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# Capitán América: The Impact of TRIPS on the Cultural Trade Balance in Latin America

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# CAPITÁN AMÉRICA: THE IMPACT OF TRIPS ON THE CULTURAL TRADE BALANCE IN LATIN AMERICA

LAURANN JOHNSON KIRSCHNER\*

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## INTRODUCTION

In a classroom in Argentina, two groups of students sit in gentle debate with each other over the use of a single word: “American.” The first group consists of local students from the Universidad de Buenos Aires, the second is a group of students from various regions of the United States who

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came to study in Argentina for a brief four months. There is a period of back-and-forth between the groups, in which many of the Argentine students voice their frustration over the fact that people from the United States refer to themselves as “Americans,” as if people from Latin America cannot hold that title, as well.

For a handful of the U.S. students, the Argentines’ frustration comes as a surprise. One student responds in guarded defense of the word, explaining that in English, there really is no other word to use. The English language does not have an adjective other than “American,” at least in popular use, to describe “one born in the United States.” In Spanish, there is such a word, “*estadounidense*.” Still, the larger issue is the word’s connotation: that United States Americans are somehow *entitled* to the term; that they are the only “Americans” worthy of the title.

One Argentine student expresses that her father holds deeper feelings about the issue than she personally felt. Her father spoke English as a second language and therefore often watched U.S. and European news programs that use “America(n)” to exclusively address the United States and its people. The student said that the use of the word in that way deeply troubled her father, but it did not affect her in quite the same way. She felt it was just another demonstration of the prominence of U.S. culture in the world landscape, which she considered somewhat justified or, at the very least, expected.

A few years prior to the students’ classroom debate, a U.S. film studio had to wrestle with the dynamics of this thorny word. In 2011, “*Capitán América: El Primer Vengador*” (“Captain America: The First Avenger”) appeared in theaters across Latin America.<sup>1</sup> Sold-out theaters showcased the red, white, and blue superhero saving the world in his star-spangled suit, complete with a large “A” on the hero’s mask. The character is a brave young man from humble beginnings-turned superhero, and the physical embodiment of what a film studio in California believes it looks like to be a hero of “American” proportions.

Before releasing “Captain America: The First Avenger” in 2011, the studio offered to distribute the movie in foreign territories as simply “The First Avenger,” out of fears that the international community would not take well to the “Captain America” name.<sup>2</sup> Only South Korea, Ukraine, and Russia took the studio up on its offer.<sup>3</sup>

Much to the studio’s surprise, the first “Captain America” film’s international sales exceeded domestic sales.<sup>4</sup> Perhaps even more perplexing, the film did “especially well in Latin America,”<sup>5</sup> with \$57 million of the \$194

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1. Pamela McClintock, *Box Office Shocker: ‘Captain America’ Earns More Overseas Than In U.S.*, HOLLYWOOD REPORTER (Sept. 14, 2011), <http://www.hollywoodreporter.com/news/box-office-shocker-captain-america-235464>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

million total gross foreign sales stemming from Latin American markets.<sup>6</sup> The success of the Captain America franchise in Latin America demonstrates the rising tension between local cultural values and cultural consumption as foreign developing markets continue to import cultural goods from the Western world in substantial numbers. This Note seeks to identify some of the root causes of the increased importation of Western media goods to Latin America, specifically the effect of an international copyright treaty which transformed the landscape of trade in cultural goods.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) is a landmark international treaty which set baseline standards for intellectual property right (IPR) protections across the globe. Now, more than twenty years after its promulgation, the effects of TRIPS have led to a decrease in domestic production of copyright-based products in several developing countries around the world. This Note will specifically consider Latin American countries that find themselves increasingly dependent upon imports of foreign cultural products. Though the post-TRIPS experiences of Latin American countries are not entirely unique to the region, other features like geographic, cultural, and lingual proximity position Latin America to be a global competitor in the world marketplace for cultural goods.

This Note will discuss the cultural implications of TRIPS-mandated copyright structures on developing countries in Latin America and suggest implementation of co-production schemes across the region which will capitalize on Latin American countries’ particular strengths in common language and cultural proximity. Part I will discuss the terms of TRIPS itself, and shed light on how it changed the landscape of trade in cultural goods around the world. In turn, Part II will demonstrate how TRIPS contributes to the homogenization of cultural goods consumption by making it increasingly expensive for developing countries to compete on the world market, thereby creating an economically inefficient model for trade, and rendering developing markets net importers of cultural goods by a wide margin. Finally, Part III will recommend a cross-border solution through which Latin America can capitalize on its resources through co-production agreements with other countries, consequently fostering greater cultural output from the region within the parameters of TRIPS.<sup>7</sup>

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6. *Id.*; *Captain America Total Grosses*, BOX OFFICE MOJO, <http://www.boxoffice Mojo.com/franchises/chart/?id=captainamerica.htm> (last updated June 14, 2017).

7. This Note will not address other IPRs implicated through TRIPS, such as patent law and the effects of TRIPS on access to health. While this Note will examine Latin American countries in particular, it will also touch on themes that are applicable to other developing countries. The term “cultural goods” is meant to implicate the World Intellectual Property Organization (“WIPO”) definition, which captures the core copyright industries. “Cultural services” represent the flow of service-based payments, including royalties and other fees, associated with the transaction of cultural goods.

## I. TRIPS TRANSFORMS THE WORLD MARKETPLACE

Western producers of copyrighted materials have long sought meaningful international protection for their intellectual wares. However, the promulgation of TRIPS ushered in an entirely new era of global trade in intellectual property-based goods. In attempts to speak to the drastic change in international protection and enforcement which emerged from the landmark treaty, this Part will first discuss the events, agreements, and negotiations leading up to its passing during the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”) in 1994. Second, this Part will examine the TRIPS provisions which at least partly supported the robust injection of Western cultural goods to the developing world. Finally, this Part will discuss the methods employed by Latin American countries at the turn of the century in implementing the TRIPS obligations.

### A. The TRIPS Origin Story

International copyright protection is hardly a novel concept, but the reach of modern enforcement mechanisms is a relatively new development. The French pioneered the first campaign toward a universal copyright law in the mid-nineteenth century.<sup>8</sup> At that time, copyright law generally protected a few categories of writings such as books, charts, and maps.<sup>9</sup> Early international copyright treaties emerged as bilateral agreements between two countries through which one country guaranteed copyright protection for the other’s goods within its borders.<sup>10</sup> Unfortunately, these bilateral treaties did not have the reach needed to properly protect against infringements in the burgeoning, and interwoven, European marketplace.<sup>11</sup> The heightening need to expand international copyright protection eventually culminated in the Convention for the Protection of Literary and Artistic Works (“the Berne Convention” or “the Convention”), which became the first truly international treaty on copyright.<sup>12</sup>

In September of 1883, delegates met in Berne, Switzerland, and ultimately produced ten articles relating to the international regulation of copyrighted goods.<sup>13</sup> Ten countries initially ratified the Berne Convention: Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the United Kingdom.<sup>14</sup> While this number is scarce in today’s terms, many of the aforementioned countries held colonies around the world which

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8. PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT PRINCIPLES, LAW, AND PRACTICE 34 (3d ed. 2013).

9. *Id.* at 32.

10. *Id.*

11. *Id.*

12. *Id.* at 34.

13. *Id.*

14. *Id.*

also were bound by the Berne Convention's provisions.<sup>15</sup> Therefore, the Convention enjoyed wide reach and marked a monumental shift in copyright protection on a global scale.<sup>16</sup> Notably absent from the initial list of ratifying countries, however, is the United States, which did not become a signatory for another one hundred years.<sup>17</sup>

The implementation of the Berne Convention on December 5, 1887,<sup>18</sup> had two primary implications for the future of global copyright recognition and enforcement.<sup>19</sup> First, the Berne Convention provided a series of minimum rights for "authors" of copyrighted works, effectively setting an "international floor for the scope of copyright protection."<sup>20</sup> At the outset, the Berne Convention expressly guaranteed two rights: the translation right and the public performance right.<sup>21</sup> The protection of these rights provided authors recourse against another who, without authorization, reproduced ("translated") or performed publicly the author's work.<sup>22</sup> Many member states already protected the translation and public performance rights through substantive law or in bilateral treaties with other countries; thus the Berne Convention did not vastly change the landscape of copyright protection in regards to the protection offered to authors of member states within in their domestic borders.<sup>23</sup> However, the Convention's permanence and reach rendered it a distinct piece of international legislation.<sup>24</sup>

The Berne Convention's second, and more significant, implication was its application of "national treatment" of copyrighted goods originating in and exported to Berne Convention states.<sup>25</sup> Under the requirement of national treatment, any work originating in a Berne member country must be afforded the same rights and protections as that country provides for its own nationals.<sup>26</sup> Essentially, a Berne member state cannot extend privileges to its domestic authors to the exclusion or detriment of foreign author-citizens of another Berne member state.<sup>27</sup>

In effect, the interaction of the Berne Convention's two principal implications creates a blanket scheme of copyright regulation in which each Berne nation must play by the same rules: (1) all countries must adopt the minimum protection standards afforded to authors; and (2) if a country enacts

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15. *Id.* at 34-35.

16. *Id.* at 34.

17. *WIPO-Administered Treaties, Contracting Parties, Berne Convention*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15) (last visited July 22, 2017).

18. *Id.*

19. JON M. GARON, *ENTERTAINMENT LAW AND PRACTICE* 41 (2d ed. 2014).

20. *Id.*

21. GOLDSTEIN & HUGENHOLTZ, *supra* note 8, at 35.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 35-36.

26. GARON, *supra* note 19, at 41.

27. *Id.*

additional protection to its domestic authors, it must extend those same protections to authors of other member countries.<sup>28</sup>

Today, there are 174 members of the Berne Convention, including the United States.<sup>29</sup> To understand the current climate of international trade in cultural goods, it is imperative to first understand the ways in which the United States benefited for more than one hundred years by not being a Berne member state. Because there was virtually no protection for British materials published or sold in the States, U.S.-American consumers became “hooked on inexpensive books” by the late-nineteenth century.<sup>30</sup> While U.S. consumers may have been singing praises for the cheap price of cultural goods during this time, U.S.-American authors were not joining the chorus. Because there was no obligation to properly compensate foreign authors for works sold Stateside, U.S. authors became severely underpriced in the marketplace by works by British authors, and were increasingly vulnerable to foreign piracy.<sup>31</sup>

Opponents to comprehensive copyright reform argued cheap books were essential to promoting “literacy, especially on the frontier,” and that “extending copyright protection to foreigners meant granting a monopoly to them at the expense of the American reading public.”<sup>32</sup> Plus, U.S. publishing houses and their employees depended on piracy to maintain competitiveness in the marketplace.<sup>33</sup> While Congress did eventually enact legislation that created a pathway to protection for foreign works, the U.S. government’s sustained failure to intervene during the “cheap books” movement demonstrated, at best, its apathy (and at worst, its disdain) toward extending protection to foreign works.

The U.S. was reluctant to extend protection to foreign materials during the nation’s infancy, but would find itself on the other side of the copyright protection quarrel about one hundred years later, as its media and technology enterprises flourished. As trade of intellectual property-based goods began rising in the mid-twentieth century, the protection of IPRs became even more vital to global success of the industries which depended upon payments stemming from IP-based products. Accordingly, a push for more forceful international enforcement of IPRs surfaced. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) arose out of these efforts, led mostly by developed countries, to encourage the enforcement of intellectual property (“IP”) goods traded abroad.<sup>34</sup> Economic giants with growing technology and media industries had great incentive to

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28. *Id.*

29. WIPO, *supra* note 17.

30. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 50 (2003).

31. *Id.*

32. *Id.* at 51.

33. *Id.*

34. GOLDSTEIN & HUGENHOLTZ, *supra* note 8, at 73-74.

create an agreement that would address the protection of IP goods in the global marketplace.<sup>35</sup>

TRIPS was heavily negotiated during the General Agreement on Tariffs and Trade (“GATT”) Uruguay Round on September 20, 1986.<sup>36</sup> In the years leading up to the Uruguay Round, Western European nations and the United States petitioned GATT (which eventually became the World Trade Organization (“WTO”))<sup>37</sup> for stricter enforcement measures for the trade of IP goods.<sup>38</sup> The purported goal of the negotiations as adopted by the negotiating parties in the GATT Ministerial Declaration was “to reduce the distortions and impediments to international trade.”<sup>39</sup> This was to be accomplished by “taking into account the need to promote effective and adequate protection of intellectual property rights.”<sup>40</sup> The Ministerial Declaration also recognized it was imperative that the “measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. . . .”<sup>41</sup>

From the outset, developing and developed countries held different ideas about what means would properly meet the desired ends stated in the Declaration. For example, India’s position during the Uruguay Round negotiations was that the national treatment and most-favored-nation provisions should be narrow, so to only extend to material goods, and not to the underlying intellectual property.<sup>42</sup> In contrast, economically developed countries took the position that the agreement should have broad coverage, encompassing the Berne Convention rights and moral rights,<sup>43</sup> as embodied in the other standing copyright treaties.<sup>44</sup>

The disparity in intellectual property know-how during the Uruguay Round negotiations provides context to the discussions, and their eventual outcome. The U.S. came to the negotiation table on behalf of a \$650 billion annual pharmaceutical industry, an \$800 billion global software and

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35. *Id.* at 73.

36. *Id.* at 75.

37. *The WTO In Brief: Part 1: The Multilateral Trading System – Past, Present, and Future*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr01\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm) (last visited July 22, 2017).

38. GOLDSTEIN & HUGENHOLTZ, *supra* note 8, at 75.

39. General Agreement on Tariffs and Trade, Ministerial Declaration of 20 September 1986 at 7, [https://www.wto.org/gatt\\_docs/English/SULPDF/91240152.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf).

40. *Id.*

41. GOLDSTEIN & HUGENHOLTZ, *supra* note 8, at 75.

42. *Id.* at 76.

43. Moral rights protect against the distortion or mutilation of copyrighted works which the author may consider detrimental to her reputation. Unlike the other rights embodied in the Berne Convention, moral rights cannot be assigned or waived, even if the author no longer holds the copyright in the work. There is disagreement as to whether the treatment of moral rights by the U.S. is compliant with the terms of the Berne Convention. GARON, *supra* note 19, at 43.

44. GOLDSTEIN & HUGENHOLTZ, *supra* note 8, at 75-76.



entertainment industry, and a \$21 million commercial seed industry.<sup>45</sup> Technology industries were growing rapidly around the globe during the 1980s, and the U.S. felt increased threats of foreign competition.<sup>46</sup> These threats were heightened by the lack of enforcement of IPRs abroad; IP products created in the U.S. were at the mercy of the importing country to properly compensate the holders of the underlying IP embodied in those products.<sup>47</sup> The U.S.—the same country that fervently resisted protecting foreign works for the better portion of its existence—was now the champion of strong IPR protection across the globe.

The U.S. recruited other developed and technology-driven countries in the campaign for stricter enforcement of IPRs abroad.<sup>48</sup> Developed countries had a particularly strong interest in robust IP enforcement: 80% of the world's IPRs at the time were held by entities in developed countries.<sup>49</sup> These developed nations argued that increased IPR protection would “encourage foreign direct investment (“FDI”), innovation, and technology transfer, and spur the development of national cultural and creative industries,” as well as “help protect public health and safety” against counterfeit medicines and products.<sup>50</sup>

On the other side of the negotiating table sat a small swath of developing nations. Only about twenty nations from the developing world came to the negotiations with the resources and expertise needed to adequately understand the implications of the discussions.<sup>51</sup> The deliberations concerned highly technical copyright and patent legislation schemes, and developing countries—some of which did not even have copyright or patent laws on the books in their own countries at the time—struggled to fully grasp the minutia of the complex schemes.<sup>52</sup> The countries that did have the requisite savvy, namely Brazil and India, may have faced other international political pressures to accept the terms of the agreement.<sup>53</sup> Needless to say, “[t]he IP playing field was uneven.”<sup>54</sup>

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45. CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 9 (2009).

46. *Id.* at 7-8.

47. *Id.*

48. *Id.* at 8 (stating the European Union and Japan joined the U.S. in its campaign for stronger IPR enforcement).

49. *Id.* at 9.

50. *Id.* A major point of contention during the TRIPS negotiations was striking a balance between patent protection and access to health in the developing world. The patent implications of TRIPS are outside of the scope of this Note, but an understanding of this contentious issue is vital to understanding the context of the negotiations.

51. *Id.* at 8.

52. *Id.*

53. *Id.*

54. *Id.* at 9.

The final terms of TRIPS reflect the “widely accepted” view that “the U.S. made virtually no concessions” during the negotiations.<sup>55</sup> Perhaps the U.S. push for stronger international protection of IP goods should come as no surprise, considering the country’s significant interest in ensuring its technological and entertainment products received adequate protection in markets across the globe. Still, the U.S. transformation from having no interest in extending meaningful copyright protections to foreign materials during the time from the “cheap books” movement, to its hardline protection position at the TRIPS drawing table, is remarkable.

### **B. TRIPS Gets a Sidekick: The Powerful Force of the WTO**

TRIPS initiated a monumental shift in international IP market treatment in three ways: by (1) extending the reach of several of the Berne Convention provisions; (2) requiring ratification of TRIPS as a prerequisite to WTO membership; and (3) providing redress for infringement through the WTO dispute-settlement body.<sup>56</sup>

Just as the Berne Convention initially included the minimum rights of translation and public performance, TRIPS provides an additional series of minimum rights for a copyright holder that better reflect the needed protections of the modern era. TRIPS incorporated by reference all of the Berne Convention rights in its Article 9, with the exception of the moral rights provision.<sup>57</sup> The Berne Convention and TRIPS now provide copyright holders with the rights of translation, reproduction, performance, broadcast, public recitation, and adaptation.<sup>58</sup> These are baseline rights that each member nation must observe and enforce in its domestic copyright regime.<sup>59</sup> Article 19 of the Berne Convention, as incorporated by TRIPS, entitles governments to promulgate “any greater protection” by legislation.<sup>60</sup>

A member state cannot provide “any greater protection” to its nationals while excluding the nationals of other member states, however, under the principles of national treatment.<sup>61</sup> Article 3 of TRIPS (the “National Treatment” provision) requires member nations to afford “nationals of other

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55. BLAYNE HAGGART, *COPYRIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* 83 (2014).

56. *See id.* at 84.

57. Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 9, 1869 U.N.T.S. 299, 301 (1994) (amended Jan. 23, 2017) [hereinafter TRIPS] (incorporating by reference Arts. 1-21 of the Berne Convention, and excepting Art. *bis*).

58. The Berne Convention for the Protection of Literary and Artistic Works, arts. 8, 9, 11, 11bis, 11ter, 12 (respectively), Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

59. GARON, *supra* note 19, at 41-42. The Berne Convention can be self-executing (nation adopts the treaty as the law of the land), or implemented by government in its copyright legislation (as done in the U.S.).

60. Berne Convention, *supra* note 58, at art. 19.

61. *Id.*; *See also* TRIPS, *supra* note 57, at art. 3.

Member[ ] [States] treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.”<sup>62</sup> Under the doctrine of National Treatment, no TRIPS nation can extend benefits to its citizens that it does not extend to foreign nationals, subject to all of the exceptions provided for in the Berne Convention.<sup>63</sup>

Complementary to the National Treatment provision is the Most-Favoured Nation clause embodied in Article 4 of TRIPS (“Most-Favoured-Nation clause” or “MFN clause”). The MFN clause prohibits a TRIPS member nation from extending additional protections to another nation’s IPR holders at the exclusion of others.<sup>64</sup> It requires that “any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country . . . be accorded immediately and unconditionally to the nationals of all other Members.”<sup>65</sup> Essentially, this provision prevents one nation from promoting, or favorably treating, another nation, so that a region or group of countries cannot collude in affording additional protections while refraining from offering these protections to others.<sup>66</sup>

Because TRIPS largely encompassed the standing Berne Convention minimum rights provisions, the true strength of TRIPS rests in its powerful intertwinement with the WTO. TRIPS is one agreement in the WTO system of multilateral treaties, and its ratification is a prerequisite to WTO membership.<sup>67</sup> The WTO “is the only international organization dealing with the global rules of trade between nations.”<sup>68</sup> The organization implements and oversees negotiations for the global multilateral trading system by establishing agreements which act as “legal ground-rules for international commerce.”<sup>69</sup> The WTO’s “overriding purpose is to help trade flow as freely as possible” by reducing barriers to trade wherever appropriate.<sup>70</sup> Therefore, a country’s accession into the WTO allows the country to tap into a network of global trade systems designed to progress the free flow of trade.<sup>71</sup> This network is especially imperative for developing countries that long to gain access to developed markets at lower tariff rates.<sup>72</sup> Of the WTO’s 164

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62. TRIPS, *supra* note 57, at art. 3.

63. *Id.*

64. TRIPS, *supra* note 57, at art. 4.

65. *Id.*

66. *Id.*

67. *See* DEERE, *supra* note 45, at 10.

68. *The WTO in brief*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm) (last visited July 22, 2017).

69. *Id.*

70. *Who We Are*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited July 22, 2017).

71. *See id.*

72. *See The WTO can help countries develop*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi06\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm) (last visited July 22, 2017).

member states,<sup>73</sup> two-thirds are developing countries.<sup>74</sup> By virtue of their WTO membership status, these developing nations are given a seat at the world market table.

A member state that believes its rights under a WTO agreement are being infringed by another member state can bring a claim through the WTO's Dispute Settlement Body.<sup>75</sup> The WTO considers dispute settlement "one of [its] core activities," and has issued over 350 rulings in various trade disagreements since its establishment in 1995.<sup>76</sup> The Dispute Settlement Body has the authority to impose trade restrictions on member states if it finds the state is in violation of one of its agreements, including suspension from the WTO itself.<sup>77</sup> Therefore, tethering TRIPS to WTO membership is powerful because the WTO Dispute Settlement Body oversees the implementation and enforcement of the TRIPS provisions.<sup>78</sup>

As a result of the expansion of the Berne rights and its significant relation to and enforcement by the WTO, TRIPS ushered in a "new and unparalleled emphasis on making privately held IP rights enforceable, demanding stronger provisions in national IP laws to promote enforcement of IP rights at the border and within the domestic market."<sup>79</sup>

### C. Latin America Suits Up

Article 65 of TRIPS built in certain safeguards for developing countries to allow for easier implementation of the TRIPS obligations into their substantive law. Developing countries, including the Latin American signatories, were given until January 1, 2000 to implement its terms.<sup>80</sup>

TRIPS attempted to accommodate the needs of developing nations by providing additional support in implementing the IP regime required by its terms.<sup>81</sup> TRIPS provided transition periods for implementation, required developed countries to enhance technology transfers to the developing world,

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73. *WTO Members and Observers*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited July 22, 2017).

74. Kimberly Amadeo, *WTO Members: Categories and Benefits*, BALANCE, <https://www.thebalance.com/wto-membership-benefits-and-importance-3306364> (last updated July 11, 2017).

75. *WTO Dispute Settlement*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited July 22, 2017).

76. *Id.*

77. *See A Unique Contribution*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited July 22, 2017).

78. *Id.*

79. DEERE, *supra* note 45, at 10-11.

80. Carlos M. Correa, *TRIPS and TRIPS-Plus Protection and Impacts in Latin America*, INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 222 (2007); TRIPS, *supra* note 57, at art. 65.

81. *Id.* at 12.

and committed developed countries to providing technological aid and capacity-building to lesser developed countries.<sup>82</sup>

Overall, implementation of the TRIPS standards in Latin America was “uneven,” with none of the Latin American countries taking full advantage of the aforementioned flexibilities provided to developing countries for smooth TRIPS implementation.<sup>83</sup> Further, many countries in this region executed, and continue to execute, free trade agreements with the U.S. through which the countries backed away from fully utilizing the TRIPS implementation breaks available to them.<sup>84</sup> Latin American countries that elected to enter free trade agreements largely forfeited the right to implementation benefits afforded them under TRIPS.<sup>85</sup>

Despite not taking advantage of some of the TRIPS implementation breaks, most Latin American countries had fully implemented the TRIPS obligations by 2000, as required to maintain TRIPS and WTO compliance.<sup>86</sup> In that year, WTO complaints were filed against both Argentina and Brazil, alleging certain “violations of TRIPS standards.”<sup>87</sup> In both cases the parties reached agreements prior to a ruling before a WTO panel.<sup>88</sup> No complaints have since been filed before the WTO against a Latin American nation, although certain controversial TRIPS provisions continue to delay complete compliance in the region.<sup>89</sup>

Latin America became blanketed by the “one-size-fits-all” TRIPS model at the turn of the twenty-first century, drastically changing the nature of the IPR landscape of the area.<sup>90</sup> For better or worse, the implementation of TRIPS, forcefully backed by the power of the WTO, means it is “more difficult than ever before for developing countries to shy from their international IP commitments.”<sup>91</sup>

## II: LATIN AMERICAN COUNTRIES BECOME NET IMPORTERS OF CULTURAL GOODS

For the developing world, implementing and enforcing TRIPS is a costly venture. The unique features of the creative industries call for the precarious balancing of cultural preservation against commercial exploitation. This Part will begin by detailing the uniqueness of the creative

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82. *Id.*

83. Correa, *supra* note 80, at 222.

84. *Id.*

85. *Id.*

86. *Id.* at 257.

87. *Id.*

88. *Id.*

89. *Id.*

90. See Diana Barrowclough & Zeljka Kozul-Wright, *Voice, Choice and Diversity Through Creative Industries*, in CREATIVE INDUSTRIES & DEVELOPING COUNTRIES 22 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2008).

91. DEERE, *supra* note 45, at 12.

sector in terms of its cultural nature and potential to be rather lucrative and discuss the balance IPR protection measures seek to strike. Next, this Part will examine how TRIPS has led Latin American countries to increasingly import media from high-income countries and has restrained the ability of Latin American countries to encourage domestic development of IP industries, resulting in an overall loss of domestic cultural goods. Lastly, this Part will explore how the increased consumption of foreign cultural goods could impact Latin American culture.

#### A. Not Your Average Industry

IP-based products wed tangible mediums (CDs, DVDs, books, etc.) with underlying cultural expression (music, film, literature, etc.) to form a single economic good. Thus, proper IPR protection is vitally necessary to ensure the economic survival of the creative industry, especially as technology continues to radically change the landscape of media and entertainment consumption across the world.

Creative industries are those “that have their origin in individual creativity, skill and talent with a potential for wealth and job creation through the generation and exploitation of intellectual property.”<sup>92</sup> Economic value to the creator is derived from leveraging the IPRs embodied in the final product.<sup>93</sup> Thus, without adequate legal protection for the underlying IPRs, the creator is cut out of the equation and retains zero economic benefit from contributing to the work.<sup>94</sup> Because the creative sector combines intangible cultural expression with tangible goods, the market is unlikely to correct itself and provide for the economic needs of the creator without a proper legal framework in place.<sup>95</sup> As the global market for cultural goods and services, and the risks imposed by illegal copying, grows, so does the importance of incentivizing IP policies.

While copyright laws serve an important economic role by ensuring financial reward to the creator of the underlying work, the nature of a copyrightable good inherently incorporates a cultural element which IP laws should also be designed to nurture, without significantly limiting the public’s access to knowledge-based products. Distinct from traditional goods, copyright-based products “rely on creativity and knowledge more than other activities.”<sup>96</sup> Thus, it becomes increasingly essential to strike a balance between ensuring the economic benefit to the creator, on one hand, and allowing the public access to knowledge and cultural expression, on the other.<sup>97</sup>

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92. Barrowclough & Kozul-Wright, *supra* note 90, at 4.

93. *See id.* at 4-5.

94. *Id.*

95. *See id.* at 19.

96. *Id.* at 4.

97. *See id.* at 14-15.

For developing countries, properly striking this balance is vital to the ability to produce competitive cultural goods for sale in the global market. In addition to the difficulty of promulgating sustainable copyright legislation, developing countries also face increased barriers to entry due to the structure of the key creative sectors themselves.<sup>98</sup>

First, the creative industry is largely dominated by large, vertically integrated oligopolies with extensive distribution channels.<sup>99</sup> This is especially evident in the film sector, where foreign-owned cinemas have remarkably efficient value chains and the propensity to exclude local content from its screens in favor of international blockbusters.<sup>100</sup> Efficient and value-adding distribution channels are key to the success of marketing a cultural product.<sup>101</sup>

Second, high-income countries wield the benefits of economies of scale to affordably produce, market, and disseminate cultural goods across the globe.<sup>102</sup> Developing countries typically do not have the same advantages of scale, so breaking through national borders is comparably very difficult and expensive.<sup>103</sup> Third, financing large-scale cultural projects is challenging because such products often involve high up-front capital costs, the product cycle is typically very fast, and there is an amplified risk that the product offering will not be well-received by the public.<sup>104</sup>

While technology may render it increasingly difficult to protect copyrighted products, internet services may also have the lesser-appreciated effect of relaxing these barriers to entry.<sup>105</sup> For creative industry newcomers in the era of YouTube<sup>106</sup> and SoundCloud,<sup>107</sup> it is possible to release creative content to the worldwide public from any location using relatively affordable production equipment. Thus, while technology poses a novel threat to current copyright schemes, it also provides novel potential for creators in developing countries to exploit their works on a global stage.

The aforementioned barriers to entry coupled with unworkable copyright laws have led to some unfavorable general trends in the creative industries of the developing world.<sup>108</sup> The lack of infrastructure to support a

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98. *Id.* at 14.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 21.

105. *See id.* at 14.

106. *See About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/>.

107. *See What is SoundCloud?*, SOUND CLOUD, <https://help.soundcloud.com/hc/en-us/articles/115003570488-What-is-SoundCloud-> (“SoundCloud is the world’s leading social sound platform where anyone can listen to or create sounds and share them everywhere.”).

108. As with any general trend, there are also some noteworthy exceptions. In particular, the BRIC countries have generally been successful in leveraging FDI to promote their domestic creative industries. *See Barrowclough & Kozul-Wright, supra* note 90, at 11-12.

creative sector has caused developing countries to lose “place in terms of high value-added and service exports” and to “become increasingly dependent upon exports of commodities.”<sup>109</sup> While the creative industries of developed countries are characterized by modern and mass production, the creative industries of the developing world “remain craft-based or art-based cottage industries.”<sup>110</sup> In fact, 60% of Latin American exports of all cultural goods in 2013 were visual arts and crafts.<sup>111</sup>

The creative industries currently occupy a unique position due to their earning potential on the world market, and Latin America’s recent struggle to capitalize on the growth of this sector puts it at a significant disadvantage. Evaluating the financial position of the U.S. media and entertainment<sup>112</sup> (“M&E”) sector provides insight not only into the stronghold the U.S. has on foreign markets, but also indicates the influence the U.S. has in negotiating on an international level. The U.S. M&E industry makes up one-third of the total global M&E sector, bringing in \$632 billion in revenues in 2015.<sup>113</sup> Those revenues are predicted to grow to \$771 billion by 2019.<sup>114</sup> The trade balance for the filmed entertainment sector alone in 2014 weighed in the favor of the U.S. to the tune of a striking \$16.3 billion trade surplus.<sup>115</sup> On the whole, the U.S. has run a trade surplus in arts culture every year since 2006, reaching \$24.1 billion in 2013.<sup>116</sup>

The potential for great success in the creative sector is evident from the numbers generated by the U.S. industry alone, which enjoys global success for distribution of its cultural products. Latin America should not forgo the opportunity to cash in on this financially and culturally valuable market. To cash in on this opportunity, Latin America must also navigate the sometimes-tumultuous terrain of international copyright law. With these goals in tow, Latin American countries should aim to decrease foreign imports and promote domestic production through effective navigation of its copyright policies within the TRIPS framework.

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109. Barrowclough & Kozul-Wright, *supra* note 90, at 11.

110. *Id.* at 5.

111. UNESCO INST. FOR STATISTICS, *The Globalisation of Cultural Trade: A Shift in Consumption*, 39 fig. 27 (2016) [hereinafter UNESCO], [http://uis.unesco.org/sites/default/files/documents/the-globalisation-of-cultural-trade-a-shift-in-consumption-international-flows-of-cultural-goods-services-2004-2013-en\\_0.pdf](http://uis.unesco.org/sites/default/files/documents/the-globalisation-of-cultural-trade-a-shift-in-consumption-international-flows-of-cultural-goods-services-2004-2013-en_0.pdf).

112. The Media and Entertainment sector, as defined by U.S. Department of Commerce International Trade Administration, consists of four segments: (1) Filmed entertainment (including film, television, home video); (2) Music; (3) Book publishing; (4) Video games. *2016 Top Markets Report Media and Entertainment*, U.S. INT’L TRADE ADMIN., [http://trade.gov/topmarkets/pdf/Media\\_and\\_Entertainment\\_Top\\_Markets\\_Report.pdf](http://trade.gov/topmarkets/pdf/Media_and_Entertainment_Top_Markets_Report.pdf) (Oct. 2016).

113. *Media and Entertainment Spotlight*, SELECT USA, <https://www.selectusa.gov/media-entertainment-industry-united-states> (last visited July 22, 2017).

114. *Id.*

115. *Id.*

116. *Arts and Cultural Production Contributed \$704.2 Billion to the U.S. Economy in 2013*, NAT’L ENDOWMENT FOR ARTS, (Feb. 16, 2016), <https://www.arts.gov/news/2016/arts-and-cultural-production-contributed-7042-billion-us-economy-2013>.



## B. Trouble on the Homefront

Certain TRIPS implications bear directly on the expansion of the trade deficits Latin America experiences in the creative sectors. First, implementing TRIPS was an extremely expensive endeavor for developing countries.<sup>117</sup> Developing countries continue to spend large sums of money enforcing TRIPS standards, thereby constraining government funding which otherwise might be dedicated to fostering domestic markets (to the extent permitted under the National Treatment requirements of TRIPS).<sup>118</sup> Second, the forced implementation of baseline copyright standards means that developing countries miss out of the “reverse engineering” stage of development that many developed countries, including the United States, enjoyed at similar points in their development.<sup>119</sup> The result of missing this stage means developing countries will continue to lag behind their developed counterparts unless an intentional counter-movement is made. Third, TRIPS makes mandatory copyright standards which may not align with the standing domestic policies and infrastructure, and thus enforcement cannot always be carried out effectively.<sup>120</sup> As a result, developing countries bear the burden of TRIPS enforcement while realizing very little of the benefits of stronger IP protection.

The worry of some initial opponents to TRIPS who argued that TRIPS would increase the price of educational and cultural products in developing countries and thus impede on domestic development has somewhat come to fruition in the twenty-plus years since its promulgation.<sup>121</sup> Proponents argued TRIPS would encourage FDI, innovation and technology transfer, and that domestic creative industries would benefit from stronger IP protection.<sup>122</sup> TRIPS proponents also asserted consumers would be protected by stronger copyright standards which would reduce counterfeit and ensure quality of goods.<sup>123</sup>

While the latter camp’s views are certainly not unfounded, the former’s predictions have also proven true. TRIPS implementation and continued enforcement is costly. Many developing countries had to rely greatly on outside legal counsel to weave TRIPS protections into their standing policies within the implementation period.<sup>124</sup> To implement TRIPS, member states not only had to create new legislation, but also had to put registration systems in place, train staff, and provide enforcement

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117. DEERE, *supra* note 45, at 10.

118. *Id.*

119. *Id.* at 9.

120. *See* HAGGART, *supra* note 55, at 5-6.

121. *See* DEERE, *supra* note 45, at 9-10.

122. *Id.* at 9.

123. *Id.*

124. *Id.* at 10.

mechanisms.<sup>125</sup> Astonishing losses occasionally accompanied these costs. The World Bank estimated in 2002 that TRIPS implementation would result in annual net losses in payment for technology and in FDI flows for Mexico of \$2.5 billion, for Brazil of \$530 million, for China of \$5.1 billion, for India of U.S. \$903 million, and for Republic of Korea of \$15.3 billion.<sup>126</sup> These costs greatly strain the pockets of developing countries, many of which have other public interests demanding government funds.<sup>127</sup>

TRIPS also prevents developing countries from benefitting from two things that greatly benefitted developed countries at earlier points of their growth: copying and reverse engineering.<sup>128</sup> Developing countries are net importers of IP, and thus “s[ee]k to employ the same strategies of copying and reverse engineering that had served developed countries at similar stages of development.”<sup>129</sup> Opponents of TRIPS pushed to “limit the recognition of IP rights for foreigners,” arguing that “[f]lexibility regarding the scope and terms of IP rights granted within their borders was . . . central to national efforts to promote national industrial capacity, generate employment, and ensure affordable access to essential technologies and knowledge.”<sup>130</sup> The strength National Treatment requirement demonstrates that developed countries were not entirely successful on this stance.<sup>131</sup>

As a result, developing countries cannot use the advancements of the developed world to progress domestic industries. Of course, this conduct is precisely what IP laws seek to prohibit, and developed countries can hardly be criticized for wanting to collect on their creative or technological successes and preclude others from inappropriately capitalizing on the copyright holder’s rights in the work. Ultimately, however, the ban against reverse engineering widens the gap between the developed and developing worlds because creators in developing countries cannot benefit from the discoveries of the developed world, and instead must pay higher fees in order to possess these products. Some critics color this unfair, because “[n]ow-‘developed’ countries like the United States may have industrialized through the free appropriation of other countries’ ‘intellectual property,’ but TRIPS makes it impossible for today’s developing countries to take the same path.”<sup>132</sup>

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125. Carsten Fink, *Intellectual Property and the WTO* 11 (2004), <http://hdl.handle.net/10986/25931>. Note, however, that Fink suggests these measures may have been taken regardless of the TRIPS requirements. He is addressing Mexico, in particular, which made these changes prior to coming under TRIPS obligations.

126. *Global Economic Prospects and the Developing Countries*, WORLD BANK 133 (2002).

127. DEERE, *supra* note 45, at 10.

128. *Id.* at 9.

129. *Id.*

130. *Id.*

131. *See* TRIPS, *supra* note 57, at art. 3.

132. HAGGART, *supra* note 55, at 69.

The third TRIPS-related factor contributing to the disparity in creative output between developing and developed countries is the mandatory baseline copyright protections embodied in the agreement. The national policies of countries with highly lucrative content industries reach beyond domestic borders to influence the international treatment of such industries, consequently decreasing the ability of developing countries “to exercise copyright-policy autonomy and implement policies that reflect their citizens’ economic and cultural needs.”<sup>133</sup>

At the risk of stating the obvious, IPRs are foremost *property* rights, strongly rooted in ideals of Western capitalism.<sup>134</sup> The underlying concepts of copyright protection, such as originality and uniqueness, are “Western in origin,” and shape the entire framework for IPR regulation.<sup>135</sup> The notion of piracy, for example, is drenched with illegality from a Western property right perspective, while other countries with a less absolute idea of personal property rights would not have such a negative association with the use of one’s creative work to further the creative or intellectual objectives of another.<sup>136</sup> In fact, if the policy argument for copyright protection is to encourage the development of creative and educational works in order to benefit the greater society, it can be argued that overly-stringent copyright policies serve as a barrier to this purported goal. Requiring developing countries to implement copyright policies that contradict with their domestic objectives creates dissonance in the country, and ultimately restricts the country from being able to promulgate workable laws that would grow its domestic industries.

Because cultural goods exist at the intersection of “the intangible and the tangible,” their development, purchase, and sale is difficult to capture with traditional data.<sup>137</sup> The difficulty in tracking the flows of cultural goods and services has increased with the growth of internet-based services, especially with regards to transactions taking place in illegal markets. Currently, organizations dedicated to providing reliable data on international trade are encouraging countries to take measures to better track the flows of cultural goods and services.<sup>138</sup>

Still, the data collected demonstrates that the global market for entertainment and media goods has burgeoned since the promulgation of TRIPS.<sup>139</sup> For the most part, however, developing countries are being left out of the global success.<sup>140</sup> For example, while a recent study showed “considerable weight of copyright related-industries in Argentina and Brazil (around 6 per cent of GNP),” the study also notes, “most value added is

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133. *Id.* at 5.

134. *Id.* at 52.

135. *Id.*

136. *Id.*

137. Barrowclough & Kozul-Wright, *supra* note 90, at 3.

138. *See* UNESCO, *supra* note 111.

139. Barrowclough & Kozul-Wright, *supra* note 90, at 6.

140. *See generally*, Barrowclough & Kozul-Wright, *supra* note 90.

contributed by the distribution of *imported* copyright works rather than the local production thereof,” thereby resulting in “significant trade deficits in this area.”<sup>141</sup> This pattern of stricter IP protection resulting in net importation of cultural products is common among countries that are not top producers of creative goods.<sup>142</sup> In fact, Canada recently resisted stronger IP legislation noting, “stronger copyright laws always increase the country’s trade deficit in royalties.”<sup>143</sup>

These trade deficits are important because they demonstrate that Latin Americans, and many other nationals in developing countries, are increasingly consuming media created in, by, and for foreign markets. While there are benefits associated with importing high-quality creative goods, including access to diverse international products at a relatively cheap price, “unless developing countries start producing their own films, music and other creative products, they will increasingly find themselves importing them.”<sup>144</sup>

A 2013 UNESCO Report on the international flow of cultural goods and services provides valuable insight into the dynamics of cultural goods and services relative to a country’s income.<sup>145</sup> According to the Report, for example, while economies of every income bracket import audiovisual and performance goods to some degree, only high-income and upper-middle-income economies export them.<sup>146</sup> This sector experienced a 112% growth between 2004 and 2013, but the entire audiovisual sector was dominated by only a handful of countries in 2013.<sup>147</sup> Similarly, nine of the ten top exporters for the “Performance and Celebration Domain” of the Report were high-income countries.<sup>148</sup> The U.S. alone exported \$3.3 billion of goods in this domain in 2013.<sup>149</sup>

High-income earners enjoy an even larger lead in the realm of creative services, as compared to creative goods. From 2003 to 2013, high-

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141. Correa, *supra* note 80, at 224 (citing OMPI-UNIVERSIDADE ESTADUAL DE CAMPINAS, ESTUDIO SOBRE LA IMPORTANCIA ECONÓMICA DE LAS INDUSTRIAS Y ACTIVIDADES PROTEGIDAS POR EL DERECHO DE AUTOR Y LOS DERECHOS CONEXOS EN LOS PAÍSES DE MERCOSUR Y CHILE 62-63 (2002)) (emphasis added).

142. HAGGART, *supra* note 55, at 242.

143. *Id.*

144. Barrowclough & Kozul-Wright, *supra* note 90, at 12.

145. See UNESCO, *supra* note 111. Note that UNESCO’s definition of “cultural goods” reaches beyond the scope of the copyright industries by including most copyright industries, cultural education, national heritage, tourism, sports, festivals, libraries, and museums. UNESCO also evaluates “cultural services” in the Report, which more closely reflect the workings of copyright industries because the services deal with the underlying transactions not relative to the product itself, such as payment of royalties and fees.

146. UNESCO, *supra* note 111, at 41, figs. 29 and 30.

147. *Id.*

148. UNESCO, *supra* note 111, at 36, 44. The Performance and Celebration Domain encompasses musical instruments and recorded media, such as CDs. The only non-high-income country in the group was China, which manufactures large amounts of CDs and other media products in this domain, and therefore may skew the data for copyright purposes.

149. *Id.* at 44.

income economies held 90% of the world's exports for cultural services.<sup>150</sup> The U.S. alone enjoyed a trade *surplus* of \$45.1 billion for cultural services in 2012; Argentina, Peru, Colombia, and Brazil all experienced trade *deficits* in the amounts of \$100 million, \$300 million, \$400 million, and \$600 million respectively.<sup>151</sup> Perhaps predictably, the Report found that cultural services are “highly dominated by high-income economies.”<sup>152</sup>

Further, the Report examined the global film market and discussed the increased similarity of successful films on a worldwide scale, concluding that the same movies are seen around the world, regardless of income level.<sup>153</sup> Film studios are progressively collecting increased revenues from international box offices, with Warner Brothers deriving 62% of its box offices sales from international markets in 2013.<sup>154</sup> With potential for high profits abroad, film giants are increasingly seeking to promote and distribute to every corner of the globe. As a result, “at least one-half of the top 10 movies seen in 2012 and 2013 were the same movies in 71% of the countries surveyed” by the UNESCO Report.<sup>155</sup> In the majority of countries surveyed, only 30% of a particular country's top ten films of 2012 and 2013 were produced domestically.<sup>156</sup> Domestic films comprised less than 20% of the top ten films of 2012 and 2013 in the Latin American countries surveyed.<sup>157</sup>

Latin America has even found itself importing cultural goods which have origins in the region but are produced in the U.S., as is the case of the vibrant Latin music industry.<sup>158</sup> The region is known for a prolific music sector, bolstering a significant share of world music consumption.<sup>159</sup> Perhaps unfortunately for Latin America, however, many successful musicians in Latin America are “poached” by U.S. major labels after the musician has garnered regional fame.<sup>160</sup> The royalties generated by these popular artists are accordingly funneled into the pockets of the U.S. entities that own the rights.<sup>161</sup> Because distribution in Latin America is built on scale, U.S. media conglomerates are best situated to be successful in this region.<sup>162</sup> However, the globalization of media outlets “generates an increasing disconnection of

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150. *Id.* at 70, fig. 53.

151. *Id.* at 72, fig. 56.

152. *Id.* at 76.

153. *Id.* at 78, fig. 60.

154. *Id.*

155. *Id.* at 77.

156. *Id.*

157. *Id.* at 78, fig. 60.

158. Stuart Cunningham, Mark David Ryan, Michael Keane & Diego Ordonez, *Financing Creative Industries in Developing Countries*, in *CREATIVE INDUSTRIES & DEVELOPING COUNTRIES* 65, 75 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2008).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 91.

the local audiences with Indigenous genres, a situation that is illustrated in some Latin American music industries.”<sup>163</sup>

Thus, the infiltration of Western entertainment media in Latin America has deepened. As a result, the various cultures of Latin America could lose their distinctive voices and competitiveness in the clatter of the international media market.

### C. Latin American Consumers Need a Héroe

Global homogenization of product offerings, including those originating from creative industries, creates “reduced consumer choice and welfare losses.”<sup>164</sup> In the media realm, homogenization is “facilitated by an absence of strong local creative industries and the presence of western-dependent media structures, resulting in the inability to resist the external media monopolies.”<sup>165</sup> The result is a one-dimensional cultural product offering, which greatly reduces diversity of choice.

Homogenization of copyright-based goods is particularly problematic because such products are a part of the *knowledge* economy, and are therefore inseparably intertwined with culture.<sup>166</sup> As global media conglomerates “attempt to control the market by determining taste in order to guarantee demand” for their creative products, these entities “progressively diminish diversity in market choices.”<sup>167</sup> For example, Hollywood realizes the majority of its revenues in box offices abroad, but most of the production inputs (writers, actors, shooting locations, etc.) have a U.S. origin.<sup>168</sup> The circulation of foreign films in the U.S. domestic market, meanwhile, is less than 3%.<sup>169</sup>

In the television industry, a “small number of media conglomerates controlling the global market [have] reduced the offering of television products throughout the world” so that people of different countries are tuning into the same programs.<sup>170</sup> This trend does not necessarily reflect viewer preference, however.<sup>171</sup> In fact, studies show audiences in both developed and developing countries “have a preference for local content.”<sup>172</sup> The success of regional movie centers, such as “Nollywood” in Nigeria or “Bollywood” in India, provide at least anecdotal support for this assertion.<sup>173</sup>

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163. *Id.*

164. Barrowclough & Kozul-Wright, *supra* note 90, at 12.

165. *Id.*

166. Anna Jaguaribe, *The Policy Parameters*, in CREATIVE INDUSTRIES & DEVELOPING COUNTRIES 305, 311 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2008).

167. *Id.*

168. *Id.*

169. *Id.* at 314.

170. *Id.*

171. *Id.* at 315.

172. *Id.*

173. See LARS ECKSTEIN & ANJA SCHWARZ, POSTCOLONIAL PIRACY: MEDIA DISTRIBUTION AND CULTURAL PRODUCTION IN THE GLOBAL SOUTH 92 (2014) (quoting Igwe:

In her essay *The Policy Parameters*, Anna Jaguaribe details this system in which “the consumption of culture is tied with economic achievement.”<sup>174</sup> She demonstrates the cyclical nature of the industry in which high-income earners have the financial leverage to create “diversified service sectors, which in turn increase the demand for cultural goods.”<sup>175</sup> As a result, creative goods are transformed into “tradable commodities” by the creation of a global mass market for such products.<sup>176</sup> Because developing countries lack the resources to compete with their developed counterparts, they “are usually relegated to the position of consumers of imported cultural goods and services and producers of folklore.”<sup>177</sup>

In the modern era, media at least informs, and at most constructs, culture.<sup>178</sup> Instead of “institutions, such as the school, church and public ordinances” serving as the basis for cultural communication, “media exchanges and consumption of symbolic creative goods and services” now serve as the primary communication of culture.<sup>179</sup> Because developed countries have such a strong-hold on the creative industries, developing countries will face an even more pressing need to curate creative products which reflect local culture if they wish to preserve it.<sup>180</sup>

### III: FOSTERING DEVELOPMENT OF THE CREATIVE INDUSTRIES IN LATIN AMERICA

Typically, developing countries face a disadvantage in the creative sectors as compared to their developed counterparts not only because there is a more pressing need for governmental financial support for the arts, but because of the need to funnel governmental money into other areas of public aid.<sup>181</sup> TRIPS makes it even more difficult to provide incentives to local creators because of its National Treatment provision and by mandating countries adopt a specific copyright regime that is not tailored to its legal structure.

This Part will first discuss measures taken by other countries on the outskirts of the global entertainment industry that have proven successful in sustaining culturally and economically efficient production models. Next, this Part will evaluate how these models may be integrated into the Latin American framework and suggest an international co-production strategy to capitalize on Latin America’s distinct advantages of cultural vibrancy and

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“[T]he first Nollywood movie was a story ‘being told by our people to our people . . . What is most important is that movies aren’t just business, they are cultural expression.”)

174. Jaguaribe, *supra* note 166, at 313.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 317.

181. Cunningham et al., *supra* note 158, at 65.

mostly common language. In doing so, this Part will also address how these measures could be implemented without violating any standing TRIPS obligations or threatening a country's WTO membership standing.

**A. A Vigilante No More: Framework for TRIPS Compliance**

The Most Favoured Nation and National Treatment clauses of TRIPS greatly constrict any nation's ability to implement regulations that would benefit local production of copyright-related goods at a disadvantage to foreign products. Additionally, TRIPS limits a country's ability to promulgate IP laws that best promote the creative industries because of its mandatory baseline protections. Failure to comply with these provisions puts countries at significant risk of WTO-imposed sanctions.

Developing countries must, therefore, be strategic in their efforts to promote domestic creative industries while maintaining TRIPS compliance. In her essay *Promoting Creative Industries: Public Policies in Support of Film, Music and Broadcasting*,<sup>182</sup> Dr. Verena Wiedemann provides four conditions, discussed below, which support a vibrant creative industry sector while recognizing first and foremost that "no single set of policies can be described as optimal for the developing world."<sup>183</sup> Instead, policies designed to promote the creative industries of the developing world should be implemented taking the "country's creative sectors, its resources, and its other policy priorities" into account.<sup>183</sup>

The first necessary condition Dr. Wiedemann identifies within this framework is the freedom of speech.<sup>184</sup> Authors must, fundamentally, have a protected outlet for their own creative expressions.<sup>185</sup> In turn, authors must also be able to receive inspiration through interaction with a variety of cultural products without restriction.<sup>186</sup> Second to the right to free speech, proper IPR protection regimes are integral to the vitality of a developing country's creative sector.<sup>187</sup> While royalty collection agencies have contributed to the overall enforcement of IPRs on a global level, the strength of the domestic market depends on how closely tailored the copyright regime is to the needs and understandings of the local artist community.<sup>188</sup> Artists in developing countries are at risk of being left out of this global success if their creative works do not benefit from the copyright structures in place which

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182. Verena Wiedemann, *Promoting Creative Industries*, in CREATIVE INDUSTRIES AND DEVELOPING COUNTRIES 251, 251 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2008).

183. *Id.*

184. *Id.* at 252-53.

185. *Id.*

186. *Id.*

187. *Id.* at 253.

188. *Id.*



compensate authors for their successes because of the indigenous artist's failure to comply with a technical requirement of copyright protection.<sup>189</sup>

Third, achieving "media pluralism" will ensure there are many participants in the creative industry sector, so to avoid a few controlling the whole.<sup>190</sup> In pursuit of this goal, Dr. Wiedemann recommends limiting the number of radio or television licenses a single owner may hold.<sup>191</sup> If this step is not taken at the outset, however, it might be impossible to achieve optimal media plurality because once the industry is in the hands of a few, the lobbying strength will be too powerful to counteract.<sup>192</sup>

Lastly, protecting the economic and social status of authors is central to maintaining a vigorous creative industry.<sup>193</sup> Governments and private agencies alike should take advantage of non-conventional opportunities to use the arts to support artists, such as providing social security to freelance artists as it is provided for other self-employed individuals, and using the proceeds of large-scale endeavors to fund artists.<sup>194</sup> This prong becomes increasingly important if artists are not included in the benefits of the copyright scheme and therefore are not collecting royalties for their work.

## B. A Content Quota & Co-Production Fly-Over

With this framework in mind, policymakers can evaluate various methods designed to support the creative sector in their own countries. While many mechanisms for funding have proven successful in fostering domestic creative industries,<sup>195</sup> typically the most successful measures hazardously hinge on the edges of the TRIPS provisions which prohibit favoring domestic over foreign cultural products.<sup>196</sup>

One way in which countries ensure domestic artists are getting more air-time in their own countries is by imposing content quotas on movie

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189. *Id.* For example, TRIPS does away with registration requirements for obtaining a copyright. Under TRIPS, an author obtains a copyright in the work once it is fixed in a tangible medium of expression. Many indigenous cultures, however, have a tradition of passing creative works through oral expression and therefore never "fix" the work in a tangible form. These works are, accordingly, barred from obtaining copyright protection. Some agencies have started working to promulgate laws that would allow indigenous people groups to receive the benefits from copyright protection without complying with the fixation requirement.

190. *Id.* at 253-54.

191. *Id.* at 254.

192. *Id.*

193. *Id.*

194. *Id.* India provides one such example, where proceeds of the film "Gandhi" were given to finance elderly local artists.

195. *See id.* Some examples of public funding include the following mechanisms: public loans (carrying specific requirements regarding language, hiring of nationals, place of commercial presence, etc.); tax incentives (using nationality-based criteria to provide write-offs to producers); third-party taxation (deriving revenues from sales of related or unrelated products); and subsidies (providing manufacturing for domestic artists).

196. *See id.*

theaters, radio stations, and broadcasters. Under a quota system, a minimum percentage of the total offerings must be domestically produced.<sup>197</sup> Content quotas are common in television and radio broadcasting around the world.<sup>198</sup> In the European Union, for example, the majority of all television content must originate from other E.U. states.<sup>199</sup> Australia and Canada impose similar quotas on television broadcasters, with 50% and 60% minimums, respectively.<sup>200</sup> In attempts to cultivate its local creative industry, Brazil enacted a unique quota requirement in 2012 for pay-television stations, under which television broadcasters must air three-and-a-half hours of domestic material daily.<sup>201</sup> Foreign producers looking to penetrate markets in which a quota is in place are usually left with the option of partnering with local enterprises to get screen time.<sup>202</sup>

Steep quotas do not come without their disadvantages, however. As this minimum requirement increases, the diversity of product offerings decreases, and the enforcement of the quota could even impinge on free speech.<sup>203</sup> Malaysia, which requires 80% domestic content, and China, which requires 90% domestic content, could find themselves in this latter camp.<sup>204</sup>

Additionally, rigorous quotas can place a country at risk of violating the National Treatment requirements of TRIPS and subject the country to other trade-related sanctions.<sup>205</sup> The case of South Korea illustrates the benefits of film quotas on film distribution for generation of local content, as well as the reactionary dangers which stem from the imposition of such quotas. In 1993, Korean films held only a 15.9% share of the domestic market.<sup>206</sup> Recognizing a need to promote domestic film production, the country imposed a screen quota under which 40% of cinema screens were required to show domestic content.<sup>207</sup> The quota now sits around 20%, but the market share for Korean films has jumped to more than 50% in the years

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197. *Id.* at 259.

198. *See id.*

199. *Id.*

200. *Id.*

201. *2016 Top Markets Report Media and Entertainment Case Study*, U.S. INT'L TRADE ADMIN., [http://trade.gov/topmarkets/pdf/Media\\_and\\_Entertainment\\_Brazil.pdf](http://trade.gov/topmarkets/pdf/Media_and_Entertainment_Brazil.pdf); Renata Acioli, *In Brazil, Film and TV Law Fosters Industry Boom*, SPARKSHEET, (Aug. 31, 2015), <http://sparksheet.com/in-brazil-film-and-tv-law-fosters-industry-boom/>.

202. *See* U.S. INT'L TRADE ADMIN., *supra* note 201, at 5 (previewing growth opportunities if U.S. producers partner with local agencies).

203. Wiedemann, *supra* note 182, at 259.

204. *Id.*

205. For example, the U.S. Trade Representative issues its own “watch-list” of countries found to be violating or infringing upon U.S. copyrights, called the Special 301 Report. A country could face severe trade sanctions from the U.S. if its conduct places it on the Special 301 Report. *See Special 301*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/intellectual-property/Special-301>.

206. Wiedemann, *supra* note 182, at 259.

207. *Id.*

following the implementation of the quota.<sup>208</sup> South Korea's success with content quotas for film has not gone unnoticed; the U.S. has pressured the country to abolish its screen quotas.<sup>209</sup>

Complementary or alternatively to content quotas, international co-production agreements have also increased the production of domestic cultural goods, particularly in the audiovisual realm. Co-production agreements are partnerships between countries which grant national treatment to member states to ensure full access to the public funding schemes available to each country.<sup>210</sup> In a co-production framework, partners agree to contribute a certain percentage or particular service to the overall project and, in doing so, decrease the costs involved for any one partner. Take, for example, an Australian film producer who wants to film a scene for its movie at Iguazu Falls, in Argentina. This could be an expensive endeavor as a foreign film producer. However, if Australia and Argentina enter a co-production agreement, the Australian producer might partner with Argentine crews to execute the shoot. The result is cost-saving for the Australian partner, and revenue-gaining for the Argentine partner.

Additionally, co-production agreements involve less risk of violating TRIPS than content quotas because they do not discriminate based solely on origin. Instead, a film created through international co-production may have many "domestic" homes, based on the sources of various inputs. Tracking this earlier example, the film may be considered domestic to *both* Argentina and Australia because of the nature of its production. Co-production agreements allow producers of one country to tap into the resources of another and create a transnational system of distribution, which is often the costliest aspect of the audiovisual sector.<sup>211</sup> This arrangement encourages the exchange of cultural goods while increasing global competitiveness in the sector.<sup>212</sup>

The shared cost structure of co-production arrangements encourages growth of entertainment and media production in the developing world while maintaining TRIPS compliance. However, international co-production agreements do not fully solve the issue of cultural homogenization and dilution because the products themselves are designed to be successful to wide audiences and may squash cultural individualism in the process.<sup>213</sup>

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208. *Id.*; Sonia Kil, *South Korea Proposes Quota for Art Movies*, VARIETY MAG. (Mar. 10, 2016), <http://variety.com/2016/film/asia/south-korea-proposes-screen-quotas-for-art-films-1201727138>.

209. Wiedemann, *supra* note 182, at 259.

210. *Id.* at 267.

211. *See id.*

212. *Id.*

213. *See id.*

### C. Latin America: Assemble!

The Latin American region possesses certain features, such as common language and cultural proximity, that make it fertile ground for successful co-production agreements. Because “control of distribution is the most important instrument of domination of media conglomerates,” a co-production strategy would best address the pressing need of effective distribution channels across Latin America.<sup>214</sup> The region has garnered success in the film sector through partnerships with Spain and Portugal, but Latin American countries should continue to aggressively enter co-production arrangements with other countries in the region in the various sectors of the creative industries.

Several Latin American countries have co-production agreements in the film sector, most notably via the Ibermedia fund, which supports audiovisual operations in Spain, Portugal, and thirteen member nations in Latin America.<sup>215</sup> Ibermedia is primarily funded and located in Spain, and requires participation by at least three member countries in each production it funds.<sup>216</sup> Ibermedia has been instrumental in guaranteeing Latin American countries access to European markets which might otherwise be out of reach due to financial or geographical barriers.<sup>217</sup> Spain is the majority contributor to Ibermedia, providing approximately 60% of the fund’s total capital.<sup>218</sup>

While Ibermedia provides Latin American countries access to the European market, Spain’s large share of contribution and the need to appeal to this market likely will lead to less-diverse media product offerings because of the need to create global “tradable commodities.”<sup>219</sup> Latin American nations should create partnerships similar in structure to Ibermedia, relying upon the strength of the potential Latin American market alone.

International co-production schemes have proven successful in the film sector, but their application to other areas of the creative industries has been limited. To address the problem identified in Part II above, in which Latin American recording artists are “poached” by U.S. conglomerates after gaining regional fame, Latin American countries should mirror the film co-production scheme in their music recording sectors. While co-production arrangements in the music industry would naturally look a bit different from their film counterparts due to the lower number of inputs involved in curating the finished product, the overall benefits could be similarly achieved. In a

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214. Jaguaribe, *supra* note 166, at 315.

215. Tamara L. Falicov, *Programa Ibermedia: Co-Production and the Cultural Politics of Constructing an Ibero-American Audiovisual Space*, HYBRID MEDIA, AMBIVALENT FEELINGS 21, 21 (Hyung-Sook Lee ed., 2007); Steve Solot, *The New International Co-Production Scenario*, LATIN AMERICAN TRAINING CTR. (Nov. 4, 2011), <http://latamtrainingcenter.com/?p=2685>.

216. Solot, *supra* note 215.

217. *Id.*

218. Falicov, *supra* note 215, at 22.

219. Jaguaribe, *supra* note 166, at 313.

music co-production scheme, a few countries could organize to provide the publishing, production, and distribution of a sound recording. Under this model, the creative control and copyright royalties would remain in Latin American hands and pockets, effectively preserving the cultural expressions embodied in the final recordings.

Under Weidemann's policy framework, this strategy would promote the creation of domestic creative industries in accordance with the standing IP protections of TRIPS, while introducing more players into the local sectors and thus achieving media pluralism. Additionally, an exclusively Latin American co-production scheme would guarantee creators' economic rights by providing prolific opportunities to engage in projects throughout the entire region. These economic rights would be bolstered by the standing IP regime implemented through TRIPS. Accordingly, TRIPS would not stand as a barrier to creative production, but rather act as a pillar of support for those entities involved in the producing the large-scale projects which in turn cultivate the vibrancy of local culture.

#### CONCLUSION

Co-production agreements that transcend territorial boundaries may hold the key for Latin American countries seeking to preserve and cultivate their domestic cultures through goods which reflect local preferences and values. While TRIPS has heightened the cost of producing IP-based products in Latin America, and thus rendered the region a net importer of cultural goods, Latin American nations have the opportunity to aggressively engage in international co-production arrangements to make their voices heard on the domestic and global level. In doing so, Latin American nations can preserve their local cultures while being globally competitive and, in turn, come to rely on the strength of the TRIPS provisions to funnel royalties back into Latin American economies.