DEFINING TERMS IN THE INTELLECTUAL PROPERTY PROTECTION DEBATE: ARE THE NORTH AND SOUTH ARGUING PAST EACH OTHER WHEN WE SAY "PROPERTY"? A LOCKEAN, CONFUCIAN, AND ISLAMIC COMPARISON.

Richard E. Vaughan*

I. INTRODUCTION .................................................................................. 308
II. PIRACY ............................................................................................... 311
III. DIFFERENT CULTURES—DIFFERENT MEANINGS BETWEEN NORTH AND SOUTH? ................................................................. 319
IV. COMPARATIVE PHILOSOPHICAL FOUNDATIONS ............................................ 321
V. THE SOUTH: COMPARATIVE PHILOSOPHICAL FOUNDATIONS .......................................................... 334
VI. PROPERTY AND CONFUCIANISM .......................................................... 336
VII. PROPERTY AND ISLAM ................................................................... 350
VIII. THIRD WORLD PIRACY—NOT A CULTURAL EXCUSE.................................................................................. 359
IX. THE ANSWER—PIRATE COUNTRIES' TRUE MOTIVE IS PERCEIVED SELF-INTEREST ........................................ 360
X. CONCLUSION ...................................................................................... 366

“What we’ve got here . . . is failure . . . to communicate.”

* J.D. 1995 St. Thomas University; B.A., 1983 University of Rhode Island. The author would like to express his deep gratitude to both Professor Douglas Matthews, of the St. Thomas University School of Law, whose guidance and enthusiasm were crucial to the completion of this project, and to Miss Sebrina Wiggins, whose assistance in obtaining obscure texts and articles, as well as her patience in the proofreading of the various drafts of this article, was invaluable.

The author is an attorney concentrating in international commercial maritime law. He has studied German Civil law at the Free University of Berlin, Germany, European Community law at the American University of Paris, France, and German language and history at the University of Salzburg in Austria. Prior to entering the practice of law, he worked for the U.S. Dept. of State and served in the U.S. Marines in the Counterintelligence field.

1. COOL HAND LUKE (Warner Brothers 1967).
I. INTRODUCTION

The concept of intellectual property, or ideas protected by patents, copyrights, and trademarks, has been around since at least the 13th century. However, it is only in the last decade that "piracy," or the illegal copying and selling of copyrighted or patented material, has become a contentious issue in trade negotiations between the nations of the Northern and Southern Hemispheres.

In surveying the literature from both perspectives, the possibility arises that each side might be using a word denoting a different meaning to either side. Each party's comprehension of that word carried with it a context gathered from hundreds or thousands of years of history. Could it be that the objective meaning of the word is being lost in the translation? And if that is the case, then it means that the parties have very little hope of ever coming to a mutual understanding. That word was "property," and more specifically "intellectual property."

For example, there is a story of an American and a Japanese executive who were locked in what seemed to be an unending round of business negotiations. Thinking that he was finally making headway, the American asked the Japanese whether they were "thinking along parallel lines." The Japanese executive seemed to agree. Later, when the deal collapsed, the American turned to the Japanese and asked with some exasperation, "I thought you said we were thinking along parallel lines." The Japanese nodded, saying, "parallel lines never meet."

The purpose of this article is four-fold. First, this article will examine whether the word "property" means the same thing in Northern and Southern contexts. Second, to establish whether such a difference, if any, is causing a linguistic disconnect in the intellectual property piracy debate between the Advanced Industrialized Countries (AICs) and the

2. During the 1460's, the Venetian senate awarded the first privilegi (limited monopolies) in copyright. A short time later, in 1474, that Senate passed the first modern-style patent law. Paul A. David, Intellectual Property Institutions and the Panda's Thumb: Patent's Copyrights and Trade Secrets in Economic Theory and History, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 51 (National Resource Counsel) (Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS].

3. In 1984, for the first time since before the first World War, the United States had a net negative balance of trade, and as intellectual property comprised a greater part of the Gross National Product, the issue became one of vital national interest. Foreign Investment: Foreign Holdings in United States Increase Eleven Percent, United States Direct Investment Abroad Up by Nine Percent, 3 Int'l Trade Rep. (BNA) 872 (July 2, 1986). See also John Burgess, Fighting Trespassing on 'Intellectual Property': United States Tries to Prevent Overseas Copying of Everything From Music to Microchips, WASH. POST, Dec. 6, 1987, at H1 (quoting Senator Patrick Leahy (D-Vt.). "Intellectual property issues have become central to congressional debate on trade policy." Id.
Newly Industrialized Countries and the Lesser Developed Countries of the South.  

Third, if such a "cultural disconnect" exists, to determine whether it, or economic self-interest, is the true motive behind piracy. Finally, the conclusion will argue that the problem of intellectual property piracy is but a symptom of a larger crisis: that of North-South economic disparity. It will also be argued that the piracy problem, to be best understood and dealt with, must be looked at using a multi-disciplinary approach.

Initially, there will be an examination of the Anglo-American concept and definition of property. Using this as a basis of comparison, there will then be an examination of the definitions of property from cultural perspectives of some of the regions where intellectual property piracy is most widespread. Specifically, there will be a brief examination of property beliefs from the Confucian, Shinto, Buddhist and Islamic perspectives. There will also be an examination of whether there are

4. WILLY BRANDT, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 31, 32 (1981). In a report, chaired by former West German leader Willy Brandt to the Independent Commission on International Development Issues, Brandt divided the North and South into two general camps: the North (the Advanced Industrialized Countries) is comprised primarily of North America, Western Europe, Australia, New Zealand, and Japan; and the South (the Newly Industrialized Countries and the Lesser Developed Countries) is comprised primarily of South and Central America, the Caribbean, Africa, the Levant, and the poorer, non-aligned nations. At the time of the Report's publication in 1980 there existed a third classification, the Second World, comprised primarily of the Communist Bloc Nations. Id.

5. Each year the United States Trade Representative (USTR) solicits United States exporters for reports of their losses due to foreign government practices (e.g. failure to make or enforce intellectual property protection laws). The USTR then confirms the losses with its own investigation. If it finds that the foreign government, through design or neglect, is encouraging intellectual property piracy, the USTR will take further action. The vast majority of piracy takes place within Newly Industrialized Countries and Lesser Developed Countries. For instance, in 1994, Ambassador Micky Kantor, the USTR, identified 37 trading partners as posing the most significant problems regarding the protection of United States Intellectual Property rights. He also announced placement of six trading partners on the "priority watch list," or the list of those nations which allow or even encourage the unauthorized copying and sale of United States intellectual property such as the European Union, Japan, South Korea, Saudi Arabia, Thailand and Turkey. Also, he announced that nineteen other countries had been placed on the "watch list", the list of countries whose copying of United States intellectual property was not as egregious as that needed to be placed on the Priority Watch List: Australia, Chile, Colombia, Cyprus, El Salvador, Greece, Guatemala, Indonesia, Italy, Pakistan, Peru, Philippines, Poland, Spain, Taiwan, United Arab Emirates, and Venezuela. Four of them -- Egypt, El Salvador, Greece, and the United Arab Emirates would be subject to out-of-cycle reviews to determine whether the past problems or practices had been remedied. Ambassador Kantor also noted concerns with continuing or prospective problems in Brazil, Canada, Germany, Honduras, Israel, Panama, Paraguay, Russia and Singapore, which were not included on the Special 301 lists. Imports of Certain Plants, Nursery Stock, 11 Int'l Trade Rep. (BNA) 18 (May 4, 1994).

cultural differences in meaning that could justify the belief that what we call piracy is simply the South's form of benign technology transfer.

Intellectual property piracy occurs in almost every country, regardless of economic or social grouping. However, only the Confucian and Islamic systems have been concentrated on for the following reasons: (1) some of the most egregious piracy of United States/Northern intellectual property comes from those nations with Confucian, Buddhist or Islamic cultural backgrounds;\(^7\) (2) other regions, such as South and Central America, share Roman Catholic roots with the West and thus, to an extent, do not pose a cultural defense against piracy on the same order as Islamic or Confucian regions;\(^8\) (3) Confucian, Buddhist and Islamic beliefs are still enigmatic to the average Westerner; (4) piracy within and among the AIC's can be attacked using the well-developed enforcement mechanism of the national court systems,\(^9\) an option foreclosed in the South where it is often the national government encouraging piracy; and, (5) while other countries with systems markedly different from that of the European West are also sources of intellectual piracy, such as India (Hindi), and the former Soviet Union and Communist Bloc (Marxist), they are beyond the scope of this paper. Within the short span of a few years, "Westerners" will comprise a mere 700 million out of a global population that may swell to 9 or 15 billion souls.\(^10\) Ignorance of the beliefs of such a vast number of people can only be a disadvantage to the Western intellectual property rightsholder.

\(^7\) Id.


II. PIRACY

How is it that the mere copying of Northern ideas has become an issue of such importance to the North, and to the United States in particular? The short answer is that intellectual property has surpassed all other categories of trade in importance to national economic well-being, both North and South. For instance, just after World War II intellectual property comprised less than ten percent of all United States exports. At that time, progress and a nation’s strength were measured by the number of planes, trains and automobiles that its factories churned out. As the West, later joined by Japan, entered the information age, the proportion of intellectual property in United States exports surged. First, to twenty-five percent, later to thirty-seven percent, and currently, up to well over fifty percent. Labor intensive industry moved offshore to Third World countries to take advantage of cheaper labor. In a nutshell, intellectual property has become the modern “wealth of nations.” This is especially true for the United States, which spent $25 billion in 1992 on basic


12. FRED WARSHOFSKY, THE PATENT WARS: THE BATTLE TO OWN THE WORLD’S TECHNOLOGY 7 (1994). Warshofsky maintains that in 1947 intellectual property comprised just under ten percent of all United States exports. “In 1986,” he states, “the last year that the United States government compiled that statistic, the figure had grown to more than thirty-seven percent. Today, the best estimate is that intellectual property accounts for well over fifty percent of all American exports.” (citing U.S. DEP’T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. (1951); U.S. DEP’T. OF COMMERCE, HIGHLIGHTS OF U.S. EXPORT AND IMPORT TRADE, Report FT990 (Dec. 1986)).


14. WARSHOFSKY, supra note 12, at 3. See also Economic Outlook for 1993, Hearings Before the Joint Congressional Economic Committee (Statement of Senator Bennett), Fed. News Serv., Jan. 27, 1993, available in LEXIS, News Library, Arcnwis file. Senator Bennett commented on how intellectual property has radically changed the nature of wealth creation in the developed world:

I find it significant that the richest man in the United States now is Bill Gates who owns no huge factories or ranches, no tremendous commercial enterprises that we would think of 50 to 60 years ago. It all comes out of his head. And the intellectual product has made him the richest man in the United States, not the physical product of a steel mill or an automobile factory. And I think that’s a demonstration of the kind of structural differences that we have.

Id.
technological research—ten times more than any other country. Ninety percent of knowledge in the sciences has been generated in the past thirty years, and is projected to double in the next fifteen years. With the accelerating pace of technology, product life-cycles are becoming shorter and shorter, giving the creators of intellectual property smaller "windows of opportunity." This allows them to recoup their increasingly expensive cost of research and development (R&D).  

A. THE NORTH AND THE SOUTH

Political observers have divided the world into the "North" and the "South," with economic classification corresponding roughly with geophysical positioning relative to the equator. Northern countries are generally characterized as wealthy, industrially, and technologically developed. These countries have stable, low, or even negative population growth rates, and well-educated, but older, populates whose average life expectancy is about seventy years of age. Countries of the South, also known as the Third World, or Developing World, differs in almost every respect. Painting with a broad brush, these nations are usually characterized as being heavily laden with foreign debt; have little or no domestic industrial or technological base; and have young, burgeoning populations who have little or no education and suffer from widespread disease, hunger, and poverty. Even within the South itself, there are growth disparities. There are the Newly Industrialized Countries, such as the Asian “tiger” countries, which are industrially and technologically backward, but are enjoying explosive growth. Next, there are the Lesser Developed Countries, especially in Sub-Saharan Africa, many of whose economies have gone from bad to worse. Fourth and Fifth World nations are those “basket case” nations whose national governments have failed utterly. Rwanda, Somalia, the Sudan, and Lebanon are some recent examples of “basket case” nations.

B. Intellectual Property: Who is Making it—and Who is Taking it?

The Northern AICs account for ninety percent of the world’s patents and carry out ninety percent of the world’s trade in technology.  

16. BRANDT, supra note 4, at 32.
In contrast, the poorer nations of the South produce little or none of their own technology, but account for over seventy-five percent of all piracy.

About a quarter-century ago, the stamp “made in Hong Kong,” was shorthand for a cheap and poorly-made product, usually a copy of something invented in the West. At worst, piracy was a mere nuisance to American and European producers of musical recordings, computer software, pharmaceuticals, books, designer fashions, high technology, and the like. However, copying is no longer just a nuisance. Western rightsholders are angry and are taking affirmative steps at protecting what
is theirs by right.\textsuperscript{21} They argue piracy is dangerous, causing them severe economic harm, and constitutes outright theft.

Piracy is "dangerous" because consumers will buy a product under the assumption that it is an original, and has been subjected to rigorous quality control and governmental testing. Pirated copies have killed or caused severe injuries.\textsuperscript{22} For example, pirated aircraft engine parts\textsuperscript{23} and automobile brake parts have failed suddenly under stress.\textsuperscript{24} Fake pharmaceuticals and chemicals, packaged just like the real thing, but crudely mixed in Third World countries, have caused death and paralysis.\textsuperscript{25}

Piracy is also causing nations that are net producers of intellectual property severe economic damage.\textsuperscript{26} For instance, in 1985, for the first time since before World War I, the United States had a net negative balance of trade. That trade deficit has swollen from $122 billion in 1985 to an estimated record high of $200 billion in 1995.\textsuperscript{27} According to the

\begin{itemize}
\item \textsuperscript{21} Stuart Auerbach, \textit{GATT's Global Stakes; Issues Are Complex, Crucial in Montreal}, WASH. POST, Dec. 4, 1988, at H1 (writing that "the United States, the European Community and Japan have joined to seek stiff trade rules against piracy of products such as books, software and pharmaceuticals that are protected by patents or copyrights," despite remaining at loggerheads with regard to national agricultural subsidies).
\item \textsuperscript{22} Nick Williams, \textit{Media & Marketing: Pirates Bag a Deadly Haul}, DAILY TELEGRAPH (London), Sept. 5, 1990, at 27.
\item \textsuperscript{23} The Federal Aviation Administration announced the grounding of 6,000 small aircraft due to "bogus" engine parts which had caused motors to fail in flight. The parts had been imported from Germany, but the authorities were attempting to find out who actually manufactured the "poorly fabricated" parts made with "inferior material." \textit{FAA Orders 6,000 Small Planes Be Grounded}, SUN-SENTINEL, Mar. 18, 1995, at A3.
\item \textsuperscript{25} Gary M. Hoffman & George T. Marcou, \textit{Outposts-Law and Society; Who's Stealing America's Ideas?}, WASH. POST, Nov. 5, 1989, at C3. While the copying of pharmaceuticals is comparatively easy, pirated goods are not made to the same quality standards nor required to pass safety standards associated with original Western-produced drugs and technology. Unauthorized imitations of amphetamines and tranquilizers have been blamed for deaths and paralysis, and a counterfeit fungicide led to the loss of 15\% of the coffee crop in Kenya.
\item \textsuperscript{26} Ronald E. Yates, \textit{Far East Offers Friendly Ports for Product Pirates}, CHIC. TRIB., Nov. 12, 1989, at B1. According to Yates, in 1989, America [was] suffering from a $130 billion trade deficit with most of the world. And more than 80 percent of that imbalance [was] with Asian trading partners where intellectual property pirates [were] pushing the United States trade picture deeper and deeper into the red. \textit{Id.}
\item \textsuperscript{27} \textit{Foreign Investment: United States Net Debtor by $107.4 Billion at End of 1985}, Commerce Department Reports, 3 Int'l Trade Rep. (BNA) 872 (July 2, 1986). However, the United States trade deficit started a few years earlier, skyrocketing along with the increasing popularity and ease of piracy: 1981 - $27.97 billion; 1982 - $35.45 billion; 1983 - $67.08 billion; 1984 - $112.51 billion; 1985 - $122.15; 1986 - $144.34 billion. INTERNATIONAL MONETARY FUND, 1987 INTERNATIONAL FINANCIAL STATISTICS 69. The 1994 deficit stood at
\end{itemize}
estimates of the Congressional Economic Leadership Institute, sixty percent of that deficit can be attributed to piracy. The cost to the United States has been the loss of tens of billions of dollars in sales and hundreds of thousands of jobs each year. A 1984 International Trade Commission report estimated United States losses in 1982 ranged between $43 billion and $61 billion and 131,000 lost jobs in five industrial sectors alone. The hemorrhage of United States jobs has continued to grow. In 1994, the United States Trade Representative (USTR), Ambassador Micky Kantor, told Congress "for every billion dollars of United States goods exported annually, 16,000 to 17,000 new domestic jobs are created." "These jobs," he continued, "generally pay seventeen percent more than the average United States wage." If these figures are correct and the corollary may be properly applied, this means that last year the United States lost 3,400,000 well-paying jobs due to its trade deficit. Applying the Congressional Economic Leadership Institutes' estimates to the USTR's assertion means that in 1995 the United States lost 2,040,000 jobs directly to piracy.

$151.1, while the 1995 trade deficit is predicted to rise to a record high of $200 billion. United States Trade Deficit: Trade Deficit to Rise to Record, Economic Analyst Predicts in Study, Int'l Trade Daily (BNA) at D6, (Apr. 26, 1995).


29. Then United States Trade Representative Clayton Yeutter told reporters that the United States Trade Commission had found that 431 United States companies suffered aggregate worldwide losses of more than $23.8 billion in 1986 due to inadequate intellectual property protection. In his 1988 United States International Trade Commission report, he stated that exports of intellectual property from the United States have doubled in the past decade and now represent more than a quarter of United States exports. Extrapolating these losses to the entire national economy, Yeutter placed the total losses between $43 billion and $61 billion. A 1984 ITC report on the effects of foreign product counterfeiting estimated that 131,000 United States jobs in five industrial sectors were lost in 1982 due solely to foreign product counterfeiting and similar practices. Major offenders targeted in the report were Brazil, China, India, Indonesia, Japan, Mexico, Korea, Taiwan, and Thailand. Critics assert these figures to be inflated, or at least, suspect. For instance, software whose market price in the United States was $400.00, but sold at the pirated price of $1.50 in Singapore, was considered to be a flat $400.00 loss. Critics charge that it would unrealistic to expect a sale to be made in a Third World country at that price. Whichever side is correct, it is still true that United States rightsholders are enduring significant losses to Third World piracy. Intellectual Property: United States Firms Lose Billions Annually to Foreign Piracy, ITC Intellectual Property Study Finds, 5 INT'L TRADE REP. (BNA) 290, (Mar. 2, 1988).

30. General Agreement on Tariffs and Trade: The Benefits of the Uruguay Trade Rounds, 103d Cong., 2d Sess. (1994) (statement of Mickey Kantor, Ambassador, United States Trade Representative.)

31. Id.
C. Piracy a Zero-Sum Equation

The concept of free trade is not figuring out new ways to slice the global economic pie, but to make it larger through the functioning of economies of scale and comparative advantage. However, some studies have shown piracy is a zero-sum game in that the Northern loss is directly tied to a pirating nations' gain. For example, in 1989 when the United States trade deficit was a "mere" $130 billion, more than eighty percent of that deficit was with Asian trading partners who simultaneously were the worst pirates of United States intellectual property. This comes as no surprise when it has been the declared national policy of many of the pirating nations to acquire Western technology and know-how.

Japan is one of the most successful examples. Its meteoric technological rise was not based on Japanese innovation, but on the copying of Western ideas. During the late 1970's, the United States spent $50 billion each year on research and development. One commentator, Teresa Watanabe, states the total price Japan had to pay for the Western technology it needed to transform itself from a nation of ricepaper and bamboo to transistors and skyscrapers was a bargain-basement $9 billion. This is not merely the product of terrific bargaining. Japan has carefully orchestrated its economy to keep out foreign imports while encouraging the copying of Western technology. Watanabe goes on to argue Japan


34. J. Davidson Frame, National Commitment to Intellectual Property Protection: An Empirical Investigation, 2 J.L. & TECH. 209, 215 (1987) (asserting that many of the worst infringers of Northern intellectual property are those countries demonstrating robust, if not explosive, economic growth benefits directly associated with their copying of Western know-how and technology). Frame states,

Given these traits, it becomes increasingly difficult to accept arguments by [Newly Industrialized Countries] that they are weak, helpless actors in the international system who need special protection. In the intellectual property arena, these countries are too big to be ignored. Their disregard for intellectual property protection has significant consequences.

Id.


36. Lawrence Chimerine & James Fallows, Japan Deserves a Tariff, N.Y. TIMES, June 9, 1995, at A15. Chimerine, chief economist at the Economic Strategy Institute (ESI), discusses how Japan keeps foreign goods out, pointed out that studies by the ESI and other research groups estimate that if Japan's markets behaved like those of other industrialized countries, Japan would import up to $200 billion more in goods each year than it does currently. Of that figure, almost $50 billion would have been imported from the United States. See also Intellectual Property:
did nothing different than what the United States did in copying European technology in its early years. However, Watanabe ignores the substantial change in the nature and importance intellectual property has taken on since that time. Meanwhile, Hong Kong, Taiwan, and Thailand have emulated Japan's strategy. Their technological and economic advances can also be traced to their piracy of Western technology.  

**D. Pirates Continue to Enjoy Generalized System of Preferences Benefits**

In an effort to assist the development of many of the world's poorer countries, the United States grants them preferential tariff treatment under its Generalized System of Preferences (GSP). GSP's help some nations more than others, and some of the same nations which benefit the most under the GSP also happen to be some of the worst offenders of piracy and unfair trade practices.38 Furthermore, the worst hit industries can trace much of their damage directly to those nations with which the United States has had significant trade deficits.39 Taken from a Southern perspective, piracy is a cheap and effective way of gaining new technology and driving economic growth. However, this ignores the likelihood that Western nations producing intellectual property will move to protect their vital interests, and it also ignores the long-range damage state-supported piracy causes to trade relations.40

---


40. American concerns are only heightened by the fact that its lead in technical innovation is slipping. John Eckhouse, *CEOs See United States Losing its Edge in Technology*, S. F. CHRON., Mar. 15, 1990, at C1.

41. Burgess, *supra* note 3, at H1. In Southern eyes, the ends of piracy justify its means. But the anger and ill-will that piracy causes is now becoming apparent. Burgess writes:

> These days the United States is increasingly less willing to listen to arguments that the quest for development and a dignified standard of living legitimizes such behavior.
The production of intellectual property by the North and its abduction by the South has resulted in an acrimonious debate between the Hemispheres with the North accusing the South of outright theft and demanding improved protection of their intellectual property. Conversely, Southern nations recognize the absolute necessity of the transfer of technology from North to South in order to survive, much less to join the ranks of developed nations. Yet, the Southern nations are unable to pay the market price of the technology they need.42

When confronted, poorer nations of the South have offered by way of explanation that Northern intellectual property conventions are "culturally biased," favoring Western needs and encouraging development of technology unsuited to their particular situations.43 They have also justified the pirating of Northern intellectual property by arguing: (1) the North is imposing its own concepts of property on them;44 (2) intellectual property is really the common property, or heritage, of mankind;45 (3) the North is really attempting to prevent the South from obtaining technological know-how and thus keeping them from joining the ranks of the developed nations;46 and, (4) they are poor and must have Northern technology out of necessity.47

"That's really an indefensible way to run a society," declared [then-USTR Clayton] Yeutter. I don't see how any nation in the world can defend piracy as a means of keeping consumer costs down. Id.

42. BLAKENEY, supra note 18, at 57-58, (attributing 87.5% of per capita growth of income in the United States in the first half of this century to technological progress and the remainder to the use of capital). Conversely, deprivation and poverty suffered by developing countries attributed "almost entirely" to their technological dependence upon the West. Id.


44. Peters, supra note 38, at 587.

45. HELENA STALSON, INTELLECTUAL PROPERTY RIGHTS AND UNITED STATES COMPETITIVENESS IN TRADE 48 (1987). Stalson writes, "[u]nder a vaguely defined principle that knowledge is the heritage of all mankind, they claim that protection denies them the ... social and industrial contributions of patented products because they are available only at prices they cannot afford and under conditions that violate their sovereignty." Id.

46. Ronald E. Yates, Winds Turn Against Product Pirates, CHI. TRIB., Nov. 13, 1989, at B1. Yates notes that despite the United States having success in forcing many of these pirate nations to enact and enforce intellectual property protection laws,

[T]here remains residual resentment and resistance over American efforts to wipe out Asia's notorious pirate dens. Many officials and businessmen in the region's newly industrializing economies continue to see the United States anti-piracy crusade as little more than an attempt to maintain America's technological and creative advantage while keeping them at a competitive disadvantage.
How valid are these Southern arguments? More specifically, are their arguments sincere when their concepts of property are different from those of the North? In the alternative, are they using so-called “cultural” defenses as a smoke screen to justify taking the ideas of the North without paying for them?

One commentator on the North-South intellectual property debate, Frank Emmert, framed the issue in this way: The question is “whether intellectual property is really a Western concept, foreign to the culture of many Newly Industrialized Countries and Lesser Developed Countries, which has simply been forced upon them by the [Advanced Industrial Countries] for egotistic economic motives.”

III. DIFFERENT CULTURES—DIFFERENT MEANINGS BETWEEN NORTH AND SOUTH?

Black’s Law Dictionary defines “property” as:

[O]wnership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from

Id. He cites other examples:

In Taiwan and South Korea, especially, United States demands for intellectual property rights protection are sometimes assailed by the media as examples of United States meddling... South Korea’s often vociferous anti-American students say United States intellectual property rights policies are an attempt to withhold critical technology and information from Koreans. In Taiwan, officials of the Interior Ministry told Chinese reporters recently that revisions in that nation’s newly drafted copyright law were “made under duress” from Washington.

Id.

47. ROBERT BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES 28 (1987).


Many producers in Europe and America complain that their patents, trademarks and other [intellectual property] rights are infringed in foreign markets, especially in the developing countries... Companies in rich countries often imply that all such disputes over intellectual property are a straightforward matter of piracy or theft... This debate goes on within the industrial countries; yet, in their dealings with the Third World, companies regard the conventions agreed at home as self-evidently correct for everywhere else. It is not at all obvious that the developing countries are obliged, either morally or for the sake of sound economics, to meet the rich countries’ demands.

Id.
interfering with it . . . to denote everything which is the subject of ownership, corporeal or incorporeal; tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.\textsuperscript{49}

Holders of United States intellectual property rights (rightsholders) and American negotiators assume that this definition of property is universally understood. They also assume that it is widely understood that an idea, expressed in the form of an invention, a song, a story, or as computer code, may also be called "property" (i.e. "intellectual property"). Assuming arguendo, the human concept of ownership of a "thing" transcends all borders, United States negotiators have encountered markedly different mindsets when dealing with concepts of private ownership of things in relation to principles of "just" distribution.\textsuperscript{50} Alan Greenspan noted this difference of societal values and economics, particularly with reference to the mindset often found in Communist nations, such as the People's Republic of China, North Korea and Cuba, and former Communist nations, such as the former Soviet Union and the Newly Independent States of Eastern Europe, stating, "[m]uch of what we took for granted in our system and had grown to assume to be human nature was not nature at all, but culture."\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{49} BLACK'S LAW DICTIONARY 845-46 (6th ed. 1990).
\item \textsuperscript{50} POPE JOHN PAUL II, supra note 8, 33-34 (1991). "Western" concepts of just distribution vis-à-vis property rights are themselves not uniform. The Western concept of property right, as discussed in this paper, essentially follows the "Labor-Desert" theory propounded by the Greek Stoic Cicero, and echoed in Justian's Institutes, English Common Law and Natural Law as defined by the Founders of America's Constitution. Challenging the concept that property rights are a natural and absolute right, are those of the Roman Catholic Church, as embodied Pope John Paul II's encyclical: the Centesimus Annus. The Pope argues that the need for profit should be subordinated to the needs of the common good. On that basis he argues that the AIC's have a moral obligation to unilaterally transfer wealth to the poorer nations. \textit{Id.}
\item \textsuperscript{51} Alan Greenspan, Thoughts About the Transitioning Market Economies of Eastern Europe and the Former Soviet Union, 6 DEPAUL BUS. L.J. 1 n.3 (1993) (citing Robert Wuthnow, The Moral Crisis in American Capitalism, HARV. BUS. REV., Mar. 1982, at 76 (discussing the interrelation between societal values and economics)).
\end{itemize}

The Free market system pervades the United States view of the world. Not only does the system connote the exchange of goods and services at prices determined by levels of supply and demand, but it also shapes basic values and conceptions and takes on moral meaning . . . Whether we acknowledge it consciously or not, the market influences our basic values, helps shape our suppositions about reality, and figures centrally in our tacit assumptions about daily life. We invest the market with moral importance and associate it with many of our most deeply held beliefs. In fact, the market system is so inextricably woven into our view of the world that any threat to the market endangers not only our standard of living but, more importantly, the very fabric of our society.
Simply stated, Western ideals are centered around the free market, individual "rights" and the concept that profits are the just reward for labor expended in creative endeavors. Other systems prevalent in the South, such as Confucianism, Buddhism, and Islam, are more communally oriented. Under these beliefs, wealth should be shared within society and distributed more or less equally.

IV. COMPARATIVE PHILOSOPHICAL FOUNDATIONS

A. Producing Nations: The North

Are property and intellectual property, as Emmert and Greenspan have mused, simply Western concepts? An examination of at least some of the cultures involved in the North-South intellectual property debate is a necessary first step in the questions' resolution. As noted above, the vast majority of innovation and trade takes place within and among the AICs. Although far from exclusive, a list representing what is meant by "AIC," includes the Group of Seven (G-7) industrialized Nations—Canada, France, Germany, Italy, Japan, United Kingdom, and the United States.52 With the exception of Japan,53 the AICs generally share common Greco-Roman philosophical backgrounds.54 Even Japan, which is principally Shinto-Buddhist-Confucianist,55 has been heavily influenced by Western Civil Code law since the 1860's and has been "Americanized" to a certain extent.


52. The Group of Seven major industrialized nations are Canada, France, Germany, Italy, Japan, United Kingdom, and the United States. 12 Int'l Trade Rep. (BNA) 200 (Jan. 25, 1995); see also Robert W. Kastenmeier & David Beier, International Trade and Intellectual Property: Promise, Risks, and Reality, 22 VAND. J. TRANSNAT'L L. 285 (1989) (listing as developed countries, the United States, the European Community, Japan, Switzerland, the Nordic countries, Canada, Australia, New Zealand, Hong Kong, and some of the ASEAN nations).


54. See generally CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD (2d ed. 1994) (tracing roots Roman laws from ancient Babylon, Chaldea, Egypt, and Greece and influence on European, Anglo-American, Islamic, and even the Japanese systems of law).

55. 4 WORLDMARK ENCYCLOPEDIA OF THE NATIONS: ASIA & OCEANIA 206 (8th ed. 1995) (describing Japan as predominantly Shinto and Buddhist, or both because as the philosophies are not mutually exclusive and may be followed concurrently) [hereinafter WORLDMARK ENCYCLOPEDIA]. Underlying these philosophers is the Confucianist ethical system, originating in China, which has had a strong influence on Japanese society and has provided the underpinnings of some characteristically Japanese attitudes. For example, the respect for elders and authority figures ("filial piety"), subordination of the wants and needs of the individual, and the central importance of the welfare and dignity of the extended family ("clan").
degree since the end of World War II.\textsuperscript{56} However, Japan is still Confucianist and a resentment and resistance against further westernization is growing.\textsuperscript{57} It defies easy classification, and lumping it in with the West simply because of its full industrialization and geographic location would be a mistake. Japan will be covered in more detail below.

1. Property and the West—Historical Background

The definition of "property" in any society is shaped by its historical, cultural, legal, and religious backgrounds. The United States is no exception. America's legal, religious, and property concepts have been shaped by a combination of its own experiences, the English common law,\textsuperscript{58} the Judeo-Christian faith,\textsuperscript{59} Roman Civil Law, and Natural Law.\textsuperscript{60} The Western concept of property, traced back to an early point of origin, will show that it is closely associated with the philosophy of natural law "rights" developed by the Greek Stoics and later by Roman philosophers and jurists.\textsuperscript{61} For example, the "Labor-Desert" theory, arguably the very embodiment of modern Western property belief, holds that man has an inherent right to property when he has added value to something previously owned by no one else.\textsuperscript{62} The Roman/natural law roots of this

\textsuperscript{56} See generally Harumi & Makoto Kojo, The Legal System of Japan, in 2 MODERN LEGAL SYSTEMS CYCLOPEDIA 2.70.10-13 (1989) (explaining how Japanese law was suddenly "westernized" during the 1860's). The customary law of the Tokugawa period was discarded and replaced by the French, and then later, by the German Civil Code. The Meiji Constitution was adopted in 1889 and modeled after the Prussian Constitution. In 1946, the United States Occupation Forces drafted a new constitution for Japan. The Japanese cabinet adopted it in 1947 after making certain changes. The effect of the new constitution was to strip divinity and thus sovereignty from the Emperor. Also, Shinto was abolished as a State religion, the freedoms of speech and religion were guaranteed, and the use of military force as a means of settling international disputes was renounced. While Japan's legal system may have been "Americanized," their economic philosophy seemed to be guided more by Hegel and Friedrich List than by Locke. See generally JAMES FALLOWS, LOOKING AT THE SUN: THE RISE OF THE NEW EAST ASIAN ECONOMIC AND POLITICAL SYSTEM (1994).


\textsuperscript{58} See generally W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE (2d ed. 1965).

\textsuperscript{59} Genesis 15:7, 17:8, 34:10; Acts 2:45.


\textsuperscript{62} JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 133 (2d ed. 1988) (describing the Labor-Desert theory).
belief are shown in Roman works written almost 1,500 years ago. F.H. Lawson, an Oxford scholar of comparative law, excerpted translations from Justinian's *Corpus Juris Civilis* (529-34 A.D): The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The materials were common to all; the new form, the produce of his time and simple industry, belongs solely to himself. His hungry brethren cannot, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength and dexterity. If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he incloses and cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labour, create a new value; and the rewards of harvest are painfully earned by the fatigues of the revolving year.

This natural law property belief reflected an individual right to property, rather than a collective right to property, and expressly excludes those who do not contribute to the addition of value from sharing in the fruits of the labors. This is the essential difference between the Northern and Southern philosophies regarding property.

2. What Is “Natural Law?”

Websters defines natural law as “(a) rules of conduct supposedly inherent in the relations between human beings and discoverable by reason; law based upon man's innate moral sense: contrasted with statute

63. SHERMAN, supra note 54, at 114. Codification of the work took place in the Eastern Roman Empire, Constantinople, between the years 529-34 A.D. Flavius Anicius Justinian's reign, from 527 to 567 A.D. was long and prosperous. Rome almost reached her old outward boundaries, which was lost earlier to Teutonic invaders. Since 391 A.D. Christianity had become the state religion and all heathen cults were forbidden. See HERMANN KINDER & WERNER HILGEMANN, THE ANCHOR ATLAS OF WORLD HISTORY 103 (Ernest A. Menze trans., 1964).


65. Id. at 32 (emphasis added); see generally Justin Hughes, The Philosophy of Intellectual Property, 77 GEO. L.J. 287 (1988).
law, common law; (b) a law of nature . . .; (c) laws of nature, collectively. . . ."66 Discussion of natural law dates back at least to Aristotle, who stated that the term natural refers "to those rules which can be known to be correct and binding in virtue of their own nature; rules that are 'natural' in this sense contrast with the arbitrary dictates which those in power may happen to lay down."67 Commentators have grappled with the problem of describing precisely that concept of justice which was immutable and true for all periods and all civilizations.68 Simply, natural law and natural rights were deemed to be those that no king or Government could deny and still justly rule. English common law jurists, and later their American counterparts, would offer their own definitions.

William Blackstone, author of the Commentaries on the Laws of England (1765-69) and a great influence on early American law, asserted that the "absolute" rights of man are "the right of personal security, the right of personal liberty, and the right of private property."69 Similarly Justice William Story spoke of the "fundamental right" to property.70 "We call those rights natural, which belong to all mankind and result from our very nature and condition. Those rights are a man's right to his life, limbs, and liberty [and] to the produce of his personal labor."71 Thus, the concept of the sanctity of private property was central to the Greco-Roman and, subsequently, the Anglo-American concept of natural law. The fact that "ideas" were embraced within the meaning of property would become enshrined in the United States Constitution72 and in the intellectual property protection laws of Northern countries.73

---

66. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1197 (2d ed. 1983).
68. "Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore, una lex, et sempiterna et immortalis, continebit." [There will be not different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.] 3 M. CICERO, 210 DE RE PUBLICA (C. Keyes trans., 1928).
69. 1 WILLIAM BLACKSTONE, COMMENTARIES 125.
70. Id.
72. U.S. CONST. amend. V.
3. Roman Natural Law Derived From The Greek Stoics

The demands of governing an Empire, rather than an ever-expanding city, forced Roman jurists to respond with a total revision of its laws.\textsuperscript{74} About 146 B.C., Rome defeated Carthage and Greece.\textsuperscript{75} While Rome may have been an enemy and conqueror of Greece, Roman jurists and philosophers greatly admired the Greek culture. The Romans embraced Greek Stoicism, particularly those aspects which urged self-denial, austerity and righteous simplicity; \textit{ius naturale}, or “natural law,” and ethics.\textsuperscript{76} From that point on, all enactments of Roman law would be weighed against the immutable truths and requirements of natural law.\textsuperscript{77} For example, the Roman Senate would look for guidance in the words of Cicero, the first Stoic, who said of natural law: “There is a true law, a right reason conformable to justice, diffused, through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil. Attempts to amend this law are impious, to modify it is wrong, to repeal it is impossible.”\textsuperscript{78}

An assertion of the overwhelming rectitude of natural law was not simple “Greco-Roman-Centrism.” In this Golden Age of law-making, Rome had established trade with, or was engaged in warfare against, most all countries bordering on the Mediterranean. Its trade relations extended eastward into India and China, as far north as Germany, and southward into Africa. Roman jurists, \textit{praetors}, collected laws common to all nations, incorporated them into the law of nations, \textit{ius gentium}, and reasoned that the commonality stemmed from universal rational principles and universal truths hence “natural law.”\textsuperscript{79}

4. Roman Property Law

In the early years of Rome,\textsuperscript{80} regulation of the exchange and ownership of property fell to the discretion of the Kings and unwritten

\textsuperscript{74} Rome (753 B.C.-1453 A.D.) existed initially as a city under Kings, and then as the Roman Republic. Rome became an Empire with the unification of Italy and Rome under Augustus (27 B.C.). SHERMAN, supra note 54, at 29, 43, 172.

\textsuperscript{75} KINDER & HILGEMANN, supra note 63, at 85; see also Richard Hyland, \textit{Pacta Sunt Servanda: A Meditation}, 34 VA. J. INT’L L. 405 (1994).

\textsuperscript{76} SHERMAN, supra note 54, at 58.

\textsuperscript{77} Id. at 59.

\textsuperscript{78} CICERO, DE RE PUBLICA, iii, 23; DE LEGIBUS i, 6, ii, 4; quoted in SHERMAN, supra note 54, at 59.

\textsuperscript{79} SHERMAN, supra note 54, at 38-59.

\textsuperscript{80} Legend has it that Rome was founded in 753 B.C. by twins Romulus and Remus, who were raised by the she-wolf Aeneas. KINDER & HILGEMANN, supra note 63, at 73.
customary law. Finding this intolerable, the plebeians demanded a written set of laws. The Tribune Terentilius Arsa responded to their demands by dispatching a group of commissioners to Hellenic Greece and charging them with the mission of studying Greek law. Upon their return, ten magistrates, the decemviri ("the ten men"), were appointed to reduce what they had learned to writing. The result was the laws of the "Twelve Tables," which were displayed in the Forum (450-449 B.C.). For the first time, Rome had a written law, some of which dealt specifically with the ownership and conveyance of property. Roman property law was borrowed from previous codes and was gradually updated.\(^81\) Much later, under Justinian, Roman law would be further refined and codified in such works as the Institutes of Justinian, the Pandects, and the Corpus Juris Civilis.\(^82\)

5. Influence of Roman Law on Western Systems

The Institutes of Justinian became the common source of the fundamental ideas of Anglo-American legal thought as well as Continental European jurisprudence.\(^83\) Many of the basic principles underlying the Anglo-American laws of admiralty, wills, contracts, easements, liens, mortgages, and adverse possession would all be handed down from Roman law.\(^84\) Roman law would survive the fall of Rome in 1453 A.D.\(^85\) and find its way into the legal systems of Europe, North and South America, the Middle East, and the Far East.\(^86\) For example, the legal doctrine or saying that "a man's home is his castle" was of Roman, rather than Angle-Saxon, origin.\(^87\) Blackstone, for instance, followed the structure and content of Justian's Institutes in his Commentaries. For example, his section on "property," like that of the Institutes, did not entitle the section as "property," but as "things."\(^88\) "Things" were property rights, both corporeal and incorporeal, including patent rights.\(^89\)

\(^81\) SHERMAN, supra note 54, at 34. Sherman notes that Rome, Founded in 753 B.C., borrowed many of its legal concepts from Babylon by way of Egypt and Greece, and therefore "must not be treated lightly or with disdain."

\(^82\) SHERMAN, supra note 54, at 114-25.

\(^83\) Id. at 8-9.

\(^84\) Id. at 386-405.

\(^85\) KINDER & HILGEMANN, supra note 63, at 207.

\(^86\) See generally FOREIGN LEGAL SYSTEMS, supra note 8.


\(^89\) DALZELL CHALMERS, STUDENT'S GUIDE TO ROMAN LAW 47 (1994).
Many of the nations of continental Europe either directly adopted the Roman Civil Code\(^90\) (Italy, 11th and 12th centuries;\(^91\) France, 16th century; and Germany, 19th century)\(^92\) or some variation of it.\(^93\) Even England, where the common law and the court systems were well entrenched, staunchly resisted what was considered to be “foreign” law\(^94\) would eventually engraft many of the natural law principles, including property concepts, into the common law. Thereafter, when the American colonies were founded, common law/natural law would follow.\(^95\)

6. Roman Law, Natural Law, The United States Constitution and Property

Natural law eluded the resistance of common law courts to the direct adoption of civil law through the interpretation and study of the classics.\(^96\) Thus, even though civil law was not adopted directly, many of its concepts found their way into the English common law indirectly under the aegis of natural law. For example, King John I was forced to sign the \textit{Magna Carta} and thus obey the “ancient law,” (i.e. natural law) and to certify the right of the Barons to resist the abuses of the feudal privileges. The \textit{Magna Carta} would become the “Bible of the Constitution.”\(^97\) The influence of natural law over English law would be seen again under the reign of Edward III, where confirmations of declarations were followed with the warning that any statute passed in violation of the \textit{Magna Carta} was “soit tenuz p’nul” (null and void).\(^98\) Thus, natural law served as a check against unjust rule under the English system. Natural law, so intertwined with “common law,” became the basis of judicial review of acts of Parliament. Lord Coke, Chief Justice of the Common Pleas, recognized the judicial custodianship of the common law/natural law, in his dictum in \textit{Dr. Bonham’s Case}:

\begin{quote}
And it appears in our books, that in many cases, the common law will controel Acts of Parliament, and sometimes adjudge them to be utterly void: for when an
\end{quote}

\begin{itemize}
\item[90.] \textit{Watson, supra} note 88, at 1.
\item[91.] \textit{The Roman Law Reader, supra} note 64, at 165.
\item[92.] \textit{Id.} at 168.
\item[93.] \textit{Foreign Legal Systems, supra} note 8, at 49.
\item[94.] \textit{Sherman, supra} note 54, at 407.
\item[95.] Corwin, \textit{supra} note 60.
\item[96.] \textit{Id.} at 260.
\item[97.] \textit{Kinder & Hilgemann, supra} note 63, at 161.
\item[98.] \textit{Id.}
\end{itemize}
Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge the Act to be void . . . . 99

The procedural protection of natural rights asserted by Coke was reinforced by the substantive protections asserted by John Locke. In his 1689 Second Treatise on Government,100 Locke espoused the natural rights of the individual of "life, liberty and estate," and provided the theoretical justification for the division of the powers of state into the legislative and executive branches.101 The ultimate check against tyranny would be the people's right of revolution.102 Locke also asserted that property in nature was given to man by God, but that man gained ownership of things by exerting labor and converting nature into something useful.103

Natural law would be carried across the sea to young America, where the founding fathers used it as a basis for the Declaration of Independence, the United States Constitution and the Bill of Rights. Some familiar examples: "[w]e hold these truths to be self evident that all men are . . . endowed by their Creator with certain unalienable rights . . . life, liberty and the pursuit of happiness;"104 the rights of free speech, to own and bear arms, to be free from unreasonable search and seizure, as enshrined by the first, second and fourth Amendments to the United States Constitution; and "[r]esistance to tyrants is obedience to God," as expressed by Benjamin Franklin.

7. Constitutional Consecration of Private Property: Encouragement of Creativity

Up until the time that the inalienable right to property was enshrined in the United States Constitution, the concept of a property right that applied to all classes, and not just aristocrats, had only been recognized as a moral right through religious institutions, or at the sufferance of the reigning sovereign. One commentator, Henry Weaver,

99. Corwin, supra note 60, at 262 (citing 8 Rep. 113b, 118a, 77 Eng. Rep. 646 (1610)).
100. Locke formulated the labor theory in this treatise. To enjoy goods, an individual must exert labor upon them. This labor "adds value" to the goods. The value added by the individual bestows property rights upon the laborer. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 208-09 (Peter Laslett ed., student ed. 1988).
101. KINDER & HILGEMANN, supra note 63, at 269.
102. Corwin, supra note 60, at 262.
103. See generally LOCKE, supra note 100, at ch. V.
104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
stated that because of the United States Constitution's Fifth Amendment, for the first time in history, "the right to own property was to be given full legal recognition and was to be extended to the humblest citizen, without reference to class distinction, social position, or status of birth." With property finally being recognized as a fundamental right, the Founders also moved to provide protection for intellectual property. Their reason was "to promote the progress of science and the useful arts." Article I, section 8, of the United States Constitution, also known as the "intellectual property clause," provides: "The Congress shall have the power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

8. Property

Once enshrined in the Constitution, it remained for the legislature and the court system to define and enforce property rights. An early example of the high value the United States placed on property rights was the case of Wilkinson v. Leland. This 1829 Supreme Court case dealt with a Rhode Island statute which had the effect of taking something from one private individual and then giving it to another. The statute was struck down as an unconstitutional "taking." Attorney for the Defendants in error, Daniel Webster, spoke:

105. U.S. Const. amend. V. "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." But what was "property"? The Founders provided guidance in the Fourth Amendment. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Thus, property in writings were protected as well. It would have made little sense for the Constitution to protect "papers" but for the ideas committed to them.

106. Henry G. Weaver, The MainSpring of Human Progress (1947). As late as 1776, no one in the civilized world with the possible exception of a noble, could call even "so much as a pigeon" his own. Id. A distinction is thus drawn between a moral right and a legally enforceable right.

107. U.S. Const. art. I, § 8. "The Congress shall have the power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." While protection would be granted American inventors, the United States in its early days, along with many of the Nations of Europe, had no qualms in "pirating" the inventions of the rest of the developed world. See generally Dru Brenner-Beck, Do As I Say, Not As I Did, 11 UCLA Pac. Basin L.J. 84 (1984). It was only after the major producers, England and France, forced the issue onto pirating nations such as Holland, Belgium, and the early United States did the first international protocols, such as Berne and Paris Conventions, come about protecting intellectual property; much as the United States is now forcing the issue onto pirating Third World nations.


109. Corwin, supra note 60 (citing Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829)).
If at this period there is not a general restraint on Legislatures in favor of private rights, there is an end to private property. Though there may be no prohibition in the Constitution, the Legislature is restrained . . . from acts subverting the great principles of republican liberty and of the social compact.110

Also present, but speaking for the Court, was Justice Story. He stated:

[T]hat government can scarcely be deemed to be free where the rights of property are left solely upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.111

9. Latent “Psychological Baggage”

Whether they are conscious of it or not, Western rightsholders and negotiators carry with them this natural law mindset, that is, of what is “right” and “just.”112 Possibly the individual Western negotiator sitting across the table from a Southern representative has never heard of Justinians “savage” who became owner of something by way of his labor, nor might he have heard of the “Labor-Desert” theory. But it is the rare Western businessman or Trade Representative who does not share the belief “this is mine because I made it” or more to the point, “taking something without paying for it is theft, pure and simple.”113

His Southern counterpart, however, raised in a Buddhist, Confucianist or Islamic society may very well have a very different concept of what is right and just. Whether the negotiating parties understand and sympathize with each other’s cultural beliefs is one thing; but if they are unaware of each other’s cultural meanings associated with property rights, it is something else. If that is the case, then the parties are confronted with a cultural-linguistic gap. If both parties are unaware of this gap, the possibility of meaningful communication, and agreement are very slim indeed. The resort to power politics is likely.

112. Wuthnow, supra note 51, at 76.
113. Id.
10. Intellectual Property Same as Property?

Before segueing into an examination of Southern perspective, one last relevant question must be addressed. Is there any difference between property rights in a tangible “thing” and in intellectual property? If there is, the key difference would be an inventor’s property rights are not absolute. Intellectual property rights, whether in the form of a patent, trademark or copyright, are limited monopolies granted by a government only for a certain period of time. Allowing the inventor to benefit from the profits of his creation by recouping his investment costs and to earn profits for his diligence encourages creativity and encourages the dissemination of new technology. To allow an inventor, or a buyer of a patent right, to keep his invention secret indefinitely would defeat the purpose of dissemination of new processes or technology. For this reason, patents, trademarks and copyrights will eventually pass into the public domain. For example, United States patents will expire after a term of seventeen years, but under the new World Trade Organization agreement, the term will be twenty years. The Western concept of property encompasses intellectual property rights, but its term has been limited for the policy reason mentioned above. Now, to the task of examining the concept of “property,” intellectual or otherwise, from a Southern perspective.

B. Pirate Nations: The South

1. Being Specific—Identifying Pirates

Which countries in the Third World are pirating Western technology, what philosophies do they adhere to? Part of the answer is given to us each year in a statement released by the United States Trade Representative (USTR). The USTR uses the “Special 301” trade law to identify and then impose trade sanctions upon those countries which provide inadequate protection to United States intellectual property.

114. Mesevage, supra note 20, at 434.
117. J. H. Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection, 22 VAND. J. TRANSNAT’L L. 747, 775 (1989) (asserting that intellectual property is a property right just like any other property right, or in a narrow sense, even a human right).
Affected United States industries, such as the International Intellectual Property Association (IIPA), which represents motion picture, sound recording, computer software, and publishing industry associations, and the Pharmaceutical Research and Manufacturers of America (PhRMA), submit their findings to the USTR to conduct trade negotiations with the named countries. If the USTR should find that the intellectual property rightsholders' grievances have merit, the United States may impose tariffs or countervailing duties on the infringing countries' imports.

Generally, the USTR's listing is incremental. "Special Mention" the lowest level, is for those countries that are still "on the radar screen" for concerns about their intellectual property protection regimes, but not to the level where the USTR is ready to impose trade sanctions. "Watch List" is for more serious infringement. "Priority Watch List," and ultimately, "Priority Foreign Country" for the most egregious offenders, who may also be subject to an "out-of-cycle review."

2. United States Rightsholder’s Accusations

On February 13, 1995, United States rightsholders (the IIPA and PhRMA) submitted their findings to the USTR as to the countries they alleged were guilty of intellectual property piracy and asked that, among others, Indonesia, (Islamic) Singapore, (mixed Buddhist-Christian-Islamic-Hindi) Turkey, (Islamic) and China (Confucianist-Marxist) be named as priority foreign countries. Altogether, the IIPA charged

Act of 1988). Requires the USTR to identify those “Priority Foreign Countries” which “deny adequate and effective protection to United States intellectual property or deny fair and equitable market access to United States’ persons who rely on such protection”. Id.

119. Intellectual Property, supra note 19. Under Special 301, USTR identifies as priority foreign countries those nations that have the most serious problems in protecting United States’ copyrights, patents, trademarks, trade secrets, and other intellectual property. The priority watch list is the second tier of intellectual property offenders, and the watch list is the third tier. A fourth tier, “Special Mention” has also been added. Id.

120. Id.
121. Id.
122. Id.
123. WORLDMARK ENCYCLOPEDIA, supra note 55, at 147.

124. Singapore, although ethnically 76% Chinese, has a diverse religious landscape: 28% Buddhist, 19% Christian, 18% nonreligious, 16% Islamic, 13% Daoist, 5% Hindi, and 1% “Other.” FEDERAL RESERVE DIVISION LIBRARY OF CONGRESS, SINGAPORE: A COUNTRY STUDY xiii-xiv (Barbara L. LePoer ed., 1991).


126. Id. at 166.

forty-two countries, plus the former Republics of the Soviet Union, with causing billions of dollars in losses to copyright-dependent industries in 1994. Of those countries, the IIPA suggested that the USTR list twenty-four on the priority watch and watch lists. The IIPA representative stressed that China's trade practices made it a "top priority" and that Turkey, "of all the countries that have been cited on Special 301 lists since 1989, has done the least to address United States concerns."128 The IIPA and PhRMA recommended that Korea, (mixed Buddhist-Confucianist-Christian)129 China, and Thailand (Confucianist-Buddhist)130 be listed on the USTR's Priority Watch list, along with the Islamic nations of Egypt, Indonesia,131 Jordan, Saudi Arabia, and the United Arab Emirates.

For Watch List recommendations from the Buddhist/Confucianist countries the rightsholders named; Taiwan (mixed Buddhist-Taoist-Christian),132 Thailand, and Japan (mixed Shinto-Buddhist-Confucianist)133 Of the Islamic nations, the IIPA and PhRMA named Bahrain, Pakistan, the United Arab Emirates, and Malaysia.134 Fifteen other nations were nominated to be listed under the "Special Mention" list. Among those listed were Hong Kong, Singapore, and Vietnam (mixed Buddhist-Taoist-Christian-Animist-Marxist),135 Jordan, Kuwait, Lebanon, Oman, and Qatar (Islamic).

3. The United States Trade Representative's Responses

On April 29, 1995, Ambassador Kantor released his latest Priority Watch and Watch Lists. Citing "substantial progress" in foreign governmental responses to American pressure for increased intellectual property protection, the USTR declined to name any nation as a "Priority Foreign Country."136 Ambassador Kantor did, however, name eight

128. Id.
129. 1995 ALMANAC, supra note 125, at 217.
131. WORLDMARK ENCYCLOPEDIA, supra note 55, at 147. Indonesia is 87% Islamic, 10% Christian, 2% Hindu, 1% Confucianist/Buddhist, and 1% tribal religion.
132. 1995 ALMANAC, supra note 125, at 270.
133. WORLDMARK ENCYCLOPEDIA, supra note 55, at 206.
134. Islam is the official religion of Malaysia, even though only 53% of the population follows that theology. Other Malaysians follow such religions or philosophies as Hinduism, Confucianism, Buddhism, Christianity, or Animism. Id. at 302.
135. 1995 ALMANAC, supra note 125, at 290.
136. On April 29, 1995, the USTR released his latest Priority and Watch Lists, citing no country as a "Priority Foreign Country" due to "substantial progress" around the world in intellectual property protection, particularly in those countries that had earlier allowed unchecked
countries who "allow[ed] or even encourag[ed] the unauthorized copying and sale of United States intellectual property" to the Priority Watch List: Japan, Saudi Arabia, Turkey, Brazil, and Greece; these first five also being subject to out-of-cycle review.  

Three others were also named on the Priority Watch List: India, Korea and the European Union (the EU was named due to discriminatory public telecommunications policies, i.e. the television and movie local-content quotas which it has recently enacted).

Twenty-four other countries were named to the less egregious "Watch List:" Bahrain, Egypt, Indonesia, Pakistan, the United Arab Emirates, China, Singapore, the Philippines, Taiwan, Thailand, Argentina, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Peru, Venezuela, Poland, Romania, the Russian Federation, Italy, Canada, and South Africa. Furthermore, Argentina, the UAE, Indonesia, and South Africa were listed as being subject to additional review.

V. THE SOUTH: COMPARATIVE PHILOSOPHICAL FOUNDATIONS

Turning South, most of Asia follows Confucian beliefs, while approximately another one-fifth to one-sixth of the world's population are adherents of Islam. Thus a sizable majority of the world's inhabitants come from a background very different than that of the Northern nations.

A. Southern Viewpoints

James Peters, a Western commentator, in his exploration of the root causes of intellectual property piracy in Singapore takes note of these different backgrounds:

---

137. Id.
138. Id.
139. Id.
Several legal theorists have challenged the effectiveness of imposing Western legal concepts on non-Western cultures. While concepts of property law are not universally accepted, the concept of intellectual property is even further removed from non-Western systems. Writers from developing countries have been quick to criticize the imposition of European law on Asian and African peoples. R. P. Anand, a well-known commentator, argued that "international law can win the respect of the new states only if it reflects the attitudes toward law and justice that correspond with the attitudes held by these countries in their own cultural backgrounds."  

An example of cultural background that Mr. Anand speaks of comes from Mr. Kyung-Won Kim, the South Korean Ambassador to the United States during 1986. In this case, the background is Confucian. Ambassador Kim was referring to a recent round of talks between the United States and South Korea culminating in the forcing open of the Korean market to American goods and increased protection for United States intellectual property in Korea. Ambassador Kim stated: "[h]istorically, Koreans have not viewed intellectual discoveries or scientific inventions as the private property of their discoverers or inventors. New ideas or technologies were "goods" for everybody to share freely. Cultural esteem rather than material gain was the incentive for creativity."  

Other countries in the Far East which have strong Confucian underpinnings reflect much the same opinion. Ronald Yates, columnist for the Chicago Tribune, in presenting the idea of intellectual property to entrepreneurs in such countries as South Korea, China, Taiwan, Hong Kong and Singapore, met with the same response. He said, "in the Confucian societies of Asia, imitation and reproduction of ideas, art and scholarship are considered a token of honor and respect. Americans, they insist, should be flattered."  

Many seemed bewildered as to why Americans were so obsessed with those who copy technology, art and ideas. Said one Taiwanese patron of a "video parlor" where pirated American films were shown, "[i]t seems selfish to me . . . Don’t

142. Peters, supra note 38, at 586 n.179.
143. Kyung-Won Kim, A High Cost to Developing Countries, N.Y. TIMES, Oct. 5, 1986, at 2. Apparently the Koreans viewed the talks to be an example of the American use of its overwhelming economic might to wring concessions from a smaller and weaker trading partner and greatly resented United States bullying.
American movie companies earn enough money already? Why are they so angry about people who are just trying to earn a living?"\textsuperscript{145}

In the Islamic countries, where piracy of Western ideas has been rampant, the explanation given has been "[t]he prevailing Islamic approach to copyright has been that there should be no obstruction to the duplication of original material since the most widespread dissemination of knowledge is for the good of all."\textsuperscript{146} Under Islam, this concept of "for the good of all" or "wealth sharing" is required and is known as zakat (sweetening). Not to be confused with the voluntary and good-for-the-soul giving of alms to the poor sadaqah; zakat is a required 2.5\% contribution by every Moslem to the state for distribution to the less fortunate,\textsuperscript{147} as every Believer is enjoined under the Shari'a (the Divine Law) to be his brothers' keeper.\textsuperscript{148} Such are the gists of the cultural arguments. While there are other arguments, such as those mentioned in the introductory section, they are beyond the scope of this paper.

VI. PROPERTY AND CONFUCIANISM

A. Intellectual Property Piracy and the Far East

Early in 1995, the United States and the People’s Republic of China (PRC) arrived at the brink of a trade war. The United States was threatening to impose 100\% import duties on more than $1 billion of Chinese imports.\textsuperscript{149} Ambassador Kantor cited as a major reason for the threatened sanctions, the one billion dollars the United States lost each year to Chinese intellectual property piracy. As evidence, the USTR pointed out the fact China had long known about, and allowed to operate, twenty-nine plants in its Southern provinces which produced seventy-five million pirated compact discs (CDs) each year. For its part, the Chinese government threatened countersanctions, refusing to be bullied by the United States. Eleven days of round-the-clock negotiations later, the PRC relented, promising to enact and enforce new laws to protect United States

\textsuperscript{145} Yates, supra note 26, at 1.

\textsuperscript{146} Simon Buckingham, \textit{In Search of Copyright Protection in the Kingdom}, 11 MIDDLE E. EXECUTIVE REP. 5, May 1988, at 11.


\textsuperscript{148} KORAN II:270-273, VIII:73.

intellectual property. Commentators caution that we may have declared victory too soon. 

A similar confrontation and agreement in 1991 yielded little in the way of concrete results. If nothing else, United States’ losses to piracy in China soared. The United States’ problems with intellectual property piracy do not begin and end with the PRC. Some of the worst offenders are our major trade partners in the “Tiger” countries of the Pacific Rim. For instance in 1994, the United States Trade Representative placed Japan, South Korea and Thailand on his “Priority Watch List,” as being, among others, the primary offenders of United States’ intellectual property rights.

B. Confucianism as a Cultural Defense

The Oriental reaction to the United States defending its intellectual property rights has ranged from bewilderment to rage. Writers familiar with the region pose as a defense the Confucian belief that ideas should be freely transmitted and are not “property” subject to ownership.

A good example of Asian reaction is when commentator William P. Alford lectured on intellectual property in January, 1991, at the National Taiwan University to an audience of officials, professors, lawyers, and other experts in, or interested in, intellectual property. Alford expressed his concerns about American policies asserting intellectual property rights. He also discussed the actions taken to defend them against piracy in Far Eastern countries. Alford described the reaction of his Taiwanese audience to be as “one of enormous anger. Terms like imperialism, traitor, and the like flew, not at me, but at the


151. Id.


156. Id.

157. Id.
American government and at Chinese citizens involved in representing foreign intellectual property holders.\textsuperscript{158}

Is this “cultural defense” a valid one, or merely a smoke screen to justify the theft of billions of dollars each year of Northern intellectual property?\textsuperscript{159} To address this question, this section will first briefly examine what Confucianism is, against a historical backdrop, and then go on to examine property rights, and intellectual property rights, in China and other countries whose culture has been greatly influenced by Confucianism.

C. A Brief Exploration of Confucianism

Confucius is the latinized honorific Kung Fu-tsu (Master K’ung), referring to the philosopher K’ung Ch’iu.\textsuperscript{160} Confucius was born in the Lu nation-state and eventually wrote The Analects (Lyiin-yuu) in which he propounded a belief system that stressed it was man’s nature to be moral. Confucius’ concept of Heaven (T’ien) was not so much a God-figure (Ti-Tien) who had an identity and will, but rather, existed in a naturalistic sense.\textsuperscript{161} Tseng Tzu, a pupil of Confucius, summed up his master’s teachings: “[t]he Way of our Master is none other than conscientiousness (chung) and forgiveness or altruism (shu).”\textsuperscript{162} This was further extended by the concepts of “human-heartedness” (Jen), “righteousness” (yi) and “filial piety” (Hsiao).\textsuperscript{163} Confucius also professed the belief that society should be guided by the Rules of Propriety (li). The li was roughly analogous to the Western concept of natural law.\textsuperscript{164}

Unlike the Western concept of natural law, however, Confucianism embraced the “five cardinal relationships,” a hierarchical order where each accepted his place in society and strove to maintain peace and harmony. The five relationships were between ruler and subject; father and son; husband and wife; elder and younger brother; and older and younger friend. Zhongshu Dong elaborated on these relationships. “The Three Cardinal Guides: . . . Ruler guides subject,
father guides son, and husband rules wife.” This hierarchy would remain central to Chinese thinking for the next 2,000 years and served to justify and embed authoritarianism from the family clan level up to the Emperor himself.166

One attained one’s rank in life by way of destiny. Thus, one’s rank, or lack thereof, had been ordained, and was therefore natural and moral. Natural law, or the natural order of things was known as the Mandate of Heaven (T’ien Ming), and Ming itself translated as “fate,” “destiny,” or “mandate,” which is akin to fate, as in the Arabic expression “Imshallah” (“if Allah wills it so”). Indeed, the Emperor ruled under the Mandate of Heaven, that is to say, the Emperor ruled because he was virtuous and therefore, it was his destiny to rule. Conversely, should the Emperor become a tyrant, he goes against li; then he would lose heaven’s Mandate and his overthrow would be just.167 The Imperial intent, and the end result, was the stability of the empire, ensured by this hierarchical structure. In a circular fashion, authority was justified because it existed. And because it existed, it was good. To rebel against authority, whether against one’s parents or elders, a violation of filial piety, or against the Emperor, was to go against the natural order of things. Creation of disharmony could have severe, even fatal, consequences for the wrongdoer.

D. Integration and Coexistence with Taoism, (Zen) Buddhism and Shinto

Over time, other beliefs, such as the Tao (the “way”) and Buddhism would become incorporated into Chinese philosophy.168 The Tao propounded the passivity principles of wu-wei (the art of standing aside) as exemplified in the martial art of Tai-chi, also tzu-jan, or spontaneity, and hsiang sheng, or seeing the complimentary nature of supposed opposites, for example, good and evil, male and female, yin and yang. Taoism and Confucianism were viewed as complimentary doctrines; Taoism stressing solitude and freedom, while Confucianism stressed responsibility and ceremony. The gap was bridged by the Book of


166. Id. at 941 n.205. See also Dan Fenno Henderson, Promulgation of the Tokugawa Statutes in TRADITIONAL AND MODERN LEGAL INSTITUTIONS IN ASIA AND AFRICA 23 (David C. Buxbaum ed. 1967).

167. KIM, supra note 161, at 60.

Changes. It is said that the Chinese are socially Confucian, but individually Taoist. Later, another school of thought taking a different tack, one towards strict interpretation of Positive law (Fa) would become popular. Proponents of this school were known as the Legalists. Buddhism would reach China, and thereafter the greater part of Asia, by way of India. Half a millennium before Christ, Gautama, the prince of the royal Sakya clan, properly known as “Sakya-muni:” or the “silent sage” (muni) of the Sakyas. Gautama Sakyamuni left his palace and family at the age of twenty-nine, and became a wandering mendicant in search for the Truth. After a period of intense meditation, he received Enlightenment and became Buddha. His ideology held that Man, as an ignorant child, is enveloped in the “flames” of his wants, needs and desires. Through meditation and spiritual learning via an endless cycle of rebirths (reincarnation), the fire is extinguished (Nirvana) and one becomes Buddha, one is Awake and no longer consumed by need. Once Buddhahood is achieved, the need for further learning through reincarnation is extinguished, and the Buddha moves on to a higher Plane of existence.

Buddha developed the “Four Noble Truths:” (1) suffering is universal (man is innately spiritually unhealthy); (2) suffering is caused by desire (trsna); (3) to eliminate desire is to eliminate suffering; and (4) the Path to Nirvana (end of rebirths) is by the “Eight-fold Path.” This Eight-fold Path contained its own list, that of: Right View, Right Aspiration, Right Speech, Right Conduct, Right Means of Livelihood, Right Endeavor, Right Mindfulness, and Right Contemplation. Buddha’s path is called the “middle way” because it avoids extremes. Buddha’s teachings are based on love, compassion and service to others. One should worship the six cardinal directions, points of the compass plus zenith and nadir, and one’s parents, one does this through obedience and performing ones’ duty to them. Buddha also taught codes of conduct for husbands, wives, children, employers and kings, rejected violence in any

169. AL-FARUQI, supra note 147, at 222.
form and taught that crime could be eliminated by improving the economic condition of the people. 174

King Ashoka made Buddhism the state religion of India in the third century B.C., but this gradually faded through splits into rival factions and hostile Brahmans. Around the birth of Christ, a major split gave rise to two major kinds of Buddhism: Hinayana (Little Vehicle) or Southern Buddhism, more individualistic and followed in Ceylon and Southern Asia; and Mahayana (Great Vehicle) which more closely followed the original teachings of Buddha. Mahayana was more social, polytheistic and followed in Himalayas, Tibet, Mongolia, China, Korea, and Japan. 175

Another form of Buddhism is Zen Buddhism. Followed in Japan, it relies on no God or Deities. It is indifferent to meditation. What, then, is Zen? When asked by their pupils what Zen was, ancient masters have answered in different ways. One master illustrated the concept by lifting one of his fingers. Another kicked a ball and third enlightened his pupil by slapping his face. 176 Zen is said to be the taking of a different point of view at life (satori). It dwells in the concrete here and now. It is the opening of one’s spiritual eye in order to look at the very reason of existence. It is the disciplining of one’s own mind through insight into its proper nature. Westerners may be familiar with the expression, “the sound of a single hand clapping.” This is an example of a koan, or “mind-snapping” problem given by masters to their pupils as basis of their meditations. 177

Shinto is yet another spiritual practice. “Spiritual practice” is so named because it has no spiritual founder (i.e. no Jesus, Mohammed, or Buddha). Shinto is a collective noun, embracing all faiths, and is the seeking of alignment and harmony with the Way or Spirit of Things (kami). Shinto has been a way of thinking and a way of life in Japan for more than two millennia. 178 Shinto was originally the worship of spirits of nature, family and imperial ancestors. The Occupational Forces abolished Shinto as the state religion after World War II. 179

174. Id. at 102.
175. 1995 ALMANAC, supra note 125, at 417.
179. WORLDMARK ENCYCLOPEDIA, supra note 55, at 206.
Shinto, Buddhism, Taoism and Confucianism can and do coexist with one another. Certainly in Japan, the beliefs run side-by-side: Confucianism deals with political organization, ethical precepts and a rational view of the universe. Buddhism is concerned with the relation of the individual soul to the limitless cosmos and the afterlife, whereas Shinto dwells on adapting to life in this world and the harmonious merging of man with his environment.

These belief systems exist in many variations throughout Asia and have become ingrained into the Oriental way of thinking, but Confucianism appears to be the common denominator among non-Islamic Asian countries. These religions or philosophies eschew the individual accumulation of wealth and avariciousness, stress in their stead the elimination of want of material things, and when thinking of property, to do so for the benefit of the family, clan, or society at large.

E. Confucianism, Technology, and Profit

Another aspect of the Confucianist belief was a low regard for profit, and thus personal, as opposed to communal, property. Confucius expressed his low regard for profit in his Analects: “The noble-minded man comprehends righteousness, the low-minded man comprehends profit.” These two tenets of belief stood out in stark contrast to the individualist, competitive, advantage seeking concepts characterizing Western civilization. These beliefs did not prevent technical innovation, but they did not encourage them either. The magnet, gunpowder, and paper were Oriental discoveries, yet it was the Westerners, after having the discoveries introduced by the likes of Marco Polo, that exploited them to their greater potential; which might have been early examples of piracy but there is no mention as to whether these discoveries were patented at the time. Indeed, Taoists believed too many devices would lead to laxity and corruption of character and the Ruling classes termed science and technology as “bizarre craft and cunning work” (qiji yinao).

Moreover,


181. Yates, supra note 26, at Bus. 1. Yates did a survey of the Far East and intellectual property piracy and stated that, “[o]thers say Americans and Europeans are ignoring fundamental differences in attitudes toward intellectual property in Asia that are rooted in ancient Confucianist beliefs. In the East, imitation is considered a sign of respect rather than a way to steal value.” Id.

182. Kim, supra note 161, at 90.

183. Wang, supra note 165, at 29.

184. Id. at 31.
the Imperial bureaucracy wielded Confucianism as a tool of control. It operated essentially as a state religion serving those in authority. It operated against mobility, independent thinking, and the dissemination of new knowledge. So it was for 2,000 years. While the Western nations were busy becoming unstable and seeking technological advances over one another, the Chinese dynasties were seeking to ensure all those in the Middle Kingdom were kept in their place. Currently, there has been a phenomenal rise in economic and technical development of the Pacific Rim nations over the past twenty years. It would be inaccurate to state that Confucianism and technology cannot coexist, or that Confucianism, in and of itself, has served to hold back technological development.  

F. Property Under Confucianism

All property belonged to the Emperor, much as in the same sense all property in Western nations was subject to a claim of eminent domain by the ruling Sovereign. Aside from the Emperor's claim, land and property were held by the father/patriarch to manage, but often he could only convey the land after consultation and acceptance by his sons, or sons, and wife, or wives. There was no primogeniture system and property was often held solely in the father's name, with no interest held by sons, wives, or daughters while he lived. Differences on claims to land were to be resolved by mediation within the Clan or family unit, or if between clans, by a neutral and learned man of unimpeachable character.

Litigation was strongly discouraged, as it brought disgrace upon both parties, since it indicated to all that the parties could not keep harmony amongst themselves. Moreover, it gave rise to the very real possibilities that it would lead to embarrassment and questioning of the patriarch's authority. Criminal and civil cases were termed "important cases" and "trifling matters" respectively, with disputes over land and property considered to be trifling. Thus, while there were property rights in ancient Confucian China, they did markedly differ from the

185. David J. Thorpe, Some Practical Points About Starting a Business in Singapore, 27 CREIGHTON L. REV. 1039 (1994). Thorpe discusses the meteoric development of authoritarian-governed Singapore and how a rise in the sophistication and education of the populace may require a loosening of the governments tight grip on the reigns of power.

186. KIM, supra note 161, at 103.

187. Wang, supra note 165, at 32.

188. KIM, supra note 161, at 104.

concept of individually held and owned property that arose in nations influenced by Roman law and the common law. Land and property were held jointly and for the benefit of the family unit.

G. Intellectual Property

Confucius wrote in his Analects, "I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients." The concept that ideas belonged to the individual from whom they sprang, and that one should pay for their use was alien to the official Confucian belief, especially considering that system's emphasis on filiality and avoiding profit-seeking. However, just because Confucian beliefs taught seeking profit was wrong and ideas were not property, does not mean that the reality on the ground was a mirror-reflection of such a belief. There was property in ideas in ancient Chinese society; in practice, if not in written thought.

There is, for example, the story of the Taoist philosopher Lao Tse, who lived sometime around 602 B.C. Lao Tse was on his way West to India, or the "glorious Buddhist paradise of Sukhavati" when he was stopped by a Chinese border official. The border official would not let him leave the kingdom without an export license for his possessions. As a court librarian, Lao Tse explained, he carried nothing with him, save for his knowledge. The border official persisted. He would have to "leave his wisdom" in China before departing. In order to leave, Lao Tse spent the next three days writing the very succinct Tao te King, eventually a very influential work of the Taoist belief. Thus, in a round-about sort of way, we find the concept, even in ancient China, that ideas were considered property. And of property, it was said by Mencius, who was one of Confucius' most notable disciples, "taking things to which one has no right is contrary to justice."

These examples illustrate a basic understanding of intellectual property akin to that found in the West.

Pure knowledge, set to paper, such as the Tao te King, might be considered analogous to something protected by the modern day copyright. Trademarks, after a fashion, also existed in ancient China. Manufacturers of sewing needles or silk would attempt to set their wares apart from


others by distinctive trademarks and would petition the government for protection against others who infringed.\textsuperscript{193}

But commerce and the dissemination of new ideas were not high on the list of priorities on the Imperial agenda. Maintaining the state monopoly on power, however, was at the top. Intellectual property protection existed more for that purpose than for the uses traditionally thought of in the West. For example, the Imperial Seal of the five-clawed dragon was strictly protected against use by others.\textsuperscript{194} The Empire also forbade the unauthorized reproduction and dissemination of scientific and astronomical writings, but this was more in the spirit of “state secrets,” with an eye toward keeping knowledge, and thus power, centrally controlled.\textsuperscript{195} Thus, a comparison to the contemporary patent would be inappropriate. Other writings, such as poetry, were protected in an effort to maintain quality and accuracy of reproduction.\textsuperscript{196}

Why should we have to resort to such a circuitous method of finding property in ideas in ancient China? A good reason is that a concept as avaricious as individual property rights might not serve the best interests of the Emperor or the Imperial bureaucracy, and thus would not get much press. If individuals could own property, that would challenge the Emperor’s otherwise exclusive claim to property in the kingdom. This would not do. The emphasis in Confucian China, once again, was maintenance of the status quo, meaning power and property, and on “saving face.” The Emperor and the bureaucracy used Confucianism because it was ideally suited to this end. As long as all property belonged to the Empire and its power could not be challenged under the Five Truths, the Emperor’s supremacy remained secure.

Therefore, what actually survived in officially sanctioned writings was highly idealistic, and reflected a striving for a perfect world, not reflective of reality.\textsuperscript{197} Under an ideology where sharing for the common good was the ideal, the accumulation of wealth in the hands of the few, in the form of opulent palaces, while the vast majority of the peasantry were

\textsuperscript{193} Id. at 172 n.57.

\textsuperscript{194} Id.

\textsuperscript{195} Wang, supra note 165, at 48 n.36. Most of the illegal copying was done by the local officials, the ones who were originally charged with enforcing the Emperor’s decrees. China still has difficulty enforcing its laws, particularly in its far-flung outer provinces. \textit{See also} Uli Schmetzer, \textit{Bottom Line Overrides Party Line in China: Economic Boom Takes Precedence Over Law}, CHI. TRIB., Jan. 26, 1995, at News 8.

\textsuperscript{196} Wang, supra note 165, at 48 n.61.

\textsuperscript{197} Wang He, \textit{The Danger of Too Much Abstraction in Debate on Traditional Culture: Proceed from Reality in Studying the Role of Traditional Culture}, Bur. Internal Affairs, Sep. 3, 1986, at China II; Part 3 The Far East FE/8354/BII/1.
dirt poor, made for an obvious, and embarrassing contradiction. It would be best for the powers that be if writings of such things were strictly controlled, lest free discussion of these disparities would give rise to dissatisfaction and instability.

Toward this end, the Emperor understood that whoever controlled the past could control the present. This required a state monopoly on historical writings. The Empire was careful to "control" the past in order to justify its actions. Chinese historians who engaged in unauthorized research were subject to castration and imprisonment. Others, reckless enough to refer to the past to criticize the present, were subject to the death penalty, along with all the members of their families. Such measures had a tendency to chill free speech. Nevertheless, piracy of official writings, such as poetry and scientific works, was widespread. Imperial attempts to suppress it were not very successful, even though backed by threats of severe beating and exile.

H. Case Study: Intellectual Property Piracy - Made in Japan

Fast forwarding to the 1990's, we find much of Asia is heavily influenced by the Confucian principles discussed above. Asia has also been the scene of a tremendous shift of technology and wealth from West to East. Of the countries in the Pacific, Japan has garnered the lion's share of this wealth. It has accomplished this while in the course of converting itself from a country devastated by allied bombing during World War II into an industrial giant. Japanese thinking is Confucian. Clearly, the presence of Confucianist underpinnings have not interfered with its assimilation of technology or the accumulation of wealth. If Confucian principles have not interfered with Japan's phenomenal growth, have they in fact, contributed to it? The answer is yes. The Confucianist concept of freely copying the ideas of others has been key to its new-found prosperity.

The example of Japanese piracy that follows explains in a microcosm, how: (1) Western assumptions may not always be correct; (2) how Confucianism contributes to the mind-set that, what the West calls "piracy" is, in Asian eyes, merely a benign form of technology transfer;

198. Alford, supra note 190, at 103.
199. Id. at 106.
200. Alford, supra note 190, at 3-5.
201. Engardio, supra note 32, at 100.
and (3) how the strong desire for technical and economic advancement is a potent incentive for piracy of Western intellectual property.

The Western assumption is that the intellectual property debate is mostly North-South: but who defines "South?" In seeing Japan as a major technology-exporting center, Americans and Europeans might assume that Japan defines itself as a Northern nation. This assumption is challenged by Daniel Garner's observation that "[d]espite its position as a leading world economic power, Japan continues to see itself as a poor, developing country," often aligning itself with Third World nations in the intellectual property debate.\(^{203}\)

I. The Kilby Patent

The case of the Kilby patent is prime example of this copying of Western technology. This was an almost thirty year battle for a patent application in Japan for the United States invented "IC chip." Jack St. Clair Kilby invented the integrated circuit (IC), the tiny device at the heart of computers, calculators and most every piece of electronics since the 1960's, while working for Texas Instruments in the late 1950's.\(^{204}\)

As background, one should note the United States Patent Office will normally approve or disapprove an application for patent within eighteen months. In contrast, it takes the Japanese Patent Office (JPO) an average of five to seven years. Also, the JPO requires "full disclosure" of the technology submitted in the application. This creates a five to seven year window during which time other industries may copy, sell, and improve on the design or process submitted for patent protection. Shoji Tada, a JPO official, has admitted that the requirement was used to allow Japanese companies to copy American intellectual property and thus to "avoid the waste of time in coming up with the same ideas."\(^{205}\)

Kilby submitted his application for patent of the IC chip to the JPO in 1960. Approval was thirty years in coming, during which time the Japanese semiconductor industry copied and sold many IC chip products, earning billions of dollars in profit from sales to America and to the rest of the world. To add insult to injury, the JPO's approval for Kilby's patent almost never came. Twelve major Japanese semiconductor producers filed oppositions to the United States' application and the JPO once asserted that


\(^{204}\) Warshofsky, *supra* note 12, at 112.

\(^{205}\) Lindgren & Yundell, *supra* note 155, at 1 n.3 (citing Sunday Present: *The Intellectual Property War-Last Trap by the Americans* (Japanese television broadcast, July 5, 1992)).
the patent had expired while it was still within the approval process. In the ensuing court battle, nineteen Japanese and Korean respondents were accused of importing products that infringed on ten United States' patents. Kilby eventually prevailed. Since that time, estimates of royalties from Japan from that patent alone have been estimated to be worth $800 million a year.206

Since the Kilby episode, American corporations have responded with a more aggressive stance in filing patents and defending their intellectual property rights in Far Eastern courts. As to the Japanese response:207 Sony Corporation's chairman, Akio Morita, stated the reason for all the suits by American firms against Japanese Corporations was "the Americans are finally realizing just how good the Japanese products are, and they are becoming frightened . . . [and that] [t]he United States has been using intellectual property rights as a means, not necessarily to beat Japan, but to protect the United States' economy from the Japanese economy."208 To the average American, this would seem to be an example of unmitigated gall, however, Japanese media reflect a real breakdown in communication. The *Tokyo Trigger* published an article in 1992, *Advanced, Developing Countries Battling Over Patents*, which stated that "[t]he basic opinion of the United States was that anything . . . born out of the intelligent activities of human beings is to be protected. This was something that was impossible to understand for Japanese people, who are permitted to 'borrow upon others' cleverness in all matters."209 This mind set, asserts Robert Merges of the Boston University School of Law, is reflected in the differences in the American and Japanese patent systems. The Japanese patent laws severely limit what the inventor can claim as exclusively his. Instead it encourages "cooperative behavior" by permitting others to copy more than they would be able to under American patent law.210

This example shows that, to a degree, there is a cultural disconnect as to what is acceptable business practice. What is one man's theft is

206. *Id.* at 7.
207. *Id.* at 3 n.3.
208. *Id.*
210. Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 242 (1990). The Japanese patent system has been said to limit the scope of exclusive rights which can be obtained, and thus encourages minimal claiming, licensing, and other "cooperative" behaviors. There is some truth to this claim. If correct, it marks a stark contrast with the more individualistic, pioneer-oriented United States system. To that extent, the patent systems reflect deep seated cultural differences.
another's benign transfer of technology. It also shows, in dollar terms, of what is at stake. But there is more to the equation than mere culture.

J. What Goes Around . . .

While culture may interfere with the communication process, self-interest has a capability of penetrating a cloud of cultural static. Japan and Taiwan, longtime leaders in piracy practices, are feeling the bite of illegal copying themselves and are now becoming true believers of intellectual property rights. First case in point, Yoshida Kogyo KK, maker of YKK zippers and the world's largest manufacturer of clothing fasteners, found Korean pirates were copying their distinctive "YKK" trademark. The Japanese rightsholders lost a protracted six-year court battle against the copiers. Since that time the Japanese Ministry of Finance has organized the "Customs Information Center," a watchdog unit to monitor illicit copying and trade practices and clearinghouse for information and legal advice; all in an effort to combat intellectual property piracy. 211 Also, United States' pressure has led to reforms of the JPO, including the harmonization of Japanese patent laws to those of Europe and the United States, discouraging the practice of "cluster filing," whereby Japanese corporations "surround" and immobilize a United States invention by filing scores of minor changes to the original 212 and by accepting patent applications in English. 213

A second case in point concerns the Taiwanese Chung Hwa Book Company. Chung Hwa actually obtained a license to sell a ten volume set of a Chinese-language version of the Encyclopedia Britannica. Before Chung Hwa could issue its first set, the Tan Ching Book Company had a lower-priced pirate copy on the market. The ensuing court action had little apparent effect on the piraters. 214 Now Taiwan has the Government Information Office, whose task is to crack down on video and motion picture pirates. Says its deputy director general, Liao Ching-kao, "respecting intellectual property is not only for the benefit of foreigners . . . respect for [intellectual property rights] benefits our own creations and businesses as well." 215

Although the total figures of United States' losses to Asian piracy remain high, improvement in intellectual property protection in the Far

211. Yates, supra note 26, at Bus.1.
212. Warshofsky, supra note 12, at 28.
214. Hoffman & Marcou, supra note 25, at C03.
215. Id.
East has been dramatic.\textsuperscript{216} Yates' survey of the region found that, overall, United States pressure has created a grudging, yet steady improvement in the enactment and enforcement of intellectual property laws by the governments of East Asian nations were piracy was rampant.

\section*{VII. PROPERTY AND ISLAM}

\subsection*{A. A Brief Exploration of the Islamic Religion}

Approximately one-fifth to one-sixth of the world's population in countries ranging from the Middle East, Africa, West Asia to Indonesia, live under Islam.\textsuperscript{217} Many of these same nations have been placed on the USTR's Priority Watch List and Watch Lists.\textsuperscript{218} Generally, the practices complained about range from a foreign national government's failure to enact or enforce antipiracy laws; to actively requiring Northern patent holders to give up their intellectual property rights ("compulsory licensing" and the like);\textsuperscript{219} to actual threats of physical violence against International Federation of the Phonographic Industry (IFPI) personnel.\textsuperscript{220} Is there any correlation between the high occurrence of intellectual property piracy in those nations and the culture surrounding the Islamic belief system regarding property?

It may be helpful to first orient the reader by briefly exploring a history of the Middle East and the religion of Islam itself. Secondly, to examine the Islamic concept of "property." Third, to inquire as to whether the Islamic concepts of property differ substantially from those of the Anglo-American concept. And finally, to examine whether there are aspects of Islamic beliefs that would preclude the protection of Northern intellectual property.

\begin{thebibliography}{99}
\bibitem{216} Yates, \textit{supra} note 26, at Bus.1.
\bibitem{217} Jamar, \textit{supra} note 141, at 1079.
\bibitem{218} \textit{USTR Announcement on Foreign Government Procurement (Title VII) and Intellectual Property Protection (Special 301)}, Int'l Trade Rep. (BNA) 18, at d91 (May 3, 1995).
\bibitem{219} Compulsory licensing refers to requirements that the producer of a product allow a local manufacturer to produce that good. General Developments, \textit{Intellectual Property: China, Turkey, India, Brazil Faulted for Intellectual Property Inaction}, Int'l Trade Rep. (BNA) 7, at d3 (Feb. 15, 1995).
\end{thebibliography}
B. Islam in a Nutshell

The United States expressly separates church and state\textsuperscript{221} and the nations of Europe likewise have secular legal systems. Islamic countries have generally not split the functions of church and state. Islam is at once a religion, a political system, and a philosophy used to organize a society in accordance to a divine purpose.\textsuperscript{222} It is not a state religion, per se, as the existence of the state is secondary.\textsuperscript{223} By and large the belief of Islam revolves around the individual, and the individual’s duty is to Allah and to his fellow man.\textsuperscript{224} The Western concept of state sovereignty conflicts with these duties, therefore, the concept of the state is different in Moslem countries. For instance, the State is just as much subject to Shari’a (literally “the path to water”), or the Divine Islamic law, as the most humble believer is\textsuperscript{225} and it does not enjoy any special immunity.

C. Sources of Islamic Law

Islamic law is bifurcated into Shari’a and Non-Shari’a.\textsuperscript{226} Shari’a, or the Divine Islamic law, is further subdivided into codified and uncodified law. Much like Western systems of law, Islamic law follows a logical hierarchy. The first and most authoritative source of law is the written word of the Koran (the Islamic holy scriptures). Next, in order of authority is the Sunna, or the words, sayings (hadith) or actions of the prophet Mohammed. Third is ijma, or consensus on a point of law by those authorized to interpret the Koran or the hadith of the Sunna. Only when there is nothing directly on point in the foregoing sources of Islamic law, may qiyas, or strict analogical reasoning be resorted to. Qiyas is not resorted to lightly. A point of departure must first be established from the Koran, Sunna or Ijma, and the extended rule applied to the facts in a narrow fashion.

\begin{itemize}
  \item[\textsuperscript{221}] U.S. CONST. amend. I
  \item[\textsuperscript{222}] 85 ORIGIN AND DEVELOPMENT OF ISLAMIC LAW (Majid Khadduri et al. eds., reprint 1984).
  \item[\textsuperscript{223}] M. Cherif Bassiouni et al., Panel Discussion at the American Society of International Law, in Islamic Law, A Survey of Islamic International Law Contracts and Litigation in Islamic Law, 76 AM. SOC’Y INT’L L. PROC. 55, 59 (1982).
  \item[\textsuperscript{224}] \textit{Id.} at 60.
  \item[\textsuperscript{225}] HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 544-45 (4th ed. 1979). \textit{See also} MODERN LEGAL SYSTEMS CYCLOPEDIA 100.5 (Kenneth R. Redden ed. 1984). Islamic law, as communicated by God through his prophet, Mohammed, was not a mere collection of metaphysical abstractions, but was transmitted in a context embodying a philosophy for organizing an entire society with a divine purpose. \textit{Id.}
  \item[\textsuperscript{226}] Jamar, \textit{supra} note 141, at 1.
\end{itemize}
When all other sources of law fail to give a clear resolution to a problem that has not been dealt with before, Islamic judges and scholars attempt to resolve it in the manner Mohammed would have resolved it.\(^{227}\) This method is called "ijtihad" ("the struggle for understanding"). Sometime around the fifteenth century (or before) Islamic law was "frozen."\(^{228}\) This "freezing" of independent reasoning is commonly known as "the closing of the gate of ijtihad."\(^{229}\) Thus, the interpretation of Islamic law is essentially locked into the world view that existed between the tenth to fifteenth centuries A.D.\(^{230}\) Since that time, taqlid, or the "submissive acceptance of an earlier interpretation," has been more the rule than the exception. To some observers, this inflexibility, and its effect on individual property rights, has been a root cause of "tyranny and stagnation" in Islamic societies.\(^{231}\) This important aspect will be revisited in greater detail below.

Whatever the school, there is almost universal agreement that interpretation of the Koran or Hadith (Tradition) is reserved to mujtahids, or those Muslim men whose intellect and integrity have been recognized as being worthy by the religious and legal scholars who have preceded them. A layman's attempt to use the Koran or Tradition to advocate a position, therefore, has always been met by condemnation.\(^{232}\) The second source of Islamic law is non-Shari'a, or those aspects upon which the Koran and other sources of Sharia law are silent. As long as the nonshari'a does not conflict with Shari'a law, adoption of new law is permitted.\(^{233}\)

**D. Variations within Islam**

Islamic law is far from monolithic. Within the first 200 years after Islam came into existence, four major schools of interpretation developed: the Hanafi (also known as the Kufa or Iraqi school), the oldest of the schools, with the greatest number of adherents worldwide, who are located for the most part in Turkey, India, Afghanistan, and Pakistan; the Maliki,
(or Medina) located mostly in North Africa and the Magreb; the Shafii, in South India, Southeast Asia, East Africa and along the Arabian coastline; and the Hanbali, the most traditional of the schools, whose followers are found primarily in Saudi Arabia.234

E. Foreign Influences on Islam - A Historical Perspective

Like most bodies of law, Islam has been influenced by its contact with other belief systems such as Roman law.235 Indeed, one scholar goes so far as to assert "the best part of Islamic law is but a republication of Justinian Roman law, adapted for Moslems and clothed in an Arabic dress."236 Other contributors have been; Judeo-Christian traditions,237 the civil codes of Turkish,238 German, Swiss,239 and French240 origin, as well as the English common law.241 To one familiar with the history of Islamic nations, the concept of foreign influence is an old one. Islamic nations have been the both the invader and the invaded. Thus, Islam has spread its influence to other nations and has itself been influenced by them.

The Moors held Southern Spain for 400 years until driven out by "El Cid" and the Turks were fought back from the gates of Vienna

234. Bassiouni et al., supra note 223, at 69-70.
236. SHERMAN, supra note 54, at 178.
237. Saba Habachy, Property, Right and Contract in Muslim Law, 62 COLUM. L. REV. 450, 453 n.10 (1962); see also MOHAMMEDIANISM: AN HISTORICAL SURVEY 88, 89 (2d ed. 1953).
238. HAIM GERBER, STATE, SOCIETY AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE 15 (1994).
239. Bassiouni et al., supra note 223, at 62. "[I]n Saudi Arabia the applicable commercial code was borrowed from the Turkish code, which in turn was borrowed from the German commercial code, unlike most of the other Turkish codes which were borrowed from the Swiss codes." Id.
240. Jamar, supra note 141, at 1095 n.93. "[T]he Egyptian Copyright Statute is modeled on French law and is consequently very different in its particulars, and in some of its basic forms of protection, from United States law." Id.
twice.\textsuperscript{242} In turn, Islamic nations have themselves been invaded. Alexander the Great and his legions would reach as far east as India. The Romans would burn Carthage and rule Northern Africa and Egypt for a time. Crusaders would storm eastwards from Europe in the eleventh century and hold sway over the region for some 200 years. Napoleon, before Waterloo, would march south and introduce his Code into Egypt, Tunisia, Algeria and Morocco. The Ottoman Turks would rule the Levant until the end of World War II, only to be succeeded by the English, the French, and the Italians.\textsuperscript{243} With the discovery of petroleum, United States oil companies introduced American influence on the economic and social direction of the Middle East.\textsuperscript{244} While Shari'a ruled the daily lives of those who lived under Islam, commerce, banking, and foreign relations were increasingly governed by laws adopted from Western systems.\textsuperscript{245} Independence from Colonialism and the Cold War introduced Marxism and Nationalism into the region, and with it, a resurgence in the fundamentals of Islamic beliefs.\textsuperscript{246}

Presently, the societies within Islamic countries are undergoing a fierce debate. Islamic societies are splitting into two major camps; those who support modernization, that is to say, harmonization of their own legal systems with those of the West (particularly in relation to international relations, banking, commerce, and human rights); and those who believe that Islamic fundamentalism is the proper course to take. To date, there is little prospect of agreement between those camps.\textsuperscript{247}

F. An Examination of the Islamic Concept of Property.

The average American has had little direct contact with the Middle East. Westerners have heard tales of hands cut off for thievery (the practice known as \textit{hadd}) and public square decapitation for religious crimes. It would not be unfair to characterize the Western image of Islam, and therefore its justice system, as pagan. This outlook was immortalized by Justice Frankfurter’s dissent in \textit{Terminiello v. Chicago}.\textsuperscript{248} Justice

\begin{itemize}
  \item \textsuperscript{242} Tom Hundley, \textit{Muslims Find New Strength to Defend Ancient Values}, DET. FREE PRESS, Feb. 1, 1987, at 1A.
  \item \textsuperscript{243} \textit{The Bishop and the Imam Ask, Do We Really Have to Fight?}, ECONOMIST (U.K. ed.), Dec. 22, 1990, at 18.
  \item \textsuperscript{244} Bernard Lewis, \textit{The Roots of Muslim Rage: Why So Many Muslims Deeply Resent the West, and Why Their Bitterness Will Not be Easily Mollified}, ATLANTIC, Sept. 1990, at 47.
  \item \textsuperscript{245} Jamar, \textit{supra} note 141, at 1083.
  \item \textsuperscript{246} \textit{The Bishop and the Imam Ask, Do We Really Have to Fight?}, \textit{supra} note 243, at 18.
  \item \textsuperscript{247} Bassiouini et al., \textit{supra} note 223, at 55.
  \item \textsuperscript{248} \textit{Terminiello v. Chicago}, 377 U.S. 1, 17 (1949) (Frankfurter, J. dissenting).
\end{itemize}
Frankfurter likened what he felt was an unbounded and unwarranted abuse of discretion by the United States Supreme Court to Islamic judges (kadis). "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." While the outer trappings of legal decision making may seem very different to Western eyes, there are striking similarities in basic legal principles, with property beliefs being no exception.

The common law concept of absolute ownership, such as fee simple absolute in land, is akin to that of mulk in Islamic law. A form of ownership in perpetuity for the benefit of charity or family, waqf, is similar to the common law concept of trust. Free and empty lands (mawat), to which title may be acquired by three years of occupation and improvement, are similar to lands granted settlers in the days of the westward expansion. To extend the analogy, such a title may also be lost to abandonment in both systems. Another form of property ownership is that of miri, or state-owned land, whose possession or usufruct (tasarruf) was given for a period of time. This is roughly similar to Federal lands for which license to exploit is often freely given. Land also may be leased, rented, mortgaged, and pass via succession. Thus, under religious doctrine at least, ownership of property reflects Western values and concepts in many ways. A comparative analysis of land ownership is not inapt to the question of intellectual property protection. Islamic countries classify property into moveable and immoveables, similar to that of civil code countries, rather than real and personal property. What is sought here is whether the differences in property concepts between Western and Islamic culture is so broad as to lead to a breakdown in communication.

In the developed nations, statutes and constitutions of secular governments define and protect property rights. Under Islam, the individual's right to property is not only recognized, it is absolute and is

---


251. Id. at 8.

252. Id. at 27.
considered sacred. All property belongs to Allah but is given to Man in "inheritance."

That property belongs to Allah and is held by the individual in trusteeship is not problematic; the owner’s title is good against all takers aside from Allah himself. Trespass is a sin against Allah and a violation of Shari’a. Foreigners are protected by this edict as well. The property right, once acquired, applies equally to Muslim and non-Muslim, Arab and foreigner alike. The Hanbali jurist Ibn Taimiya taught the protection of this right was the first duty of the state. Expropriation is only allowed in two instances. First, in the execution of judgment against a debtor and second, for the purposes of public utility. Even if property is taken to satisfy a debt, such as the religious requirement of alms (zakat), the state may only take what it is owed and no more. If seized in the name of public utility, just compensation must be paid the owner.

G. Recognition of Intellectual Property Under Islam

The Koran, at II:188, admonishes the faithful against the theft of another’s property. Thieves and converters, therefore, cannot obtain good title, but become trustees of the property and are liable for any damage or loss incurred on the true owner. Islamic law also recognizes the separability of physical property and ideas. It recognizes that those concepts, fixed in their expression are worthy of a property right. More

258. Id. at 455 n.19.
260. Jamar, supra note 141, at 1085, discussing the protectability of concepts under Islam: Islamic law did recognize that physical property on one hand and ideas on the other are conceptually separable, at least in the context of the hadd, the amputation of the hand of a thief, under certain limited circumstances, for things of certain minimum monetary value. For example, the Hedaya provided that one does not amputate the hand of a thief for stealing a book because the thief’s intention is not to steal the book as paper, but the ideas in the book, which was not tangible property. However, the same source notes that stealing a book of accounts is “appreciable” property, and not just the paper and materials which make up the book. It must be noted that this particular rule is not Quranic, does not come from the traditions, is not based on consensus, and is not from the qiyas type of reasoning. That is, this rule comes from a commentary on the law written by a prominent jurist. (footnotes omitted) (emphasis added).
to the point, forgery of original creations has been considered to be wrong under Islam, and indeed, to be a serious crime.\textsuperscript{261} Also congruent to the Western concept of the limited monopoly needed to effect intellectual property protection, is the existence of restrictive and self-regulating Islamic trade guilds.\textsuperscript{262} The concepts of intellectual property, limited monopoly, and a prohibition against forgery, all exist under the cultural history of Islam. Thus, the differences which exist between the Western and Islamic systems would seem to argue for greater, not less, understanding of Northern intellectual property.

\textbf{H. Zakat: The Difference within the Similarities}

As we have seen, Islamic law has many influences on it from Roman and other, more recent, Western legal systems. Ideally, Islam should present no barrier to a common North/South understanding of the word “property.”\textsuperscript{263} The difference within these similarities lies with the Muslim distributive justice doctrine (\textit{maaslaha} or “public interest”).\textsuperscript{264} Islam, as far as property rights are concerned, seems to take the middle way between the communal property rights of Confucianism and the individual natural rights of the Labor-Desert theory. Mohammed lived during a period of great disparities and, in the Koran, he enjoins the Believer to share his wealth with the less fortunate.\textsuperscript{265} Maulana Shah Ahmad Noorani, a notable Pakistani religious scholar stated, “Mohammed was the leader of the first welfare state. . . . At the time of the Prophet,

\begin{itemize}
\item [\textsuperscript{261}] \textit{Gerber}, \textit{supra} note 238, at 99. Gerber conducted what he termed to be “legal anthropology” by searching the records of legal cases (\textit{fetva}) of the Ottoman empire between the 16th and 19th centuries. His research uncovered the crime and punishment of “coin forgery” (i.e. the minting of “debased” currency). Coin forgery was committed in large part by the State itself. \textit{Id.}
\item [\textsuperscript{262}] \textit{Id.} at 118-19.
\item [\textsuperscript{263}] \textit{Survey: Islam and the West: The Next War, They Say}, \textit{ECONOMIST}, Aug. 6, 1994, at 3.
\item [\textsuperscript{264}] Jamar, \textit{supra} note 141, at 1090.
\end{itemize}
everyone was provided for—even the lowest beggar.”266 This concept of sharing for the good of all extends to “knowledge” as well, and may give rise to a belief, under the doctrines of economic and social justice, that Northern technology, particularly when it comes to medicines and educational materials, must be shared “for the good of all.”267

I. Idealism Versus Reality: No Western-Style Property Rights Under an Islamic Kleptocracy

An analysis of Islamic religious tenets asserting individual property rights are sacred is fine, but does little to explain the crushing poverty which exists side-by-side with vast amounts of oil wealth in many Islamic countries, nor does it explain the many other crucial differences that make the Middle East seem so alien to the average Westerner. It would seem at first blush there are many common roots (such as Roman law) linking the West to Islam. However, just as in the preceding look at the disparity between the Confucian ideal and reality, there remains a gulf between concepts and practices under Islam. One commentator, Tom Bethell, asserts, in reality, property rights in Islamic nations are far less secure than those in the West.268 And it is this insecurity, according to Bethell, that is the single most important reason for the great disparity of material wealth between the two societies.269 Bethell sought, but could not find a reason under Islam why the on-the-ground concept of a property right should be so different from the Western ideal. Certainly, the Koran forbids *riba*, usually interpreted to mean “usury,” but in some schools, there is the outright prohibition against interest when lending money. The Koran also condemns hoarding,270 gambling, (*maisair* literally means getting something too easily, getting a profit without working for it),271 and requires the giving of *zakat*. But, as discussed above, the Koran praises industry and gives its express blessing to the concept of private property.

Bethell thinks a leading cause of the insecurity of private property in Islamic countries is the closing of the gate of *ijtihad* and the establishment of a kleptocracy. Much as in the case of the Confucian Orient, religion was used as a means of gaining unassailable authority. Where independent reasoning is foreclosed, those in power may not be

266. Hundley, *supra* note 242, at 1A.
269. *Id.*
270. *Id.* at 45.
questioned and the believers’ sole recourse is prayer and endurance. Thus, a civilization that once was preeminent in the sciences and international trade was frozen in time at its fifteenth century stage of development. Whether under the oppression of Ottoman Turks, the Caliph, or under the more recent tenets of Socialism, the national government, taqlid served the ends of those in power and gave license to seize private property with impunity. Bethell’s analysis clarifies why intellectual property rights are given such short shrift in Islamic countries, in spite of the contrary teachings of the Koran. Property rights of Islamic countries’ own citizens do not exist in the Western sense—why should it be that foreigners are given any better rights over property than their own countrymen?

Another commentator, William E. Schmidt, of the New York Times, conducted a more temporal investigation as to the attitudes of intellectual property pirates in Islamic countries. Polling merchants in the Cairo souk, he found a variety of reasons why they sold counterfeit Western goods. Some saw themselves as Robin Hood, taking from the rich to give to the poor. Others simply asserted that it was not illegal. Still others did not see piracy as a moral or ethical issue, but as a question of the market. They were simply offering goods to the community (umma) at a price they could afford, but were unaware of the long-term consequences.272

VIII. THIRD WORLD PIRACY—NOT A CULTURAL EXCUSE

But are the doctrines like the Islamic zakat and the Confucian free alienability of ideas, the true motivating factors behind piracy from Confucian and Islamic countries? Based on the foregoing discussion they are not. We have seen that under both Confucianism and Islam, valuable information, even if not in a fixed form of expression, may be considered to be property.

While cultural differences do exist, they are not so extreme as to cause a linguistic or cultural breakdown in communication between the North and South when each says the word “property.” However, there is a serious breakdown in communications, with fault being attributable to both sides, when it comes to the issue of perceived national self-interest.

IX. THE ANSWER—PIRATE COUNTRIES’ TRUE MOTIVE IS PERCEIVED SELF-INTEREST

Cultural arguments notwithstanding, Third World countries, the “have-nots” of the world, are pirating out of self-interest. Statements going to their state of mind reveal this to be their true motive. For example, Third World pirates scoff at patents, saying only the West will benefit if patents are enforced. They are also unabashed in giving their reasons; Vaivudhi Thanesvorakul, managing director of the Thai pharmaceuticals pirate company Biolab stated, “Thailand’s pharmaceutical industry isn’t yet mature enough for patents . . . . We haven’t had time to copy enough.” Sometimes it is Third World government officials themselves who advocate piracy. Senator Leahy once asked a government official about his government’s refusal to take action against widespread piracy in his country and his answer was direct, “[i]t makes money.” Other government officials claim helplessness. Only recently, Chinese government officials, attempting to shut down a factory for making pirated goods, were chased out of town by locals; “[i]f it makes money, it’s untouchable, no matter what the [Chinese Communist] Party orders.”

---

273. Eric Wolfhard, International Trade in Intellectual Property: The Emerging GATT Regime, 49 U. TORONTO FAC. L. REV. 106, 123 (1991). See generally 21 UN CHRONICLE 11, HEADS OF STATE OR GOVERNMENT: ADDRESSES AT THE OPENING OF THE THIRTY-NINTH GENERAL ASSEMBLY OF THE UNITED NATIONS (1984), available in LEXIS, News library, Arcnws file (Third World leaders calling for the unilateral transfer of technology from the West to the South as the “common heritage of mankind” and further, asserting that rich countries of the North were responsible for financially assisting poor Third World countries). See also Murray L. Weidenbaum, The Unveiling of an Increasingly Complex Global Marketplace, CHALLENGE, Jan. 1993, at 10 (quoting the United States GAO (General Accounting Office) as asserting [that the] “[d]eveloping countries” desire for economic development is perhaps the single most important reason for the persistence of inadequate protection, particularly for foreigners.”). Id.


276. What to Watch for on the US/Asia Front: Japan, BUS. ASIA, Jan. 8, 1990, available in LEXIS, Asiapc Library, Allasi File. The Japanese have remained intransigent in protecting their market from United States and European imports while enjoying a massive trade imbalance in their favor. Business Asia reports, “[i]n Japan, talks on supercomputers, satellites and wood products have yielded nothing thus far. Citing a litany of social and historical factors—including earthquakes—Japan says it simply can’t change its ways.” Id.

A. Southern Excuses—Pirate America

One of the counter-arguments leveled at the United States by nations pirating American intellectual property is the fact that in the early days of the United States, the government offered very little, if any, protection to foreign intellectual property in order for it to achieve advancement. This argument would have merit but for the considerable changes in the circumstances in the hundred-odd years that have passed since then, and in the nature and importance of intellectual property as well.

In the mid-nineteenth century, the concept of intellectual property was neither well developed nor as widely accepted as it is today. Intellectual property piracy, particularly in the field of copyright was more the rule than the exception. For instance, Holland and Belgium absolutely refused to protect foreign copyrights. The French, being primary targets of such piracy, failed to draw Holland into negotiations. Only by criminalizing piracy and other economic measures did France finally succeed in protecting its literary works. Young America, like many of its European compatriots, had no qualms in pirating the inventions and literature of the rest of the developed world. Eventually, the problems associated with piracy resulted in the negotiation of a series of international patent and copyright protection regimes, such as the Paris Convention in 1883, which dealt with patent and trademark protection, and the Berne Convention in 1886, which dealt with copyright protection.

Prior to this time, the United States was not so far from the norm in international intellectual property protection. Now, intellectual property protection has existed on the international scene for well over a century.

278. Watanabe, supra note 35, at 1.
279. Brenner-Beck, supra note 107, at 84 n.15.
280. Peter Burger, The Berne Convention: Its History and its Key Role in the Future, 3 J.L. & TECH. 1, 9 (1988). Burger explains as literacy increased, so did piracy of intellectual property, particularly of books. While the United States blatantly discriminated against foreign rightsholders, piracy at the time was more the rule than the exception throughout Europe. Id.
281. Id. at 8 n.49.
Moreover, the very nature and importance of intellectual property has changed dramatically. In the eighteenth and nineteenth centuries, to steal, and then use, someone else's intellectual property required some considerable effort: book printers had to actually typeset and print the books they pirated. Those copying cotton gins had to actually make cotton gins; in essence, pirating required almost the same effort as making the original during its production phase. The scope of piracy was also much narrower in the eighteenth and early nineteenth centuries. The buying and selling of books, a primary target of pirates of that era, was mostly domestic, and not exported to compete with the original product.285

One hundred years hence, the situation has changed considerably. Costs of research and development have soared. Expense factors such as large-scale production, international distribution and marketing, have been added to the basic cost of every item. Add to this, the cost of piracy. On the other side of the equation, the ease of mass-copying of software, music and videos, as well as the ability to instantaneously transmit data around the globe via satellite, has made costs of piracy minuscule relative to profits realized.286 Northern exports cannot make entry into foreign markets where pirated copies of their wares are offered at a fraction of their normal price.287 Pirates will even import their illegally-copied wares and sell them in direct competition with legitimate goods in Northern markets.288 Also, intellectual property simply did not occupy the same state of importance to the national interest as it does now. Finally, the events surrounding the resolution of the international piracy dispute then mirror much of the discourse taking place now; with producers demanding increased protection, while the lesser-developed nations sought free alienability of ideas.289 Thus, if Third World nations use the argument that they are justified in taking property because at one time Northern nations

285. Burger, supra note 280, at 7. Later, when international trade boomed and rightsholders felt the bite of piracy, holders of copyrights would seek greater protection for their works. Id.


287. Indonesia Cracks Down on Pirated Computer Software, L.A. TIMES, Aug. 2, 1989, at B5 (describing how an American computer program that sells for $422.00 in the United States sells for the equivalent of $1.50 in Jakarta, Indonesia and with such odds as these, original goods have no chance of market entry).

288. Maggie Farley, Trade Tussle is Killing Toy Makers' Fun, L.A. TIMES, Jan. 19, 1995, at 4D (describing how product spies roam the corridors of toy conventions looking for hot products to copy. "They can ask for a sample, knock it off and have it on a boat to the States in a matter of weeks," said one United States Rightsholder).

289. Burger, supra note 280, at 12.
were also guilty of piracy, the North may rebut by pointing out the earlier situation, was finally resolved by the imposition of protective laws.

B. Piracy Endangers International Trade Accords

By doggedly pursuing what they perceive to be their own national interest, and short-circuiting the multilateral dispute resolution process, piracy by Third World nations endangers the viability of international trade accords. By incorporating piracy into “national development” policies, using multilateral organizations, such as the World Intellectual Property Organization (WIPO) to block effective remedies for Rightsholders, and by using multilateral negotiations merely as delaying tactics to stave off economic sanctions while they continue to copy Western ideas Third World nations have essentially forced the hand of Developed nations into using unilateral measures.

For instance, the United States’ use of Sections 301 and 337 have proven to be effective in achieving improved intellectual property regimes for Northern ideas in nations who initially failed to respond to multilateral and bilateral talks. Finding their access to free transfer of technology

290. Stefan Kirchanski, Protection of United States Patent Rights in Developing Countries: United States Efforts To Enforce Pharmaceutical Patents in Thailand, 16 LOY. L.A. INT’L & COMP. L.J. 569, 572 (1994). Kirchansky asserts that “these countries may fear drastic price increases that would result from paying royalties on patented pharmaceutical and agricultural technology as well as a loss of control over technology that is vital to national development.” Id.


292. Hoffman & Marcou, supra note 25, at C03.

293. See generally John F. Sweeney et al., Using U.S. Courts and International Treaties to Protect Against Infringement Abroad, and at Home, 393 PLI/Pat 9 (1994). Sweeney and coauthors state that developing countries which play host to a disproportionately high amount of counterfeiting activities do not have any strong motive to voluntarily pass or enforce laws to prevent such activities. Therefore, developed countries like the United States, as well as the European Community and several of its individual members, have endeavored to persuade the developing countries to take such measures. Since the developing countries require access to the developed countries as markets for their tangible products, the developed countries such as the United States have found that the threat of foreclosing or restricting trade access for the export products of the developing countries is the most persuasive tool available for compelling those countries to pass and enforce laws which will protect the intellectual property rights of the developed country’s nationals.
cut off, Developing Nations dependent upon piracy have raised a strident protest, alleging that United States' unilateral measures are violations of GATT. Nevertheless, the United States continues to use unilateral measures despite GATT panel findings that they violate the GATT doctrine against discriminatory treatment. Indeed, the United States considers trade sanctions, such as the imposition of countervailing tariffs and suspension of GSP benefits, to merely be "retaliation in kind" and well within their rights under GATT. Piracy, they allege, distorts markets and defeats the comparative advantage of nations.

This vituperative back-and-forth is ultimately destructive to all parties concerned. The GATT structure is jeopardized when the United States, its major proponent, is seen by others as having to ignore GATT Panel findings and to strike out on its own in order to protect its interests. Also, the very end that the pirating nations hope to achieve, that of economic and technological development, will be defeated if the developed nations find that they can only protect themselves by denying Third World nations' access to their markets, by refusing to export needed technology to them, and by refusing to invest in them. Yet, this is the very direction continued piracy is taking the world's nations.


295. Id. at 134. See also GATT: EC, Other Nations Said Set To Attack United States Over Trade Sanctions at GATT Meeting, 6 Int'l Trade Rep. (BNA) 171 (Feb. 8, 1989); GATT Council Finds That Section 337 Discriminates Against Foreign Companies, 39 Pat. Trademark & Copyright J. (BNA) No. 955, at 30 (Nov. 9, 1989).


297. Wolfhard, supra note 273, at 130.


C. Self-Destructive Nature of Piracy

The underlying premise of intellectual property piracy is that it is a fast and cheap method for a lesser developed or newly industrialized country to join the ranks of developed nations. Commentators have pointed to Japan's apparent success, through institutionalized piracy as a "model for emulation."\(^{301}\) These commentators ignore Northern, particularly American,\(^{302}\) bitterness engendered by these and other Japanese trade practices which have persevered despite long-standing United States protests.\(^{303}\) They also ignore the fact such practices may touch off trade wars and endanger the GATT, as well as other international business accords.\(^{304}\)

Aside from simply incurring anger from developed nations and drawing trade sanctions upon themselves, piracy is self-destructive to developing nations in other ways. For instance, for the individual Third World consumer, a pirated copy may not even be less expensive than the original. Piraters have copied originals, charged the same price and simply pocketed the profit.\(^{305}\) Nor, like their namesakes, do piraters have the best interests of the customers in mind. Copies can be dangerous to the user, such as using cheaper non-flame-retardant material for children's

---


302. Chimerine & Fallows, *supra* note 36, at A15. Chimerine, chief economist at the Economic Strategy Institute, discussing unfair Japanese trade practices. Even though Europeans also feel the bite of "managed trade" or Japanese markets closed to their products, they are less vociferous in their protests, as they themselves are highly protective of their own markets. *Id.*


[I]f Japanese markets were open to the same degree of the United States or even Europe, it would import $200 billion more in goods than it does now; at least $50 billion of which would come from the United States. Closed cartel-like business relationships, *keiretsu*, serve as hidden, non-tariff barriers to entry of United States goods.

*Id.*

304. Cooper, *supra* note 303, at B4. The United States has threatened Japan with $5.9 billion in punitive tariffs unless it opens its market to American automobiles and car parts.

pajamas. Other pirate operations have been exposed as to be just another money-making proposition for the Mafia. 306

On a larger, macroeconomic scale, by not protecting intellectual property, Third World nations stunt the growth of domestic innovative industries since there is no incentive to create new knowledge or ideas. 307 This in turn has led to a "brain drain," where the best and brightest from the Third World feel compelled to leave their home countries for the more remunerative systems in developed nations. 308 Another destructive aspect is the downward spiral of quality, since competing copiers, after having forced original products out of the market, try to undercut one another. 309 Moreover, those producing intellectual property, such as pharmaceuticals or magnetically-reproducible media such as cassettes, computer software, and videotapes, will refuse to allow their products to be exported to those countries where they know their products will be given no protection by local intellectual property laws. 310 Piracy also has had a serious chilling effect on direct foreign investment and the startups of new production facilities. 311 Developed nation producers want to move production offshore. They look longingly to the sheer massive size of the potential consumer markets in developing nations, yet hold back as they have been burned by their earlier ventures in those markets. 312 In this sense, Third World Nations are the authors of their own misery.

X. CONCLUSION

The data would tend to show that the Southern nations are acting in their own perceived economic self-interest and in what they believe is an expedient, even necessary, course of action, rather than acting under a good-faith misunderstanding of the issue at hand. If the North is to

306. Williams, supra note 22, at 27.
308. Ronald Bailey, Brain Drain, FORBES, Nov. 27, 1989, at 261; Bob Johnstone, Diverting the Brain Drain, FAR E. ECON. REV., Jan. 28, 1988, at 70; but see ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 156, 174 (1990) (describing a reverse "brain drain" back to South Korea after the enactment of new intellectual property protection laws there).
310. Id. at 94 (citing Gunda Schumann, Economic Development and Intellectual Property Protection in Southeast Asia, in INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE 173 (F. Rushing & C. Ganz Brown eds., 1990). Seventy-five percent of corporations in a 1987 survey stated lack of intellectual property protection was a strong disincentive to license technology to Developing Countries. Id.
311. Id. at 94.
312. Id. at 94.
staunch the hemorrhaging trade imbalances and lost jobs brought about by the failure of the LDC/NICs to enforce IP measures in their own countries, it must raise the stakes to make it the self-interest of those violator-nations to suppress IP piracy.

The Northern nations which produce intellectual property are steadily moving production offshore where LDC's find their competitive advantage in providing the labor-intensive aspects of industry. The North is becoming increasingly dependent upon the LDC's for raw materials, fossil fuels, and production and must be able to retain its right in the property in the creative arts and sciences. These are, in sum, our own competitive advantage. A caution however; Smoot-Hawley-type trade protectionism generally harms the economic well-being of all parties concerned. It lowers political stability and enhances the likelihood of hostilities between nations by foreclosing alternatives to armed conflict.

Most disturbing, however, is the entire backdrop against which the North-South conflict is being played. The conflict, if it ever is to be peacefully resolved, must be analyzed from a wider perspective, "a world-view, a larger frame of reference." The South is poor and getting poorer. Third World population pressures are taxing the environment and seriously threaten the stability of Southern hemispheric governments. First World Nations themselves are feeling the osmotic pressure of Third World populations pushing into their own countries.


314. Robert McNamara, The Population Problem, in EARTH AND US 50 (Mostafa Kamal Tolba & Asit K. Biswas eds. 1991). McNamara cites disturbing figures: forty-two countries have population growth rates over three percent per year, and twenty-four of these are in Africa, by far the poorest continent. Africa's population will have soared from 220 million in 1950 to a projected 880 million by the end of the century. By contrast, the population of economically advanced nations grew by an average of 0.74% from 1970 to 1985. Id. See also Samuel Huntington, The Clash of Civilizations?, 72 FOREIGN AFFAIRS 22 (1993); Matthew Connelly & Paul Kennedy, Must it be the Rest Against the West? Immigration and Relations Between Western and Developing Nations, 274 THE ATLANTIC MONTHLY 61 (1994); Thomas Fraser Homer-Dixon, On the Threshold: Environmental Changes as Causes of Acute Conflict, J. INT'L SECURITY (1991); Ross Laver, Special Report: Looking for Trouble: Tad Homer-Dixon's Prophecies for a Crowded Planet Have Created a Stir in Washington, MACLEAN'S, Sept. 5, 1994, at 18, available in Westlaw, Magazine database.


Add to this mix, the arsenal-for-sale of the erstwhile Soviet Union, to include weapons of mass destruction, as well as the unemployed scientists who made them, the military officers who watched over them, and the idle hands of the largest terror-and-espionage services history has ever seen, that is, the KGB and GRU. Add to these, the rising Islamic fundamentalism in the Middle East, and to this, the stirring giant of China, who has shown itself a willing supplier of weapons refined with the newfound technology provided by Western education. Now pour in a widespread belief system based on anger and resentment against First World Nations that is often used by NIC/LDC elite for their own purposes, and the mix is volatile indeed.

In sum, the Developing Nations are justified in their own minds when they take AIC intellectual property, but not for the reason that they give—the disingenuous argument that intellectual property is the "common heritage" of mankind. Even a cursory study of the major cultures of the world show that each includes the very human understanding of the feeling that "this is mine." They take Western intellectual property out of necessity. It is in the long-term interest of the developed nations that they get Western technology, since it serves to lend stability to the South (as


319. Recall that it was Chinese-made "Silkworm" anti-ship missiles that Iran launched against oil tankers in the Gulf of Hormuz during the "Tanker" war; that "Scud" missiles provided from the Far East and the USSR rained down on Israel and Saudi Arabia during Desert Shield, and that a substantial portion of graduate students in the hard sciences, have been, and are, students from the Peoples' Republic of China. The Tanker War, JANE'S INTELLIGENCE SER., May 1, 1992; see also Duncan Lennox, Iraq's "Scud" Programme—The Tip of the Iceberg, JANE'S DEFENCE Wkly., Mar. 2, 1991, at 301.

320. Lewis, supra note 244, at 47. See also RICHARD H. SCHULTZ & ROY GODSON, DEZINFORMATSIA: ACTIVE MEASURES IN SOVIET STRATEGY (1984) (describing how the world press, politicians and academics were manipulated by the Soviet secret services (KGB and the GRU) to spread inflammatory untruths). Some examples were that (1) AIDS was a CIA plot to destroy the Third World using biological warfare, (2) American were abducting Third World babies to use as organ donors for Western babies, and (3) the United States, by introducing neutron bombs and cruise missiles into Western Europe to counterbalance the overwhelming preponderance of tanks and their own introduction of mid-range SS-20's, was pushing the West into a nuclear war which would be fought exclusively on West European soil. Id.
thus the world). This was, after all, the underlying logic and intent of establishing the Bretton Woods institutions in the first place.

There is a quid pro quo however. It is imperative that the Southern Nations gain control over and drastically reduce their skyrocketing population rates. Economic and political stability will be impossible until this is done. It will not be enough simply to find new ways of feeding, housing, educating, and employing an ever-growing population with new technology. The introduction of AIC medicines and food aid into Third World countries has had the salutary effect of reducing infant and child deaths, however this was not sufficiently balanced by increased use of birth control. Now, the effects are being felt in the form of the desertification in Africa, and of the loss of the Amazonian Rain Forest, where a great proportion of the world’s oxygen is produced and from which global weather patterns are affected, and by the tides of overflowing Third World humanity pressing into Europe and America.

Nor is there any reason that First World Nations be expected to part with what has become their competitive advantage for free. The Third World is sitting upon a mineral, and in the case of the Amazonian Rain Forest—a biological wealth that the First World very much needs. What is needed is an exercise of good-faith and common-sense bargaining. However, given human nature, perhaps this is asking too much from either side. Third World hosts to joint extractive or manufacturing enterprise must discard the Marxist revanchist policies that they embraced during the “Wars of Liberation” in the fifties and sixties, and which serve now only to scare off reasonable investors and punish foolish ones. Instead, they should allow for repatriation of profits and not unduly interfere with management’s control over the daily business operations of the enterprise.

Joint venturers from developed nations, in their turn, should actually benefit the host country. Aside from just providing jobs, they must not drive such a hard bargain by whipsawing competing Third World countries, that in the “race to the bottom,” no benefits have accrued to the host country at the end of the tax holiday. Nor should production or extraction operations in a Third World nation be a free license to pollute. A balanced “win-win” approach is needed, whereby creative Northern intellectual property is protected, and the means and opportunity are given Lesser Developed Countries to achieve their own advancement.

In conclusion, the data shows that cultural barriers to communication do exist, but they are not insuperable. And, although power politics may be able to force a solution today, an agreed-to settlement that recognizes and deals with the barriers to meaningful communication would result in a more peaceful and enduring coexistence tomorrow.