

# CULTURALLY-BASED COPYRIGHT SYSTEMS?: THE U.S. AND KOREA IN CONFLICT

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*No man but a blockhead ever wrote except for money.*<sup>1</sup>

*I transmit but do not create.*<sup>2</sup>

*The scholar . . . is not elated or enervated by riches.*<sup>3</sup>

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1. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 316 (Justin Kaplan ed., 16th ed. 1992) (attributed to Samuel Johnson).

2. RAYMOND DAWSON, *CONFUCIUS* 11 (1981) (quoting Confucius). *See also* WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 9 (1995).

3. CONFUCIUS ET AL., *THE ETHICS OF CONFUCIUS: THE SAYINGS OF THE MASTER AND HIS DISCIPLES UPON THE CONDUCT OF "THE SUPERIOR MAN"* 90 (1915) (citation omitted).

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## INTRODUCTION

If copyright generally is a “nearly deadly but intrinsically fascinating subject,”<sup>4</sup> imagine copyright in an *international* setting, where the copyright laws of multiple nations are present.<sup>5</sup> In such a setting, copyright systems of two nations representing societies different in race, ethnicity, language, history, and culture can be at issue. A further difference in legal systems—for example, a common law jurisdiction versus a civil law jurisdiction—could well leave an overall effect on an observer that is paralytic, entrancing, or both. Copyright disputes between the United States and Korea incorporate all of these differences.<sup>6</sup> The subject is not merely of academic interest. In the already complex state of U.S.-Korea relations<sup>7</sup> lurks the not insignificant

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4. Peter Davison, Book Review, *THE ATLANTIC MONTHLY*, Dec. 2000, at 126 (reviewing EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* (2000)).

5. This would present a double challenge given Mark Twain’s note that “[o]nly one thing is impossible for God: to find any sense in any copyright law on the planet.” MARK TWAIN, *MARK TWAIN’S NOTEBOOK* 381 (1935).

6. Unless the context indicates otherwise, all references to “Korea” herein are to the Republic of Korea, also known as South Korea.

7. See generally DON OBERDORFER, *THE TWO KOREAS: A CONTEMPORARY HISTORY* (1997); THE U.S.-SOUTH KOREAN ALLIANCE: TIME FOR A CHANGE (Doug Bandow & Ted Galen Carpenter eds., 1992).

matter of the continuing piracy in Korea of American intellectual property<sup>8</sup>—books, software, records, and movies.<sup>9</sup> The damage to the United States has been extensive; the piracy has allegedly resulted in hundreds of millions of dollars in lost revenue for American copyright owners and a trade imbalance for the United States.<sup>10</sup> Over the years, the situation has drawn sharp U.S. protest, followed by Korean accommodation and action (and inaction), and further U.S. protest.<sup>11</sup>

Commentators have offered various cultural explanations for the widespread piracy in Korea, among them that Koreans view intellectual creations as public goods that benefit society, rather than private property of the author.<sup>12</sup> Often, however, commentators who refer to cultural differences do so conclusorily, or offer only brief, sometimes totemic, descriptions of the traditional Confucian values that shape the Korean concept of copyright,<sup>13</sup> in contrast to the rights-based approach seen in the United States. An initial difficulty with such cultural references is that they are so general that they invite the obvious question: *what* culture (or *what* cultural differences)? Moreover, when commentators advance specific cultural traits to explain the Korean approach to copyright, those outside the jurisdiction see such traits as so foreign that they ignore them altogether,<sup>14</sup> or quite the opposite, they overemphasize these traits, inviting a stereotyped view of Korean copyright. This Article offers a more complete elaboration of the cultural dimension of

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8. Korea is one of several countries in Asia where there is piracy of American products. There are obvious parallels between Korea and China with respect to intellectual property, among them, the impact of Confucian influence on the reproduction of intellectual and artistic creations. Whereas the relationship between United States and China has long been adversarial, the U.S.-Korea relationship was for many years one of political, military, and diplomatic alliance, with occasional turbulence in recent years. This history may well impact negotiations between the United States and Korea over copyright protection.

9. For an early press account, see Richard Halloran, *Seoul Is Moving on Book Pirates*, N.Y. TIMES, Mar. 4, 1974, at 15 (reporting American Embassy's protest to Korean government about illegal copying by "book pirates").

10. Between 1995 and 2000, Korean piracy allegedly cost the United States an average annual trade loss of over \$390 million. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2001 SPECIAL 301 REPORT: SOUTH KOREA 211 [hereinafter IIPA, 2001 SPECIAL 301 REPORT], available at <http://www.iipa.com/rbc/2001/2001SPEC301SOUTHKOREA.pdf> (last visited Nov. 13, 2001).

11. See *infra* text accompanying notes 17-23.

12. See, e.g., Kyung-Won Kim, *A High Cost to Developing Countries*, N.Y. TIMES, Oct. 5, 1986, § 3, at 2. See also *infra* note 107.

13. See, e.g., Byoung Kook Min & James M. West, *The Korean Regime for Licensing and Protection of Intellectual Property*, 19 INT'L LAW. 545, 565 (1985) ("[D]o not underestimate the importance of language and cultural difference when consulting with Korean partners, government officials or patent attorneys."); Elliott Hurwitz, *Copyrights Are as Vital as Merchandise*, N.Y. TIMES, Oct. 5, 1986, § 3, at 2 (stating, as Special Assistant to the Under Secretary of State for Economic Affairs, that "the Administration has often met resistance from nations where protection of intellectual property may not be part of the prevailing culture").

14. Ethnocentrism could contribute to this approach. See *infra* note 154.

copyright, principally for the Korean copyright system, but to some extent for the U.S. system as well.<sup>15</sup> In so doing, this Article examines the cultural attitudes reflected in each jurisdiction's copyright, and critiques and measures those cultural attitudes for practical and current applicability. This process ensures that the matter of culture in copyright receives the balanced attention that it is due.<sup>16</sup> Awareness of the cultural aspects of each other's copyright system will be important in future discussions between the United States and Korea, especially in light of the ongoing tension between the two over the piracy situation.

Consider the history of the past seventeen years. The conflict began in 1985 when the United States, complaining of rampant piracy of its intellectual property products, commenced a Section 301 investigation<sup>17</sup> and threatened sanctions.<sup>18</sup> Diplomacy and negotiation helped to avert a potentially explosive situation the following year when the United States agreed to suspend the investigation in exchange for Korea's pledge to enact new, comprehensive copyright legislation to protect foreign authors' rights, aggressively enforce the new laws, and join international copyright conventions.<sup>19</sup> That denouement would have made for a happy ending, but proved instead to be the beginning chapter in the protracted U.S.-Korea dispute over intellectual property rights. Since 1988 when the United States created a classification system to identify nations that do not provide

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15. The examination herein takes into account the various layers of culture, appreciating its "thickness," an oft-quoted concept advanced by anthropologist Clifford Geertz. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* (1973).

16. Commentators who attempt to reveal the intellectual property system of an Asian country often refer to the national *culture* and include some description of traditional attitudes that would explain the historical lack of appreciation for the concept of copyright there. *E.g.*, Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 *VAND. J. TRANSNAT'L L.* 735, 766-67 (1996) (discussing People's Republic of China); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt To Use Shakespeare To Reconfigure the U.S.-China Intellectual Property Debate*, 19 *B.U. INT'L L.J.* 1, 16-21 (2001) (same). More informative are those works that elaborate on the impact of cultural attitudes on intellectual property policy in the contemporary setting. *See generally* ALFORD, *supra* note 2 (discussing Chinese culture and law); Toshiko Takenaka, *Does a Cultural Barrier to Intellectual Property Trade Exist? The Japanese Example*, 29 *N.Y.U. J. INT'L L. & POL.* 153 (1996-97) (discussing Japanese culture and law).

17. Section 301 of the Trade Act of 1974, currently, 19 U.S.C. §§ 2411-20 (1994), authorizes the President to take action in response to the policies or practices of foreign governments that meet certain criteria. *See* Judith Hippler Bello & Alan F. Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 *NW. J. INT'L L. & BUS.* 633, 634 (1986). Section 301 investigations "may be initiated in response to a petition filed by an interested party or by the [United States Trade Representative] on a self-initiated motion." *Id.* at 645 (footnotes omitted).

18. *See* Anna Y. Park, Recent Development, *International Trade-Agreement Between the United States and Republic of Korea Concerning Insurance Market Access and Intellectual Property Protection in the Republic of Korea*, July 21, 1986, 28 *HARV. INT'L L.J.* 166, 166-67 (1987).

19. The agreement also covered the American insurance business in Korea. *See id.* at 167.

adequate protection of American intellectual property interests,<sup>20</sup> the United States has placed Korea on the “Watch List” five times and on the more severe “Priority Watch List” eight times, including the last two years.<sup>21</sup> This classification has done little to improve Korea’s image as an international pirate<sup>22</sup> and a leading offender of unauthorized copying.<sup>23</sup> In light of these setbacks, both sides must consider all possibilities to facilitate negotiations toward resolution, including a more thorough understanding of each side’s cultural traits that shape copyright policy.

Part I of the Article introduces the concept of culture, acknowledges its many facets, and selects a definition of culture that emphasizes a group’s values-based, patterned way of thinking. This preferred definition provides the necessary foundation for a discussion of the relevant culture that shapes American and Korean approaches to copyright discussed in Part II. Part II

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20. Two years after the U.S. agreement with Korea, Congress enacted the Omnibus Trade and Competitiveness Act of 1988, which included the so-called “Special 301” provision. The sole purpose of Special 301 was “to promote the adequate and effective protection of intellectual property rights in foreign countries.” Judith H. Bello & Alan F. Holmer, “*Special 301: Its Requirements, Implementation, and Significance*,” 13 *FORDHAM INT’L L.J.* 259, 259 (1989). Special 301 directs the U.S. Trade Representative to identify annually those foreign countries that “deny adequate and effective protection of intellectual property rights,” 19 U.S.C. § 2242(a)(1)(A) (1994), or “deny fair and equitable market access to United States persons that rely upon intellectual property protection,” *id.* § 2242(a)(1)(B). Special 301 also requires the U.S. Trade Representative

to name as “priority foreign countries” those countries:

- (i) whose acts, practices, or policies are the most onerous or egregious, and have the greatest adverse economic impact on the United States; and (ii) that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.

Bello & Holmer, *supra*, at 261 (footnotes omitted). Rather than identifying countries as “priority foreign countries,” the U.S. Trade Representative created a “Priority Watch List” and “Watch List” classification system. *Id.* at 267.

21. Korea was placed on the “Priority Watch List” in 1989, the inaugural year of Special 301 classifications; moved down to the “Watch List” in 1990 and 1991; returned to the “Priority Watch List” 1992 to 1996, inclusive; moved down again to the “Watch List” in 1997, 1998, and 1999; and returned again to the “Priority Watch List” in 2000 and 2001. See IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, app. E, at 62 (for 1989-2000); UNITED STATES TRADE REPRESENTATIVE, 2001 SPECIAL 301 REPORT 3, 13, available at <http://www.ustr.gov/enforcement/special.pdf>.

22. For example, reports indicate that two out of three computer software products in use in Korea are pirated versions, sold far below cost and without any compensation to the owner of the copyright. See, e.g., Calvin Sims, *How Korean Pride Rallied to Save a Software Maker*, N.Y. TIMES, Aug. 15, 1999, § 3, at 7; *Korea’s Software Piracy Reached 70 Percent in 1996*, NEWSBYTES NEWS NETWORK, May 9, 1997, available at 1997 WL 10172443.

23. Korea will likely remain a consumer of the works of foreign authors, especially in light of the national agenda seeking globalization, *seh-ge-hwa*. See Suh-Yong Chung, *Is the Mediterranean Regional Cooperation Model Applicable to Northeast Asia?*, 11 *GEO. INT’L ENVTL. L. REV.* 363, 385 (1999); Sang Don Lee, Essay, *United States-Japan Trade Relations: A Comment from the Korean Perspective*, 16 *ARIZ. J. INT’L & COMP. L.* 127, 131 (1999). Even Korean products are subject to Korean piracy. For an example of rampant piracy of Korean software that nearly led to bankruptcy of the software company, see *infra* text accompanying notes 309-22.

summarizes the traditional American regard for private property, surveys the pertinent traditions from Confucian Korea, and explains how the respective traditional traits have shaped the contemporary understanding of copyright in each setting. This part focuses primarily on Korean cultural history, as it is more complex. It raises the question of whether the Korean cultural explanation for what Americans call “piracy” is over-emphasized or outdated. It is advanced here that while some traditional attitudes based on cultural values have a residual presence in contemporary Korea, they are, with respect to the current piracy situation, of mostly historical interest. Rather, more attention must be given to other cultural traits, like the Confucian-driven regard for status and for economic wealth as a means to attain it.

Parts III and IV reveal that traditional cultural and societal attitudes permeate Korea’s copyright system. In addition, Parts III and IV argue that understanding the cultural dimension is crucial in international negotiations. To gain a more complete understanding of Korean copyright, Part III describes the current Korean copyright (i) *law*, which appears to be an amalgam of both the property-rights based approach seen in American copyright and selected traditional Korean cultural norms, and (ii) *policy*, which appears to reflect the priorities of a national copyright system in transition, from that of a traditional society with little need for formal copyrights to a member of the international marketplace. Part IV summarizes the important lessons U.S. and Korean representatives may take from the cultural discussion. Initially, international negotiators must consider culture. The still growing anti-American sentiment in Korea and America’s own checkered history in honoring the rights of foreign authors are also relevant. Indeed, cultural differences could explain why such sentiment and history are of more import to one side (Korea) than the other. Finally, in light of the cultural aspects of each jurisdiction’s approach to copyright, this Article offers preliminary thoughts to assist both sides in negotiations toward resolution. Ultimately, the matter of the protection of American intellectual property rights in Korea presents an enormously difficult situation. In a process that will require time, the parties can ill afford to refuse to be better informed.

## I. CULTURE AND THE COPYRIGHT

The notion that a nation’s copyright laws are based in part on its culture<sup>24</sup>

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24. See Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC’Y USA 265, 267 (2000); Barbara A. Ringer,

appears to have become a maxim in international commentary.<sup>25</sup> But what is culture?<sup>26</sup> Culture is “a fundamental feature of human consciousness, the *sine qua non* of being human”;<sup>27</sup> culture is our “social legacy”;<sup>28</sup> culture may take over the world.<sup>29</sup> Culture has also been described as “one of the two or three most complicated words in the English language.”<sup>30</sup> There is no shortage of proposed definitions<sup>31</sup>—150, according to one study.<sup>32</sup> The definition of culture remains elusive<sup>33</sup> and contested.<sup>34</sup> The various definitions exist in part

*The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1050 (1968).

25. See Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 741 (2001) (citing Ginsburg, *supra* note 24); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 471 (2000) (“[C]opyright law is an essential instrument of national cultural and information policy.”) (citing Ginsburg, *supra* note 24; Ringer, *supra* note 24). See also J.H. Reichman, *Goldstein on Copyright Law: A Realist’s Approach to a Technological Age*, 43 STAN. L. REV. 943, 948 (1991) (reviewing PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (1989)) (“Professor Goldstein pragmatically acknowledges the diverse cultural values that all developed copyright systems seek to implement.”) (footnote omitted).

26. And what does it mean to refer to an “American copyright culture”? Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC’Y USA 93, 102 (1994). Or to say that “[a]n ‘intellectual property culture’ has yet to be developed in Korea”? R. Michael Gadbar, *Republic of Korea*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 272, 275 (R. Michael Gadbar & Timothy J. Richards eds., 1988).

27. Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, in *THE CONFLICT AND CULTURE READER 7* (Pat K. Chew ed., 2001). Professor Chew’s text is recommended for a one-volume collection of insightful pieces on the impact of culture on conflict. See Cindy Fazzi, *Book Review, Viewing Conflict Through the Lens of Culture*, 56 DISP. RESOL. J. 85 (2001) (reviewing *THE CONFLICT AND CULTURE READER*, *supra*).

28. CLYDE KLUCKHOHN, *MIRROR FOR MAN* 26 (1949).

29. In a provocative and controversial piece, Professor Samuel P. Huntington declared that culture is the key factor in determining the balance of power in world politics: “The great divisions among humankind and the dominating source of conflict will be cultural.” Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFAIRS, Summer 1993, at 22. Acknowledging the interrelation between culture and civilization, Huntington urged that the “principal conflicts of global politics will occur between nations and groups of different civilizations.” *Id.* His thesis drew sharp responses. See *Responses to Samuel P. Huntington’s “The Clash of Civilizations?”*, 72 FOREIGN AFFAIRS, Sept.-Oct. 1993, at 2.

30. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76 (1976). See John David Donaldson, “*Television Without Frontiers: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*,” 20 FORDHAM INT’L L.J. 90, 147 (1996) (“Without doubt, culture is one of the most difficult and problematic English terms to define due to its amorphous and inherently subjective nature.”) (footnote omitted).

31. Anthropologist Edward B. Tylor proposed one of the earliest definitions of culture: “Culture . . . is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.” EDWARD B. TYLOR, *PRIMITIVE CULTURE* 1 (3d ed. 1889).

32. See IRWIN ALTMAN & MARTIN CHEMERS, *CULTURE AND ENVIRONMENT* 3 (1980) (citing A.L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* 181 (1952)).

33. Or does it need a definition at all? Is culture like, for example, “‘time,’ ‘number,’ ‘beauty,’

because the term is used by experts in a number of different social fields.<sup>35</sup> A substantial bibliography now exists on the search for a definition of culture<sup>36</sup> (and perhaps a separate but related bibliography of works commenting on such search).<sup>37</sup> Even accepting the pitfalls of adopting a single definition, this Article must do so in order to give meaning to the statement that “a nation’s copyright laws lie at the roots of its culture”<sup>38</sup> and to determine the extent to which U.S. and Korean copyright systems are culturally-based.

Thus, for purposes of this Article, bearing in mind that culture is not monolithic in any society<sup>39</sup> and changes over time,<sup>40</sup> references to culture include three components: (1) a patterned way of thought or behavior of (2) a group (3) that is based on certain values.<sup>41</sup> The social, economic, political,

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and ‘law,’” all words “we use with perfect clarity . . . that we can’t define.” *Publications Int’l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 339 (7th Cir. 1998) (Posner, C.J.). I resist the temptation to liken culture to obscenity, to wit, that one knows it when one sees it. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The literature indicates that culture is far more elusive than that, especially in the international setting. One may be in the presence of culture and not know it; one may expect culture and find something else. Culture is “the hidden dimension.” RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES* 153 (1991).

34. *See* Robert H. Winthrop, *Introduction: Culture and the Anthropological Tradition*, in *CULTURE AND THE ANTHROPOLOGICAL TRADITION: ESSAYS IN HONOR OF ROBERT F. SPENCER* 1 (Robert H. Winthrop ed., 1990).

35. *See* Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 *YALE J.L. & HUMAN* 575, 602 (1998). Anthropologists agonize over the meaning of “culture”; legal commentators presume to understand its meaning and use the term more freely. Legal scholars use the terms “law firm culture” and “corporate culture,” for example, without explanation.

36. *See, e.g.*, ALTMAN & CHEMERS, *supra* note 32; JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* (1988); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); ROGER M. KEESING, *CULTURAL ANTHROPOLOGY: A CONTEMPORARY PERSPECTIVE* (2d ed. 1981); CLYDE KLUCKHOHN, *CULTURE AND BEHAVIOR* (Richard Kluckhohn ed., 1962); A.L. KROEBER, *ANTHROPOLOGY: CULTURE PATTERNS AND PROCESS* 1 (1948); A.L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* (1952); *WRITING CULTURE* (James Clifford & George Marcus eds., 1986); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *TEX. L. REV.* 1853, 1859 (1991); John Frohnmayer, *Should the United States Have a Cultural Policy?*, 38 *VILL. L. REV.* 195, 195-96 (1993); Ramón N. Valle, *Ethics, Ethnicity, and Dementia: A “Culture-Fair” Approach to Bioethical Advocacy in Dementing Illness*, 35 *GA. L. REV.* 465, 482-83 (2001).

37. DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* (1979); FRANK R. VIVELLO, *CULTURAL ANTHROPOLOGY HANDBOOK* (1978); Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividuation, the Paradox of Blackness*, 70 *IND. L.J.* 709, 715-17 (1995); Marshall Durbin, *Cognitive Anthropology*, in *HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY* (John J. Honigmann ed., 1973).

38. Ringer, *supra* note 24, at 1050.

39. *See* ALFORD, *supra* note 2, at 6. There is a risk of overgeneralization in identifying culture. “But, to avoid this problem of stereotyping, we cannot then swing to an opposite extreme and argue for no commonalities. On the contrary, there is a middle ground where we can respectfully speak of central tendencies among groups of people, a modality tendency.” CARLEY H. DODD, *DYNAMICS OF INTERCULTURAL COMMUNICATION* 40 (2d ed. 1987).

40. *See* Merry, *supra* note 35, at 602.

41. The first formal definition of culture that encompasses these components appears to be by

and legal histories of the United States and Korea indicate certain prioritized values in each society that have led to a patterned way of thought (and action) regarding the concept of copyright. These cultural differences provide an explanation for how the United States and Korea developed not only different attitudes, but also “different realities, different worlds”<sup>42</sup> regarding the protection of copyrights.

## II. CULTURALLY-BASED COPYRIGHT SYSTEMS

### A. *American Property, American Copyright*

The commentary that analyzes the cultural differences purportedly motivating the Korean approach to copyright makes little mention of the United States’ culturally-based copyright system. In reality, American copyright also is shaped by cultural norms. This section argues simply that (i) the right of property, revered since the beginnings of the American experience, is ingrained in American culture; and that (ii) although copyright law seeks to protect property in a different form than land or tangible goods, it is driven by the same traditional regard for property ownership. Although the latter view is not unanimously held, an American author who complains of unauthorized copying of her work in a foreign jurisdiction essentially seeks respect for the same property or ownership right that is valued domestically.

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Kroeber and Kluckhohn:

Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values; culture systems may, on one hand, be considered as products of action, on the other as conditioning elements of further action.

KROEBER & KLUCKHOHN, *supra* note 36, at 181, *quoted and adopted in* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1152-53 (1983). The same definition appears in KLUCKHOHN, *CULTURE AND BEHAVIOR*, *supra* note 36, at 73. Geert Hofstede’s more concise definition captures the essential components. GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* 21 (abridged ed. 1984) (Culture is “the collective programming of the mind which distinguishes the members of one human group from another. . . . Culture, in this sense, includes systems of values; and values are among the building blocks of culture.”). *See also* DAVID M. FETTERMAN, *ETHNOGRAPHY: STEP BY STEP* 27 (1989) (Culture includes “a social group’s observable patterns of behavior, customs, . . . way of life,” “ideas,” values or beliefs, definition of reality, “attitudes,” and “habits.”); ROBERT F. MURPHY, *CULTURAL AND SOCIAL ANTHROPOLOGY* 26 (3d ed. 1989) (“Culture is an integrated system of meanings, values, and standards of conduct by which the people of a society live . . .”).

42. Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957 (1988).

### 1. *The Sacred Right of Property*

The American regard for the right of private property—the right to own and economically exploit property to the exclusion of others—was seen in colonial America. When the American independence movement reached a crescendo in the eighteenth century, mention of the right of property accompanied it.<sup>43</sup> On the eve of American independence, some patriots saw the right to own property as a primary, indispensable right. Virginian Arthur Lee<sup>44</sup> boldly pronounced that “[t]he right of property is the guardian of *every other right*.”<sup>45</sup> In an attempt to rally his troops, George Washington reminded them that they were fighting for both freedom and property: “The time is now near at hand which must probably determine whether Americans are to be freemen or slaves; whether they are to have any property they can call their own . . . .”<sup>46</sup>

Concerned with the need to safeguard property rights and related economic interests,<sup>47</sup> the Founding Fathers included property explicitly in the Bill of Rights.<sup>48</sup> It was thus preserved for American democracy.<sup>49</sup> Because an

43. The motto of various American colonial newspapers in the 1760s was: “The united voice of all His Majesty’s free and loyal subjects in America—liberty and property, and no stamps.” BARTLETT, *supra* note 1, at 778.

44. Lee was a member of the Virginia House of Delegates and the Continental Congress and a revolutionary patriot. See LOUIS W. POTTS, ARTHUR LEE: A VIRTUOUS REVOLUTIONARY 5-6 (1981).

45. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775), *quoted in* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (2d ed. 1998). Lee related property rights and liberty: “[T]o deprive a people of [the right of property], is in fact to deprive them of their liberty.” LEE, *supra*, at 14.

46. George Washington, Address to the Continental Army Before the Battle of Long Island (Aug. 27, 1776), *quoted in* BARTLETT, *supra* note 1, at 336.

47. ELY, *supra* note 45, at 4. Commentary strongly supports the proposition that the Framers considered protection of the property right a top priority. See, e.g., Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far.”* 49 AM. U. L. REV. 181, 195 (1999) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 302 (Max Farrand ed., 1937)); Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056 (1996) (citing THE FEDERALIST Nos. 84, 85 (Alexander Hamilton)). *But see* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 12 (1990) (arguing that Framers held diverging views about importance of property right). Charles A. Beard has gone so far as to argue that the drafters crafted the Constitution to protect their own economic interests. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (5th ed. 1986). For critiques of this view, see ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF “AN ECONOMIC INTERPRETATION OF THE CONSTITUTION” (1956); ALPHEUS THOMAS MASON & RICHARD H. LEACH, IN QUEST OF FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 74 (2d ed. 1981).

48. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”). See also *id.* amend. XIV (stating “nor shall any State deprive any person of life, liberty, or property, without due process of law”).

49. Compare U.S. CONST. amend. V, XIV, with KARL MARX & FRIEDRICH ENGELS, THE

American's right to property is fundamental, the Constitution requires a certain "due process" when the state intrudes on it.<sup>50</sup> In 1829, the Supreme Court reaffirmed this point when Justice Story declared,

[G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.<sup>51</sup>

Indeed, for over two centuries, protection of the right of property has been a staple of American constitutional law.<sup>52</sup>

The enduring American experience reflects both a desire for property ownership and the accompanying demand for the protection of that property. In 1850, less than a century into the Republic's history, the American obsession with property caught the attention of Tocqueville, a famed U.S. observer. "In no other country in the world," he noted, "is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned."<sup>53</sup> The obsession with property appears to have remained a constant throughout America's three centuries. Historian James Ely notes that the "widely shared desire to acquire and enjoy property has long been one of the most *distinctive* features of American society."<sup>54</sup> Property is the "most American of all institutions."<sup>55</sup> Today, many Americans view the right of property as *sacred*,<sup>56</sup> representing a "core

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COMMUNIST MANIFESTO (1848), *reprinted in* KARL MARX, CAPITAL THE COMMUNIST MANIFESTO AND OTHER WRITINGS 335 (Max Eastman ed., Samuel Moore trans., 1959) ("[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property.").

50. U.S. CONST. amend. XIV.

51. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). In a similar tone, one commentator argues that in Lockean liberalism, the state exists to promote and protect the appropriation of private property. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 995 (1990).

52. See ELY, *supra* note 45, at 3 ("Throughout much of American history, economic liberty was an essential component of constitutionalism."); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 405-06 (1988) ("For most of American constitutional history, rights theories have been associated with protection of property against a more just distribution of wealth and privilege.").

53. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 638-39 (J. Mayer ed., 13th ed. 1966), *quoted in* ELY, *supra* note 45, at 160.

54. ELY, *supra* note 45, at xi (emphasis added).

55. Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 379 (1988). A previous edition of *Black's Law Dictionary* had declared that property is the "highest right a man can have to anything." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). This phrasing has been deleted in a subsequent edition. See BLACK'S LAW DICTIONARY 1232 (7th ed. 1999) [hereinafter BLACK'S 7th ed.].

56. See Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal*

value.”<sup>57</sup> As in Washington’s day, the property right is revered in the same category as liberty and freedom.<sup>58</sup> Although the discussion of whether the right to property is indeed the most important American right will continue in academic circles,<sup>59</sup> its deeply rooted societal value is undisputed.<sup>60</sup>

In the American culture of property, virtually every right at law is seemingly either a property right or only a slight degree removed. The U.S. public, its legislators, the bench, and the bar have become accustomed to looking at rights through the property lens. Within the past two decades, for example, the Supreme Court has ruled that a governmental regulation that results in loss of all economic value of a parcel of land constitutes an impermissible taking of property under the Fifth Amendment.<sup>61</sup> A state supreme court has declared that a medical license is “marital property” for purposes of equitable distribution upon divorce.<sup>62</sup> Another state court held that the right to bear arms is a property right, thereby resolving, at least within one jurisdiction, the great debate over the meaning of the Second

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*Analysis*, 52 RUTGERS L. REV. 269, 284 (1999); Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20, 69 (1998); Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1368 (1993) (reviewing MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991)); Maya Grosz, *To Have and To Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235, 237 (1998).

57. Frank A. Vickory & Barry A. Diskin, *Advances in Private Property Protection Rights: The States in the Vanguard*, 34 AM. BUS. L.J. 561, 595 (1997) (citing Jonathan H. Adler & Kellyanne Fitzpatrick, *For the Environment, Against Overregulation*, WALL ST. J., July 29, 1996, at A12).

58. See generally RICHARD PIPES, *PROPERTY AND FREEDOM* (1999). Machiavelli noted the relation between the right to property ownership and individual honor. “When neither their property nor their honor is touched, the majority of men live content.” BARTLETT, *supra* note 1, at 136 (quoting NICCOLO MACHIAVELLI, *THE PRINCE* 19 (W.K. Marriott trans., 1532)).

59. Could any right surpass the right of life? Professor Carol M. Rose examines the question of whether the right of property is truly the most important right and provides a survey of the key arguments supporting the proposition. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996). In the end, she finds the declaration exaggerated, preferring instead,

a rather modest claim for property as a keystone right, that is, as an educative institution. On that conception, property would play a central role not as the fierce bulldog guardian of autonomous individual rights, but rather as the gentle and somewhat fragile persuader, rewarding the character traits needed not only for commerce but also for self-government.

*Id.* at 364.

60. Indeed, one author goes so far as to state that the American reverence for property is not only a matter of American culture, but also a result of an American “biological predisposition.” Coletta, *supra* note 56, at 23, 24.

61. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992).

62. See *O’Brien v. O’Brien*, 489 N.E.2d 712, 713 (N.Y. 1985). The court rejected arguments that such a license does not carry the characteristics of property. *Id.* at 715. The *O’Brien* decision appears to be the minority rule, although that minority may be growing. See Susan Etta Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees As Marital Property*, 21 VT. L. REV. 409, 425-26 (1996). Professor Keller also discusses the property interest asserted in other matters relating to the marriage setting—nonvested pension benefits, dead bodies, frozen embryos, and body parts. *Id.* at 441-44.

Amendment.<sup>63</sup> Likewise, law commentators have seized on the tendency to portray issues in the property cloth. For example, critical race theorists, no friend of traditional academia, nevertheless command the attention of the latter when they ask whether one's race is a form of property—that is, whether one can claim a property right in her “whiteness.”<sup>64</sup> There apparently are no limits to the extent to which a matter can be characterized in proprietary terms in discourse by legal scholars, save their imagination.<sup>65</sup>

## 2. *Property Right in Copyright*

Is not copyright merely protection of a different form of property? In 1855, writer and constitutional scholar Lysander Spooner made a passionate case for why results of intellectual labors should have the same legal status and protection as tangible property.<sup>66</sup> A precocious thinker, Spooner first explained that property is a form of wealth, and wealth is any thing that is valuable to or contributes to the well-being of humankind.<sup>67</sup> “All property is wealth,”<sup>68</sup> he explained, and “[p]roperty is simply wealth[] *that is possessed—that has an owner.*”<sup>69</sup> Emphasizing the exclusive ownership dimension of property, Spooner noted that property belongs to its proprietors “and not to another man. He has a right, as against all other men, to control it

63. See *Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990) (interpreting provision of Indiana Constitution).

64. See Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1053-58 (1990). See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

65. One author of the conventional camp has openly questioned whether scholars who endorse the narrative or storytelling form in legal scholarship claim it as a matter of *proprietary* interest: “Anyone who challenges this ownership . . . is treated as a trespasser.” Jim Chen, Panel on Narrative, National Association of Scholars (Jan. 8, 1998), *quoted in* Kathryn Abrams, *How To Have a Culture War*, 65 U. CHI. L. REV. 1091, 1117 n.48 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

66. LYSANDER SPOONER, *THE LAW OF INTELLECTUAL PROPERTY: OR AN ESSAY ON THE RIGHT OF AUTHORS AND INVENTORS TO A PERPETUAL PROPERTY IN THEIR IDEAS* (1855), *reprinted in* 3 *THE COLLECTED WORKS OF LYSANDER SPOONER* 9 (Charles Shively ed., 1971), *discussed in* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817, 821-22 (1990).

67. SPOONER, *supra* note 66, at 10, 13. A great deal under the sun could classify as wealth, as it includes “every conceivable object, idea, and sensation, that can either contribute to, or constitute, the physical, intellectual, moral, or emotional well-being of man.” *Id.* at 10.

Every thing, therefore—whether intellectual, moral, or material, however gross, or however subtle [sic]; whether tangible or intangible, perceptible or imperceptible, by our *physical* organs—of which the human *mind* can take cognizance, and which, either as a means, occasion, or end, can either contribute to, or of itself constitute, the well-being of man, is wealth.

*Id.* at 13.

68. *Id.* at 15. “[B]ut all wealth is not property.” *Id.*

69. *Id.*

according to his own will and pleasure; and is not accountable to others for the manner in which he may use it.”<sup>70</sup> Spooner also stated that “[e]very conceivable thing, whether intellectual, moral, or material,” that can be “possessed, held, used, controlled, and enjoyed, by one person” and not another “is rightfully a subject of property.”<sup>71</sup> Thus, Spooner concluded, “A man’s rights . . . to the *intellectual* products of his labor, necessarily stand on the same basis with his rights to the *material* products of his labor.”<sup>72</sup>

Spooner’s eloquence did not convince all. In the twentieth century, Professor Wendy Gordon returned to the question of property rights protection in copyright.<sup>73</sup> In a probing study, she highlighted and updated the continuing objections to extending property protection to authors’ works (within the “long and honorable history” of the “[h]ostility to copyright”<sup>74</sup>), many of which were initially rejected by Spooner. Chiefly, some commentators balked that “certain objects of intellectual property law are not sufficiently ‘thinglike’ to be the subject of ‘ownership.’”<sup>75</sup> Hence, Professor Gordon noted that in both lay opinion and in academia, “there seems to be a

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70. *Id.* at 16 (emphasis omitted). *See also id.* at 16-17 (“This right of property, which each man has, to what is his own, is a right, not merely against any one single individual, but it is a right against *all* other individuals, singly and collectively . . . . It is a right against the whole world. The thing is *his*, and is *not* the world’s.”).

71. *Id.* at 17.

72. *Id.* at 27. Spooner continued, “If he have the right to the latter, on the ground of production, he has the same right to the former, for the same reason; since both kinds of wealth are alike the productions of his intellectual or spiritual powers.” *Id.* Spooner had also raised and answered a host of objections to extending property protection to intangible property. *Id.* at 31, 41-42, 57, 61, 73, 75-76, 105, 108.

73. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

74. *Id.* at 1344. As Professor Gordon has reported, the leading works against the property-for-copyright movement are Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972); Stephen Breyer, *The Uneasy Case of Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLIN L. REV. 261 (1989); Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985). Gordon, *supra* note 73, at 1344-47. Consistent with this body of literature is the once held view that copyright, along with other subjects in intellectual property, was a subject of only “modest intellectual merit.” William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 9 (1994). Copyright was once described as “an offshoot of patent law—as one of the two queer branches of our jurisprudence in which, by an exception depending on the statute, intangible ideas are protected.” Kenneth B. Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932, 932 (1939), *quoted in* Gordon, *supra* note 73, at 1347 n.16.

75. Gordon, *supra* note 73, at 1346. The *thingness* requirement is not beyond the pale. *See* BLACK’S 7th ed., *supra* note 55, at 1232 (defining “property” as “1. The right to possess, use, and enjoy a determinate *thing* . . . 2. Any external *thing* over which the rights of possession, use, and enjoyment are exercised . . . .”) (emphases added).

feeling that having intellectual property rights is less natural than having tangible property rights, and that somehow the compulsions inherent in copyright require special justification.”<sup>76</sup> Professor Gordon then attempted to justify extending property protections to copyright, arguing that “copyright is functionally as well as structurally consistent with tangible property.”<sup>77</sup>

Other commentators agree in result and see no need to agonize over the theoretical objections. Professor Howard Abrams, for example, acknowledges “the ruckus,” but reaches the “obvious” conclusion that “[c]opyrights are a form of property.”<sup>78</sup> Professor Neil Netanel goes so far as to state that “U.S. copyright doctrine applies traditional property principles to the field of copyright, and treats authors’ works as the subject of proprietary, quasi-ownership rights.”<sup>79</sup> Still, other commentators emphasize the utilitarian purpose that American copyright serves, that of granting exclusive rights to authors in order to encourage their work in the arts.<sup>80</sup> A leading treatise offers

76. Gordon, *supra* note 73, at 1347.

77. *Id.* at 1378. She summarized her work thus:

I suggest that intellectual property doctrine provides functional substitutes for the missing element of tangibility and argue that this functional understanding explains intellectual property law’s willingness to give rights over use. I also suggest that as a result, restraints on liberty need not be any more a part of intellectual property rights than they are of any property rights. Finally, I show the similarity in economic role played by the entitlement package in both forms of property.

*Id.*

78. HOWARD B. ABRAMS, 1 *THE LAW OF COPYRIGHT* § 1.02[A], at 1-10 (1991). Rights in copyright “can be protected in the courts, can be transferred, and, if the work is popular, earn a good deal of money. The jurisprudential aphorism that if something looks like a duck, walks like a duck, and quacks like a duck, then it is a duck, holds true.” *Id.* For example, when Ted Turner announced plans to colorize black and white movies to which he had obtained rights, over the vehement objections of the directors who created the classics, he reportedly retorted, “The last time I checked, I owned those films.” William H. Honan, *Artists, Newly Militant, Fight for Their Rights*, N.Y. TIMES, Mar. 3, 1988, at C29 (emphasis added), and “I think the movies look better in color, pal, and they’re my movies.” PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 166 (1994) (emphasis added). All of America knew what he meant: the movies were Turner’s *property*.

Moreover, historian James Ely explained that “property is a dynamic concept” and that

[f]orms of wealth change over the course of decades or centuries. In the eighteenth century, land was the principal form of wealth. By the late twentieth century land, though still important, had been eclipsed by intangible property such as stocks, bonds, and bank accounts. Many commentators, furthermore, believe that *intellectual property*, especially patents, will represent the most significant wealth of the next century.

ELY, *supra* note 45, at 6 (emphasis added).

79. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 *CARDOZO ARTS & ENT. L.J.* 1, 7 (1994). “American law has traditionally treated authors’ creations as objects of ownership.” *Id.* at 1. See also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 *VAND. L. REV.* 1, 2 (1985) [hereinafter Kwall, *Copyright and Moral Right*] (“[T]he primary objective of our copyright law is to ensure the copyright owner’s receipt of all financial rewards to which he is entitled, under the 1976 [Copyright] Act, by virtue of ownership.”).

80. E.g., Pamela Samuelson, *The Quest for Enabling Metaphors for Law and Lawyering in the*

the dual realities of American copyright: although “[t]he primary purpose of copyright . . . is *not* to reward the author, but . . . rather to secure ‘the general benefits derived by the public from the labors of authors,’”<sup>81</sup> the author’s reward of the exclusive rights to the copyrighted work is a “necessary condition to the full realization” of the creative activities of the authors from which the public benefits.<sup>82</sup>

Whatever the arguments challenging the proprietary foundation in copyright,<sup>83</sup> those American authors—more accurately, copyright holders (after all, an author may contractually give up her economic interest in her work)—who complain of piracy and unauthorized copying abroad are advancing the exclusive property right to which they have become accustomed to receiving *intranationally*.<sup>84</sup> These copyright holders typically base their argument on the culturally ingrained American belief that one has the sacred right to exploit the economic benefits of one’s property.<sup>85</sup> Moreover, when the U.S. government objects to the piracy and the resulting “trade imbalance,” it does so on behalf of the nation’s collective economic (property) interests.<sup>86</sup> Here, the highly valued property right is advanced not

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*Information Age*, 94 MICH. L. REV. 2029, 2041 (1996) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)); Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. DAYTON L. REV. 247, 253 n.24 (2001) (same). As the Supreme Court has explained: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

81. I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] at 1-66.17 (2001) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)) (citations omitted) (emphasis added).

82. *Id.* at 1-66.18.

83. It is not necessary to resolve the dispute over whether creative expressions of authors or artists should be given the same protection as traditional tangible property, like land. Case law includes language that supports both positions. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 236 (1939) (Roberts, J., dissenting) (Copyright Act “create[s] a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property.”), with *Quinto v. Legal Times of Wash., Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) (stating copyright protection is not “just the vindication of private property rights”).

84. Note the unambiguously property-oriented phrasing in the introduction of a practice guide to intellectual property protection in Asia: “This book describes how one can acquire *title* to intellectual property in the countries of Asia, and how to assure that competitors respect that *title*.” Arthur Wineburg, *Protecting Intellectual Property—A Capital Asset*, in INTELLECTUAL PROPERTY PROTECTION IN ASIA § 1.01, at 1-3 (Arthur Wineburg ed., 2d ed. 1999) (emphases added).

85. This still-disputed American property-oriented approach to intellectual property did not mature fully until the end of the twentieth century. During much of the nineteenth century, the United States was itself a notorious pirate of foreign authors’ works. See *infra* text accompanying notes 327-34.

86. As Professor Alford pointed out, both the (Elder) Bush and Clinton administrations elevated the U.S. intellectual property protection to one of the central objectives of American foreign policy,

privately, but with the voice and legitimacy of a sovereign.

When Americans seek intellectual property rights protection in other jurisdictions, Professor William P. Alford asks, “[A]re we not assuming that the definitions and attributes of property rights are uniform world-wide? Is that a wholly warranted assumption?”<sup>87</sup> These questions join the issue of the culturally-based copyright systems. The next section addresses the cultural forces that have shaped Korea’s approach to copyright.

### *B. Korea: Another Century of Confucian Tradition?*

Logically, Korea could have been one of the first organized societies in the world to recognize formally the proprietary interest in authors’ works. After all, historians credit Korea with producing the first movable metal type printing press in the thirteenth century.<sup>88</sup> Two centuries later, King Sejong of the Yi (or Choson) dynasty directed the creation of *Hangul*, the indigenous Korean alphabet<sup>89</sup> and “the most remarkable writing system ever invented.”<sup>90</sup> But the government did not provide formal protection of authors’ works in the five centuries of the Yi dynasty ending in the beginning of the twentieth century.<sup>91</sup> Even after independence from Japanese colonial rule in the 1940s,<sup>92</sup> Korea did not enforce to any degree either the Japanese copyright laws that were left intact<sup>93</sup> or a similar copyright act that the National

particularly in East Asia. ALFORD, *supra* note 2, at 113; Alford, *supra* note 74, at 14. *See also* Wineburg, *supra* note 84, § 1.01, at 1-2 (“[I]ntellectual property rights and their protection . . . is now an essential element of economic growth.”). With respect to China, Professor Alford questions the wisdom of equating the protection of intellectual property rights with the likes of weapons of mass destruction and human rights. “[T]here is something somehow out of whack about putting [Mickey Mouse] up there with nuclear war and torture.” Alford, *supra* note 74, at 14.

87. Alford, *supra* note 74, at 17.

88. *See* ANDREW C. NAHM, *KOREA, TRADITION & TRANSFORMATION: A HISTORY OF THE KOREAN PEOPLE* 79 (1988). *See also* KI-BAIK LEE, *A NEW HISTORY OF KOREA* 170 (1984) (Edward W. Wagner & Edward J. Shultz trans., 1984). *But see* ALFORD, *supra* note 2, at 1 (noting scholars’ credit of Chinese “with having contributed . . . movable type . . . to humankind”).

89. *See* LEE, *supra* note 88, at 192; NAHM, *supra* note 88, at 119. Before *Hangul*, Koreans used Chinese characters for communication. *Id.* “Hangul Day,” for years a national holiday, is still observed annually, on October 9.

90. FLORIAN COULMAS, *THE WRITING SYSTEMS OF THE WORLD* 118 (1989).

91. *See* Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 *UCLA PAC. BASIN L.J.* 276, 278-81 (1999). The Yi dynasty began in the closing years of the fourteenth century and lasted until the beginning of the twentieth century, when Korea became a Japanese protectorate. *See* NAHM, *supra* note 88, at 517, 521. The Japanese occupation left an impact that is still seen, as many of the Korean laws are Japanese-revised versions of the German civil law. *See* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA 14 (Sang Hyun Song ed., 1983).

92. Korea was formally a colony of Japan from 1908 until the close of the Second World War in 1945. *See* NAHM, *supra* note 88, at 521-22.

93. *See* Young Sik Song, *General Application and Implementation: Legal Remedies Against Infringement*, at 2, in *KOREAN INTELLECTUAL PROPERTY RESEARCH SOCIETY, INC., INTERNATIONAL*

Assembly enacted in 1957<sup>94</sup> to any degree.<sup>95</sup> Few authors sought to advance their statutory copyright protections,<sup>96</sup> “Korean courts paid little attention to copyright,”<sup>97</sup> and the subject was “a nonissue” for many years.<sup>98</sup> This was the period of government indifference<sup>99</sup> and a “tradition of neglect.”<sup>100</sup>

### 1. Cultural and Traditional Attitudes

Commentators examining copyright (and intellectual property) in Korea have referred to the cultural norms that purportedly explain Korea’s traditional lack of appreciation of copyright.<sup>101</sup> Scholars focused on these

SYMPOSIUM ON THE NEW COPYRIGHT LAW: CHALLENGE OF THE NEW COPYRIGHT LAW IN A CHANGING ENVIRONMENT (1987) [hereinafter Song, *Legal Remedies*]. There is some irony here. There has been great resentment of Japan since Korea gained its independence. See generally BRIAN BRIDGES, *JAPAN AND KOREA IN THE 1990S: FROM ANTAGONISM TO ADJUSTMENT* (1993); SUNG-HWA CHEONG, *THE POLITICS OF ANTI-JAPANESE SENTIMENT IN KOREA: JAPANESE-SOUTH KOREAN RELATIONS UNDER AMERICAN OCCUPATION, 1945-1952* (1991). Yet many of the institutions that Japan implemented during its military occupation, including the court system, many of the substantive laws, and legal education, remain intact in Korea today. In recent years, occasional reports of improving relations between the two countries, see Lorien Holland & Chester Dawson, *What If? The Dream of Korean Unification Could Be a Nightmare for the World’s Superpowers*, FAR EASTERN ECON. REV., June 29, 2000, at 18, are tempered by the latest incident that fuels the continuing political and social tension, see Howard W. French, *Japan’s Refusal To Revise Textbooks Angers Its Neighbors*, N.Y. TIMES, July 10, 2001, at A3.

94. See Copyright Law, Law No. 433, Jan. 28, 1957, reprinted in UNESCO KOREAN SURVEY 641-47 (1960) [hereinafter Korean Copyright Law] (current version at Copyright Act, Law No. 432, Jan. 28, 1957, amended by Act No. 3916 of Dec. 31, 1986, translated in VII STATUTES OF THE REPUBLIC OF KOREA 1091 (Korea Legislation Research Inst. trans., 1997)). See generally KYUNG JAE PARK, *THE INTELLECTUAL PROPERTY LAWS OF KOREA* 295-355 (1986); Youm, *supra* note 91, at 281-82. Under this law, works of foreigners would receive copyright protection in Korea if first published in Korea or if the foreigner’s native jurisdiction had a treaty with Korea providing reciprocal coverage. Korean Copyright Law, *supra*, art. 46. See Youm, *supra* note 91, at 284. Few, if any, non-Korean authors could meet these conditions, and thus, had virtually no copyright protection in Korea. See *id.*; Min & West, *supra* note 13, at 563.

95. See Song, *Legal Remedies*, *supra* note 93, at 3. The Korean copyright law of the day was virtually “dead law,” with little enforcement. Youm, *supra* note 91, at 276 (quoting YOUNG-PYO JEON, *CHULPAN MUNHWA WA CHAPJI CHONOLRIJUM* [BOOK PUBLISHING AND MAGAZINE JOURNALISM] 504 (1997)). Apparently, even government officials believed mistakenly that Korea did not have a copyright act. See Song, *Legal Remedies*, *supra* note 93, at 3.

96. Descriptions of the small number of cases involving copyright are available in Song, *Legal Remedies*, *supra* note 93, at 3-8.

97. Youm, *supra* note 91, at 288.

98. *Id.* at 278. “[F]ew Koreans had an opportunity to appreciate copyright in its practical sense.” *Id.*

99. See Song, *Legal Remedies*, *supra* note 93, at 3.

100. William Enger, *Korean Copyright Reform*, 7 UCLA PAC. BASIN L.J. 199, 213 (1990).

101. See Song, *Legal Remedies*, *supra* note 93, at 1; Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118, 120 (1994); Wineburg, *supra* note 84, § 1.03, at 1-9 to 1-15; Damon Darlin, *Where Trademarks Are up for Grabs: U.S. Products Widely Copied in South Korea*, WALL ST. J., Dec. 5, 1989, § 2, at 1.

norms in the 1980s when Korea, under pressure from the United States, agreed to a comprehensive overhaul of its copyright policy.<sup>102</sup> If long-standing cultural attitudes made copyright protection an alien concept in Korea,<sup>103</sup> there were understandable questions as to whether Korea could make good on its pledge.<sup>104</sup> As to the specifics of the culture that shaped the Korean mindset regarding copyright, the following are the salient features from the commentary:

- During the five centuries of the Yi dynasty, Korea was steeped in the Confucian tradition, which gave rise to certain lasting societal attitudes;<sup>105</sup>
- the Confucian ways established an ordered society with divisible classes, in which the political leadership was chosen from the top class, consisting of scholars and gentry;<sup>106</sup>
- Koreans viewed intellectual creations as public goods, rather than as private property, to be shared rather than exploited privately by the author;<sup>107</sup>

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102. See Park, *supra* note 18, at 168. Discussions held before 1985 were unsuccessful. See Enger, *supra* note 100, at 200; Gadbaw, *supra* note 26, at 272, 273.

103. Sang Hyun Song, *Keynote Speech*, at 1, in INTERNATIONAL SYMPOSIUM ON THE NEW COPYRIGHT LAW, *supra* note 93. Indeed, in Korea, “even the term ‘Intellectual property’ is very foreign.” *Id.* Traditionally, the term “industrial property” was used to refer to patents and trademarks. See Soo Kil Chang, *A Memorandum on the Korean Industrial Property Rights*, in BUSINESS LAWS IN KOREA: INVESTMENT, TAXATION AND INDUSTRIAL PROPERTY 635, 635 (Chan-Jin Kim ed., 1982). Still today, organizationally, the Korean Industrial Property Office oversees noncopyright intellectual property matters. Korean Industrial Property Office, *Missions of KIPO*, at <http://www.kipo.go.kr/ehtml/eAboIndex03.html> (mission includes “[e]xamination and registration of the patent, utility model, industrial design and trademark (including servicemark), policies on the protection of trade secrets, and registration of semiconductor chip layout designs”). Copyright matters are under the supervision of the Ministry of Culture and Tourism (formerly, and most recently, the Ministry of Culture and Sports; Ministry of Culture and Information). See Copyright Act, Law No. 432, Jan. 28, 1957, art. 53, amended by Act No. 3916 of Dec. 31, 1986, translated in VII STATUTES OF THE REPUBLIC OF KOREA 1091 (Korea Legislation Research Inst. trans., 1997) [hereinafter Korean Copyright Act] (Copyright “registrations . . . shall be made by the Minister of Culture and Tourism.”); Ministry of Culture and Tourism, *About the MCT: Bureau of Offices*, at [http://www.mct.go.kr/e\\_mct/sub1.htm](http://www.mct.go.kr/e_mct/sub1.htm) (Ministry’s Cultural Policies Bureau includes Copyrights Division).

104. Park, *supra* note 18, at 166, 173.

105. This influence appears to be a matter of general knowledge and acceptance. See Wineburg, *supra* note 84, at 1-9 (“Most Asian societies are influenced by the Confucian ethic.”). Indeed, the Confucian influence on Korea was substantial: “[T]he Yi dynasty brought about a thorough Confucianization of Korea’s politics and political structure, social thoughts and institutions, as well as its economic, intellectual, and cultural patterns. In the end, Korea became more Confucian than Confucian China as its influence permeated every aspect of the life of the nation.” NAHM, *supra* note 88, at 95.

106. See Song & Kim, *supra* note 101, at 120.

107. In 1986, Korea’s ambassador to the United States expressed this view directly. Kim, *supra*

- the copying of a scholar's book was "not an offense, but instead a recommended activity, reflecting a passion for learning";<sup>108</sup> indeed, the copying of a work was considered an honor;<sup>109</sup>
- authors gained and preferred "honorable status through authorship"<sup>110</sup>; Confucian values "devalue[d] the materialistic compensation of the literati."<sup>111</sup>

These features comprise the pertinent and prevailing culture of several centuries, which have continued,<sup>112</sup> giving rise to a mindset that had little appreciation or need for a system of protecting the proprietary rights of authors.<sup>113</sup> Likewise, the cultural forces explain why Korea did not traditionally adopt the rights-centered approach to copyright seen in common-law jurisdictions like the United States<sup>114</sup> and why acceptance of copyright in Korea even after the 1986 improvements has been slow.<sup>115</sup>

## 2. Korean Culture and Copyright Revisited

The commentary that relies on culture to help explain the continuing piracy and the lack of appreciation of authors' rights in Korea offers little elaboration of such culture. Few authors have attempted, for example, to break down the elements of the cultural attitudes,<sup>116</sup> critique the applicability

note 12, at 2 ("Historically, Koreans have not viewed intellectual discoveries or scientific inventions as the private property of their discoverers or inventors. New ideas or technologies were 'public goods' for everybody to share freely."). The point has been frequently repeated by commentators on both sides of the Pacific. *See, e.g.*, Gadbow, *supra* note 26, at 283; Sang Jo Jong, *Recent Developments in Copyright Law of Korea*, 24 KOREAN J. COMP. L. 43, 47 (1996); Song & Kim, *supra* note 101, at 120; Darlin, *supra* note 101, at 1. *See also* Wineburg, *supra* note 84, at 1-10; Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BALT. INTELL. PROP. L.J. 25, 26 (1997) [hereinafter Wineburg, *Jurisprudence in Asia*].

108. Song & Kim, *supra* note 101, at 120. *See* Wineburg, *supra* note 84, at 1-9; Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 25.

109. *See* Gadbow, *supra* note 26, at 283; Wineburg, *supra* note 84, at 1-9 ("copying is considered a high form of flattery"); Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 25.

110. Song & Kim, *supra* note 101, at 120.

111. Youm, *supra* note 91, at 279. *See* Jong, *supra* note 107, at 47; Kim, *supra* note 12, at 2; Song & Kim, *supra* note 101, at 120; Song, *Legal Remedies*, *supra* note 93, at 1; Wineburg, *supra* note 84, at 1-9, 1-10; Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 26.

112. *See* Song & Kim, *supra* note 101, at 120; Song, *Legal Remedies*, *supra* note 93, at 1.

113. Such a culture could even be "hostile" to the idea of copyright. *See* Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 25.

114. *Id.* at 25-26.

115. Youm, *supra* note 91, at 279.

116. Professor Alford suggests a similar process of breaking down the American notion of property "into its constituent elements, rather than treat[ing] it as an undifferentiated whole that one either has or lacks." Alford, *supra* note 74, at 17.

of traditional cultural norms to the current piracy situation, shed light on the various nuances of cultural beliefs, or suggest pertinent cultural trends in contemporary Korean society—all of which bear on the continuing piracy and slow development of copyright protection.<sup>117</sup> This portion of the Article begins the discussion, ultimately toward a more searching and thorough study.

If indeed the societal attitudes that influence the Korean appreciation of copyright are borne from centuries of tradition, it is altogether understandable that a society with such views would have little need or appreciation for legal recognition of the proprietary interests of the author. The notion of one person holding an exclusive right of exploitation of a work would indeed be alien. Yet the practice of relying on centuries-old cultural traditions as justification for actions in the industrialized setting of the twenty-first century entails some risk. One is reminded of Professor Alford's caution that "avowedly cultural explanations" of a national intellectual property system tend to have an "unduly conclusory impact."<sup>118</sup> Granted, traditional attitudes affect contemporary thinking (especially in a society that is anchored more to the past than to the present or future)<sup>119</sup> with regard to the rights of authors. Nevertheless, all societies evolve, and whereas some traditions are carried through the centuries to the present, others have merely residual presence in the technological age, and still others are lost altogether.<sup>120</sup> Although

117. In one notable exception, a study by two economists suggests that the "collectivist" orientation seen in Korean culture might explain its high piracy of software. See Donald B. Marron & David G. Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 *ECON. INQUIRY* 159 (2000). Marron and Steel note that national intellectual property protection policies depend partly on societal culture, and specifically that there is a correlation between a society's collectivist (as opposed to individualistic) culture and piracy of software. Referring to Hofstede's work on the cultural dimension of individualistic/collectivist orientation, see HOFSTEDE, *CULTURE'S CONSEQUENCES*, *supra* note 41, Marion and Steel suggest that,

[i]ndividualism both encourages and requires social institutions that protect individual rights. Chief among these are conceptions of individual ownership and equality before the law. Collectivism, in contrast, encourages institutions that favor close relatives, friends, and trusted associates (the "in-group") over outsiders. Such institutions emphasize resource sharing rather than individual ownership; they also attribute different rights to insiders and outsiders.

Marron & Steel, *supra*, at 166. For another discussion of the individual versus collective orientation, see Harry C. Triandis et al., *Multimethod Probes of Individualism and Collectivism*, in *THE CONFLICT AND CULTURE READER*, *supra* note 27, at 52-55.

118. ALFORD, *supra* note 2, at 6.

119. See *infra* text accompanying notes 323-25.

120. For instance, in the hierarchy of Confucian society, merchants—those in the business of buying and selling—were regarded as "inferior, greedy and dishonest," occupying a status of "degradation and deprivation." NAHM, *supra* note 88, at 101. See also DENISE POTRZEBA LETT, *IN PURSUIT OF STATUS: THE MAKING OF SOUTH KOREA'S "NEW" URBAN MIDDLE CLASS* 19 (1998) ("The low status attributed to . . . entrepreneurial activity . . . had a legal basis. During the Chosŏn dynasty yangban were prohibited by law from participating in . . . entrepreneurial activity . . .").

Confucian attitudes still influence Korean thinking and appear at the margins in the Korean copyright setting, many of the referenced traditions are outdated or of historical interest, and economic interests play a more determinative role.

One Korean cultural attitude whose continuing applicability must be examined is the view that creations of the intellectual and creative mind are public goods, to be shared, not economically exploited privately by the author. Although the continuing prevalence of this view may well explain a societal attitude that the copying of books, software, and albums without the creator's authorization is no vice,<sup>121</sup> two developments from the contemporary setting are worth note. First, Korean commentary has emphasized the great success of the Korean government's efforts since the copyright reforms of 1986 to educate the public on the concept of copyright and the author's right to exclusive exploitation.<sup>122</sup> As a result, "[t]here have been significant changes in the social attitudes towards intellectual property protection,"<sup>123</sup> and there is now a "heightened status of copyright in Korea."<sup>124</sup> Secondly, in spite of these efforts, piracy has continued, and there is little to ameliorate Korea's image as a main producer of international piracy.<sup>125</sup> This situation suggests that either the Confucian conception of creative works as public goods is still strong and the characterizations of the awareness efforts are exaggerated, or as is advanced here, that other factors explain the piracy. In support of the latter proposition, for those producing copies of works, there is a point at which (whatever the current influence of Confucian thought) traditional practices and attitudes give way to modern commerce and to notions of private property, economic motivation, and realities of the marketplace. In Confucian society, an author's work was considered a public good, and the task of printing copies for dissemination

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Times have changed. "[A]ttitudes toward commerce have been adapted to fit the requirements of a modern capitalist economy." LETT, *supra*, at 208.

121. As late as 1994, the Korean media noted that the illegal copying of an author's work is based "more on a lack of awareness among Korean consumers over the nature of copyrights than on a malicious disregard for copyrights." Yoo Choon-sik, *Young Engineer-Turned Software Developer, Manager Vies for Rising Opportunities*, KOREA ECON. DAILY, Jan. 31, 1994, available at LEXIS, News Library, World Archive News File.

122. In 1996, Professor Sang Jo Jong reported the "broad array of activities [by the Korean government] to inform and educate the general public of the necessity and importance of intellectual property protection." Jong, *supra* note 107, at 47. These included seminars, workshops, publications, "a copyright school where short courses on copyright are offered to the general public," a public service video, lectures, and "two large rallies" attended by over 8,000 people each. *Id.* at 48.

123. *Id.*

124. Youm, *supra* note 91, at 298.

125. See Enger, *supra* note 100, at 209, 210.

was left exclusively to the government.<sup>126</sup> In contemporary Korea, whatever the view that intellectual creations are for societal benefit, copies of such works are made and sold by private entrepreneurs. Copies are sold at their market value, and presumably, the ownership of the property is zealously guarded by its producers until timely payment has been made. The private exploitation suggests that the tradition of sharing public goods has given way to the modern notion of economic opportunity. Even when a society deeply rooted in Confucian traditions meets the present day reality of capitalism and economic opportunity, there is a question of how much such traditions dominate.

Next, the copying and sharing of intellectual works purportedly serve a culturally inspired educational purpose of fulfilling “a passion for learning.”<sup>127</sup> This attitude stems from the elevated status that scholars enjoyed in the hierarchical social and legal strata of traditional Confucian society.<sup>128</sup> Perhaps the copying and distribution of scholars’ works allowed members of the lower classes to emulate those above. Although formal classes have long been abolished, the Confucian influence has left a deeply status-conscience society in Korea,<sup>129</sup> with the highly educated enjoying commensurate status. One study notes, “The social importance of education is one of the major continuities between traditional and contemporary Korea.”<sup>130</sup> The moral superiority that scholars possessed in the dynastic era is

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126. See Song & Kim, *supra* note 101, at 120; Youm, *supra* note 91, at 278 (citing HAN SUNG-HON, CHOJAKKWON UI POPJE WA SILMU [*COPYRIGHT LAW AND PRACTICE*] 25 (1988)).

127. Song & Kim, *supra* note 101, at 121; see Wineburg, *supra* note 84, at 1-9; Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 26.

128. According to Confucian tradition, the people were divided into discrete classes. At the very top was “the scholar-gentry class called *yangban*, whose members controlled politics, sustained social morality and ethics.” NAHM, *supra* note 88, at 100. Below the *yangban* stratum was the *chung-in* (literally, “middle people”), “a group of petty central and local functionaries” that also included medical, scientific, and foreign language professionals.” *Id.* The *chung-in* “enjoyed certain privileges such as educational opportunities and political and social prestige, [but was] subservient to the *yangban*.” *Id.* at 100-01. Next in the hierarchy was the *sang-in*, the commoner class of “farmers, craftsmen, fishermen and merchants.” *Id.* at 101. This class comprised eighty percent of the population, with some hierarchy within this class itself. *Id.* The lowest class was the “*ch'onmin*, or the ‘low-born’ or ‘inferior people.’” *Id.* at 101. Slaves, domestic servants, sorcerers, butchers, basket-makers, and public entertainers were all members of this class. *Id.*

129. For a thorough and revealing look, see LETT, *supra* note 120. “[T]he assertion of status has become an important element in both the formation and the definition of its new urban middle class.” *Id.* at 1.

130. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, SOUTH KOREA: A COUNTRY STUDY 98 (Andrea Matles Savada & William Shaw eds., 4th ed. 1992). “People at the top require blue-ribbon educational backgrounds, not only because education gives them the cultural sophistication and technical expertise needed to manage large, complex organizations, but also because subordinates will not work diligently for an uneducated person—especially if subordinates are educated themselves.” *Id.*

still seen in Korean society,<sup>131</sup> and the “[u]niversity professor, the historical successor to the scholar of the Chosŏn dynasty, is among . . . the most prestigious of occupations in . . . Korea today.”<sup>132</sup> Education is perhaps the single most important determinant of social status in contemporary Korea.<sup>133</sup>

The societal emphasis on education explains various aspects of book piracy in Korea, namely: the prevalence of the practice in the higher education setting; the book publishers’ and buyers’ economic interest in the illegally copied materials; and the reported lack of aggressive enforcement of the copyright laws. The Korean university setting continues to be “a sanctuary to the unauthorized reproduction of books.”<sup>134</sup> One report summarizes: “There are more than 30 universities in Seoul, concentrated into three main areas. Around the start of the academic terms . . . when students acquire their course materials, these areas become hotbeds of piracy.”<sup>135</sup> One might argue that the copying and distribution of academic texts and works do advance knowledge, toward a more informed and educated citizenry. But it is not societal altruism that motivates the unauthorized copying and sales of pirated books. Rather, reproducers know that academic texts, exam preparation materials, and educational software<sup>136</sup> are necessities in obtaining an education,<sup>137</sup> and that there exists a starved market for those materials.<sup>138</sup>

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131. See LETT, *supra* note 120, at 46. See *id.* at 159-60 (“Confucian doctrine places heavy emphasis on the importance of education. In the 1990s education, moral worth, and status were still linked in the minds of Koreans.”). A socially constructed sense of morality, or a complete lack of appreciation for copyright even in academia, would explain the following reported practice by Korean professors. “In a typical case, a university professor obtains a book from abroad, goes to a reproduction company to have it reprinted, then assigns his students to buy it—with a kickback from the printer to the professor.” Halloran, *supra* note 9, at 15.

132. LETT, *supra* note 120, at 46.

133. See SOUTH KOREA: A COUNTRY STUDY, *supra* note 130, at 98 (“Education remained the single most important factor affecting social mobility in the 1990s . . . .”); LETT, *supra* note 120, at 164 (“[A]cquisition of a university degree was the surest way . . . to acquire status.”). See also VINCENT S.R. BRANDT, A KOREAN VILLAGE: BETWEEN FARM AND SEA 95 (1971) (“Education is an important formal determinant of social status today.”); James Robinson, *Social Status and Academic Success in South Korea*, 38 COMP. EDUC. REV. 506, 512 (1994). The Korean obsession with education is such that what college one attends defines the person and impacts greatly on one’s career, occupation, and marriage potential.

134. *Seoul Waging War Against Illegal Copying*, KOREA TIMES, Apr. 6, 1999, available at 1999 WL 5592060.

135. IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, at 218. “Photocopies are made in photocopy shops, and in some cases in vans which station themselves around campuses.” *Id.*

136. Especially those materials in English. During the Yi dynasty, “literacy in Chinese was a requisite skill of the cultivated man. Since then, English has replaced Chinese as a marker of status.” LETT, *supra* note 120, at 164.

137. There is also a widely accepted hierarchy of colleges. See SOUTH KOREA: A COUNTRY STUDY, *supra* note 130, at 98; Jeffrey Goldberg, *The Overachievers*, NEW YORK, Apr. 10, 1995, at 46.

138. See Shin Hye-Son, *Crackdown on Software Piracy Wreaks Havoc for University Computer Courses*, KOREA HERALD, May 4, 1999, available at 1999 WL 17748790; *President Kim Orders*

For the consumers—the nation’s college students and professors—there is also economic benefit in a situational necessity. Professors and students, who must have academic materials, benefit from reduced prices and thus support the piracy system.<sup>139</sup> Finally, if a jurisdiction’s legal policies are an affirmation of the society’s values, the great importance Korean society places on education explains its leadership’s reluctance to aggressively enforce the copyright laws and prevent the piracy of books.<sup>140</sup> It has been reported that Korean law enforcement, prosecutors, and courts “often fail to take book piracy seriously as a commercial crime”<sup>141</sup> and that neither the Ministry of Education, which oversees the nation’s universities, nor the individual universities have done enough to discourage book piracy.<sup>142</sup>

As an aside, the Confucian rationale, that copying assists in the pursuit of knowledge and honors the most learned and revered class, works best where the copied products are academic texts, books of poetry and literature, and educational software. This cultural tradition does not explain the copying of audio and video materials from the entertainment industry—recordings by singers and actors. Indeed, in traditional Confucian society, entertainers occupied the very lowest class, along with “such degraded professions” as butchers and grave diggers.<sup>143</sup> “[A]rtists and musicians were traditionally looked down upon,”<sup>144</sup> and this view persisted until only recently. Even today a derogatory term exists to refer to entertainers and theatrical folk: *ddan-dda-rah*.<sup>145</sup> Nevertheless, another traditional practice explains the copying of the works of entertainers. Historically, in Korea, entertainers “created their artistic works without the intention of making money. In general, as they were [retained by] the noble classes, they created their works upon request, which means they did not produce their works for

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*Crackdown on Pirating of College Textbooks*, KOREA HERALD, Feb. 10, 1999, available at LEXIS, News Library, Asia/Pacific Rim Archive News File.

139. See Gadbow, *supra* note 26, at 281 (reporting that when Korean book publishers opposed proposed (and eventually adopted) copyright legislation in 1986, university professors joined in support); Sally Taylor, *Korean Govt. Probing Continued Piracy*, PUBLISHERS WKLY, Feb. 17, 1989, at 56 (“[P]rofessors and students still support the pirate system.”).

140. In the 1970s, the Korean government had, in a paternalistic gesture, explicitly referenced the economic plight of its students in refusing cooperation with American requests. See Halloran, *supra* note 9, at 15 (“The Korean Government . . . has refused to clamp down on pirated editions within Korea . . . . One major reason . . . is that Korean students are poor and would be deprived of books they needed if they could not buy cheap editions.”).

141. IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, at 218.

142. See *id.*

143. NAHM, *supra* note 88, at 101.

144. Won Soon Park, *The Korean Situation on Music Copyright*, at 1, in INTERNATIONAL SYMPOSIUM ON THE NEW COPYRIGHT LAW, *supra* note 93.

145. I thank Professor Hi Won Yoon, Seoul National University, Department of Korean Language Education, for assistance with the development and full meaning of this term.

themselves.”<sup>146</sup>

Finally, commentators advance two additional cultural traits to explain the continuing piracy and the lack of appreciation for copyright in Korea: the copying of authors’ works honors and flatters them; and authors prefer cultural esteem over monetary compensation.<sup>147</sup> These traits are more apt in the domestic setting where both nonauthors and authors understand and accept the cultural norms,<sup>148</sup> but are far less apt in the international setting. Korean scholars of today, like their predecessors in the Yi dynasty, enjoy respect and envied status. They may well be honored by the copying of their works and prefer the affirmation of their status that such copying brings. But in the international (or transnational) setting, there is a question as to whether Korean reproducers intend to honor foreign authors. Foreign authors typically do not perceive the intended honor;<sup>149</sup> to the contrary, they feel wronged and see the copying as an infringement of their sacred rights to property ownership.<sup>150</sup> Likewise, the traditional practice of authors not seeking compensation for their works appears to have been held society-wide by both authors and nonauthors in Korea.<sup>151</sup> Even in the late 1980s, Korean authors reportedly thought it “unworthy of them to make monetary profits”<sup>152</sup>

146. Park, *supra* note 144, at 1. This historical practice had the same practical effect as the “works made for hire” doctrine seen in U.S. copyright law, where absent agreement, “the employer or other person for whom the work was prepared is considered the author” and owner, 17 U.S.C. § 201(b) (1994). A similar form of this doctrine exists in the current Korean copyright law. Korean Copyright Act, *supra* note 103, art. 9 (“When a work is made by an employee engaged in the affairs of juristic person, etc. in the course of duties and which is made under the name of relevant juristic person, etc., . . . under the planning of a juristic person, an organization or other employers . . . its author shall be the relevant juristic person etc., unless otherwise stipulated in a contract or the work regulations, etc. . . .”).

147. See *supra* text accompanying notes 110-11.

148. Such traits are most applicable in a society like Korea, with a highly homogeneous population and a long, shared history with little external interference. These are common characteristics of cultures that tend to be more high (versus low) context cultures. See Stella Ting-Toomey, *Toward a Theory of Conflict and Culture*, in THE CONFLICT AND CULTURE READER, *supra* note 27, at 46-51. In general, “high-context cultures . . . refer to groups of cultures that value group-identity orientation, covert communications codes . . ., and maintain a homogeneous normative structure with high cultural demand/high cultural constraint characteristics.” *Id.* at 46-47. In contrast, “low-context cultures . . . refer to groups of cultures that value individual orientation, overt communication codes . . ., and maintain a heterogeneous normative structure with low cultural demand/low cultural constraint characteristics.” *Id.* at 46. Korea is seen as situated towards the high-context end of the spectrum, the United States the low-context. *Id.* at 47.

149. With respect to American authors, the prospect of an intention to honor or flatter is more questionable in light of the continuing anti-American sentiment in recent years. See *infra* text accompanying notes 307-22.

150. Of course, there may be authors of all nationalities who take a more Confucian approach to their works, that is placing a greater value on advancing knowledge than on receiving compensation.

151. In any event, those authors that broke this mold and sought some compensation did so through conciliation, rather than litigation. See Song, *Legal Remedies*, *supra* note 93, at 1.

152. *Id.* “Those engaged in scholarly and artistic profession avoided the monetary disputes over

and did not “see themselves as a ‘group’ engaged in a commercial venture.”<sup>153</sup> Yet again, this component is absent in the international setting, where foreign authors usually hold a different view.<sup>154</sup>

The point is taken that those in Korea who copy works of foreign authors without authorization do not conduct their activities in conformance with a prescribed comprehensive cultural checklist, and that the above discussion may be somewhat hypertechnical in its treatment of the cultural dimension. Nevertheless, the discussion highlights the dangers of relying on culture *globally* to explain contemporary practices. When traditional culture meets the industrial age, it is not clear when culture applies and when it does not. Some cultural forces become more dominant than others, and the meeting of culture and modernization unearths inconsistencies and questions.<sup>155</sup>

Although Confucian traditions can be seen at the margins, economic interest emerges as the more dominating factor in the Korean piracy situation. As in other societies, new technology has made copying easier in Korea.<sup>156</sup> As a simple matter of economics, given necessary demand, those with the means to copy are more likely to profit from selling unauthorized copies at high volume than to pay for a license and sell fewer copies at higher prices. A part of the Korean culture sheds light on the economic motivation. As discussed above, Korea is a deeply status-oriented society. Although education is an important factor in determining status, in recent years, “status

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their published works because they traditionally valued the spirit of nobility until recent years as members of the cultural elite . . . .” Youm, *supra* note 91, at 279 (quoting Yong-Sik Song, *Problems with the Current Copyright Law (I)*, 19 PYONHOSA [LAWYER] 181, 182 (1989)).

153. Gadbow, *supra* note 26, at 283. This view is consistent with the honored but humbled and economically disinterested Asian author. See Wineburg, *supra* note 84, at 1-10; Wineburg, *Jurisprudence in Asia*, *supra* note 107, at 25-26.

154. The notion that all authors, whatever their society of origin, *ought* to be honored by the copying and wide distribution of works suggests a sense of ethnocentric attitude. Ethnocentrism refers to the tendency “to interpret or to judge all other groups and situations according to the categories and values of our own country,” SHARON RUHLY, *ORIENTATIONS TO INTERCULTURAL COMMUNICATION* 22 (1976), or “to think the characteristics of one’s own group or race superior to those of other groups or races,” HOFSTEDE, *CULTURE’S CONSEQUENCES*, *supra* note 41, at 25 (quoting J.A. DREVER, *A DICTIONARY OF PSYCHOLOGY* 86 (1952)).

155. Literal application of the Confucian traditions to the twenty-first century international setting presents a riddle that highlights the clash of culture. If intellectual works are goods for the public, and hence, in the public *domain*, any member of consuming society could do with it what she wishes. This membership would include private entrepreneurs who wish to exploit the goods for their own profit, subject to market supply and demand. Thus, applying traditional attitudes, any member of the public would be allowed to exploit the goods (because they are in the public domain), except the owner, because of the traditional view that literati ought not meddle in matters of compensatory reward.

156. Ironically, a society credited with producing the first movable printing press in the thirteenth century did not become known as a leading piracy jurisdiction until the middle of the twentieth century.

has also come to depend more on differences in wealth.”<sup>157</sup> Whereas other determinants are irreversible after a certain point, wealth is the most malleable. Expression of wealth through materialism, for example, is decidedly not Confucian,<sup>158</sup> but appears to have emerged as a societal characteristic nevertheless.<sup>159</sup>

### 3. *Domestic Resistance to Copyright Reform*

The deliberations that ultimately resulted in the comprehensive new copyright law in 1986 demonstrated the economic interest in the piracy situation. Commentator R. Michael Gadbow's review of the intellectual property reforms is telling. He notes that Korean publishers depend greatly on the sale of pirated textbooks; therefore, they generally oppose copyright protection.<sup>160</sup> The Korean Publishers' Association, an organization whose membership profits from unauthorized copying and sales of books, publicly argued against enhanced copyright protections because “not only would book prices rise substantially . . . , but their members would also be burdened with large royalty payments.”<sup>161</sup> Likewise, software companies opposed legislation providing more protection of computer programs, “partly out of fear that their employees would leave to form their own companies,”<sup>162</sup> which presumably would increase competition. Furthermore, as both publishers and software companies were significant importers rather than exporters of works, they would benefit from limited copyright protection of

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157. LETT, *supra* note 120, at 40 (citing Clark W. Sorensen, *Ancestors and In-Laws: Kinship Beyond the Family*, in ASIA'S CULTURAL MOSAIC: AN ANTHROPOLOGICAL INTRODUCTION 118, 144 (Grant Evans ed., 1993)).

158. One subject that the Master seldom spoke of was profitableness. See THE PHILOSOPHY OF CONFUCIUS 62 (James Legge trans., 1953).

159. The drive for economic wealth toward enhancing one's status taken to excess can, of course, lead to conspicuous consumption. See LETT, *supra* note 120, at 104. Then there is the survey taken of a congregation of a church in Seoul, in which respondents were asked to identify the primary reason for turning to their Christian faith. Less than thirty-one percent identified healing as the primary reason, while over thirty-seven percent referred to material blessings. See Andrew E. Kim, *Korean Religious Culture and Its Affinity to Christianity: The Rise of Protestant Christianity in South Korea*, 61 SOC'Y OF RELIGION 117, available at 2000 WL 21849785 (citation omitted). Scripture is not lacking in supporting text. See *Job* 8:7 (“Your beginnings will seem humble, so prosperous will your future be.”); *id.* 22:21 (“Submit to God and be at peace with him; in this way prosperity will come to you.”).

160. Gadbow, *supra* note 26, at 281.

161. *Id.* “Korean publishers have consistently claimed that the protection of foreign copyrights will cause severe, even fatal damage to the local publishing industry.” *Id.* at 280 (quoting Ian Taylor, *How To Prepare for the New Environment*, in INTERNATIONAL SYMPOSIUM ON THE NEW COPYRIGHT LAW, *supra* note 93, at 22-23).

162. *Id.* at 281.

incoming foreign works.<sup>163</sup>

Gadbaw reports that although there was “[v]isible support”<sup>164</sup> for legislation improving copyright protection from organized groups representing writers, music authors and composers, and record makers and sellers, their influence was limited.<sup>165</sup> The “extensive domestic opposition far outweighed internal support.”<sup>166</sup> Because author groups traditionally did not see themselves as engaged in a commercial venture and because Korean copyright law was inadequate, these groups did not have the lobbying presence of their counterparts in the United States.<sup>167</sup> However, the Korean publishing industry, which stood to gain from less rather than more copyright protection, as well as consumers who could benefit from reduced prices, apparently had more influence.<sup>168</sup>

### C. Summary: A Common Interest in Property

In summary, the American demand for protection of works by authors and the continuing rampant piracy in Korea both demonstrate the preservation of economic interest. Still, culture helps to explain the motivation behind the economic interest. In the United States, property ownership is related to economic wealth (which is a determinant in social status, of course)<sup>169</sup> and the desire for property. In contrast, in status-oriented Korean society, economic wealth is a factor in determining social standing. Stated another way, where American culture may see the desire of property and economic wealth as an end itself, Korean culture sees economic gain more as a means to a different end—enhanced standing in the social hierarchy. This approach helps to explain the continuing piracy in Korea

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163. *Id.*

164. *Id.* at 282.

165. These groups were, respectively, the Korean Society of Authors, the Korean Music Copyright Association, and the Korean Phonograms Association. *Id.* at 283-84.

166. *Id.* at 276.

167. In the case of authors, contributing to the limited role is the traditional trait of authors not seeing themselves as engaged in a commercial venture. The Korean Phonograms Association directed its energies to the passage of the Phonogram Act instead. *Id.* at 284.

168. In a fascinating analysis, Gadbaw offers a quantitative assessment of the “political pressure” that publishers, authors, and other groups put on the Korean government with respect to copyright legislation. *Id.* at 278, tbl. 8.1. Not surprisingly: “Violators” (presumably, publishers) and “Consumers” exerted pressure to reduce protection; “Innovators” (writers, authors, composers and record producers) put pressure to improve protection; and “Trading Co[mpanies]” took no position. *Id.* Interestingly, Gadbaw notes, without elaboration, that the political influence of the consumers and “Violators” is measurably higher than that of the authors, composers, and the recording industry who urged enhanced copyright protection. *Id.*

169. Although American society is conscious of social status, it does not have the deeply rooted history of class over centuries of time that Korea does.

against American objections.

The discussion above questions whether the cultural factors previously advanced to explain the piracy situation are still applicable, and also urges awareness of cultural traits to explain aspects of the piracy situation in Korea. This balanced appreciation will be necessary for U.S. representatives in future negotiations. Also important is an understanding of the cultural attitudes reflected in current Korean copyright law and policy, addressed in the following discussion.

### III. KOREAN COPYRIGHT AT THE NEW CENTURY: SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED, SOMETHING (FOR THE RED, WHITE, AND) BLUE<sup>170</sup>

The current Korean copyright system—in law and practice—appears to reflect on the one hand attributes of both American and Korean culture, and on the other, a practical urgency of a national society long steeped in (pen)insular traditions seeking acceptance in the international legal and market arena. The textual copyright law of Korea<sup>171</sup> incorporates much of the property-oriented approach to copyright seen in the U.S. counterpart. The Korean cultural influence is most evident in the protections of the author's moral rights<sup>172</sup> and procedures for the out-of-court resolution of copyright disputes.<sup>173</sup> The Korean act also provides for a mechanism to educate the Korean public on the new copyright regime.<sup>174</sup> Korea appears to be hurriedly attempting to transform itself from a traditional society with little appreciation for copyright toward one with a modern copyright system suitable for international trade and respect. These matters are discussed in turn.

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170. For a discussion of the origin of this phrase, see A DICTIONARY OF SUPERSTITION 42-43 (Iona Opie & Moira Tatem eds., 1989). With respect to the current Korean copyright system, there are: traditional Korean cultural attitudes (something old); emphasis of the author's property rights in copyright (new, borrowed); statutory provisions adapted from the German and Japanese civil codes (borrowed); and protection of the works of foreign, that is, American, authors (red, white, and blue).

171. The Korean Copyright Act is the main Korean copyright statute. The Computer Programs Protection Act, Act No. 6233, Jan. 8, 2000, available at <http://www.moleg.go.kr/mlawinfo/english/htmls/law28.html>, enacted at the same time as the Copyright Act and which provides for copyright protections of computer programs specifically, Sound Records, Video Products, and Game Software Act, Act No. 5925, Feb. 8, 1999, amended by Act No. 6186, Jan. 21, 2000, translated in VII STATUTES OF THE REPUBLIC OF KOREA 901 (Korea Legislation Research Inst. trans., 1997), comprise the jurisdiction's statutory copyright regime. See Song & Kim, *supra* note 101, at 123-24.

172. See *infra* text accompanying notes 229-46.

173. See *infra* text accompanying notes 247-62.

174. See *infra* text accompanying notes 267-68.

### A. *The Author's Property Rights*

A comparative appreciation of the Korean copyright law first requires an understanding of the salient features of its American counterpart. The U.S. Copyright Act of 1976, with subsequent amendments, represents the current state of American copyright.<sup>175</sup> The act gives “the owner of copyright”<sup>176</sup> (the author or one to whom she has transferred the copyright),<sup>177</sup> the exclusive rights for a statutory term<sup>178</sup> to reproduce and distribute copies of the copyrighted work.<sup>179</sup> A broad category of works can receive copyright protection.<sup>180</sup> A central tenet of copyright law is that copyright protection does not apply to authorship of mere ideas.<sup>181</sup> The statute provides no definition of “author,” but the term is understood to be broad,<sup>182</sup> the “work made for hire” doctrine<sup>183</sup> delimits the definition by denying authorship status to those who prepared their works within the scope of employment or by special order or commission.<sup>184</sup> There are limitations to the exclusive

175. Pub. L. No. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). Congressional authority is taken from the “copyright clause” of the United States Constitution. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to promote “the . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective writings”).

176. 17 U.S.C. § 106 (1994). *See id.* § 101 (defining “Copyright owner”).

177. *Id.* § 201(d)(1)-(2). “The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law,” and “[a]ny of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately.” *Id.*

178. Generally, the rights subsist from the creation of the work, for a duration of the life of the author plus seventy years. The statute provides for succession of the copyright interest upon the author’s death. *See id.* § 302.

179. *Id.* § 106. The author also has the right to prepare derivative works based on the copyrighted work, and in the case of literary, musical, dramatic, choreographic or similar works, to perform and display the work publicly. *Id.*

180. “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression,” including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural works, as well as motion pictures and musical pantomimes. *Id.* § 102(a). Computer programs also receive protection. *See* NIMMER & NIMMER, *supra* note 81, § 2.04[C], at 2-51 to 2-52.4. *See also* 17 U.S.C. § 101 (1994) (defining “[c]omputer program”). The U.S. Copyright Office began registering computer programs in 1964. *See* Diamond v. Diehr, 450 U.S. 175, 194 n.2 (1981) (Stevens, J., dissenting) (citing 11 COPYRIGHT SOC’Y USA BULL. 361 (1964)). For a historical development of copyright protection of computer programs, see Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 978 (1993).

181. *See* 17 U.S.C. § 102(b) (1994).

182. *See generally* Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323 (1996).

183. 17 U.S.C. § 101 (1994) (defining “work made for hire”).

184. “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201 (1994). The doctrine is based on the rationale that an employee’s work is under the control of her

rights, principally the “fair use” doctrine,<sup>185</sup> which allows the public’s limited use of the works without the owner’s authorization or compensation when policy reasons justify it, as well as certain other exempted uses.<sup>186</sup> The act provides for a cause of action for the copyright owner against infringement of her exclusive rights<sup>187</sup> and provides for various remedies.<sup>188</sup> The act also allows criminal penalties for infringers,<sup>189</sup> though historically, prosecutors apply them infrequently.<sup>190</sup> Foreign authors may receive protection in a number of ways, but most generally, if the author “is a national [or] domiciliary . . . of a treaty party.”<sup>191</sup> In prior comparative commentary,

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employer. *See generally* Dennis Angel & Samuel W. Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L. SCH. L. REV. 209 (1976).

185. 17 U.S.C. § 107 (1994) (“[T]he fair use of a copyrighted work, including such used by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”). Factors to be considered in determining whether use is fair use include:

- (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

186. *See id.* §§ 108-12 (providing limitations on exclusive rights for reproductions by libraries and archives; transfer of particular copy or phonorecord; exemptions of certain performances and displays; secondary transmissions; ephemeral recordings).

187. *Id.* § 501(b).

188. They include injunctive relief, impounding of the infringing articles, damages, and costs and attorney’s fees. *See id.* §§ 502-05.

189. Criminal liability requires willful infringement of a copyright either for “purposes of commercial advantage or private financial gain” or by the reproduction or distribution of a phonorecord or copyrighted work that has a total retail value of more than \$1,000. 17 U.S.C. § 506(a) (Supp. IV 1998).

190. Historically, the criminal provision served a mainly deterrent purpose; prosecutions for copyright infringement were rare. *See* NIMMER & NIMMER, *supra* note 81, § 15.01[B][2], at 15-17. *See also* Ting Ting Wu, Comment, *The New Criminal Copyright Sanctions: A Toothless Tiger*, 39 IDEA 527 (1999) (reporting sixty-eight criminal infringement cases out of 3,300 reported cases from 1948 to 1997). Recent amendments to 17 U.S.C. § 506(a) make criminal prosecution of copyright violations easier. *See* No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 U.S.C.). The question remains whether the amended provisions will see an increase in prosecutions.

191. 17 U.S.C. § 104(b)(1) (Supp. IV 1998). “A ‘treaty party’ is a country or intergovernmental organization other than the United States that is a party to an international agreement.” *Id.* § 101. Of relevance here, the United States is a party to the Berne Convention, the Universal Copyright Convention, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6*bis*, as last revised, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235; Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 132; Convention for the Protection of Producers of Phonograms Against Unauthorized

scholars have described the U.S. copyright system as one that emphasizes the economic and pecuniary distribution of rights.<sup>192</sup> Such a system is appropriate in a culture that desires and values property and expects laws that protect property rights.

The Copyright Act of Korea<sup>193</sup> enacted in 1986, as subsequently amended, adopts many of the essentials of the U.S. counterpart, with obvious parallels and functional equivalents.<sup>194</sup> Most notably, the act provides for *juh-jak-jeh-san-gwon*—literally, “author’s *property* rights”<sup>195</sup>—and repeatedly uses the very phrasing throughout the act.<sup>196</sup> The author’s rights<sup>197</sup> include the right of reproduction, public performance, broadcasting, transmission, exhibition, distribution, and production of derivative works.<sup>198</sup> Such rights are transferrable, with the transferee standing in place of the author.<sup>199</sup> As with American copyright, a broad category of works can receive copyright

Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994).

192. Kwall, *Copyright and the Moral Right*, *supra* note 79, at 2; Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59 (1994). See YOUNG SIK SONG, *JUHK-SOH-YOO-KWON* [INTELLECTUAL PROPERTY] 972 (1994) (describing American copyright as protecting property rights by focusing on economic value).

193. Korean Copyright Act, *supra* note 103. The Korean constitutional counterpart to the U.S. copyright clause reads: “The rights of authors . . . and artists shall be protected by Act.” KOREA CONST. art. 22(2), Oct. 29, 1987, art. 22(2), translated in I STATUTES OF THE REPUBLIC OF KOREA 5 (Korea Legislation Research Inst. trans., 1997).

194. A helpful guide to Korean copyright law appears in Joon K. Park, *South Korea*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA 337, 348-53 (Alan S. Gutterman & Robert Brown eds., 1997).

195. The “author’s property rights” phrasing is absent in the prior Copyright Law, *supra* note 94. Ironically, although this Article argues that the U.S. copyright interest is a form of the property right so valued in American culture, it is the Korean (not American) statutory text that emphasizes this “property” phrasing. On this note, left to another day is a study of the Korean legal protection of tangible property, relative to that of intellectual property. A sketch of the American debate over extending property protection to copyright is provided *supra* text accompanying notes 73-82.

196. See Korean Copyright Act, *supra* note 103, §§ 5, 6, 7, 8; arts. 11(2), 22, 23(3), 36(1) (twice), 36(2), 37(1) (twice), 38 (twice), 40, 41(1), 41(2), 42(1), 42(3), 44, 45(1) (four), 45(3) (twice), 45(4) (twice), 46.1, 46.2, 47 (title), 48 (twice), 50 (twice), 51(1), 52.1 (twice), 52.2, 60(2), 60(3), 74(1), 74(2), 77, 78(3), 93(1) (twice), 93(2) (twice), 93(3), 94, 97 (twice).

197. Generally, the rights are for a duration of the life of the author plus fifty years. See *id.* art. 36(1). The English translation of the statute does not specify that the author’s rights are exclusive. Korea, however, has confirmed the exclusive nature of the rights. WORLD TRADE ORGANIZATION, COUNCIL FOR TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, REVIEW OF LEGISLATION, REPUBLIC OF KOREA § IV.A.3 (Sept. 27, 2000) [hereinafter REVIEW OF LEGISLATION, REPUBLIC OF KOREA] (Korea’s Responses to Questions Posed by the European Communities and the Member States) (“[I]t is an author alone that has exclusive rights concerning the use of his works and enjoys the benefits flowing from use.”).

198. Korean Copyright Act, *supra* note 102, arts. 16-21.

199. *Id.* art. 41 (except for right to production of derivative work).

protection.<sup>200</sup> Also similarly, the Korean equivalent of the work made for hire doctrine<sup>201</sup> limits the rather broad definition of “author.”<sup>202</sup> The author’s rights are subject to similar limitations seen in the U.S. equivalent.<sup>203</sup> The Korean law also provides for “redress for infringement of rights,” which sets forth provisions for injunctive relief,<sup>204</sup> confiscation,<sup>205</sup> and damages.<sup>206</sup> A separate section provides for criminal penalties,<sup>207</sup> which must be requested by the author.<sup>208</sup> Works of foreign authors may receive protection in Korea under various scenarios, but principally, “in accordance with the treaties to which the Republic of Korea has acceded or which it has ratified.”<sup>209</sup> Korea joined the Universal Copyright Convention<sup>210</sup> and the Geneva Phonograms Convention<sup>211</sup> in 1987; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>212</sup> (by membership in the World Trade

200. “Work means a creative production belonging to the category of original literary, scientific or artistic works.” *Id.* art. 2(1). Examples are

novels, poems, theses, lectures, recitations, plays and other literary works; . . . [m]usical works; . . . [t]heatrical works including dramas, dances, pantomimes . . . paintings, calligraphic works, sculptures, crafts, works of applied art, and other artistic works; . . . [a]rchitectural works including architectural models and design drawings; [p]hotographic works including photographs and other works produced by similar methods; . . . [c]inematographic works; . . . [m]aps, charts, design drawings, sketches, models and other diagrammatic works; and . . . [c]omputer program works.

*Id.* art 4(1). Before the 1986 overhaul of the copyright laws, there was some question as to whether computer programs could receive copyright protection. The revised copyright act explicitly states that computer programs are copyrightable subject matter, and that protections are provided in a separate act (the Computer Programs Protection Act). *See id.* art. 4(1)9, 4(2). For discussion of the development of copyright protection of computer programs in Korea, see Young-Cheol Jeong & Yoong Neung Kee, *Protection and Licensing of Software in Korea*, 8 No. 7 COMPUTER LAW. 25 (1991); Young A. Lee, *Recent Developments in Korean Law with Notes on the Protection of Computer Software*, 15 KOREAN J. COMP. L. 186 (1987); Byungkwon Lim, *Protection of Computer Programs Under the Computer Program Protection Law of the Republic of Korea*, 30 HARV. INT’L L.J. 171 (1989); Byoung Kook Min & Gary Sullivan, *Recognition of Proprietary Interests in Software in Korea: Programming for Comprehensive Reform*, 8 MICH. YEARBOOK INT’L LEGAL STUDIES 49 (1987).

201. Korean Copyright Act, *supra* note 103, art. 9 (providing that authorship of work by employee in course of duties and made public under name of legal person, organization or employer is to be attributed to legal person).

202. “‘Author’ means a person who creates the works.” *Id.* art. 2(2).

203. *Id.* arts. 22-35 (under “Limitations to Author’s Property Rights,” including judicial proceedings, education purpose, news reporting, nonprofit performance, and private use).

204. *Id.* art. 91.

205. *Id.* art. 101.

206. *Id.* art. 93.

207. *Id.* art. 98.

208. *Id.* art. 102.

209. *Id.* art. 3(1).

210. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 132.

211. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

212. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—

Organization) in 1995; and the Berne Convention in 1996.<sup>213</sup>

### B. Cultural Norms

The two provisions of the Korean copyright law that appear the most culturally derived relate to the protection of the author's moral rights and the conciliation of disputes as an alternative to court litigation. Cultural differences between Korea and the United States likely explain why U.S. copyright law has substantially less emphasis on moral rights and no provision whatsoever governing alternative dispute resolution procedures.

#### 1. Moral Rights and the Author's Honor

The much discussed matter of moral rights in copyright<sup>214</sup> seeks to protect the noneconomic, personal, or personality rights of the author. They include chiefly the right of disclosure of the work,<sup>215</sup> the right of author attribution,<sup>216</sup> and the right of integrity of the work.<sup>217</sup> Authors' moral rights are most prominent in the continental countries,<sup>218</sup> especially in France, which is home to the *droit moral* and the most extensive protections for authors' personality rights.<sup>219</sup>

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Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994).

213. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6bis, as last revised, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235.

214. A recent discussion (and a recommended bibliography) is available in Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 799 n.25 (2001).

215. As the creator of the work, only the author can determine when her work is complete and when it is ready for publication for public review. See Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 7 (1988); Kwall, *Copyright and the Moral Right*, supra note 79, at 5-6; Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 1 (1997) [hereinafter Kwall, *How Fine Art Fares Post VARA*].

216. Once the work is published, this right ensures that the author (and no one else) will receive attribution as its creator. See Damich, supra note 215, at 7; Kwall, *Copyright and the Moral Right*, supra note 79, at 7; Kwall, *How Fine Art Fares Post VARA*, supra note 215, at 1.

217. This right protects against significant alteration of the work or derogatory use of it that is contrary to the author's intentions. See NIMMER & NIMMER, supra note 81, § 8D.04, at 8D-49 to 8D-57; Damich, supra note 215, at 15. The right of integrity is often considered the most central of moral rights. See 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 143 (2d ed. 1987); Kwall, *How Fine Art Fares Post VARA*, supra note 215, at 2; Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 387 (1993); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 565 (1940).

218. For a discussion of moral rights protections in various civil law countries, see Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995).

219. For example, under French law, moral rights are exclusive to the author, inalienable (not subject to waiver or transfer), and perpetual. See generally Russell J. DaSilva, *Droit Moral and the*

In contrast, the United States historically has been unreceptive to adopting the moral rights doctrine, in part because of the view (often debated) that equivalent protections are available under various common-law theories, such as privacy, defamation, and unfair competition.<sup>220</sup> The federal copyright law provides for the rights of attribution and integrity only to “work[s] of visual art.”<sup>221</sup> Such rights may not be transferred, may be waived with consent of the author,<sup>222</sup> and exist only for the duration of the author’s life.<sup>223</sup> Moral rights protections in the federal statute appear to be an after-thought, a begrudging accommodation to the supporters of authors’ rights who long clamored for formal recognition of the personality rights;<sup>224</sup> however, some saw the protections as inadequate.<sup>225</sup> In substance, the federal provisions indicate a congressional intention that moral rights occupy a secondary status. In addition to the limited categories of works and authors that receive moral rights protection under the law, such rights are subject to fair use,<sup>226</sup> and violations of moral rights (unlike violations of authors’ economic rights) are not subject to penal sanction.<sup>227</sup> These limitations provide additional support for the characterization of U.S. copyright law as being based primarily on the allocation of proprietary and economic interests. It is a matter of culturally driven prioritizing.<sup>228</sup>

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*Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1 (1980); Jane Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC’Y USA 269 (1989); Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 390-409 (1951); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

220. Damich, *supra* note 215, at 35-76; Kwall, *Copyright and the Moral Right*, *supra* note 79, at 17-34.

221. 17 U.S.C. § 106A (1994).

222. *Id.* § 106A(e).

223. *Id.* § 106A(d).

224. Moral rights provisions are contained in § 106A, inserted between the section that provides for the various exclusive rights of the copyright owner and the first of several sections that provides for limitations to the such exclusive rights. Section 106A was added to the copyright act by virtue of the Visual Artists Rights Act of 1990. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128.

225. E.g., Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945-46 (1990).

226. 17 U.S.C. § 106A(a) (1994).

227. *Id.* § 506(f).

228. Note Professor Paul Goldstein’s characterization of the differences in European and U.S. “copyright culture”:

The European culture of copyright places authors at its center, giving them as a matter of natural right control over every use of their works that may affect their interests. . . . By contrast, the American culture of copyright centers on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a calculus that appears to leave authors at the margins of its equation.

GOLDSTEIN, *supra* note 78, at 168-69.

Moral rights protections in Korea are a core component of the author's protections in the jurisdiction's Copyright Act.<sup>229</sup> Korean moral rights provide for the triangular rights of disclosure, attribution, and integrity, without limitation to any category of authors.<sup>230</sup> Such rights belong exclusively to the author,<sup>231</sup> even after the ownership of copyrighted work transfers hands, and are perpetual, surviving the death of the author and passing to her estate.<sup>232</sup> Importantly, the Korean copyright law explicitly provides that moral rights are not subject to fair use,<sup>233</sup> and infringements of such rights are subject to criminal sanction.<sup>234</sup> Although many Korean statutes generally are based on the German civil code (with Japanese modification),<sup>235</sup> and the Korean moral rights provisions resemble those of the German and Japanese counterpart,<sup>236</sup> this particular Korean act is not a matter of mere transplantation. Indeed, Professor Kyu Ho Youm states, "Koreans might have created their own version of moral rights as part of copyright regardless of whether their law was transplanted from Europe. This is culturally and legally in tune with Korean society."<sup>237</sup> The extent of the moral rights protections is a cultural relic of the traditional reverence for the scholar-author, which has extended to contemporary musicians and movie producers. With respect to the standard for assessing infringement of moral rights, although the Korean statute refers to the Berne Convention's standard of prejudice to the author's honor or reputation,<sup>238</sup> some provisions of the statute equate violation of the author's moral rights with defamation of the author.<sup>239</sup> Under the Korean law, an author whose moral rights are violated

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229. The principal provisions governing the author's moral rights are included in articles 11 to 15 of the Copyright Act. Korean Copyright Act, *supra* note 103, arts. 11-15. The author's property rights are provided subsequently, in articles 16-21. Korean Copyright Act, *supra* note 103, arts. 16-21.

230. Korean Copyright Act, *supra* note 103, arts. 11-13. The general definition of authors ("the person who creates the works") appears to apply, limited by the equivalent of the works made for hire doctrine. *Id.* art. 2(2).

231. *Id.* art. 14(1). *But see* Jong, *supra* note 108, at 45 (questioning rule of alienability in light of *Jong v. Hotel Lotte, Inc.*, 92 Da 31309 (Korea Sup. Ct. 1992)).

232. Korean Copyright Act, *supra* note 103, arts. 14(2), 96.

233. *Id.* art. 35 ("No provisions of this Section [limitations on author's property rights] may be interpreted as affecting the protection of authors' moral rights.").

234. *Id.* art. 98.

235. *See* INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, *supra* note 91, at 14.

236. *See* Youm, *supra* note 91, at 299 ("The moral rights aspect of the Copyright Act is directly influenced by the civil law system of continental Europe which Korea adopted through Japan.").

237. *Id.*

238. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6*bis*, as last revised, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235.

239. Korean Copyright Act, *supra* note 103, arts. 14(2), 98.2. *See* Youm, *supra* note 91, at 299. In contrast, the defamation claim to protect authors' moral rights in the American courts has had only sparing success. *See* Damich, *supra* note 215, at 63-65; Kwall, *Copyright and the Moral Right*, *supra* note 79, at 22-25.

has an assortment of “preventive measures and restorative actions”<sup>240</sup> that she may seek. In addition to compensation for damages,<sup>241</sup> she may seek criminal punishment<sup>242</sup> and “measures necessary for the restoration of [her] reputation.”<sup>243</sup> Korean authors are said to prefer respect for authorial personality over economic profit and see criminal sanctions as the better form of punishment for those who infringe their moral rights.<sup>244</sup> This preference is another carry-over from the era when scholar-authors favored confirmation of their status through proper publication over economic benefit.<sup>245</sup> In any case, a review of the cases decided by the Korean courts indicates that litigation involving the author’s moral rights comprises a significant portion of the decisional law.<sup>246</sup>

## 2. Preference for Conciliation

The Korean copyright act also establishes a Copyright Deliberation and Conciliation Committee, an organization that, as the name suggests, is to “deliberate matters concerning copyright and conciliate disputes concerning the rights protected under this Act.”<sup>247</sup> Regarding the conciliation function, the Act establishes a division within the Committee that is to conduct

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240. Youm, *supra* note 91, at 294 (describing court’s characterization of remedies available under Copyright Act in *Korean Broadcasting Corp. v. Han*, 92 Na 35846 (Seoul High Ct. 1994).

241. Korean Copyright Act, *supra* note 103, arts. 91(1), 92(2).

242. *Id.* art. 98.2.

243. *Id.* art. 95.

244. See Youm, *supra* note 91, at 299. Of interest is the relief sought in *Han v. Korean Broadcasting Corp.*, 90 Kaham 1404 (Seoul District Court 1992), *aff’d*, 92 Na 35846 (Seoul High Court 1994), discussed in Youm, *supra* note 91, at 292. In *Han*, a television company had broadcast an edited version of a sociology professor’s lecture, deleting one-third of the original one-hour lecture. The professor alleged that the “unreasonably” edited broadcast damaged his scholarly reputation, and sought a rebroadcast of the original lecture, broadcast of the trial court’s decision ruling in favor of the professor, a public apology, but no money damages. The appellate court affirmed the lower court’s order of broadcast of the judgment in favor of the professor. Youm, *supra* note 91, at 292-93 (citing *Han*, 90 Kaham 1404).

245. See *supra* text accompanying notes 110-11.

246. See cases mentioned in Jong, *supra* note 107, at 45; Song, *Legal Remedies*, *supra* note 93, at 3-7, 15-19; Youm, *supra* note 91, at 292-94. See also Copyright Deliberation and Conciliation Committee, *About the Committee: Services—Deliberation and Conciliation*, at [http://www.copyright.or.kr:8080/index\\_en.asp?menu=13](http://www.copyright.or.kr:8080/index_en.asp?menu=13) (“The most frequent disputes are . . . : Disputes on author’s moral right[;] . . . Disputes concerning author’s property rights[;] . . . Disputes concerning neighboring rights[;] . . . Disputes concerning compensation to be paid to the performer and the phonogram producer by the broadcasting organization when broadcasting commercial phonograms.”).

247. Korean Copyright Act, *supra* note 103, art. 81(1). Members are to “have knowledge and experience in copyright matters and renowned for their virtues,” and are “nominated by the Minister of Culture and Tourism.” *Id.* art. 81(3).

conciliation of copyright disputes<sup>248</sup> and sets forth the procedures to be followed for such conciliation.<sup>249</sup> This portion of the statute reflects what has been described as the cultural preference for conciliation over court adjudication.<sup>250</sup> Indeed, the early commentary reflects a traditional distaste for litigation among Koreans.<sup>251</sup> Again, Confucian ethics<sup>252</sup> and Korean society's value of harmony and peace engender this distaste for litigation.<sup>253</sup> Koreans "tend to regard public conflict as being beneath their dignity," and thus hesitate to resort to the judicial process.<sup>254</sup> Although some members of Korean society still hold such sentiments, more recent commentary suggests that the trend is changing.<sup>255</sup> In contemporary society, say observers, Koreans

248. *Id.* art. 83. See also Copyright Deliberation and Conciliation Committee, *Conciliation: Information—Summary*, at [http://www.copyright.or.kr:8080/index\\_en.asp?menu=31](http://www.copyright.or.kr:8080/index_en.asp?menu=31) ("[I]n case a dispute arises regarding a copyright, it can be resolved, speedily and simply, without a trial through the advice of specialists, at a very low cost."). Participation in the conciliation appears to be voluntary and the recommendations of the conciliation division nonbinding. See Korean Copyright Act, *supra* note 103, arts. 85, 86, 87. For example, the conciliation is considered to have failed if a party refuses to attend. *Id.* art. 85(2). The conciliation is concluded by terms agreed to by the parties. *Id.* art. 86(1). The statute contemplates that a conciliation may not be reached at all. *Id.* art. 84(3).

249. Korean Copyright Act, *supra* note 103, arts. 84-88.

250. See PYONG-CHOON HAHM, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* 95-96 (1986); Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 84 (1997). See also Austin Sarat & Joel B. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POL. SCI. REV. 1200, 1208 (1975) (reporting "crude data" showing that Korea had lowest number of civil cases per population among selected countries). It makes intuitive sense that societies with a collectivist orientation, see *supra* note 117, tend to have lower rates of private litigation. Empirical studies to support this point appear to be unavailable, however.

251. A summary statement of the traditional sentiment, from an oft-quoted commentator:

Koreans have abhorred the black-and-white designation of one party to a dispute as right and his opponent as wrong. Assigning all blame to one for the sake of rendering a judgment has been repugnant to the fundamental valuation of harmony, because such a judgment has retarded swift restoration of broken harmony. . . . [I]f discord could not be avoided, society demanded the quickest restoration of broken concord. For this purpose mediation has been preferred to adjudication because it does not require the fixing of blame. Parties themselves formulate the solution by mutual agreement, thus obviating the need for an external sanction. Since mediation is possible only when both sides are willing to compromise, each side has to give a little and to be satisfied with less than complete victory.

HAHM, *supra* note 250, at 95-96 (footnotes omitted). See also *id.* at 177 ("A litigious man . . . threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity.").

252. RAYMOND DAWSON, *CONFUCIUS* 71-73 (1981) (discussing "The Master's antipathy to litigation"); Ahn, *supra* note 250, at 84.

253. HAHM, *supra* note 250, at 95-96; Jae-Jin Lee, *Freedom of the Press and Right of Reply Under the Contemporary Korean Libel Laws: A Comparative Analysis*, 16 UCLA PAC. BASIN L.J. 155, 191-92 (1998).

254. Lee, *supra* note 253, at 191-92.

255. See Ahn, *supra* note 250, at 84; Jeong-Oh Kim, *The Changing Landscape of Civil Litigation*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 321, 323 (Dae-Kyu Yoon ed., 2000); Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303,

are becoming more litigious, more willing to advance legal claims, and more willing to resort to the courts.<sup>256</sup>

Thus, the establishment of a conciliation division and specified procedures for conciliation of copyright disputes is related to a cultural norm that (while still held in some quarters) is rapidly changing. Nevertheless, matters are submitted to the conciliation division, and the reported results of conciliations are informative.<sup>257</sup> American reviewers may be particularly interested in the number of settlements that include a public apology as part of an agreement to resolve a dispute arising out of alleged copyright infringement.<sup>258</sup> The inclusion of an apology toward the resolution of dispute is an important part of Korean culture,<sup>259</sup> in contrast to the United States

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303 (1993). See also Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOYOLA L.A. INT'L & COMP. L.J. 585, 591 (1997). Survey data are informative. Whereas in the late 1960s, "[i]he vast majority of the population . . . ha[d] never been to a courthouse. . . [and] were proud of that fact," HAHM, *supra* note 250, at 98, a survey taken in the 1990s shows that nearly thirty percent of respondents had "been to court for 'legal problems'" and almost half "regard[ed] filing a suit for a money matter as a means of achieving justice or as a method of exercising their rights," Korean Legislation Research Institute, *A Survey on the Korean People's Attitude Towards Law* (Sang-Hyun Song trans.), in KOREAN LAW IN THE GLOBAL ECONOMY 128, 146 (Sang-Hyun Song ed., 1996).

256. Ahn, *supra* note 250, at 84; Kim, *supra* note 255, at 323. This litigiousness has led to an increasing docket and complaints from the bench of taxed judicial resources. See Ahn, *supra* note 250, at 84; Lee, *supra* note 255, at 591; Yang, *supra* note 255, at 309-10. It is of some moment to note the trend of Korea and the United States toward the traditional characteristics of the other, that is, a Confucian-influenced society (Korea) with a traditional preference for conciliation and distaste for litigation heading toward a "litigious *zeitgeist*," Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 260 (1995), and a traditionally litigious and adversarial society (the United States) adopting more mechanisms to encourage nonlitigation resolution of disputes, see generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* §§ 7:01 to 7:07, at ch. 7, page 1 to ch. 7, page 65 (2d ed. 1994).

257. Reported conciliations are available on the Committee's Internet site. Copyright Deliberation and Conciliation Committee, *Conciliation: Cases*, at [http://www.copyright.or.kr:8080/index\\_en.asp?menu=32](http://www.copyright.or.kr:8080/index_en.asp?menu=32) [hereinafter *Conciliation: Cases*]. A subject that requires further examination elsewhere is the degree of deference that Korean parties show to the conciliators and the tendency to agree to their recommendations, relative to, for example, a similar situation in the American setting. Differences in the cultural dimension of "power distance" could help to explain a higher tendency to defer and agree in Korea. See generally HOFSTEDE, *CULTURE'S CONSEQUENCES*, *supra* note 41, at 70-71. In its purest form, power distance "is a measure of the interpersonal power or influence between B[oss] and S[ubordinate] as perceived by the least powerful of the two, S[ubordinate]." *Id.*

258. *Conciliation: Cases*, *supra* note 257. The Committee's Internet site reveals that the parties reached a settlement in thirty of thirty-four matters submitted for conciliation. (The parties failed to agree in three matters; the result was unclear in the other.) Of the thirty, seven included an apology in the agreed terms of conciliation. *Id.*

259. See Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205, 218-20 (2000) (criticizing Korean Constitutional Court's holding, in defamation action against newspaper publisher, that portion of Civil Code that permits court-ordered apology as part of judgment is unconstitutional, as it is contrary to constitutional guarantee of freedom of conscience). The apology is "a traditional, culture-bound means of remedying the damages" in certain cases. *Id.* at 224.

where “denial may be a central part of American culture.”<sup>260</sup> In Korean settlement of conflicts and disputes, “an apology is functional as both a powerful facilitating factor and as a desired personality trait, particularly of the one who committed the wrong. These are cultural dictates placed on society and its members.”<sup>261</sup> In contrast, the American discussion of including an apology toward dispute resolution has begun only recently.<sup>262</sup>

### C. Education, Awareness, Enforcement?

As indicated above, the differences between the Copyright Act of Korea and the U.S. counterpart are not great; in fact, there is great similarity in textual content.<sup>263</sup> The key distinction is that while the current American law and practice is the result of two centuries of development, the Korean law came suddenly in the 1980s at U.S. insistence.<sup>264</sup> The success of the new Korean law depended on societal acceptance and compliance.<sup>265</sup> Likely with this in mind, the Korean act charges the Copyright Deliberation and Conciliation Committee with the deliberation of copyright issues.<sup>266</sup> Practically, the Act gives the Committee the task of educating the public on the concept of copyright and enhancing the public’s awareness of the rights-based copyright system that Korea has adopted.<sup>267</sup> Such education and awareness programs are a matter of practical necessity for a culture that long had little need for or appreciation of copyright. Undoubtedly, “proper protection of the copyright works . . . cannot be truly obtained . . . unless the

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260. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L.J.* 1447, 1472 n.96 (2000). Japan appears to be the only country that still allows for court-ordered apologies in defamation cases. See Choi, *supra* note 259, at 220.

261. Choi, *supra* note 259, at 219.

262. See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 *S. CAL. L. REV.* 1009 (1999); Cohen, *supra* note 260.

263. See *supra* text accompanying notes 176-213.

264. See *infra* text accompanying notes 301-03.

265. See Song & Kim, *supra* note 101, at 120-21.

266. See Korean Copyright Act, *supra* note 103, art. 81(1). Formally, matters for deliberation are those: concerning compensation of the author; arising under article 78(3); or “referred to the Committee by the Minister of Culture and Tourism or by three or more members jointly.” *Id.* art. 82.

267. To achieve these objectives, the Committee has provided training and educational facilities for businesses and has arranged “publicity activities.” Copyright Deliberation and Conciliation Committee, *About the Committee: History*, at [http://www.copyright.or.kr:8080/index\\_en.asp?menu=11](http://www.copyright.or.kr:8080/index_en.asp?menu=11). See Copyright Deliberation and Conciliation Committee, *About the Committee: Services—Copyright Awareness Program and Publication*, at [http://www.copyright.or.kr:8080/index\\_en.asp?menu=13](http://www.copyright.or.kr:8080/index_en.asp?menu=13) (describing publication of materials on copyright law, and “PR campaign, which inspires respect for copyright by spreading information on the concept of copyright and effectiveness of the law, [and] ultimately seeks to aid in establishing a firm foundation of the society of knowledge and information.”). See also Jong, *supra* note 107, at 47-48 (reporting Korean government’s copyright awareness campaign).

society as a whole supports the[] concept and [its] importance.”<sup>268</sup>

The government’s education of its people on the rights of a new copyright statute is one matter,<sup>269</sup> enforcement of the law is another. Indeed, part of the agreement with the United States in 1986 required Korea to step up enforcement of the revised laws.<sup>270</sup> The prospects for real enforcement would be questionable in a jurisdiction where the courts were “traditionally controlled by the executive branch, [and were] viewed as being unduly influenced by the ruling class.”<sup>271</sup> Yet commentators note progress on this score as well.<sup>272</sup> There were occasional reports in the late 1980s and early 1990s of the government conducting large-scale raids and seizure of pirated goods and pressing criminal prosecutions.<sup>273</sup> The closing years of the recent decade saw nearly annual increases in the number of raids, criminal prosecutions, convictions, and criminal penalties by fines and jail terms.<sup>274</sup> Americans wonder whether this trend reflects an effort by the Korean government toward genuine enforcement of a newly adopted copyright regime or merely well-timed efforts to avoid possible sanctions by the United States.<sup>275</sup> This concern, which is raised in discussions between the two countries, is addressed in the next section.

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268. Jong, *supra* note 107, at 43.

269. There is a question as to how successful the awareness campaign has been. As indicated above, reports of success of the awareness campaigns, such that copyright now occupies a “heightened status,” Youm, *supra* note 91, at 298, must be balanced with the continuing piracy that has occurred in Korea. See *supra* text accompanying notes 8-10.

270. Park, *supra* note 18, at 168 (citations omitted).

271. Youm, *supra* note 91, at 298. The “ruling class” apparently includes the media. *Id.*

272. *Id.* Professor Youm credits this progress in part to “Korea’s increasingly functional democracy.” *Id.* One American attorney, who served as a foreign legal consultant to a law firm in Korea for five years, commented on the tremendous progress the Korean courts have made over the years in deciding cases by applying the rule of law, especially in intellectual property litigation. Telephone interview with Glenn P. Rickards, Of Counsel, Dorsey & Whitney LLP, Seattle, Washington (July 10, 2001). Others have lingering doubts. See, e.g., Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 ASIAN-PAC. L. & POL’Y J. 45, 50 (2001), available at <http://www.hawaii.edu/aplpj/pdfs/v2-02-Kim.pdf>.

273. See East Asian Executive Reports, *China, Thailand, Indonesia Among Countries Criticized for Inadequate Protection of Intellectual Property*, Mar. 15, 1991; Song & Kim, *supra* note 101, at 134.

274. REVIEW OF LEGISLATION, REPUBLIC OF KOREA, *supra* note 198, § VI annex (Responses to Questions Posed by the United States).

275. Two observers say the latter, but add that the activities nevertheless “provided a turning point to the general public’s lax and vague idea of intellectual property rights and violations thereof.” Song & Kim, *supra* note 101, at 134.

#### IV. TOWARD RESOLUTION AND COMPROMISE: U.S.-KOREA NEGOTIATIONS

This part, in two sections, is concerned with the matter of direct negotiations between the United States and Korea regarding copyright protection of American goods in Korea. The first section opens with a discussion of how the topic of culture could be raised and to what extent it should be considered in the negotiations. The section then offers each side's possible reactions to the cultural norms of the other. Finally, this section addresses the other intangibles pertinent to the party discussions, namely, the general anti-American sentiment in Korea and the truncated, but significant, history of the relationship between the United States and Korea over intellectual property protection. With these matters in hand, the second section offers preliminary suggestions (rather than definitive proposals) on how the parties could benefit from the awareness of cultural and other pertinent factors to help resolve the piracy matter.<sup>276</sup>

##### A. *Lessons from the Cultural Divide (and Other Intangibles)*

###### 1. *What Consideration of Culture?: An Example*

In negotiations between the United States and Korea regarding the protection of American intellectual property rights on the Korean peninsula, an initial question for both sides is what consideration of culture is proper. In this regard, *United States of America v. Yu* is of interest.<sup>277</sup> This case, although outside of the intellectual property arena, is informative in that it calls to question the consideration *vel non* of cultural differences between

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276. Both Korea and the United States are parties to TRIPS, "the most comprehensive multilateral agreement on intellectual property," Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 392 (1996). TRIPS provides for resolution of disputes arising thereunder through "the integrated dispute settlement system of the World Trade Organization." *Id.* at 411. However, TRIPS does not provide for the definitive resolution of all disputes for member nations. An agreement of the World Trade Organization contemplates and encourages resolution of disputes between nations through "[g]ood offices, conciliation and mediation." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, art. 5, 33 I.L.M. 1230 (1994) [hereinafter Understanding on Settlement of Disputes]. (A term used most often in the international setting, "good offices" refers to the involvement of a third country or international organization toward settlement of a dispute between two countries. See BLACK'S 7th ed., *supra* note 55, at 701.) The Understanding on Settlement of Disputes specifically covers disputes arising out of TRIPS. See Understanding on Settlement of Disputes, *supra*, app. 1. As neither the Understanding on Settlement of Disputes nor TRIPS contains any reference to consideration of culture in the resolution of dispute, this is left to the parties.

277. 954 F.2d 951 (3d Cir. 1992).

Korea and the United States. Dr. Yu<sup>278</sup> was a native of Korea who immigrated to the United States at forty-six years of age.<sup>279</sup> He pled guilty to two counts of bribing a public official, an IRS examining agent, in the course of an audit of his and his wife's joint tax return.<sup>280</sup> At sentencing, Yu urged the district court for a downward departure from the range that the Sentencing Guidelines imposed, based on cultural differences between his native Korea and the United States.<sup>281</sup> He made an offer of proof that, based on his Korean experience, the bribe was "an honorarium and that it could be viewed as an insult not to offer the payment."<sup>282</sup> The district court held that it had no discretion to take into account the cultural differences that Yu advanced and refused the downward departure on that ground.<sup>283</sup> On appeal, the U.S. Court of Appeals for the Third Circuit, in a divided opinion, agreed with the refusal of a downward departure and affirmed the district court's sentence.<sup>284</sup> The majority of the court decided that given the particular defendant—a resident of the United States for twelve years, a naturalized U.S. citizen, a professional tax preparer, and a successful businessman stateside—it was unnecessary to consider the cultural differences advanced.<sup>285</sup>

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278. The court opinion notes that Yu "is referred to as 'Dr.,' apparently on the basis of either [a doctorate degree obtained through a correspondence course] or one earned in Korea." *Id.* at 953. The importance of status in Korean society is discussed *supra* text accompanying note 129-133.

279. *Id.* at 952. Note the possible cultural explanation in the reporting of Yu's age in the opinion: "Yu was born in Korea in 1931 . . . . In 1976, when he was 46 years old . . . ." *Id.* (emphases added). The calculation of Yu's age could have been a simple counting or typographical error by the court, by Yu's counsel, or both. Alternatively, Yu could have insisted that his age was as indicated. It is not uncommon for Koreans to refer to their age in the traditional manner—that is, being considered one year old at birth, then adding a year of age at the beginning of every calendar year. Age is also determinant of seniority, and seniority is a factor in establishing one's ever important status.

280. *Id.*

281. *Id.* at 953. Yu relied on 18 U.S.C. § 3553(b). 954 F.2d at 953.

282. 954 F.2d at 953. The government opposed Yu's contention, arguing that "Yu could not reasonably rely on his Korean background" in light of his lengthy residence in the United States, and also that the downward departure he sought was barred by the Sentencing Guidelines, U.S. Sentencing Guidelines Manual § 5H1.10 (1998), which precludes consideration of national origin as a factor in the determination of a sentence. 954 F.2d at 953.

283. 954 F.2d at 953. "[T]he district court stated: 'Just so that it's clear I'm not exercising any discretion not to use a power that I have, I'm holding that I lack the power.'" *Id.*

284. *Id.* at 954.

285. *Id.* The majority also ruled that the facts of the case made it unnecessary to decide whether a foreign culture is subsumed within the term "national origin" under the Sentencing Guidelines and under what circumstances cultural differences might justify a downward departure. *Id.* Dissenting, Judge Becker would have vacated the judgment of sentence and remanded for resentencing. *Id.* at 960 (Becker, J., dissenting). Judge Becker reasoned that although cultural differences are sometimes linked to national origin, the two are not the same, and the district court has not only the discretion, but also the initial function of breaking down a claim for a departure of the sentence based on cultural differences. *Id.* at 958. In the *Yu* case, Judge Becker viewed as disputed the question of whether Yu knew or should have known that the United States does not tolerate taxpayers bribing tax collectors.

The manner in which culture was raised and addressed in *Yu* is of some interest here because the case provides an opportunity to see how these matters can appear in the U.S.-Korea negotiations setting. In *Yu*, the defendant explicitly raised the cultural differences between his native Korea and the United States and relied on them in an effort to gain mitigation.<sup>286</sup> The majority of the court concluded that it was unnecessary to examine the cultural dimension in the case.<sup>287</sup> In the U.S.-Korea discussions over the piracy situation, cultural explanations may be raised explicitly, implicitly, or not at all. If they are raised clearly, it would be unwise and ludicrous for a U.S. representative to discount cultural explanations for certain activities, as the court did in *Yu*. Assuming the culture issue is raised then, there may be questions from the U.S. side regarding the details and validity of the cultural explanation advanced.<sup>288</sup> Whereas in a criminal or civil action before an

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*Id.* at 959.

286. This was not a situation where culture was hidden or where another party was oblivious to it.

287. Although the result in the *Yu* decision is altogether defensible, some of the court's expressions, not improper in an opinion supporting the sentencing of an American citizen for violation of a criminal law, would surely be questionable and even inappropriate in the international negotiation setting. Most notable is the ethnocentrically-tinged statement: "The bottom line is that, while immigrants lawfully entering the United States are welcome to bring their cultures with them, the aspect of a culture which justifies the bribing of federal agents must be left abroad." 954 F.2d at 955. At the sentencing stage, the question is not whether a defendant should not have been influenced by his former environment, but whether that environment could be considered as a factor in mitigation of the sentence.

288. Put another way, "How do we know that's true? Do we just take their word for it?" Pat Chew, *Cultural Relativism and Cultural Conflict*, Panel Discussion, ABA Section of Dispute Resolution: Cross-Cultural Disputing: International and Diversity Issues, Apr. 28, 2001, Arlington, Va. The assertion of Korean culture by a Korean representative poses a different situation than the attribution of Korean culture by a non-Korean. Regarding the latter, of interest is *Jinro America Inc. v. Secure Investments, Inc.* 266 F.3d 993 (9th Cir. 2001), which addresses the proper qualification of an expert on Korean culture, at least for purposes of Federal Rule of Evidence 702 ("Testimony by Experts"). In *Jinro America*, the purported expert witness testified on the great prevalence of corruption and fraud in Korean business. 266 F.3d at 1003. For instance, the witness testified that he would not recommend his non-Korean clients to rely on oral contracts with Korean companies: "[B]ecause of the culture, dealing with Korean businessmen can end up with some pretty sorry results . . ." *Id.* (emphasis omitted). The basis of such testimony was the witness's "personal investigative experiences, his 'hobby' of studying Korean business practices, unspecified input from his office staff [of a commercial security company in Korea] and his marriage to a Korean woman"; the witness had provided no "empirical evidence or studies" to support his testimony. *Id.* at 1006. The majority of the court held that the witness lacked the adequate foundation for the expert testimony he gave, and determined that it should not have been admitted under Rule 702. *Id.* at 1005-06. In this discussion, the majority observed that the witness "was not a trained sociologist or anthropologist, academic disciplines that *might* qualify one to provide reliable information about the cultural traits and behavior patterns of a particular group of people of a given ethnicity or nationality." *Id.* at 1006. Such a statement appears to set a high standard for the qualifications of cultural expert witnesses. In a concurring opinion, Judge Wallace wrote that the purported expert testimony should not have been permitted because it was not relevant, and was highly critical of the "majority's visitation to issues unnecessary for our disposition of this appeal." *Id.* at 1010 (Wallace, J., concurring). Judge Wallace also observed that the majority was incorrect in its conclusion that the witness was unqualified. *Id.* at

American court, the task of proving the relevance of cultural differences is left to the parties and to the adversarial process, in an international negotiation the negotiator has the initial responsibility of being properly educated on the counterpart's culture. The reality is that culture is involved in any "political, economic or legal" issue set in the international arena.<sup>289</sup> Regardless of the subject of the negotiations, "[c]ulture as an explanation is neither all (the prime mover) nor nothing (a mere epiphenomenon)."<sup>290</sup> With respect to copyright policies of Korea and the United States, if the two could be said to possess cultural differences (they do),<sup>291</sup> then such differences might produce different perspectives and approaches on the same subject matter. Thus, culture and its elements must be considered, discussed, and (as suggested above) sometimes questioned in any effort toward resolution of disputes over intellectual property rights.

This is not to suggest that awareness of the American and Korean cultural attributes that shape the respective jurisdiction's copyright policy is enough

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289. Robert J. Smith, *Culture As Explanation: Neither All nor Nothing*, 22 CORNELL INT'L L.J. 425, 425 (1989).

290. *Id.* at 426.

291. Apart from the cultural forces that affect a party's position on a substantive subject, there is the matter of the extent to which cultural differences shape negotiation style and approach to dispute resolution generally. Such differences could explain, in part, the "intensive" and "difficult" negotiations that led to the 1986 agreement between Korean and U.S. representatives. Song & Kim, *supra* note 101, at 122; Kim, *supra* note 12, at 2. The subject of cross-cultural negotiations is multi-faceted and interdisciplinary, combining not only dispute resolution and negotiation methods covered in law schools, but also concepts seen in other disciplines—anthropology, psychology, international business, and politics, to name a few. Nevertheless, the legal academy has taken interest. *See* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 166-68 (2d ed. 1991); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 270-91 (forthcoming 2002); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Oscar G. Chase, *Culture and Disputing*, 7 TUL. J. INT'L & COMP. L. 81 (1999); Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997). At present, two U.S. law schools offer an independent course in "Cross-cultural Negotiations" during the academic year, Pepperdine (since 1989) and Missouri (2000). Telephone interview with Peter Robinson, Associate Director of the Straus Institute for Dispute Resolution and Assistant Professor of Law (Jan. 16, 2002), Pepperdine University School of Law. The author has taught the course at Missouri. Professor Grant Ackerman developed this course. A few other schools include the course as part of international summer programs. New York University offers "Culture and Disputing," taught by Professor Chase. (A syllabus is on file with author, and available at <http://www.law.nyu.edu/chaseo/fall01/culturedisputing/syllabus.html>.) In other schools, the subject of cross-cultural negotiations is a component of a broader course on international law or alternative dispute resolution. *See, e.g.*, The University of Wisconsin Law School, *Courses, Schedules and Exams, Course Descriptions: 872—Legal Issues Involving North American and East Asia*, at <http://courses.law.wisc.edu/descriptions/desc.asp?form=num&update=&param=872&Submit=Go%21&term=1022> ("[T]hree sessions devoted to cross-cultural negotiations . . . will introduce negotiation theory and techniques and issues presented in cross-cultural negotiations."); Course Syllabus-Winter 2001, Advanced Mediation 696R-21, Brigham Young University, J. Reuben Clark Law School, at [http://www.law2.byu.edu/Pullins/Advanced\\_Mediation/syllabus.html](http://www.law2.byu.edu/Pullins/Advanced_Mediation/syllabus.html) (session on "culture and gender influences").

to resolve disputes definitively between the two.<sup>292</sup> Mastery of what could be described as culture is only part of the solution. Negotiations between national societies are generally complex; the nature of the U.S.-Korean relationship, especially with regard to intellectual property issues, offers additional complexities. Some of these are highlighted here, beginning with each side's possible reactions to the other's positions in negotiations.

## 2. *U.S. Reaction.*

For the U.S. side, there is the potential for initial skepticism of the cultural explanation and justification. Even accepting the cultural explanations as valid, there is room for discussion on the extent to which any of the various cultural traits are applicable to the contemporary piracy situation. The culture "defense" is less convincing when its elements are separated and analyzed. As suggested above, U.S. negotiators may legitimately question whether Confucian traditions are the primary mover in the explanation of unauthorized copying and exploitation or whether there are other forces at work. Moreover, there is the risk that continued reliance on cultural explanations (especially global references to centuries of traditional Confucianism) to explain the rampant piracy in the contemporary setting could bring on, for the United States, a sense of culture fatigue.<sup>293</sup>

Whatever the role of culture to explain the traditionally weak (but much improved) sense of copyright in Korea, the more practically urgent matter for American interests relates to the aggressive enforcement of the revisions in the textual law and the necessary cooperation from law enforcement, the prosecutor's office, and the courts. Despite the increase in the number of criminal raids, prosecutions, and jail sentences in the past few years, U.S. observers see Korean enforcement as sporadic, seasonal,<sup>294</sup> and ineffective.<sup>295</sup> The International Intellectual Property Alliance, a private

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292. For private U.S. representatives and copyright owners, knowledge of the culturally-dependent Korean copyright system provides an explanation for the cultural regard for the integrity of the author's work, the traditional preference for conciliation over litigation, and the use of the apology in settlement. But this information aids little in the curing of piracy of their products.

293. The reliance on culture to explain copying might seem too convenient to the U.S. side. For example Koreans explain that the copying of a book honors the author, and rely on the revered status that the scholar-author enjoyed in the Confucian hierarchy. But this cultural trait does not explain the copying of the works of entertainers, who historically occupied the lowest and most degraded status. Yet a different traditional practice, namely, that entertainers were on "retainer" to the noble classes and did not produce works for themselves, is used to explain why the copying of their work is justified. *See supra* text accompanying notes 143-46.

294. *See* IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, at 214.

295. *Id.* at 218. "Jail terms are routinely suspended, and no effort is made to supervise the activities of convicted defendants"; thus, sentencing has little deterrent effect. *Id.* Korean

organization that represents U.S. copyright-based industries in improving international copyright protection,<sup>296</sup> cites “disturbing evidence of bias against foreign copyright owners.”<sup>297</sup> Moreover, over the years, American counsel have questioned whether the Korean judiciary is partial to Korean interests.<sup>298</sup> Thus, U.S. observers suggest a fundamental revamping of the Korean criminal justice and enforcement system.<sup>299</sup> On this point, there is agreement, by two Korean commentators, who note that a system that can provide effective remedies for infringement of intellectual property rights “will require a review of the judicial system in Korea as a whole, including the court structure, legal education system, the process of selecting judges, and judicial administration to mention a few.”<sup>300</sup>

### 3. *Korean Reaction*

Both Korean and American observers generally agree that pressure from the United States caused the new, comprehensive Korean copyright policy beginning in 1986.<sup>301</sup> This perception explains the prevalent attitude in

commentators acknowledge that some of the raids and prosecutions were more for appearances than substance, that is, to avoid making the U.S. Watch List or Priority Watch List, rather than toward genuine implementation of rights-based copyright system. See Song & Kim, *supra* note 101, at 134.

296. See International Intellectual Property Alliance, *About IIPA*, at <http://www.iipa.com/aboutiipa.html>.

297. IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, at 211.

298. See Enger, *supra* note 100, at 206-07. Note the phrasing on the Internet site of the Supreme Court of Korea, which could magnify the partisan image: “With speedy and impartial trials, the Supreme [C]ourt of Korea will continue to fulfill [its] constitutional mission to *serve the Korean people* and to protect *their* basic human rights.” Supreme Court of Korea, Home, at <http://www.scourt.go.kr/english/> (emphases added). American attorneys would likely find troubling some traditional practices in the Korean judiciary discussed candidly in Kim, *supra* note 272, at 48-52 (stating “cordial personal relationships, not convincing arguments or technical legal skills, play a major role in legal practice” and reporting judicial cronyism and unethical practices by judges). Chief among them is *jun kwan ye wu*, which

consists of affording preferential treatment during litigation to recently retired judges. This preferential treatment has been [made] possible by the unusual guild mentality, which was produced by the unified training and the homogeneous composition of the legal profession. The practice operates as follows: a recently retired judge who files suit as a private attorney receives favorable treatment from the court during the legal process. In a survey conducted by a Korean newspaper, 45 out of 100 practicing attorneys admitted that they have experienced such preferential treatment. Incumbent judges are expected by custom to help former colleagues in this way.

*Id.* at 51 (footnotes omitted).

299. See IIPA, 2001 SPECIAL 301 REPORT, *supra* note 10, at 213, 214.

300. Song & Kim, *supra* note 101, at 134. Such changes seem drastic and unnecessary to those who believe much progress has been made in the development of copyright protection in Korea. See, e.g., Jong, *supra* note 107, at 43.

301. See SANG JO JONG, *Ji-JUHK-JEH-SAHN-KWON* [INTELLECTUAL PROPERTY] 10 (1997); Enger, *supra* note 100, at 199; Gadbaw, *supra* note 26, at 276, 299; Lee, *supra* note 200, at 196-97; Min &

Korean society—“including police, prosecutors, and sometimes courts”—that provisions of the current copyright law were “enacted to meet the demands of foreigners,”<sup>302</sup> that is, the United States.<sup>303</sup> The resentment against American imposition is likely to be more pointed with publicly visible efforts in enforcement, such as raids, prosecutions, and penalties against Korean parties. Moreover, Korean representatives may see the American-mandated legislation and increased enforcement activities beginning in the 1980s as part of a continuing pattern of the United States imposing its intellectual property preferences on Korean soil. The United States had previously sought and obtained formal legal protections of American intellectual property rights on the Korean peninsula in the beginning of the twentieth century. Korea, as a protectorate of Japan, was subject to a 1908 treaty between the United States and Japan, in which Japan agreed to extend to American copyright holders in Korea the same copyright protections that existed in Japan.<sup>304</sup> Thus, the first legal copyright protections in Korea<sup>305</sup> were a matter of U.S., not Korean, initiative, and the same characterization could be made about the reforms beginning in the 1980s. One Korean commentator characterizes the American influence and surveys the situation thus:

[The 1908 U.S.-Japan treaty] . . . was made upon demand of the United States which wanted to protect its citizens’ intellectual

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Sullivan, *supra* note 200, at 50; Song, *Legal Remedies*, *supra* note 93, at 3; Youm, *supra* note 91, at 298. One commentator preferred a less pointed characterization of the U.S. involvement: “Partly with *encouragements* from industrialized nations including the U.S. and, also, partly as part of the process of internationalization of domestic industry, Korea has made dramatic reforms in the field of copyright law . . . .” Jong, *supra* note 107, at 43 (emphasis added). See also PARK, *supra* note 94, at 299 (new legislation result of part “external pressure” and part Korean realization of wide gap between “social reality” and intellectual property legal system).

302. Song & Kim, *supra* note 101, at 121.

303. For many Koreans, mention of “foreign” or “international” is often understood to mean American. See Robert A. Scalapino, *The United States and Asia in 1998: Summitry Amid Crisis*, ASIAN SURVEY, Jan. 1, 1999, available at 1999 WL 19055685.

304. Convention Between the United States and Japan for Protection of Patents, etc., May, 19, 1908, 35 Stat. 2041 art. I. Koreans would receive the same protection as Japanese and American citizens. *Id.* Interestingly, the treaty provided that “Korean subjects [would] enjoy in the United States the same [copyright] protection as native citizens,” but only “upon fulfillment of the formalities prescribed by the laws and regulations of the United States.” *Id.* art. IV. Such formalities are not further elaborated in the treaty. In any event, the 1908 treaty was “considered as having been abrogated . . . since it was included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the pre-war bilateral treaties or conventions which the United States wished to continue in force or revive.” TREATIES IN FORCE, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 473, 483 n.19 (app.).

305. Two authors have indicated that Korea was one of the original signatories to the Berne Convention, see Min & West, *supra* note 13, at 562, a contention that is specifically refuted by another, Youm, *supra* note 91, at 280.

properties in Korea, soon after Japan, as victor of both the China-Japan War and the Russia-Japan War, began ruling the Korean Peninsula.

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... [The 1986 revision of the copyright law] was made under strong pressure of the United States for the sake of accomplishing trade balance between the United States and Korea. It reminds us of the situation eighty years ago when the first document on copyright protection in Korea was born upon demand of the United States.<sup>306</sup>

Compounding the situation is the problem of the general anti-American sentiment in Korea.<sup>307</sup> Anti-Americanism could also be considered a part of the contemporary Korean culture, to the extent that it shapes the Korean mindset and affects Korea's interactions with American interests. A society with a long, shared history and little external influence is likely to resent

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306. Song, *Legal Remedies*, *supra* note 93, at 2-3.

307. Once a nation that was strongly pro-American, Korea changed beginning in the 1980s, with Koreans questioning the alleged U.S. support of the oppressive regime of President Doo Hwan Chun, and growing tension over trade issues. See generally MARK L. CLIFFORD, *TROUBLED TIGER: BUSINESSMEN, BUREAUCRATS, AND GENERALS IN SOUTH KOREA* 297-305 (1994); SOUTH KOREA: A COUNTRY STUDY, *supra* note 130, at 241; Jinwung Kim, *The Nature of South Korean Anti-Americanism*, 34 *KOREA J.* 36 (1994); Jinwung Kim, *Recent Anti-Americanism in South Korea*, 29 *ASIAN SURVEY* 749 (1989); Gi-Wook Shin, *South Korean Anti-Americanism*, 36 *ASIAN SURVEY* 787 (1996).

Over the years, there have been periodic reports in the popular media of rising anti-American sentiments. See, e.g., Steve Glain, *Blame the Yankees? Fallout from Korean Trials Worries U.S. Policy Makers*, *ASIAN WALL ST. J.*, Dec. 26, 1995, at 1; Ju-Yeon Kim, *Uncle Sam Effigy Skewered in Anti-Government Rally*, *ASSOCIATED PRESS*, May 28, 1994, available at 1994 WL 10135257; Frank Langfitt, *Anti-Americanism Returning in Korea 50 years After War: US Troop Presence Produces Frictions*, *BALT. SUN*, June 24, 2000, at 1A; William McGurn, *Anti-Americanism Heads South of the Korean Divide*, *WALL ST. J.*, Nov. 30, 1988, at A21; Jonathan Power, Editorial, *Bush's Suspicious Gambit with North Korea*, *PITTSBURGH POST-GAZETTE*, Mar. 25, 2001, at E1; Kevin Sullivan & Mary Jordan, *S. Korea Wants to Be Grown-up Ally*, *WASH. POST*, Oct. 19, 1995, at A31; *Radicals Attack U.S. Military Installation in Seoul*, *ASSOCIATED PRESS*, Apr. 25, 1991, available at 1991 WL 6183153; *S. Koreans Urged To Curb Anti-American Sentiment*, *CHI. TRIB.*, Oct. 10, 1989, at 4, available at 1989 WL 4631079; *U.S. Travel Advisory "Overreaction," Says Rep. Chung Mong-Joon*, *KOREA HERALD*, Aug. 12, 2000, available at 2000 WL 21234287; *Washington and Seoul Switch to Snarling*, *BUSINESS WEEK*, Oct. 28, 1996, at 70, available at 1996 WL 10771259; *Will Anti-Americanism Resurface*, *KOREA TIMES*, Nov. 20, 1998, available at 1998 WL 21404993. Anti-American sentiments may even contribute to the negative image that some Koreans in Korea have of Koreans stateside. See SAMSUNG PRESS FOUNDATION, *A STUDY OF KOREAN AND AMERICAN NEWSPAPER EDITORS' PERCEPTION OF THE UNITED STATES, KOREA, AND NORTH KOREA* 19 (1998), discussed in *Jeh-mi-dong-po Image Boo-jung-juhk [Negative Image of Korean Americans]*, *HAN-KUK ILBO* [THE KOREA TIMES] (Chicago edition), June 26, 1999, § 2, at 1 (reporting survey that showed 44.4% of respondents had negative image of Koreans in America, 30% positive image, and 25.6% neutral image). See also Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 *CONN. L. REV.* 535, 571 n.263 (2001) (recounting Korean author's experience in Korea).

military, economic, or legal intruders and to resist cooperation in carrying out transplanted legal rules designed to protect such intruders. A vivid example of Korean resentment was seen shortly before the enactment of the 1986 copyright legislation, when Korean publishers “staged an ‘Anti-U.S. Pressure’ rally in which headbands were worn to protest U.S. efforts at intellectual property reform.”<sup>308</sup> This dissension is part of the copyright culture in Korea.

The story of Hangul & Computer Company,<sup>309</sup> a Korean software company, highlights both the extent of piracy in Korea and the nationalistic, anti-American mood there.<sup>310</sup> The company produces word processing software for *Hangul*, the native Korean alphabet, and eventually captured eighty percent of the market. Illegal copying of the software product was widespread, which led to obvious revenue loss and put the company on the verge of bankruptcy. In debt by \$19 million, Hangul & Computer announced plans to enter into an agreement with Microsoft in which the American company would invest \$20 million in exchange for the Korean company withdrawing its *Hangul* software from the Korean market, allowing Microsoft to pursue more of it.<sup>311</sup> Public outrage and “a nationalist backlash” followed.<sup>312</sup> Koreans saw *Hangul* as “the people’s software,”<sup>313</sup> a national cultural treasure,<sup>314</sup> and viewed Microsoft’s financial arrangement as “an intrusion into the national psyche.”<sup>315</sup> In the end, a national campaign to “save *hangul*” raised capital from the public and Hangul & Computer called off the deal with Microsoft.<sup>316</sup>

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308. Gadbow, *supra* note 26, at 280.

309. The company was subsequently renamed Haansoft. See Laxmi Nakarmi, *Pulling Back from the Brink: Korea’s Software Giant Gets Internet-Ready Fast*, ASIAWEEK, May 26, 2000, available at 2000 WL 8936908.

310. A thorough press account is available in Sims, *supra* note 22. See also Michael Baker, *Korea Asks Gates: Whose Tongue Is It?*, CHRISTIAN SCI. MONITOR, July 2, 1998, at 6, available at LEXIS, News File; John Burton, *Microsoft Loses Deal in S. Korea*, FIN. TIMES (LONDON), July 21, 1998, at 27, available at LEXIS, News Library, News Group File; Jim Erickson, *Saving the People’s Software: South Koreans Block a Microsoft Power Play*, ASIAWEEK, Aug. 7, 1998, at 46, available at LEXIS, News Library, Asia/Pacific Rim Archive News File; Don Kirk, *Koreans Bristle at Software Deal: Local Company Draws Fire for Ceding a Market to Microsoft*, INT’L HERALD TRIB., July 3, 1998, at 17, available at 1998 WL 4792789.

311. This agreement would have allowed Microsoft to gain a greater share of the market in Korea, perhaps the only country in which it did not have a monopoly in the word processing sector. See Sims, *supra* note 22, at 1.

312. Burton, *supra* note 310, at 27. Hangul & Computer’s president was characterized as a traitor. See Baker, *supra* note 310, at 6.

313. Erickson, *supra* note 309, at 46 (quoting president of Korea Venture Capital Companies Association).

314. *Id.*

315. Baker, *supra* note 310, at 6 (quoting Korean Fair Trade Commission official).

316. Burton, *supra* note 310, at 27; *Korean Language National Software Program Faces the Axe*,

The Hangul & Computer matter vividly illustrates the extent of the piracy problem in Korea. Out of the approximately three million copies of the *Hangul* software in use, two and a half million were illegally duplicated.<sup>317</sup> Thus, Korean products were subject to the same rampant piracy about which the United States has complained. The irony was that while domestic piracy contributed to the company's financial woes, Korean sources expressed little interest in a financial bailout.<sup>318</sup> But when American Microsoft emerged, Koreans quickly portrayed it as a predatory, imperialistic colonizer<sup>319</sup>—a characterization normally reserved for Korea's long-time nemesis, Japan. As a result of the Hangul & Computer experience, the government announced a crackdown on piracy of software.<sup>320</sup> This reaction supports the view that a nation does not press for copyright protection seriously until it recognizes the need to protect the work of its authors. Yet piracy of software and other goods has continued, and Korea has returned to the U.S. "Priority Watch List."<sup>321</sup> The Hangul & Computer episode was not so much a matter of Korean society realizing at long last the need for copyright protection of its intellectual property. Rather, the event poignantly demonstrated the Korean revulsion to the notion of a foreign (American) entity having ownership of that most Korean property.<sup>322</sup>

#### 4. U.S.-Korea Intellectual Property History

The historical development of international copyright protection in the United States and Korea is also pertinent to the U.S.-Korea discussions over copyright protections. Cultural differences would explain why this history is

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ASIA PULSE, June 25, 1998, available at 1998 WL 12619741. Users of pirated software were asked to contribute to the financial drive by donating 10,000 won (about \$7.20) each. *Id.*

317. *Korean Language National Software*, supra note 316. Even software used in government offices had the same rate of piracy. See Sohn Tae-see, *Government Agencies Forced To Buy Legitimate Software*, KOREA HERALD, Aug. 5, 1998, available at LEXIS, News Library, Asia/Pacific Rim Archive News File.

318. See Mark Milner, *Korean Backlash: Gold Rush by West Falters as Microsoft Deal Collapses*, THE GUARDIAN, July 21, 1998, at 19, available at 1998 WL 3100349; *Renunciation of "Hangul" Word Processor Raises Problems*, KOREA ECON. WKLY., June 29, 1998, available at LEXIS, News Library, Asia/Pacific Rim Archive News File.

319. See *US Software Mogul Faces Web Site Protests by S. Korean "Netizens"*, AGENCE FR. PRESS, June 17, 1998, available at LEXIS, News Library, Asia/Pacific Rim Archive News File. See also Erickson, supra note 310, at 46.

320. See *South Korea Vows To Stamp Out Computer Software Piracy*, 10 No. 8 J. PROPRIETARY RTS. 25 (1998).

321. See supra note 21.

322. See Nam In-Soo, *MS Korea Aims To Capture Local Word Processor Market This Year*, KOREA HERALD, Jan. 6, 1999, available at LEXIS, News Library, Asia/Pacific Rim Archive News File.

more of a concern for Korea. Scholars note that “different cultures may be more or less attracted to past, present or future orientations.”<sup>323</sup> Korea, with its rich Confucian tradition, appears to be a society that is oriented to the past, one that “values tradition and continuity with the past,”<sup>324</sup> and is still connected to “a nostalgic past to which everything attempted in the present must appeal.”<sup>325</sup> In contrast, the United States is oriented more to the present and future.<sup>326</sup> If this cultural difference is maintained in negotiations, then it could explain why American negotiators are more likely to focus on the protection of copyright rights prospectively and why Korean negotiators may assess current practices in reference to the past. With regard to the latter, Korean representatives could not be faulted for raising the comparative development of international copyright protection seen in both countries’ histories.

An obvious parallel is that neither country’s initial copyright law provided protection for the works of foreign authors.<sup>327</sup> The U.S. Copyright Act of 1790 was more explicit, specifically excluding works “by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”<sup>328</sup> For several decades, the United States played the role of “copyright outlaws.”<sup>329</sup> There was little change in the protection of foreign authors until a full century after the initial copyright law,<sup>330</sup> but even then the protection of foreign authors “proved to be to some extent illusory.”<sup>331</sup> The United States did not become a respectable member of the international copyright community until the middle of the twentieth century, and only after it realized its status as a copyright exporting nation.<sup>332</sup> In 1968,

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323. FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 125 (2d ed. 1998).

324. Mark Withers, *Leveraging Cultural Differences To Improve Performance*, 7 *INT’L HUM. RESOURCES J.* 5, 7 (1998), available at WL 7-SUM INTLHRJ5. The United Kingdom is also described as a past-oriented culture. *Id.*

325. TROMPENAARS & HAMPDEN-TURNER, *supra* note 323, at 126.

326. Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 *LAW & SEXUALITY: REV. LESBIAN & GAY LEG. ISSUES* 195, 216 (1994) (“American society tends to follow a future time orientation based on modern values.”).

327. *Compare* Copyright Act of 1790, ch. 15, § 5, 1 Stat. 124 (1790), with Korean Copyright Law, *supra* note 94, ch. II, art. 46.

328. Copyright Act of 1790, ch. 15, § 5.

329. EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 230 (2000).

330. *See* Act of Mar. 3, 1891, ch. 565, § 13, 26 Stat. 1106 (1891). In the interim, the United States had the opportunity to change course and join the Berne Convention in 1886, but declined.

331. SAMUELS, *supra* note 329, at 234.

332. *Id.* at 241. Professor Samuels notes that

[t]he world read American books, listened to American music, watched American movies, and ran American computer programs. And as the technologies for electronically reproducing copyrighted works made it possible for users around the world to make unauthorized copies of U.S. works, we

the Assistant Register of Copyrights of the United States Copyright Office acknowledged that “[u]ntil the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest.”<sup>333</sup> In short, the United States had “a pretty embarrassing history”<sup>334</sup> in the international copyright community.

This history will not likely be lost on the Korean side. For Korea, the concept of copyright was absent during the five centuries of the Yi dynasty; and after liberation from Japan at the close of World War II and another war on the peninsula, intellectual property rights protection was not a top priority. Even with the piracy of foreign works continuing, progress in the development of copyright protections in Korea was quite rapid, comparatively speaking. Korea’s Ambassador to the United States made this point in 1986: “Korea . . . has agreed to protect intellectual property at a far earlier stage of industrialization than either the United States or Japan.”<sup>335</sup>

### *B. Incorporating Culture in Negotiations*

Helpful in the U.S.-Korea setting is that the culture of both societies is amenable to the prospect of conciliation toward resolution. Alternative dispute resolution has gained increasing acceptance in the American legal arena.<sup>336</sup> Although Korean society has become more litigious in recent years, Korean leadership is still likely to prefer resolution of disputes through

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began lobbying around the world for other countries to tighten their copyright protection to regulate record, movie, and computer software piracy.

*Id.*

333. Ringer, *supra* note 24, at 1051. *See also* Hamish R. Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J.L. & ARTS 89, 91 (1986) (“[U]p to 1891, the United States denied copyright protection altogether to published works by nonresident foreigners . . . [and] up to 1955, the United States refused to enter into multilateral copyright relations outside the Western Hemisphere.”).

334. SAMUELS, *supra* note 329, at 230.

335. Kim, *supra* note 12, at 2. “[C]opyright protection is provided by a country only when it has intellectual property that needs to be protected, that is, when its inventors and artists are close to catching up with the state of the art in their fields.” *Id.*

336. *See, e.g.* Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts*, 172 F.R.D. 550, 555 (1996) (“Over the past several years, the use of alternative dispute resolution (ADR) techniques has been growing in significance and popularity, having served parties in disputes both large and small, from international conflicts to neighborhood arguments.”); Carolyn Kleiner, *The Action Out of Court: Programs in ‘Alternative Dispute Resolution’ Are on the Rise*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 90, 91 (reporting that 177 law schools offered ADR courses in 1997, compared to 47 schools in 1984). The ADR movement also has its skeptics. *See generally* Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996); Kleiner, *supra*, at 90.

conciliation<sup>337</sup> in matters of international dispute. Direct negotiation between the United States and Korea present the best means to resolve the piracy situation because it allows for discussion and consideration of all factors, including those of a cultural dimension. In the deliberations toward negotiations then, negotiators should be aware of the American and Korean cultural contexts that shape each jurisdiction's copyright policy.

Initially, when the United States complains of rampant piracy in Korea of its copyrighted works, resulting in a trade imbalance and losses for private authors and companies, Korea must be mindful of not only the U.S. economic interests, but also the deeply rooted regard for the sacred right of property that fuels the American objection.<sup>338</sup> Conversely, the U.S. side must be aware that its trading partner is a society with five centuries of Confucian traditions. Some of these traditions, which still have a residual presence today, help to explain certain aspects of the piracy situation. Yet mere awareness of the other's specific cultural traits will not solve the piracy problem. This Article offers preliminary suggestions on appreciating the role of culture in future negotiations. These suggestions must be viewed as a beginning, rather than an end, of the contemplation and deliberation of cultural factors relevant to copyright policy and the piracy situation.<sup>339</sup>

Cultural education and information will enable each party to characterize its objections and interests in terms that the other can better accept. For instance, U.S. representatives might draw comparisons between the American regard for property rights in copyright and the Korean respect for the author's moral right of integrity under Korean law. Thus, if the deeply revered ownership of *private* property is held in the same reverence as the equally regarded *personal* interest in preserving the integrity of the author's work, Korean negotiators might better accept that unauthorized copying of the author's work is equivalent in impact to dishonoring the author through unauthorized alteration of the work. Also, assuming Korean society is a collectivist culture that tends to "emphasize resource sharing rather than

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337. See *supra* text accompanying notes 247-62.

338. Korean commentary acknowledges the property-oriented approach to copyright seen in the United States. *E.g.*, SONG, *supra* note 192, at 53.

339. Putting aside the cultural differences, one approach for the American side is to emphasize what the two copyright systems have in common. As noted above, Korean copyright law provides for protection of the author's property rights seen stateside, and adopts many of the equivalents in basic U.S. copyright law. The danger here is that the Korean public may view the creation and enforcement of Korean copyright law as a matter of American demand rather than Korean volition. The anti-American sentiment further fuels the resistance. This is problematic. American negotiators may choose to emphasize that the growing democratization movement in Korea, which developed free from American pressure, endorses application and enforcement of the rule of law in statutes enacted by the national legislature.

individual ownership,<sup>340</sup> American representatives could characterize the licensing relationship between authors and Korean companies as a vehicle to facilitate the sharing of property interests.

Clearly, the Korean side has the more difficult task in negotiations because Americans are unlikely to accept any explanation suggesting justifications for piracy of American products.<sup>341</sup> Still, the parties may reach mutual understanding of conflicting positions by building on common foundations. For example, Korean negotiators could explain that although Korean society, like U.S. society, appreciates a desire for economic wealth (though for different ends), the technicalities of property ownership and divisible property rights are still in development. Moreover, if the American example is any indication,<sup>342</sup> a meaningful system of international copyright protection in Korea will require patience,<sup>343</sup> a change in status from copyright importer to exporter, or both.

#### CONCLUSION

Commentators often point to cultural differences to explain the rampant piracy of American intellectual property products in Korea, which allegedly results in millions of dollars of losses for U.S. companies and a trade imbalance. This Article examines the cultural dimension to copyright in the United States and Korea. It attempts to determine the extent to which each nation's copyright system (its laws, enforcement, and underlying purpose) is based on the respective society's culture. To understand the two countries' cultures, one must consider not only the origins of Korean and American traditional attitudes—from the Yi dynasty when Confucian traditions ruled and from the days of colonial America—but also attributes of more contemporary Korean and American cultures. In summary, the American approach to copyright (and intellectual property in general) appears to be based on the time-honored societal desire for property and the expectation of property rights protection. Korean culture is more complex. For centuries, the Confucian society had little need for, or appreciation of, copyright. In the twentieth century, Korea emerged as a player in the international marketplace

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340. Marron & Steel, *supra* note 117, at 166.

341. If pockets of Korean society still subscribe to the traditional view that what Americans refer to as intellectual property is essentially public property and that copying honors the author, a change of attitudes will take time, in spite of aggressive education efforts.

342. See *supra* text accompanying notes 327-30.

343. American negotiators will need great patience if it is true that meaningful protection of international works requires not only change in societal attitudes, but also reforms in Korea's legal institutions. See Song & Kim, *supra* note 101, at 134.

and technological age; it continues its transformation today. Although Confucian attitudes still explain aspects of the Korean approach to copyright, economic interest has emerged as the key motivator in the piracy situation. Still, culture will continue to play a role in U.S.-Korea discussions over this difficult matter. Each side will need to be aware of the other's culturally-based approach to copyright—especially the patterned thinking based on certain societal values. Awareness of the societal attitudes and the different realities they create will facilitate a more informed dialogue between the two nations. Otherwise, there will remain the risk of attributions of lawless and uncivilized misappropriation by one side and imperialistic monopolization by the other.