of the World Trade Organization ("WTO").<sup>83</sup> As a result, the United States will have to argue before panelists who have different training and backgrounds<sup>84</sup> and might be subject to adverse rulings that are in tension with the U.S. constitutional principles and legal tradition.<sup>85</sup>

Indeed, foreign countries increasingly rely on the dispute settlement mechanism of the WTO to resolve conflicts they have with the United States. For example, most recently, the European Union challenged the Fairness in Music Licensing Act of 1998 ("FIMLA")<sup>86</sup> before the Dispute Settlement Panel of the WTO.<sup>87</sup> FIMLA codifies the compromise between copyright

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383 (2000); Peter K. Yu, *Conflict of Laws Issues in International Copyright Cases*, GIGALAW.COM (Apr. 2001), at <http://www.gigalaw.com/articles/2001/yu-2001-04.html>. See also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) (developing a new foundation for choice-of-law scholarship in light of globalization and technological change); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957 (2002) (responding to Professor Andrew Guzman); Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941 (2002) (replying to Professor Guzman).

83. Article 64 of the TRIPS Agreement requires that all intellectual property conflicts arising under the Agreement be settled by the dispute settlement procedure provided in the General Agreement of Trade and Tariffs. TRIPS Agreement, *supra* n.49, art. 64, 33 I.L.M. at 1221. See generally DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* (1999), for a comprehensive discussion of the dispute settlement procedure of the World Trade Organization ("WTO").

84. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, art. 8, 33 I.L.M. 112 (1994) (providing the procedure for establishing a Panel and selecting panelists). See generally PALMETER & MAVROIDIS, *supra* n.83, at 68-70 (discussing the composition of a WTO Dispute Settlement Panel).

85. Concerned about these adverse rulings, the Senate Majority leader proposed, a few days before Congress voted on the Uruguay Round Agreements Act, to establish a statutory commission to review adopted WTO Panel reports adverse to the United States. As proposed, the Commission will review the Panel reports based on four criteria: (1) whether the Panel had exceeded its authority or terms of reference; (2) whether it added to the obligations, or diminished the rights, of the United States; (3) whether it acted arbitrarily or capriciously or engaged in misconduct, and (4) whether it deviated from the applicable standard of review. This proposal was subsequently abandoned. See John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 186-87 (1997) (discussing the proposed WTO Dispute Settlement Review Commission).

86. Pub. L. 105-298, Sec. 202, 112 Stat. 2830-31 (1998) (codified at 17 U.S.C. Secs. 101, 110(5)(B), 504, 513 (2000)).

87. For excellent discussions of the dispute, see generally Dinwoodie, *Development*

holders and small business enterprises<sup>88</sup> by amending section 110(5) of the United States Copyright Act by exempting from royalties those restaurants, bars, and retail stores that use “homestyle” audio and video equipment to play broadcast music.<sup>89</sup> The European Union argued that the FIMLA and the homestyle exemption of the United States Copyright Act<sup>90</sup> violated the United States’ obligations under the TRIPS Agreement. The United States defended that the exemption is valid under article 13 of the Agreement.<sup>91</sup>

The Dispute Settlement Panel held for the European Union, maintaining that the FIMLA violated articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention as incorporated into the TRIPS Agreement.<sup>92</sup> To remedy this violation, the Panel recommended that “the Dispute Settlement Body request the United States to bring [the FIMLA] into conformity with its obligations under the TRIPS Agreement.”<sup>93</sup> Although the United States eventually entered into an agreement with the European Union to submit to binding arbitration,<sup>94</sup> this case provides an excellent

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*and Incorporation of International Norms, supra* n.57; Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000).

88. Helfer, *supra* n.87, at 102 (noting that the FIMLA “split the difference between business interests who wanted a total exemption for secondary uses of broadcast music and [performing rights organizations] and copyright owners who opposed any relaxation of the homestyle exemption”).

89. 17 U.S.C. Sec. 110(5)(B).

90. 17 U.S.C. Sec. 110(5)(A).

91. Article 13 of the TRIPS Agreement provides: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” TRIPS Agreement, *supra* n.49, art. 13.

92. World Trade Organization, *United States — Section 110(5) of the U.S. Copyright Act: Report of the Panel*, WT/DS/160/R, para. 7.1(b) (June 15, 2000), available at <http://www.wto.org>:

Subparagraph (B) of Section 110(5) of the U.S. Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

*Id.*

93. *Id.* para. 7.2.

94. See Phil Hardy, *WTO Arbitrators Rule That U.S. Should Pay \$1.4m a Year to EU Copyright Owners*, MUSIC & COPYRIGHT, Nov. 7, 2001 (providing background for the WTO arbitration decision). In November 2001, the Arbitration Panel awarded EU copyright holders about \$1.4 million per year for lost revenues caused by the FIMLA. World Trade Organization, *United States — Section 110(5) of the US Copyright Act: Recourse to Arbitration Under Article 25 of the DSU*, WT/DS160/ARB25/1, para. 5.1 (Nov. 9, 2001),

illustration on how the United States would increasingly find itself defending its policies in a forum that has judges with different cultures, philosophies, and legal traditions.<sup>95</sup>

Going hand in hand with judges is the legal system, which diverges from one country to another.<sup>96</sup> Adjustment to these systems is sometimes difficult, especially in countries that lack a sophisticated legal system or that have limited respect for the rule of law. For example, in China,<sup>97</sup> courts until recently were of limited effectiveness<sup>98</sup> and were marred by various structural problems, such as “the limited independence of the judicial branch, the intertwining relationship between the court and the

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available at <http://www.wto.org> (determining the award at 1,219,900 Euros per year); see also Hardy, *supra* (discussing the arbitration decision). Despite the arbitration ruling, questions remain as to how the U.S. government will fund the settlement and distribute the penalty money. See *id.* For discussion of events occurring after the arbitration decision, see *International Development*, ENT. L. REP., Mar. 2002; *Settlement Between European Union and United States of WTO Fairness in Music Licensing Case Appears to Have Fallen Apart*, ENT. L. REP., Feb. 2002.

95. For a brief overview of WTO dispute settlement matters involving the United States, see Office of the United States Trade Representatives, *Dispute Settlement Update* (July 16, 2002), available at <http://www.ustr.gov>.

96. See Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57, at 441-42 (noting that “[u]nderstanding foreign substantive law often requires a more generalized appreciation of foreign systems and methods that does not neatly correlate to the specialized division of substantive law”).

97. For discussions of the development of the rule of law in China, see, for example, RONALD C. BROWN, *UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS* 101-07 (1997); CHINA'S LEGAL REFORMS (Stanley Lubman ed., 1996); DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman B. Potter ed., 1994); RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* (1994); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner *et al.* eds., 2000); MURRAY SCOTT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* (1999); Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities, and Strategy*, 39 AM. J. COMP. L. 293 (1991).

98. See Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 24-25 (1996) (noting that “[t]he court system as an institution generally lacks the political muscle to stare down powerful, local officials who may wish to impede law enforcement”); Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, in *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA* 7, 28 (Mary L. Riley ed., 1997) (explaining that “[i]n China, administrative enforcement is occasionally seen as more cost effective than either civil or criminal proceedings against counterfeiters”). *But see id.* at 32 (arguing that “[d]ue to the more public nature of a court action, there is somewhat less likelihood that a judge will give in to local pressure”); Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 414-15 (1996) (noting that courts are more powerful than administrative agencies and may institute preliminary measures against the infringer no matter where it is located).

Chinese Communist Party, the court's vulnerability to outside influence, the judges' susceptibility to bribery and corruption, underfunding, abuse of government officials, and local protectionism."<sup>99</sup> The acute shortage of lawyers,<sup>100</sup> in particular intellectual property lawyers, in China, also makes it difficult for businesses and individuals to obtain competent legal advice and services to protect and enforce intellectual property rights.

In addition, because personal connections, or *guanxi*, are essential to commercial success in China, litigation would be considered unappealing by most foreign firms that intend to continue doing business in the country, for lawsuits might wreck the *guanxi* needed for future business dealings.<sup>101</sup> The different legal strategies available under the Chinese legal system also pose challenges to foreigners. A case in point is the dual option of administrative and judicial enforcement, which is particularly confusing to foreign businesses that are accustomed to only judicial enforcement.<sup>102</sup>

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99. Yu, *From Pirates to Partners*, *supra* n.17, at 217-18.

100. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 37 (1998); William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, in CHINA'S LEGAL REFORMS, *supra* n.97, at 22, 30; Berkman, *supra* n.98, at 29; Yu, *From Pirates to Partners*, *supra* n.17; Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 149 (1994); Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 71. This shortage may alleviate once China lifts the geographic ban on overseas lawyers and opens up the legal profession to foreign law firms, as it joins the WTO. "So far, branches of overseas law firms have been set up in only eight cities including Beijing and Shanghai among all the fifteen Chinese cities which have government permission to hold overseas law firms." *China: Geographic Restrictions on Lawyers to Be Lifted After WTO*, CHINA BUS. INFO. NETWORK, May 4, 1999.

101. Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 451 (1996) (arguing that "it may be difficult for foreign firms which plan to continue doing business in China to sue because doing so may wreck their 'guanxi'— personal contacts or favors — that are integral for doing business in [China]").

102. One commentator compared administrative and judicial enforcements:

The courts are . . . more powerful than administrative agencies. While an administrative agency may only take action against infringers located in the same area, a court, under proper procedure, may institute preliminary measures against the infringer no matter where it is located. In the past, a court could only detain a suspect with the consent of the suspect's local court. The Supreme People's Court has recently waived this requirement, apparently out of a concern for the undue influence of local protectionism. In a breach of contract case, Yanbian Leather Factory vs. Mishan City Shoe Factory, the defendant's place of business was in Mishan City, Heilongjiang Province whereas

In sum, unless businesses successfully adapt to the foreign legal environment, legal actions sometimes may result in unexpected outcomes that shock the litigants and affect adversely their interests. As courts increasingly engage in choice-of-law analyses and apply foreign laws in domestic fora, a deeper understanding of foreign legal systems and laws might become necessary.<sup>103</sup>

### LESSON 3: THE COMPETITION

So far, the United States has been very successful in exporting its ideas and concepts. From laws<sup>104</sup> to basketball,<sup>105</sup> coun-

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the breach took place in Longjing City, Jilin Province. The City Court of Longjing City rendered a default judgment against the defendant and ordered bailiffs to seize the defendant's properties in Mishan City. With the support of the local enforcement authority, the defendant regained the confiscated properties. The City Court of Longjing held that the defendant had seriously obstructed justice and, citing Articles 102(1)(2) and 105 of the Civil Procedure Law, detained the manager and assistant manager of the defendant's company, who were in Mishan City at the time. The defendant ultimately complied with the court's order and surrendered the confiscated properties. Here, the City Court of Longjing had not sought the approval of the City Court of Mishan and the decision was upheld by the Supreme People's Court.

Li, *supra* n.98, at 414-15; see also Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 255 (Mark A. Cohen et al. eds., 1999) (discussing issues potential litigants in the Chinese courts must be aware of when considering whether to seek enforcement of intellectual property rights through Chinese courts). But see Berkman, *supra* n.98, at 24 (arguing that "[t]he court system as an institution generally lacks the political muscle to stare down powerful, local officials who may wish to impede law enforcement"); Lagerqvist & Riley, *supra* n.98, at 28 ("In China, administrative enforcement is occasionally seen as more cost effective than either civil or criminal proceedings against counterfeiters."); Kolton, *supra* n.101, at 451 (suggesting that "it may be difficult for foreign firms which plan to continue doing business in China to sue because doing so may wreck their 'guanxi' — personal contacts or favors — that are integral for doing business in the PRC").

103. See Dinwoodie, *International Intellectual Property Litigation*, *supra* n.57, at 441 (noting that "the mere fact that national courts are now engaging in serious copyright choice of law analysis and that they are contemplating the application of foreign law requires us to know foreign law more intimately and thus enhances the need for comparative work"); *id.* at 453 (noting that "the increasingly multidimensional nature of international intellectual property litigation may mean that only a comparativist can fully appreciate these dimensions and accord them the proper weight"); see also Dinwoodie, *Development and Incorporation of International Norms*, *supra* n.57, at 777 (noting that "[c]ultural assimilation and the ability of digitized works to evade national regulation make it significantly more likely that modern copyright litigation will entail analysis of different national laws").

104. For discussions of legal transplants, see generally ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* (1978); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Paul Edward Geller, *Legal Transplants in*

*International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974); Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207 (1995); Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921 (1999). See also JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS & FOREIGN AID IN LATIN AMERICA 280 (1980) (arguing that the law and development movement was “an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed”); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999) (discussing American legal assistance to post-Communist societies); John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 82 (1998) (“Legal culture is not so readily exportable as scientific culture, in which the medium is the universal language of mathematics and experiments are reproducible abroad. Law is inevitably more local.”); Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1996) (discussing the difficulties encountered while assisting China in drafting legislation). As Professor Huntington cautioned us in his seminal work, POLITICAL ORDER IN CHANGING SOCIETIES:

In confronting the modernizing countries the United States was handicapped by its happy history. In its development the United States was blessed with more than its fair share of economic plenty, social well-being, and political stability. This pleasant conjuncture of blessings led Americans to believe in the unity of goodness: to assume that all good things go together and that the achievement of one desirable social goal aids in the achievement of others. In American policy toward modernizing countries the experience was reflected in the belief that political stability would be the natural and inevitable result of the achievement of first, economic development and then of social reform. . . .

. . . In some instances programs of economic development may promote political stability; in other instances they may seriously undermine such stability . . . the relationship between social reform and political stability resembled that between economic development and political stability. In some circumstances reforms may reduce tensions and encourage peaceful rather than violent change. In other circumstances, however, reform may well exacerbate tensions, precipitate violence, and be a catalyst of rather than a substitute for revolution.

SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 5-7 (1968).

105. See LAFEBER, *supra* n.19, at 14 (noting that “basketball has become an important fixture in global as well as American culture”); Dan Markowitz, *Foreign Youths Learn Basketball, U.S. Style*, N.Y. TIMES, Aug. 29, 1999, Sec. 14WC, at 9 (considering basketball the United States’ leading sport export); Barry Stavro, *America from Abroad*, L.A. TIMES, July 10, 1990, at H6 (noting that basketball is a “favorite American export”); Tony Van Alphen, *NBA Czar Forecasts Big Exports for Sports*, TORONTO STAR, Jan. 22, 1992, at F3 (quoting remarks of David Stern, the NBA Commissioner, that “North American sports, properly done, can become a very interesting global export”); Thomas P. Wyman, *Basketball — Made in America, Loved Throughout the World*, INDIANAPOLIS STAR, at 6D (pointing out that “[t]he United States at last has managed to export a sport that captures the imagination, and support, of much of the world”). See also LAFEBER, *supra* n.19 (using Michael Jordan as an example of how U.S. corporations have used technology to sell their products in the global marketplace).

tries have incorporated American concepts into their systems.<sup>106</sup> Indeed, as Professor Robert Keohane and Dean Joseph Nye pointed out, the United States possesses immense “soft power.”<sup>107</sup> By appealing to its ideas and culture, rather than by military means, the country successfully transforms others’ preferences by convincing them that the American way is more preferable.

It is no coincidence that teenagers abroad are wearing Air Jordans or Reebok Pumps or that they are imitating NBA players, longing to be the next Magic, Michael, or Larry (or perhaps even Sir Charles).<sup>108</sup> With aggressive marketing and the ubiquity of American media, basketball has become the leading American sport export, and the NBA a global brand.<sup>109</sup> Indeed, many countries have begun to give up their traditional pastimes for basketball. A case in point is the former British West Indies, in which basketball “began to displace cricket as the national sport.”<sup>110</sup>

Unfortunately, the United States’ success in exporting its ideas and concepts puts the country in a “catch-22” position. Af-

106. Ironically, in making their transition from a command economy to market economy, some emerging democracies have emulated U.S. policy without understanding the dire ramifications of their action:

For example, the government of Poland invited representatives of the U.S. Internal Revenue Service to Poland to teach Polish tax collectors how to collect taxes. Many Americans who learned of this invitation were horrified at such a prospect. The Internal Revenue Service is one of the least freedom loving of all government bureaucracies. It has been known to confiscate and destroy or sell assets with little or no due process. Yet Poland and other countries want to copy U.S. policies and methods.

ROBERT W. MCGEE, *A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM* 160 (1994).

107. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 220 (3d ed. 2001) (defining “soft power” as “the ability to get desired outcomes because others want what you want”); JOSEPH S. NYE, *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T DO IT ALONE* xvi (2002) (noting the increasing importance of soft power).

108. Jim Litke, *How Times Have Changed for U.S.*, CHATTANOOGA TIMES, Sept. 7, 2002, at D3 (“There’s [sic] 183 countries and 3 billion people watching these games. And somewhere out there now is a 13-year-old who wants to be a Michael, a Magic, a Larry or a Patrick.” (quoting Chuck Daly, coach of the 1992 Dream Team)); *see also id.* (“Ten years ago, explaining the difference between USA basketball and the rest of the world was simple. The United States had Michael Jordan. Everyone else had guys wearing Air Jordans. Man, how times have changed.”).

109. *See* sources cited *supra* n.105.

110. LAFEBER, *supra* n.19, at 19.

ter all, the more a country succeeds in exporting its ideas and concepts, the more likely these ideas and concepts will be adopted abroad. In turn, these exports might level the playing field and enhance the competitiveness of the importing countries. With commitment and dedication, the importing countries might even be able to improve the ideas and challenge the U.S. market, or even to establish them as international standards or staple goods.<sup>111</sup>

A decade ago, when the FIBA first allowed professional players to play in the Olympics, many wondered if that was a mistake.<sup>112</sup> Skeptics pointed to the thirty- or forty-point losses foreign teams suffered at the mercy of the American Dream Teams. However, as the gap between U.S. basketball and the rest of the world reduces,<sup>113</sup> commentators begin to appreciate the foresight of the FIBA executives. Like the kid who plays with bigger guys, the international game has improved its level of competition by including NBA players.<sup>114</sup>

Today, the NBA has many fine overseas players: Vlade Divac and Peja Stojakovic from Yugoslavia, Pau Gasol from Spain, Andrei Kirilenko from Russia, Steve Nash from Canada, Dirk Nowitzki from Germany, Tony Parker from France, and Hedo Turkoglu from Turkey.<sup>115</sup> These players are not just backups

111. Fran Blinbury, *It's Time for Some Soul-Searching in the NBA*, HOUSTON CHRON., Sept. 7, 2002, at 4 (comparing basketball to other American exports: "This is how it happened with TVs and radios, automobiles and VCRs. We gave them the know-how and then they turned around and took over our market with greater commitment, more dedication to quality in the task.")

112. Steve Bulpett, *U.S. Boosts International Game*, BOSTON HERALD, Sept. 8, 2002, at B8:

Those of you who haven't understood why international teams wanted to play the NBA's best and not a bunch of college kids — regardless of the result — ought to understand now. You can only beat the best if you play the best. Teams were right to absorb 60-point whippings in '92, knowing better days were ahead.

*Id.*

113. For an excellent chronology of the erosion of U.S. global basketball supremacy, see Wolff, *supra* n.5.

114. See Wilbon, *supra* n.9 (commending the foresight of "that the only way they could raise the level of their game was to play on the same floor with the best — like the young kid in the park who plays with the bigger guys").

115. Compare the following statistics:

In 1946-47, the league's inaugural season, five players from four countries and territories were in the NBA. In 1988-89, 20 from 15 countries and territories existed. By the 1991-92 season, those numbers had increased to 23 players from 18 countries and territories. It escalated to a league-record 52 interna-

whom nobody recognizes, but proven stars who start for their NBA teams. Three of them were selected to represent the league's very best in the 2002 All-star Game,<sup>116</sup> and most recently Yao Ming, the 7-foot-5 Chinese center, was selected first in the NBA draft.<sup>117</sup> Starting this season, Manu Ginobili, Pepe Sanchez, and Ruben Wolkowyski, the three Argentine players who helped end the United States' 58-0 winning streak, will play for the San Antonio Spurs,<sup>118</sup> the Detroit Pistons,<sup>119</sup> and the Boston Celtics,<sup>120</sup> respectively.

Similar progress was made on intellectual property protection in less developed countries. In the past, less developed countries were skeptical of intellectual property and regarded it as an exploitative device that drains less developed countries of their scarce resources<sup>121</sup> and slows down their economies and catch-up processes.<sup>122</sup> Some of them also considered intellectual

tional players on opening day of the 2001-02 season, before finishing at 51 from 30 countries and territories at the end of the regular season.

Since 17 of the top 57 picks in June's NBA draft were European players, the number of Europeans in the league is expected to eclipse 60 for the first time in league history when the season opens Oct. 29.

Stephen A. Smith, *Team USA Missing the Team Part*, PHILA. INQUIRER, Sept. 8, 2002; see also Litke, *supra* n.108 (noting that "[f]ive of the 10 rookies on the first- and second-team All-Rookie squads were non-Americans [and that] Pau Gasol was rookie of the year").

116. Steve Nash, Dirk Nowitzki, and Peja Stojakovic played in 2002 All-Star Game. *NBA All-Star 2002 Participants*, NBA.COM, at <http://www.nba.com/allstar2002/participants.html>.

117. Mike Wise, *The Home Team Provides the Intrigue*, N.Y. TIMES, June 27, 2002, at D1.

118. Litke, *supra* n.108.

119. Chris McCosky, *Pistons Defend Title, All They Have Gained*, DETROIT NEWS, Sept. 30, 2002, at 2D.

120. The Official Site of the Boston Celtics, *Celtics Sign Wolkowyski* (Sept. 16, 2002), at [http://www.nba.com/celtics/news/Wolkowyski\\_091602.html](http://www.nba.com/celtics/news/Wolkowyski_091602.html).

121. Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 331 (1994) ("As with the importation of capital, developing countries often view the importation of intellectual property as a means of dominating and exploiting the economic potential of the importing country. Paying for imports or royalties is thus seen as an economic burden fostering a negative balance of trade.").

122. *But see* Robert P. Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 246 (1990) (noting the growth of the Hong Kong recording industry and the Indian software industry after improved copyright protection); Robert M. Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* n.58, at 68, 72 (noting a large increase of patent applications filed by Mexican nationals after Mexico reformed its patent law in 1991); *id.* (noting that, since Colombia started providing copyright

property rights to be tools to protect competitive advantage of the developed world by concentrating intellectual property ownership in enterprises based in developed countries,<sup>123</sup> while covertly transferring valuable cultural resources out of less developed countries.<sup>124</sup>

Today, however, many leaders realize the benefits of intellectual property rights, in particular their positive impact on foreign investment,<sup>125</sup> taxes,<sup>126</sup> creation of jobs,<sup>127</sup> and transfer of

protection to software in 1989, “[m]ore than 100 Colombian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered”); Yu, *From Pirates to Partners*, *supra* n.17, at 192 (noting that effective intellectual property protection will promote the development of indigenous industries and technologies); Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 63 (same).

123. Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 39, 46 (Frederick M. Abbott & David J. Gerber eds., 1997) (noting that less developed countries argued that intellectual property rights “will lead to or embed a stratification and concentration of [intellectual property rights] ownership” in enterprises based in industrialized countries).

124. See Bellagio Declaration, *supra* n.70 (declaring that contemporary intellectual property law denies protection to people who do not fit the author-centered model, such as “custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties”); see also BOYLE, *supra* n.60, at 2 (arguing that Western intellectual property systems tend to disproportionately favor industrialized countries while ignoring the interests of less developed countries which supplied the indigenous cultural materials); Yu, *From Pirates to Partners*, *supra* n.17, at 241 (emphasizing the importance of granting protection to rare and irreplaceable raw materials like folkloric works, works of cultural heritage, and biological and ecological know-how of traditional peoples); Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 86 (same). But see Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT’L L. & COM. REG. 229, 271 (1998) (contending that “copyright laws can form the first line of defense in protecting indigenous culture and still comply with TRIPS standards”).

125. See EDWIN MANSFIELD, INTELLECTUAL PROPERTY PROTECTION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFER (1994); Antonio Medina Mora Icaza, *The Mexican Software Industry*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* n.58, at 232, 236 (“Intellectual property rights protection in a country is a way to seek the trust of foreign investors in the country that will allow its economy to grow.”); Lagerqvist & Riley, *supra* n.98, at 8 (listing the loss of foreign investment and know-how as a cost of counterfeiting); Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COM., Mar. 7, 1996, at 1C (reporting on a World Bank survey that demonstrates the correlation between intellectual property rights and foreign investment); A.R.C. Westwood, *Preface*, GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* n.58, at v, vi (“Clearly, a company will not be enthusiastic about doing business in a country unwilling to provide protection for the intellectual content of its products — a concern now facing U.S. businesses as they evaluate opportunities in the former Soviet Union.”); Yu, *From Pirates to Partners*, *supra* n.17, at 192 (noting that effective intellectual property protection can attract foreign investment); Yu, *Piracy, Prejudice, and Perspectives*, *supra*

technology.<sup>128</sup> If these countries continue to improve their intellectual property system, they eventually might catch up, or even be able to compete, with the developed world. While the United States might have aggressively exported intellectual property laws to promote its economic interests,<sup>129</sup> its success in exporting

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n.17, at 63 (same); see also Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) (using foreign investment as one of the variables in measuring intellectual property protection in a less developed country); *Mickey Mouse Back in China*, N.Y. TIMES, June 3, 1993, at D4 (reporting that Disney brought Mickey Mouse back to China after a self-imposed four-year absence due to copyright infringements). But see A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 849 ("In the complex decisionmaking process of whether to invest in a foreign country, the availability of patent protection seems unlikely to be a determinative factor."); McManis, *supra* n.56, at 1289 (noting the lack of "empirical support for the proposition that increased levels of intellectual property protection in the developing world will necessarily lead to increased levels of foreign investment in developing countries").

126. See Lagerqvist & Riley, *supra* n.98, at 9; PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY 4 (1998), available at <http://www.bsa.org/usa> (estimating that a sixty percent decrease in piracy would translate into more than \$466 million in tax receipts).

127. See Lagerqvist & Riley, *supra* n.98, at 9; Yu, *From Pirates to Partners*, *supra* n.17, at 192 (noting that effective intellectual property protection can create jobs); Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 63 (same); see also PRICEWATERHOUSECOOPERS, *supra* n.126, at 4 (estimating that a sixty percent decrease in piracy would translate into more than 79,000 jobs).

128. See MANSFIELD, *supra* n.125, at 20 (noting that "the strength or weakness of a country's system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country"); SELL, *supra* n.58, at 214 (arguing that an operational intellectual property regime will promote technology transfer); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 175-76 (1994) (same); Yu, *From Pirates to Partners*, *supra* n.17, at 192 (noting that effective intellectual property protection can facilitate technology transfer); Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 63 (same).

129. See J. Thomas McCarthy, *Intellectual Property — America's Overlooked Export*, 20 U. DAYTON L. REV. 809 (1995) (discussing the need to protect intellectual property rights in an era when information products constitute a major sector of the U.S. economy); Yu, *From Pirates to Partners*, *supra* n.17, at 130; see also INTELLECTUAL PROPERTY LAWS OF EAST ASIA 9 (Alan S. Gutterman & Robert Brown eds., 1997) (noting that the share of intellectual property-based exports in the United States has doubled since the Second World War); R. Michael Gadbaw & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in GLOBAL CONSENSUS, GLOBAL CONFLICT?, *supra* n.64, at 38, 45 ("The new reality is that the U.S. economy is increasingly dependent for its competitiveness on its ability to protect the value inherent in intellectual property. United States exports are increasingly weighted toward goods with a high intellectual property content."); Bruce A. Lehman, *Speech Given at the Inaugural Engelberg Conference on Culture and Economics of Participation in an International Intellectual Property Regime*, 29 N.Y.U. J. INT'L L. & POL. 211, 211 (1997) (observing that "[m]any Americans have begun to derive

these laws eventually might hurt the country by reducing the competitiveness of its products and enlarging its trade deficit.<sup>130</sup>

#### LESSON 4: THE GLOBAL VISION

Team USA's recent losses in the World Championships have demonstrated the need to have a global vision and the importance of understanding the opposition. In the past, the United States could easily gather some of its best players and put on an all-star show en route to the basketball throne. Today, this is not the case. The U.S. players no longer can use their sheer strength, athleticism, and instincts to beat their opponents.<sup>131</sup> While they might still be able to beat their opponents by a margin of twenty or thirty points by using their best players, they risk embarrassment, as shown in the recent World Championships, if those players are not playing or if they do not have enough preparation. Thus, to improve the team's understanding of their opponents, some commentators noted the need to institute a scouting system,<sup>132</sup> hire a full-time national coach,<sup>133</sup> and in-

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their livelihoods from products of their minds, as opposed to products of manual labor, and much of [its] gross domestic product is attributable to new information and entertainment-based industries which have an interest in protecting their valuable products through intellectual property rights").

130. The trade deficit between China and the United States was one of the major reasons for the coercive U.S. foreign intellectual property policy toward China. See Yu, *From Pirates to Partners*, *supra* n.17, at 136-51 (tracing the United States' coercive policy during the 1980s and early 1990s); see also Gana, *supra* n.50, at 119 (noting that "[i]nternational intellectual property has become, primarily, the mechanism for redressing trade deficits and for maintaining a competitive edge in global markets").

131. See Deveney, *supra* n.15 (opining that "[f]rom here on, international tournaments will not be American All-Star cakewalks"); Weiss, *supra* n.72 (noting that the United States "can no longer out-talent the competition unless it convinces the NBA's best players to participate in a summer event after a long season"); Alexander Wolff, *U.S. Failed to Respect Game, Opponents*, *SPORTS ILLUSTRATED ONLINE* (Dec.2, 2001), at [http://sportsillustrated.cnn.com/inside\\_game/alexander\\_wolff/news/2002/09/06/hoop\\_life/](http://sportsillustrated.cnn.com/inside_game/alexander_wolff/news/2002/09/06/hoop_life/) (reminiscing that "[g]one forever are the days when a U.S. team, by dint of the letters across the front of its jerseys, will by birthright field the most talent, and prevail simply by showing up and playing hard enough").

132. See Deveney, *supra* n.15 (discussing the need to develop a scouting system). As a sports columnist explained:

When Argentina left the Americans defenseless by running an endless progression of picks, the U.S. team reacted as though it had been caught off guard. "They were doing all kinds of things we were not expecting out there," says forward Elton Brand.

Problem is, Argentina always has played that way. The message just failed to get to the American players. They underestimated the Argentine players, too. As Pistons director of international scouting Tony Ronzone says: "Most

crease awareness of international games.<sup>134</sup>

As the world becomes increasingly interdependent, we no longer can afford to ignore foreign countries by using a “go it alone” policy. Consider international trade, for example. During the post-war period, some less developed countries took a radical approach by isolating themselves from the international trading system, which, they argued, was biased toward industrialized countries.<sup>135</sup> While many South American countries practiced import substitution<sup>136</sup> and provided large subsidies to local industries,<sup>137</sup> China took an extreme approach by launching the Great Leap Forward Movement,<sup>138</sup> withdrawing completely from the global economy.<sup>139</sup> By the late 1980s, however, virtually all of these countries have abandoned their ill-advised strategies.<sup>140</sup> In the case of China, its self-reliant development strategy had led to high-cost and ineffective domestic production, and the country remained backward, possessing very limited foreign technology

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coaches and scouts know Manu Ginobili and Ruben Wolkowysky, but they don't know Argentina can bring Andres Nocioni off the bench. The people who are out there all the time, watching these players, watching teams, they know.”

*Id.*

133. See Deveney, *supra* n.15 (discussing the need to hire a full-time national coach to “learn the rules of the international game . . . [and] become familiar with international referees and the opposition”); May, *supra* n.15 (discussing the need to “hire a national coach who knows not only the international game, but also the international players”).

134. Enlund, *supra* n.4 (noting that “the U.S. is generally uneducated in international competition other than the Olympics”); *id.* (“In the U.S., it's pretty much the Olympics, the NBA Finals, the NCAA and the high school tournaments. [The World Championship] has been a different kind of competition. People are not familiar with it because it has never been here.” (quoting Tom Jernstedt, the president of USA Basketball)); May, *supra* n.15 (criticizing the lack of priorities in the World Championship in the United States: “In the United States, it's the Olympics and nothing else. Everywhere else, it's the World Championships because it's all about one sport. It's the World Cup of basketball”).

135. Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 576.

136. BARRY B. HUGHES, *CONTINUITY AND CHANGE IN WORLD POLITICS: THE CLASH OF PERSPECTIVES* 374 (2d ed. 1994). “Import substitution is a policy of producing domestically as much as possible of that which a country traditionally imported.” *Id.*

137. See *id.*

138. See IMMANUEL C.Y. HSU, *THE RISE OF MODERN CHINA* 655-58 (6th ed. 2000), for a discussion of the Great Leap Forward Movement in China.

139. See Yu, *From Pirates to Partners*, *supra* n.17, at 198 (discussing China's mistaken withdrawal from the global economy).

140. HUGHES, *supra* n.136, at 374 (noting that, by the late 1980s, “most countries had concluded that import substitution was not working (or that they had sheltered the nascent industries long enough”).

and capital.<sup>141</sup>

In today's globalized economy, international cooperation is particularly needed to deal with cross-border problems.<sup>142</sup> By facilitating communication and coordination, international cooperation not only will enable governments to obtain information that is essential to effective action on cross-border issues,<sup>143</sup> but also will help governments understand the interests they share with other governments. Such cooperation also will enhance the chances of cooperation in areas in which governments otherwise would act unilaterally.<sup>144</sup>

This need for global cooperation is particularly evident in the development of the international intellectual property system. Traditionally, intellectual property lawmaking is a matter of domestic affairs. Without external interference, governments make value judgments as to what would best promote the creation and dissemination of intellectual works in their own countries. As a result, these disparate judgments often reflect the country's level of wealth, economic structure, technological capability, political system, and cultural tradition.<sup>145</sup>

Although bilateral and multilateral treaties allow countries to adjust their intellectual property systems in exchange for better protection abroad,<sup>146</sup> policymakers often evaluate these ad-

141. Yu, *From Pirates to Partners*, *supra* n.17, at 198; see also William T. Pendley, *China as International Actor*, in *BETWEEN DIPLOMACY AND DETERRENCE: STRATEGIES FOR U.S. RELATIONS WITH CHINA* 19, 27 (Kim R. Holmes & James J. Przystup eds., 1997) (explaining why China needs to integrate with the global economy).

142. Examples of these problems include terrorism, drug trafficking, refugees, illegal immigration, environmental degradation, illegal arms sales, nuclear proliferation, and bribery and corruption. See Judith H. Bello, *National Sovereignty and Transnational Problem Solving*, 18 *CARDOZO L. REV.* 1027, 1027 (1996) (stating that "[m]any of the most difficult problems that challenge nation states in the increasingly interdependent world do not respect borders. . . . Nation states acting alone are helpless to resolve or most effectively alleviate these problems").

143. KEOHANE & NYE, *supra* n.107, at 291; Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 606.

144. Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 606 (noting that the cooperative approach might result in countries revealing their substantial shared interests, thus encouraging cooperation on issues that governments might otherwise act unilaterally).

145. RYAN, *supra* n.48, at 191; Yu, *From Pirates to Partners*, *supra* n.17, at 239; Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 84; Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 569.

146. For example, in the nineteenth century, bilateral agreements were used extensively to govern intellectual property relations in Europe. Prussia was the first country to enter into a bilateral copyright treaty. From 1827 to 1829, it entered into thirty-

justments carefully to make sure that they correspond to the country's socio-economic conditions, research and development capabilities, and institutional and budgetary constraints.<sup>147</sup> Thus, most bilateral and multilateral intellectual property treaties tend to focus on a limited range of issues.<sup>148</sup> Even when they seek to harmonize protection by creating international minimum standards, these treaties are designed with such flexibility that allows governments "wobble room" to develop their own intellectual property systems.<sup>149</sup>

However, with increasing globalization and the establishment of the WTO, the control of national governments over the adoption and implementation of domestic intellectual property laws has been greatly reduced. Indeed, international lawmaking has begun to replace country-based assessments and domestic policymaking as the predominant mode of intellectual property lawmaking. Through a global process, governments collectively design an international intellectual property system that takes into consideration the diverging interests, histories, cultures, and traditions of the various members of the international community.<sup>150</sup>

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two bilateral agreements with other German States. 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 44 (1938). In 1840, Austria and Sardinia became the first autonomous States to enter into a bilateral copyright agreement. Predominant powers like France and Great Britain soon followed. *Id.* By the middle of the nineteenth century, a network of bilateral copyright conventions between major European powers had been established. See Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 12 (1986). In the 1880s, multilateral intellectual property regimes emerged. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised in Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter Paris Convention].

147. See Peter K. Yu, *World Trade, Intellectual Property, and the Global Elites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. (forthcoming 2002).

148. For discussions of the different characteristics of bilateral and multilateral intellectual property regimes, see, for example, DORIS ESTELLE LONG & ANTHONY D'AMATO, *A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY* 284 (2000); PAUL GOLDSTEIN, *INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS* 95-141 (2001); *INTERNATIONAL INTELLECTUAL PROPERTY LAW* 219 (Anthony D'Amato & Doris Estelle Long eds., 1997); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 339-40 (1994). See also *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* 57-60 (Graeme Dinwoodie et al. eds., 2001) (discussing the negotiation of intellectual property treaties).

149. See, e.g., Berne Convention, *supra* n.146; Paris Convention, *supra* n.146.

150. See generally *INTELLECTUAL PROPERTY LAWMAKING AND THE GLOBAL ECONOMY*

In the context of international copyright laws, national legislation has largely given way to a supranational code, and the networked model has increasingly replaced the patchwork model lawmakers traditionally apply.<sup>151</sup> As Professor Jane Ginsburg pointed out insightfully:

“International copyright” can no longer accurately be described as a “bundle” consisting of many separate sticks, each representing a distinct national law, tied together by a thin ribbon of Berne Convention supranational norms. Today’s international copyright more closely resembles a giant squid, whose many national law tentacles emanate from but depend on a large common body of international norms.<sup>152</sup>

Nevertheless, some national norms remain significant, particularly in areas where these norms have direct impact on the country’s labor and cultural policies or where the drafters of

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(Peter K. Yu ed., forthcoming 2003) for a collection of essays discussing the changing nature of intellectual property lawmaking.

151. Professor Geller elaborated on how media technologies have shifted the patchwork model of intellectual property lawmaking to the network model:

Until recently, national laws of intellectual property, along with corresponding markets, fit within the patchwork model. Now, media technologies are shifting the marketplace to the network model.

Laws of intellectual property have formed a patchwork, country by country. Treaties in the field set out minimum rights, but in flexible terms so that each right may be implemented with more or less discretion. Otherwise, these treaties, starting with the Berne and Paris Conventions, provide for national treatment, requiring each member-state to protect foreign treaty claimants like domestic claimants. Thus, while differing from country to country, much the same legal rules have governed most competitors in media and technology markets within each set of borders. Industries have tended to group within such borders: for example, publishers have gravitated to centers such as Paris, London, and New York. Hard copies and products have been marketed outward from such centers within national territories.

Now, however, markets are being globally networked. Computers are releasing creation and production from the constraints of geographical space. For example, they allow writers to ready text for publishing, composers to synthesize music, and designers to shape products, all at their desk tops. Telecommunication media, like the fax and the Internet, enable teams of creators from the four corners of the earth to collaborate instantaneously across cyberspace. The World Wide Web opens up new interactive channels between creators and producers, on the one hand, and mass and specialized markets, on the other. More generally, the communication of media productions, marketing symbols, and technologies is being decentralized and enriched between points of input and end-use.

Geller, *From Patchwork to Network*, *supra* n.82, at 70-71.

152. Ginsburg, *International Copyright*, *supra* n.79, at 289.

multilateral instruments fail to reach a political consensus.<sup>153</sup>

#### LESSON 5: THE PLAYERS' MINDSET

For most people, basketball is a very competitive sport. For basketball addicts and die-hard NBA and NCAA fans, it is larger than life. As a manufacturer would print on a T-shirt, "Basketball Is Life. Just Hafta Play Basketball." However, to others, basketball is not only about competition. It is a sport for which people have passion, an exercise that helps people improve physique, and a game that helps people, especially children and youngsters, understand the need for teamwork and coordination.

Like basketball players, policymakers bring different mindsets to the playground. To resolve intellectual property disputes, they generally use three different approaches.<sup>154</sup> The coercive approach requires a party to use its strength or bargaining position to force the other party to do what it otherwise would refuse.<sup>155</sup> By contrast, the adversary approach calls for parties to confront each other in an adjudicatory proceeding.<sup>156</sup> The only approach that encourages parties to work together to resolve disputes and differences is the cooperative approach.<sup>157</sup> Depending on the mindsets of the negotiators, this approach can result in two distinctive outcomes. If negotiators have a zero-sum mindset, i.e., they believe they are playing a zero-sum game in which one country's gain necessarily results in another country's loss, the cooperative approach will result in compromises.<sup>158</sup> However, if they have a nonzero-sum mindset, i.e., they believe they are playing a nonzero-sum game in which a country's gain does not necessarily result in another country's loss, the cooperative approach may result in a forward-looking solution that provides mutual benefits for all the parties involved,<sup>159</sup> resolving the dispute and preserving the hard-earned relationship between

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153. *See id.*

154. *See generally id.* at 573-88 (discussing the various approaches used in resolving intellectual property disputes).

155. *See id.* at 573-82 (discussing the coercive approach).

156. *See id.* at 582-86 (discussing the adversary approach).

157. *See id.* at 586-88 (discussing the cooperative approach).

158. *See id.* at 611 (discussing the difference between a compromise and a nonzero-sum solution).

159. *See id.* (discussing the benefits of the nonzero-sum approach).

the disputing parties.<sup>160</sup>

In unilateral initiatives and bilateral treaties, the nature of the conflict resolution approach is always apparent.<sup>161</sup> For example, nobody would mistake the coercive nature of a policy that calls for unilateral trade sanctions or one imposing protective tariffs. Likewise, nobody would query the cooperative nature of a policy that promotes technical assistance or the exchange of information between government authorities. However, when complex multilateral agreements, like the TRIPS Agreement<sup>162</sup> or the 1996 WIPO Treaties,<sup>163</sup> are concerned, it is much more difficult to determine the nature of the conflict resolution approach used in the agreements.

Indeed, if we dissect the TRIPS Agreement, we will find that all four approaches have been used in the Agreement.<sup>164</sup> For example, from the standpoint of less developed countries, the minimum standards provisions of the Agreement are coercive by nature.<sup>165</sup> As Professor Marci Hamilton pointed out, the TRIPS Agreement was not designed only to correct the international balance of trade or to lower customs trade barriers, but to “re-make international copyright law in the image of Western copyright law.”<sup>166</sup> In contrast, the dispute resolution provision embraces the adversary approach.<sup>167</sup> By mandating that disputes arising under the Agreement be settled by the dispute settlement procedure of the WTO, the TRIPS Agreement therefore provides predictability and stability to the international intellectual property system and deters signatory countries from cheat-

160. *Id.* at 587.

161. *Id.* at 573.

162. TRIPS Agreement, *supra* n.49.

163. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996).

164. *See* Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 634-41 (discussing the various dispute resolution approaches used in the TRIPS Agreement).

165. *Id.*

166. Hamilton, *TRIPS Agreement*, *supra* n.50, at 614; *see also* Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in *VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS* 305, 316 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that the TRIPS Agreement “universalize[s] the U.S. system of intellectual property rights”).

167. TRIPS Agreement, *supra* n.49, art. 64, 33 I.L.M. at 1221.

ing on other Member States.<sup>168</sup>

In addition, the TRIPS Agreement includes provisions that reflect the cooperative approach. Unfortunately, not all cooperative provisions result in a win-win solution; some merely result in a compromise. For example, the transitional provisions<sup>169</sup> allocate losses between developed and less developed countries.<sup>170</sup> By contrast, those provisions that call for technical and financial cooperation,<sup>171</sup> that require signatory countries to eliminate international trade in intellectual property-infringing goods,<sup>172</sup> and that require the Council for TRIPS to review the implementation of the Agreement<sup>173</sup> reflect the nonzero-sum approach.

Given the increased emphasis on the knowledge-based economy and information products,<sup>174</sup> understanding the different approaches and the mindsets of the global players becomes particularly important. By doing so, one not only will gain in-

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168. See Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 584-85 (discussing the benefits of the WTO dispute settlement mechanism).

169. TRIPS Agreement, *supra* n.49, art. 65-66, 33 I.L.M. at 1222. Article 65 of the Agreement provides less developed and transitional countries with a five-year transitional period. TRIPS Agreement, *supra* n.49, art. 65(1)-(3), 33 I.L.M. at 1222. Likewise, Article 66 provides least developed countries with an eleven-year transitional period. *Id.* art. 66(1), 33 I.L.M. at 1222. To help create "a sound and viable technological base" in these countries, Article 66 further requires developed countries to provide incentives for their businesses and institutions to promote and encourage technology transfer to least developed countries. *Id.* art. 66(2), 33 I.L.M. at 1222.

170. See Yu, *Toward a Nonzero-sum Approach*, *supra* n. 48, at 639.

171. Article 67 of the Agreement requires developed countries to provide technical and financial cooperation to less and least developed countries "on request and on mutually agreed terms and conditions." TRIPS Agreement, *supra* n.49, art. 67, 33 I.L.M. at 1222. Such cooperation includes "assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and . . . support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel." *Id.* at 1222-23.

172. Article 69 of the Agreement requires all signatory countries to cooperate with each other to eliminate international trade in intellectual property-infringing goods by establishing and notifying contact points in their governments, exchanging information on trade in infringing goods, and promoting cooperation between their customs authorities. *Id.* art. 69, 33 I.L.M. at 1223.

173. To allow for further cooperation and coordinated decisionmaking, article 71(1) of the Agreement requires the Council for TRIPS to review the implementation of the Agreement at two-year intervals after the expiration of the transitional period and in light of any relevant new developments that might warrant modification or amendment of the agreement. *Id.* art. 71(1), 33 I.L.M. at 1224.

174. RYAN, *supra* n.48, at 191; Yu, *From Pirates to Partners*, *supra* n.17, at 239; Yu, *Piracy, Prejudice, and Perspectives*, *supra* n.17, at 84; Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 569.

sight into the effectiveness and future prospects of the dispute resolution arrangement,<sup>175</sup> but also will become better prepared to react to proposals, make adjustments, and ultimately preserve delicate relationships.

### CONCLUSION

In the recent World Men's Basketball Championships in Indianapolis, Team USA found out painfully that the international game is very different from what they play at home and that the gap between USA Basketball and the rest of the world has been closing. While the United States' losses might have a significant impact on how the country will prepare for the 2004 Olympics in Athens and on how Americans train youngsters to play basketball, their teachings go beyond basketball.

The international harmonization process is a game with different rules, different officials, and players with different visions and mindsets. By watching how players interact with rules, officials, and other players, one therefore could gain insight into globalization and the international harmonization process. Team USA's recent loss might be a painful lesson to Americans, but it provides a beneficial lesson to all of us who are involved in intellectual property and international trade.

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175. Yu, *Toward a Nonzero-sum Approach*, *supra* n.48, at 571.