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SOME REALISM ABOUT INDIGENISM*

Michael H. Davis**

The debate about creating so-called intellectual property ("IP")—legal monopolies—over indigenous information (a product mostly of Third World countries) is habitually (almost stereotypically) characterized by qualifications that such monopolies really don’t fit, and further qualifications that although they don’t fit they are the best alternative. But underlying both sets of qualifications is often a confusion about what the real problem is. Because of a frequent failure to analyze closely the problem (and sometimes because of misinformation mixed with an unhealthy dose of romanticism), critics far too often jump to the legal monopoly solution to problems that ironically may be in large part the consequences of IP itself.

The debate, as is recognized by critics, involves several distinct and very different concerns. It would be a remarkable serendipity if all of them, or even most, could be addressed by a single solution. To make matters worse, it is not even clear that all—or even many—of them truly merit resolution. But deciding whether they demand a solution, and what the (various) solutions may be, becomes more difficult when they are confused or misunderstood.

The goal of this essay is first to identify concretely the different concerns in this debate, then to discuss briefly how their characters may demand remedies that are exclusive of one another and then, most importantly, to determine, once the issues, problems, and remedies, are exposed, whether they are in truth isolated

* The title is derived, obviously, from Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931), and those many imitators before me, my favorite being Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451 (1974). The word "indigenism" is my neologism, but it seems more harmonious with the title, and no less awkward nor neological, than what the Oxford English Dictionary suggests: "indigentity." 7 Oxford English Dictionary 867 (2d ed. 1989).

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1 Because I do not wish to support the doubtful proposition that so-called intellectual property merits the label "property," I prefer to call it "so-called intellectual property." To avoid the awkward repetition of that qualification, I incorporate the entire phrase into the term "IP."

problems or whether they are merely consequences of a far more dominant problem. In other words, despite their disparity, do they still have something legally important in common? Does IP, especially through TRIPS,\textsuperscript{3} really offer a solution to the problems Third World countries seek to resolve? Can it protect the very substance of indigenism—its cultural intellectual product?

**Clearing Out the Underbrush**

Reviewing the literature\textsuperscript{4} identifies at least five relatively different goals of indigenism: (1) ownership and control of cultural information, (2) the ability to exploit and profit from the use by others of that information, (3) promotion and encouragement of cultural information, (4) protection and preservation of bio-cultural information, including biodiversity, and (5) protection and preservation of cultural artifacts. The major legal issues of indigenism and IP involve demands that IP regimes be created to accomplish those five goals. And indigenism has posed these demands because no existing legal tools have managed so far to accomplish these goals.

That these are new legal issues is very much the heart of the problem. Because existing legal regimes do not address many of these concerns, attempts to do so using existing models are probably bound to be dissonant. This is why the qualifications men-


tioned at the start of this discussion are so characteristic. The collision between IP and these novel goals is inevitable. In the end, it is inescapable that IP was never designed to address these concerns and may well be totally inadequate to do so. Or worse, an attempt to harness these concerns with inconsistent legal regimes may, in fact, aggravate the problems.

Next I will clarify the potential IP impact on each of the five different goals of indigenism. Is IP the appropriate means to reach those goals? I will conclude that indigenism is not so much a legal problem, as it is, in all its many facets, an economic one: lack of wealth.

1. Ownership and Control of Cultural Information

Indigenism proposes an ownership regime over cultural information, such as folklore, traditional medical products and procedures, mores, and customs. But one must ask how this information will be protected by regimes that share intellectual property characteristics. At bottom, IP owners exercise ownership and control by, in one way or another, profiting from its use, by either charging a fee for its use by others, or by licensing others to collect that fee. But it does not seem that indigenism, with respect to at least some of its concerns, wants so much to commercialize this information as to assert ownership and control in order to protect it (although, as discussed in the second category, they do want to share in profits if others commercialize). But protection, as is noted below, is an entirely different thing than what IP purports to do—that is, to allow for an efficient means of commercializing information. (In fact, a major goal of IP is to alter, not preserve, its subject matter by encouraging innovation and thus modifications, thought of as improvements, to existing inventive and expressive works).

If the goal of indigenism is so different from what IP normally promises, why is indigenism not able to accomplish its goal with a more appropriate tool? How would one best go about protecting cultural information from unauthorized use or misuse by others? What is it exactly that is being protected? It appears that indigen-

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5 See sources cited supra note 4 (especially Downes, Quinn, Ragavan, and Scafidi).
ism seeks to protect the integrity of this knowledge from dilution, erosion, and disappearance, and to do that requires something different than IP. How do societies normally protect their information from a loss of integrity, or worse total disappearance? It would seem that this is a kind of archiving activity normally accomplished by libraries or depositories in one form or another. Why does not indigenism simply advocate the establishment of massive archiving and preservation institutions that would safeguard cultural information from loss?

To pose the question is to answer it. After all, if the indigenous were advanced societies they would have all sorts of institutional devices to preserve and protect their heritage. Is this, after all, nothing more than a consequence of poverty? Are the demands for legal protection simply an attempt to find an institutional response that appears to be affordable or, perhaps, shifts the cost to others? Is this not, in the end, a question of wealth?

2. THE ABILITY TO EXPLOIT AND PROFIT FROM THE USE BY OTHERS OF CULTURAL INFORMATION AND CULTURAL PRODUCTS

At the outset, note that this category overlaps the fifth. The protection of historically significant cultural artifacts is different, however, from the exploitation of modern productions or reproductions. For the latter, the use of marks of authenticity has been suggested, and, to the extent they are useful, they are no different in substance from modern (or even ancient) trademarks. The use of such marks, however, virtually cedes legitimacy to those who would create non-authentic reproductions. Opposition to those creations would be problematic once marks of authenticity were adopted.

The claims that the indigenous have a right to share in the profits of the use of their cultural information certainly smacks of some moral claims, and thus gains some apparent legitimacy. It is also consistent with the classical commercial goals of IP. But the subject matter, of course, is not consistent with IP—it is not innovative, it exists in the public domain, and thus IP protection serves none of the classical purposes of IP. Certainly, the indigenous community would not support Northern demands that the South pay even more for the use of all sorts of Northern cultural informa-

7 Scafidi, supra note 4, at 819-20.
tion that is presently used without additional cost because it carries no IP protection. (Imagine, for instance, if the North demanded royalties for the Western style of architecture found in both North and South today or for the use of all sorts of Western clothing found in ever-increasing areas of the entire globe.) Why does the indigenous community demand a right that it could not conceivably afford to grant to other (developed) communities?

That question is raised because it seems obvious that the indigenous community seeks this profit as one of the only available sources of revenue it possesses and, as well, sees the Northern exploitation of Southern cultural information as a form of "free-ridership." But, if so, both of these reasons are related more to the poverty of the South than to either the sensibleness of the proposal or its essential merit. We might ask here, again, what is it that the indigenous really are seeking here? In this case, it is quite explicitly economic revenue in the form of commercial profits. Once again, the issue does not seem to be one of IP, but one of wealth.

If it is one of wealth, it is doubtful that the Third World is going to become wealthy through the sale of its cultural knowledge. If the goal is to equalize the gap between First and Third World, the sale of cultural information will be exquisitely uncompetitive in a world of high technology. It seems clear that an IP or IP-based sui generis regime is not going to achieve the real goal—competitive wealth.

3. **Promotion and Encouragement of Cultural Information**

In this category there is a host of cultural information amounting to the entire body of cultural identity, and the aims of promotion seem clearly non-commercial. Instead of an ability to exploit or license others to do so, the goal is quite different: to promote the use, production, preservation, and appreciation of indigenous information—for the most part by the respective indigenous populations themselves—while at the same time preventing the intrusion of Northern or Western values, and perhaps saving indigenism from dilution or extinction. The inaptness of intellectual property is clear, especially because other tools have long been used to achieve this goal. For instance, Canada’s province of Quebec has long, although controversially, imposed French-language require-
ments on various domestic activities, in order to protect Quebec culture from English intrusions. Canada itself imposes Canadian-source requirements on its broadcast and film industries, partly to protect its economic interests as well as its interest in preserving its national identity from its immeasurably more powerful neighbor.

What is the obstacle preventing indigenism from enacting similar measures to promote their own cultural values and to prevent Northern and Western intrusions? Once again, the answer seems to lie in wealth (and the access to appropriate legislative tools that wealth affords). It is one thing to require the use of a language, but quite another to resist the appeal of heavily promoted goods and services. For just one example, to counter the appeal of Northern and Western clothing, for instance, would require a substantial investment of resources promoting indigenous garb, especially if it were to be accomplished while, at the same time, preserving individual rights.

4. Protection and Preservation of Bio-cultural Information, Including Biodiversity

At least one classic alternative to IP-based sui generis protection of biodiversity is the use of depositories, and land reserves. On the other hand, it is not at all clear that IP-based measures have any chance of achieving this goal. One example is the modern IP regime itself, which purports to require deposit of many patented and copyrighted objects for reasons of record as well as for technological accuracy, validity and reproducibility. Moreover, these deposit requirements extend far beyond bio-products. But in reality these deposit requirements are far more often observed in the

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9 As a matter of general policy, the Canadian broadcasting system is expected to “encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.” Broadcasting Act, R.S.C. ch. C-11 § 3(d)(ii) (1991) (Can.) (emphasis added).
If IP cannot be trusted to record that which it purports to record, we are left with depositories and preserves.

What is to prevent indigenism from establishing massive depositories as well as land reserves? To pose the question, once again, is to answer it: wealth. Western and Northern societies are the homes of the major biological depositories. They also harbor large tracts of reserved lands and, coincidentally, are the originators of the concept of land reserves. The only thing preventing indigenism from accomplishing the same goals is wealth. Could sufficient wealth be generated through the use of deposits? Certainly not. Depositories do not generate wealth and require substantial subsidies to operate.

13 In Amgen v. Chugai Pharmaceutical Co., 927 F.2d 1200 (Fed. Cir. 1991), the Court of Appeals refused to invalidate a patent even though the subject engineered cell line had not been deposited. The Court held that deposit of a non-engineered cell would suffice as long as the public could achieve the engineered specimen through experimentation. The deposit requirement is generally not well-policed, as Amgen demonstrates. So, too, the Copyright Office routinely fails to require proprietors to deposit works that would reveal secret information, even though it is that very secret information that is the subject of the copyright bargain between the proprietor, the government, and the public. For instance, "secure tests" need only be submitted for examination by the Copyright Office and then are returned to the proprietors. Only "identifying material" as opposed to the actual work, needs to be deposited. 17 U.S.C. § 408(c)(1); see National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 495 F. Supp. 34 (N.D. Ill. 1980), aff'd, 692 F.2d 478 (7th Cir. 1982).

14 Henry David Thoreau called for "national preserves" of virgin forest in The Maine Woods, which was published posthumously in 1864:

The kings of England formerly had their forests "to hold the king's game," for sport or food, sometimes destroying villages to create or extend them; and I think that they were impelled by a true instinct. Why should not we, who have renounced the king's authority, have our national preserves, where no villages need be destroyed, in which the bear and panther, and some even of the hunter race, may still exist, and not be "civilized off the face of the earth,"—our forests, not to hold the king's game merely, but to hold and preserve the king himself also, the lord of creation,—not for idle sport or food, but for inspiration and our own true re-creation? Or shall we, like villains, grub them all up, poaching on our own national domains?


5. PROTECTION AND PRESERVATION OF ORIGINAL CULTURAL ARTIFACTS

Frequently, cultural and other indigenous artifacts are considered “national patrimony.” Of all of the goals of indigenism, this is already achieved, in perhaps limited ways, by legal regimes—both national and international—which do not depend upon the IP model, but instead on a traditional model of tangibles and their attendant property rights. Two obstacles, however, are important to this discussion. To the extent export-import measures are adopted to achieve the goals, it is possible that they may conflict with WTO or NAFTA rules limiting obstacles to trade. To the extent they impose restrictions on free alienability, objections based on property and even human rights have been raised. Both of these problems have their source, once again, in wealth. To the extent indigenism is required to compensate possessors of artifacts and other culturally important personalty, wealth will be a limiting factor. And, if GATT or WTO rules limit the ability of indigenism to freely impose export limitations, those limits will be found in the ability of indigenism to absorb the financial costs of sanctions that might be imposed.

So far I have suggested how the different goals of indigenism may be mere consequences of a far more dominant problem. Despite their disparity, they do have something important in common, although its nature is not that which is commonly characterized as a legal one. I identified that common feature as being wealth. Of course, this common feature can find few, if any answers in the legal world. Quite the contrary: Law certainly is a means for securing wealth, but there is no instance in human history of which I am aware when it did not and does not function to redistribute wealth from the dispossessed to the powerful. It is for good reason that Mao asserted that “power grows out of the barrel of a gun.”

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15 See Vernon, supra note 4; Kuruk, supra note 4.
17 See Merryman, supra note 10.
18 See Cahn & Schimmel, supra note 16.
19 MAO TSE-TUNG, Problems of War and Strategy (November 6, 1938), in 2 SELECTED WORKS 224 (Foreign Languages Press 1961-1965) (“Every Communist must grasp the truth, ‘Political power grows out of the barrel of a gun.’”).
and not that it comes from legal institutions. Legal institutions only rearrange power.

**Misinformation, Confusion, and Romanticism (Cheap Shots)**

Compounding the problems of wealth is the misinformation and confusion that seems inevitable when seeking a solution in the arcane and abstract world of IP, an incoherence increased by the dysfunctional marriage of IP with international trade and the WTO.\(^{20}\) The failure to understand IP basics is a source of confusion, but certainly not the only one.

For instance, one objection to offering IP protection to indigenism is that it would violate a bedrock principle—that IP exists to expand the public domain, and that to protect existing knowledge is to revert to the “infamous English regimes”\(^{21}\) based on that illegitimate principle. But our present patent law still excludes foreign knowledge from being invalidating prior art,\(^{22}\) and the United States recently agreed to extend copyright to foreign works that had been in the public domain.\(^{23}\) So much for principle, bedrock or otherwise.

Similar suggestions, such as the argument that “moral utility” should be readopted as a bar to patentability, ignore IP basics. First, utility has always been more of a negative requirement. (Generally, with few exceptions none of which are relevant here, an innovation will be barred by a lack of utility, only if it is exclusively and demonstrably harmful, usually in the sense of illegality). Second, courts have always refused to become moral or aesthetic arbiters in intellectual property matters.\(^{24}\) Protecting indigenism in this way would not require the revitalization of a moral utility standard that never existed, but the creation of a brand-new one.

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\(^{21}\) Heald, *supra* note 2.


\(^{24}\) *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Writing for the majority, Justice Holmes focused not on the skill of the artist or the aesthetics of the work, but on originality, and held that courts should not be the arbiters of aesthetics, or determiners of what is art. “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, . . . and the taste of any public is not to be treated with contempt.” *Id.*
Added to the mix is a romanticism that does not help clarify the issues. To claim that the "South is the contemporary garden of Eden" that holds "the key or answers to diseases and health problems"\textsuperscript{25} surely overstates the issue. Even worse, such a claim pins the hopes of indigenous justice upon factual claims that may turn out to be wrong. Furthermore, claims that the South furnishes the compounds at the basis of a quarter of the prescription drugs used in the United States or that three-quarters of the basic compounds used in drug manufacture come from the South\textsuperscript{26} are not only romantic, but apparently wrong.\textsuperscript{27}

\textbf{The Irony of IP (as a Remedy to the Problems of Indigenism)}

If the preceding analysis is even partly accurate, the real obstacle to those goals is not to find an IP-based remedy, but to gain the wealth necessary to achieve them—with or without IP. The irony, therefore, of suggesting an IP-based remedy as an apparently costless solution, is that IP is a major source of indigenous poverty. Surely, TRIPS is the biggest disaster faced by the Third World since the end of the territorial-based colonial era. In fact, as shown below, it is a baffling irony for indigenism to choose IP as its savior, when the sudden international expansion of multinational-imposed IP itself has further impoverished and immiserated those countries hosting indigenism.

Well before IP overran its banks, Proudhon said, "All property is theft."\textsuperscript{28} Today, he might say "All intellectual property is robbery," for it is a taking of property accompanied by threats of force and intimidation.\textsuperscript{29} Sometimes the victims seem more willing than frightened. For instance, it is not true that "South Africa puts

\textsuperscript{26} Id.
\textsuperscript{27} My discussions of these claims with knowledgeable scientists and chemical engineers indicate that most chemicals used in pharmaceutical manufacture derive, in fact, from petroleum or carbon-based materials having little if any connection to indigenism.
\textsuperscript{28} Although Proudhon is popularly believed to have said this, what he really said was "It is theft," in response to the question he posed, "What is Property?" P.J. Proudhon, \textit{What is Property? An Inquiry into the Principles of Right and of Government} 11-12 (B.R. Tucker trans. 1966) (Paris 1840); see Michael H. Davis, Death of a Salesman's Doctrine: A Critical Look at Trademark Use, 19 GA. L. REV. 233, 279 n. 24 (1985).
\textsuperscript{29} See discussion infra text accompanying note 39 (discussing Section 301 of the United States Trade Act of 1974); see also 4 WILLIAM BLACKSTONE, COMMENTS ON *242 ("Putting in fear is the criterion that distinguishes robbery from other larcenies."); Carter v.
its feet down to save millions of its citizens"\(^{30}\) when it attempted to compel licenses on AIDS drugs. Aside from the scandal that South Africa's president then proceeded (and occasionally continues) to deny that HIV causes AIDS,\(^{31}\) it is also curious that, having joined the WTO and agreed to TRIPS, South Africa insisted on licensing these drugs, thus agreeing to pay compensation for them, when it could just as easily have excluded many of them from patentability under TRIPS Article 27(3).\(^{32}\)

Traditionally, IP is a matter of domestic, not international concern. The doctrine of national treatment does not so much mean that foreigners deserve the same treatment as nationals—though it certainly means that as well—but, far more importantly, that no particular level of protection is merited under any domestic IP regime. National treatment means, first and foremost, that no country is required to recognize patentability (or copyrightability, or trademarkability) at all.\(^{33}\) Thus, TRIPS, from the perspective of international law, is an unlawful violation of the doctrine of na-

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\(^{30}\) Nwabueze, supra note 25.


\(^{32}\) See Michael H. Davis, On the Right of All Nations to Exclude from Patentability Therapeutic Methods for the Treatment of Humans, Including Those Methods that Involve the Use of Pharmaceuticals (unpublished manuscript, on file with author). This article argues that the allowable exclusion from patentability for therapeutic methods includes all pharmaceutical patents which cover only the use (and thus a therapeutic method) of a chemical or chemicals as opposed to a patent on the product itself. AZT is one example, and a large number of patented pharmaceuticals also fit into this category. No country is required to recognize these claims, and yet South Africa, among others, has not sought to use Article 27(3) of TRIPS as at least a first step in reducing its dependence on foreign patent claims.

tional treatment—a doctrine, along with the principle of territoriality, that is the most basic of all international IP doctrines. In other words, not only does TRIPS violate its underlying theories of free trade, but it is illegitimate from the point of view of IP basics. This is so despite the (unsurprising) fact that while TRIPS plays lip service to national treatment, it violates it on a wholesale scale.

Furthermore, the role, and more importantly the true goal of the United States in forcing the undeveloped world to accede to TRIPS is just as often misunderstood. It is not true, or at least misleading, to assert that these countries were told that “failure to accede to TRIPS might be visited with United States trade sanctions,” as if mere global adherence to TRIPS were truly the goal, because the United States has reserved the right to punish countries even after they fully accede to TRIPS. The United States, under section 301 of its trade law, threatens to impose sanctions against countries that in its unilateral view deny “provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights.” Thus, even after threatening to sanction countries for failure to join TRIPS, the United States continues to stalk and threaten them with trade sanctions for failing to adhere to United States, not international, standards. Clearly, the United States has far less interest in enforcing TRIPS than it does in enforcing its own raw power and parochial interests.

But it is the very core of IP that is the most troublesome, and ironic. One critic says that “the impact of a patent system on economic development and foreign investment is generally admit-

34 On the illegitimacy of TRIPS as a part of free trade, see Davis & Neacsu, supra note 20.
35 See TRIPS, supra note 3, art. 3 (national treatment provision inherited from the national treatment provisions of GATT Article III(4)).
36 Nwabueze, supra note 25.
38 The trade law provision is merely a symptom of the much larger United States arrogance in using free trade ideology to further not free trade, but private interests whether consistent with TRIPS and WTO or not. The recent decision by the Bush fits administration to impose protective tariffs on imported steel is yet another symptom. Paul Krugman, America the Scofflaw, N.Y. Times, May 24, 2002, at A25.
Assuming this means a positive impact, it is certainly not generally admitted. It is highly doubtful, in fact, that any underdeveloped country is well advised to adopt a patent system until its infrastructure is sufficiently developed that it can export roughly as many patents as it imports. Until that time, it is in its economic interest to resist adoption of any patent law at all. The argument that adoption of a patent system will invite foreign investment simply has no factual support. Canada, for instance, was assured that if it abandoned its compulsory licenses on pharmaceuticals, United States investment in the Canadian industry would increase, but exactly the opposite occurred. Countless studies indicate that patents have little if any correlation with technical innovation. Even the United States Supreme Court has observed that innovations will occur with or without patent protection, which affects only the speed of discovery.

Often IP boosters adopt a fallback position that even if IP is not immediately profitable (to say the least), it is an incentive to develop an infrastructure of innovation, encouraging local inventors motivated by the new possibility of patent income. But this

39 Nwabueze, supra note 25.
40 See Oddi, supra note 33; Primo Braga, The Economics of Intellectual Property Rights, supra note 33; Primo Braga, The Developing Country Case, supra note 33.
43 "Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives, but that is all." Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980).
ignores the indisputable fact of international IP that local inventors can always obtain patent rights in foreign, much more highly developed, countries even if their home countries have no IP protection at all. If that is not sufficient incentive, it is simply baffling how the assurance of IP protection in a country with little or no existing manufacturing or marketing facilities could be a decisive incentive. Quite obviously, this argument is but a ruse to encourage expansion of IP—not so that locals can get protection (they can already receive full protection in those developed countries having IP which are the only countries that count from the perspective of providing sufficient economic incentives for innovation)—but so that the inauguration of an ever-increasing outward drain of precious domestic resources can be legitimized.

The theory of international IP, supported by the two classical pillars of national treatment and territoriality, is that a country should refuse to adopt an IP regime until it has developed its IP-producing industries sufficiently to justify paying royalties to other nations. By withholding IP until that time, a country can build up its technical infrastructure (including such secondary but essential sectors as public education) to a sufficient point that it is able to become IP-competitive. This is, of course, what the United States did in the nineteenth century. TRIPS, at the proverbial end of the day, is a mean, cruel, and ultimately immoral theft of the sur-

45 Graeme B. Dinwoodie, International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?, 49 AM. J. COMP. L. 429, 436 (2001) (“The adoption of the principle of national treatment as the primary means of ensuring broader international protection was in fact the corollary of another principle, namely, territoriality.”); Lynn Carino, Note, Creative Technology, Ltd. v. Aztech System PTE, Ltd.: The Ninth Circuit Sends a United States Copyright Infringement Case to Singapore on a Motion of Forum Non Conveniens, 41 VILL. L. REV. 325, 333 (1996) (“The Berne Convention and UCC are the major international treaties in the area of copyrights. From these two treaties evolved the two important principles of ‘national treatment’ and ‘territoriality.’”).

46 “There ensued the great Age of Piracy, in which books of several European countries, but particularly English novels, were appropriated and published in such quantities as to flood the market for a time.” 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 208 (1972); Hannibal Travis, Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment, 15 BERKELEY TECH. L.J. 777, 811-19 (2000); Keith Aoki, Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection, 6 IND. J. GLOBAL LEG. STUD. 11, 58 n.45 (1998); Alan Lewine, Protecting Copyright in the Digital Millennium: Mudwrestling, Copyright Lawyers: Napster, The RIAA and the Pig Encoder, 20 TEMP. ENVT. L. & TECH. J. 11, 15-16 (2001); Susan Tiefenbrun, A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention, 17 WIS. INT’L L.J. 1, 5-6 (1999).
plus national product of all undeveloped countries that become party to it.

The poverty of the Third World and of indigenism is certainly due to many factors. But TRIPS and IP generally play a role in that impoverishment by ensuring that for every step forward out of poverty, economic tribute must be paid (in the form of royalties, supra-competitive prices, and prohibitions of the fair use of information necessary for economic development). This is a futile trip up a ladder that is constantly being lowered. And, most importantly, that role will increase. As long as TRIPS requires these peoples to pay a substantial portion of their surplus for whatever monopolized (through patents, copyrights or trademarks) items they might afford—such as pharmaceuticals—those funds will not be available to become competitive. Thus, TRIPS condemns indigenism to the poverty with which they entered TRIPS, and renders that poverty permanent.

It is thus then dreadfully ironic that indigenism should be advised to seek in IP the remedies for maladies caused by IP itself. Aside from the irony, there are insurmountable practicalities. If indigenism is to pay the First World for the use of all patentable innovations it needs, it cannot imaginably be rescued by imposing IP-based remedies upon indigenous information. One would have to posit that the First World would use so much of this information that the royalties for its use would somehow come close to the royalties for the manifold technical advances offered by First World patented products and processes. It simply defies common sense.

The solution is certainly not more IP, but to repeal TRIPS.\(^47\) There is no reason for the majority of the world to belong to a convention that is guaranteed to impoverish and immiserate it. To suggest that the language of IP offers a remedy, when it is the language of IP that causes its poverty and misery is to trap indigenism into legitimizing the source of its tragic situation.

\(^{47}\) Of course, this is no easy matter, for TRIPS, like GATT, cannot be altered by simple democratic means through a majority vote. There is a long tradition for consensus decisions, a tradition written into the agreement itself, where consensus cannot be reached. A supermajority of either two-thirds or three-quarters is required to alter the agreement. All the more reason, it would seem, to repeal it. WTO Agreement, supra note 3, arts. IX(1), X.
CONCLUSION

A close account of the issues of indigenism seems to reveal that they are all but reflections of the overriding issue of wealth. We should probably not ignore the remarkable, if wholly serendipitous, similarity between the words "indigenous" and "indigent," even though they apparently derive from distinctly different roots.\(^48\)

When the issue is seen as unequal resources, virtually all, if not all, of the issues of protecting indigenism through legal monopolies become lamentably unnecessary. If the real problem is the poverty delivered, and (importantly) rendered permanent by TRIPS, it can make no sense either to legitimate TRIPS by sponsoring limited exceptions, or by facilitating variations on the TRIPS scheme. That can only increase the monopolies that impoverish and immiserate while, at the same time, legitimizing the tools used by the North to impoverish the South.

At bottom, one of the most serious objections to this pressing and real problem is an abstract and intellectual, but no less real, one. That is, by borrowing the language and methods of the oppressors, we may be further empowering them. Thus, while it may be unrealistic to suggest repealing TRIPS—but, of course, it may not be—it may be equally or more unrealistic to suggest, or even actually implement, provisions that render TRIPS even more powerful and immune to fundamental criticism. It seems that this might be an overriding issue that deserves preliminary consideration.

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