Moral Rights Exclusion in the North America Free Trade Agreement and the General Agreement on Tariff and Trade: A Legal Proposal for the Inclusion of Moral Rights in Future Free Trade Agreements in Latin America and the Caribbean

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Introduction

The North American Free Trade Agreement (NAFTA),[1] one of the most comprehensive pacts made between countries in recent history,[2] represents a giant step towards economic integration among developed and developing nations in the western hemisphere. For centuries, nations have followed and executed protectionist trade policies in international commerce. The modern trend, however, is toward market integration and cooperation among countries. This is not only desirable, but necessary for survival in the global market.[3]

One important, integral and innovative part of NAFTA is the protection of intellectual property rights it recognizes the nationals of each member country, in and outside their national territory. Compared to world-wide protection on intellectual property rights negotiated in the past, NAFTA is by far the most extensive. Yet recently, still another multilateral

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[1] North American Free Trade Agreement, December 17, 1992, Mex.- Can.- U.S., 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA was ratified by the U.S. Congress on December 8, 1993; *see also,* NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

[2] *See* Kent S. Foster & Dean C. Alexander, *Opportunities for Mexico, Canada and the United States: A Summary of Intellectual Property Rights Under the North American Free Trade Agreement,* 20 RUTGERS COMPUTER & TECH. L.J. 67 (1994).

[3] The economic benefits derived by Canada, Mexico, and the United States through NAFTA are staggering. The economic projections at the time of the signing were in the billions of dollars in benefits for the countries joined by the Agreement on December 17, 1992. *See Overview*, *Response to Issues Raised in Connection With the Negotiation of North American Free Trade Agreement*, Transmitted to Congress by the President May 1, 1991, *available in* WESTLAW, 1991 WL 434196 (N.A.F.T.A.).

agreement regarding intellectual property rights protection entered into play at the international level. This agreement has a strong enforcement feature, that not only binds the current NAFTA countries, but over one hundred countries around the world. Like NAFTA, The General Agreement on Tariff and Trade (GATT),[4] signed on April 15, 1994, includes a section on the protection of intellectual property rights known as the Trade Related Aspects of Intellectual Property Rights (TRIPS).[5] The TRIPS component of GATT seems very similar to the intellectual property rights that NAFTA provides for its members. The difference locates in their extension, GATT regulates trade in goods but not services, and NAFTA regulates both.[6]

The United States used the GATT draft on intellectual property rights as a base for the creation of Chapter 17 – Intellectual Property Rights– of NAFTA. Similarly, the GATT Draft on intellectual property rights used the Berne Convention for the Protection of Literary and Artistic Works[7] to create the TRIPS draft. In other words, Berne is the foundation for the protection of intellectual property rights of NAFTA and TRIPS. Both of these Agreements expanded or reduced the protection that Berne requires its members. One of the reductions of the protection of intellectual property rights, that both NAFTA and TRIPS specifically excluded (and Berne requires its members) is *moral rights*.[8] The Berne Convention covers the minimal moral rights[9] protection that members must provide their nationals

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4 General Agreement on Tariff and Trade, Final Act, April 15, 1994, 33 I.L.M. 13 [hereinafter GATT].

5 Trade Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 81, [hereinafter TRIPS]; *see also* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement,* 29 INT'L LAW 345 n. 4 (1995).

6 Stacie Strong, *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods,* 4 DUKE J. COMP. & INT'L L. 93, 103 (1993).

7 *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter Berne].

8 *See* NAFTA, *supra* note 1, Annex 1701.3; *see also* GATT, *supra* note 4, article 9; *and see also,* Charles S. Levy and Stuart M. Weiser, *The NAFTA: A Watershed for Protection of Intellectual Property,* 27 INT'L LAW 671 (1993).

9 *See* Berne, *supra* note 7, art. 6 (bis).

and nonnationals of the countries bound by the Convention. *It is precisely the exclusion of moral rights in NAFTA and TRIPS what motivates this Article*.

The moral rights of authors and inventors are recognized in Civil Law countries around the world as part of their protection of intellectual property rights, particularly, as part of the copyrights afforded to the authors and inventors. Moral rights include nonpatrimonial aspects of a creation, like paternity and integrity.[10]

The United States has not recognized moral rights in their courts as a cause for recovery.[11] When the United States joined Berne in 1989,[12] they believed that the moral rights covered by their copyright laws were sufficient to satisfy Berne's minimal standards. Therefore, no new legislation was created or added to include these rights in their Copyright Law. The only legislative action for the protection of moral rights has occurred in the United States, first at the State level,[13] and second at the Federal level with the 1990 Visual Artist Rights Act.[14] On the other hand, Civil Law countries continue to legislate in favor of moral rights as part of their national protection on copyrights. Curiously, they continue to sign bilateral or multilateral pacts for free trade, without a provision for the protection of moral rights. With these actions (or inactions) they are allowing for international infringement of moral rights, without any possible recourse against a violating country. Changes in bilateral and multilateral agreements are imperative to prevent and enforce the protection of those rights for their nationals.

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[10] *Id.*

[11] Gilliam v. American Broadcasting Co., 538 F. 2d 14, 24 (1976). ("American copyright law, as presently written, does not recognizes moral rights or provides for cause of action for their violation, since the law seeks to vindicate the economic, rather than personal, rights of authors.").

[12] *See* Berne, *supra* note 7.

[13] Cal. Civ. Code §§ 987-989 (1984); *see also* New York Artists' Authorship Rights Act, §§ 14.51-14.59 (1984).

[14] *See* Visual Artists' Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) [hereinafter VARA].

This article will first discuss the moral rights doctrine from its origin to today's application in the European and Central American communities. Second, it will discuss the three foremost important international treaties for the protection of intellectual property rights. Third, it will analyze the influence the prospective of becoming a NAFTA country has created in the Americas, as for their internal movement to revise national laws to comply with the minimal protections of intellectual property that this Agreement requires them to have. Fourth, it will illustrate how moral rights recognition for nationals of other countries will depend on the nation that they present their claims from, violating the "National Treatment"[15] requirement of NAFTA. Finally, this articlesuggests various mechanisms of implementation of moral rights in future trade agreements in the Americas.

I. Definition of Moral Rights

Civil Law countries historically have recognized that any person that is an author or inventor of an original piece of work has over its creation rights that go beyond its patrimonial exploitative rights. These rights are acquired by the mere act of creation. They are personal, nonpecuniary, and unseparable from human rights.[16]

What are exactly moral rights? Do they only include Paternity and Integrity, or are there more? Many countries accept as moral rights all or some of the following:

1. The right to be known as the author of the work,
2. the right to prevent others from being named as the author,
3. the right to prevent others from falsely attributing a person the authorship of work which they has not in fact created,

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15 *See* NAFTA, *supra* note 1, art. 1703.

16 *See* DIEGO ESPÍN CÁNOVAS, MANUAL DE DERECHO CIVIL ESPAÑOL, VOL. II-DERECHOS REALES 392-398 (7ma. ed. 1985); *see also* Patricia Rivera MacMurray, *Moral Rights in Puerto Rico: Spanish Tradition and the Federal System*, 57 REV. JUR. U.P.R. 297, 298 (1988).

4. the right to prevent others from making deforming changes or mutilating the author's works,
5. the right to withdraw a published work from distribution if it no longer represents the views of the author, and
6. the right to prevent others from using the work or the author's name in such a way as to reflect on his/her professional standing.[17]

There are other moral rights that derive either from the interpretation or the application of the original moral rights mentioned before, namely: the right to disclosure and first publication, which grants the author the discretion to decide to either keep the work to himself or make it public; the right to modifications of the work but with the authorization of the author or creator.[18]

The doctrine of moral rights has evolved throughout history and its application and definition with all probability will continue changing in the near future as the world economy develops.

II. Evolution of Moral Rights

A. Origin

The moral rights doctrine has its roots in the 19th century France. The origin of this doctrine is traceable to two main philosophical views that were embraced after the French Revolution: Individualism and the Natural Rights doctrine;[19] both of which gave birth to what countries consider and protect as moral rights today. Moral rights developed in three periods in history:

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[17] *See* Jorge A. Pierluisi, Jr., *Droit Moral: The need for Avoiding Its Potential Conflict With Federal Copyright Law,* 19 REV. JUR. U.I. 619, 623 (1985).

[18] *See* MacMurray, *supra* note 16, at 303.

[19] *Id.* at 298.

1. 1793 to 1878 - Patrimonial Right Theory: The characteristic of this period is the Property Rights argument. In this period the author could exploit all economic aspects of the work, similar to the right of any real property owner has over its chattel. The main argument was that unlike real property, these rights (the author's) were not perpetual (they died with the creator). Critics to the property rights approach believed that moral rights should be personal, inalienable, and abstract.
2. 1879 to 1902 - Personalism: During this period the concept of moral rights was defined and the property rights theory was abandoned. Moral rights had preemption over economic property rights. This narrow view, as the property rights approach, was severely criticized. This gave place to the introduction of a new theory, that covers both, the property and moral rights, called the dualist approach.
3. 1902 to 1957 - Eclectic Theory: During this period civil law countries tried to seek a balance between the two theories. These gave place to two theories that harmonized the property and moral rights: dualism and monist. The dualist theory considers moral rights separate from pecuniary property rights. The monist theory considers both moral and pecuniary rights as one integrated right.[20]

B. Interpretation of the Monist and Dualist Theories

Neither the dualist nor the monist theories affect the consequences of copyright protection. For instance, both doctrines of moral rights cover pecuniary and nonpecuniary rights. This can be seen in the protection provided by the European countries.

Monist Germany and Dualist France recognize that there are two groups of attributes of copyrights. In one group,

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[20] *See* Mac Murray, *supra* note 16, at 299-300.

national laws provide that moral rights are perpetual, inalienable, and imprescriptible; the other set of laws provide that the rights are limited in time, alienable, and subject to prescription. However, the rights recognized in each country are the same. The main difference between the theories is that the dualistic theory states that moral rights are primordial due to the guaranteed protection of the personal, intellectual, and spiritual interest of the author. In view of this fundamental right, importance is given to the protection of the personality in modern society, therefore they cannot be signed away. The monist theory states that moral rights cannot be perpetual, because they are not separate of patrimonial rights, as it will be against the best interest of society to keep patrimonial rights forever. Therefore, moral rights end at the same time patrimonial rights expire.[21]

Today, both theories find acceptance in Civil Law countries that recognize moral rights. Countries only differ in their application of the protection of intellectual property rights within their borders.

C. Other Moral Rights Theories

Other doctrines about moral rights have been developed based upon different interests protected. One of these theories states that the needs of society are to be put before the right of the author, based on the view that an author does not create anything new, but only modifies what already exists. Another theory states that the right of the author to his creation should be absolute, like real property rights, but with limits to the point where it affects a third party. The foundation of this last theory derives from the right to enjoy and dispose of private property.

The United States is familiar with the last theory; American courts have recognized that property rights cannot be as

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[21] *See* Adolf Dietz, *ALAI Congress: ANTWERP 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries,* 19 COL. VLA. J. L. & ARTS 199, 208 (1995).

absolute as our founding fathers believed they should be. As there has been a need to strike a balance between the society's interest and the author's rights over his creation.[22] However, the balancing approach needs to be defined within specific acceptable limits that will allow measuring society's economic needs against the author's moral and property rights. This conflict needs to be resolved, before another treaty for the protection of intellectual property rights is signed or another country joins NAFTA. Civil Law countries in the Americas need to negotiate for the inclusion of moral rights in NAFTA. A balance of motives between economic advancement (society) and moral rights (individual) should be possible to negotiate with the United States for the inclusion and recognition of intellectual moral rights.

III. Application of Moral Rights

A. Moral Rights in European Countries

European countries have different ways of implementing and protecting moral rights. They have maintained a strong protection of the author's moral rights, even with the expansion of the European Economic Community in recent years.[23] This is a strong indication that moral rights will not disappear from the Civil Law countries in which economic advancement has become a main priority in recent years.

Most European countries find that the protection of moral rights offered by the Berne Convention is minimal compared to the protection offered in their countries.[24] For example, the German Copyright Act grants the divulgation right, the paternity right, and the integrity right to foreign authors, independently from their situation under the Berne

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22 *See* MacMurray, *supra* note 16, at 300.

23 *See* Jan Corbet, *The Law of the EEC and Intellectual Property*, 13 J. L. & COM. 327 (1994) (The Member States are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom).

24 *See* Dietz, *supra* note 21, at 199.

Convention. This provision of the German Law intends to respect the human rights content of the divulgation right. The normal economic rights are left to the agreements in bilateral and multilateral conventions.[25] In addition, Germany's copyright law was framed within the monistic doctrine, in other words, moral rights are unseparable from patrimonial rights. Other countries like France, Spain, and Italy, use a dualistic approach in which patrimonial copyrights are separate from the moral rights.

Specifically, the divulgation right is recognized in France, Spain, Italy, Switzerland, and Germany as part of the moral rights. The divulgation right provides the author the opportunity to decide whether he wants to, when he wants to, and how he wants to release his work from his private domain to the public sphere, also determining the moment his work enters the financial or commercial sphere. The right to repent or withdraw appears as the corollary in case the author repents from the publication due to artistic or moral concerns for the continued exploitation of his work.[26] In the case of employed authors the decision regarding when the work that he has committed himself to do is finished and ready to be handed over, is made by the author due to this divulgation right. This is different from the common law fictitious figure of "work for hire", in which the employer becomes the owner of the creation and the employee creator has no right whatsoever over his own creation.

B. Sample of Moral Rights Legislation

The following are examples of moral rights laws in the United Kingdom, France, Mexico, and El Salvador, used to illustrate some possible interpretations of the protection of moral rights.

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[25] *Id.* at 204.

[26] *See* Dietz, *supra* note 21, at 204.

United Kingdom

The United Kingdom decided to recognize and protect moral rights in its territory after it joined the Berne Convention. The law protects copyrighted work and also the work of a director of a copyrighted film.[27] The moral rights protected are: the right to be identified as the author or director of a work; the right not to have a work falsely attributed to an author; and the right not to have his work subject to derogatory treatment (distortion or mutilation of the work that is detrimental to the honor or reputation of the author or director).[28]

France

France considers that moral rights are attached to the person, thus are perpetual, inalienable, imprescriptible, and transmittable *mortis causa* to the heirs of the author. Also, these rights can be conferred to a third person by testamentary provisions. The law states "notwithstanding the transfer of the exploitation rights, the author even after the publication of his work, shall enjoy, with the transferee, the right to correct or retract, in such case he must indemnify the transferee beforehand for the loss that the correction or retraction may cause him."[29]

Mexico

Mexico revised their Industrial Property Law in June 27, 1991.[30] Its main purpose was to provide individuals and industries means to protect themselves from unauthorized duplication or imitation of their industrial technology and

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[27] *See* June M. Besek, *Protecting your Copyright Abroad: Selected Issues,* GLOBAL TRADEMARK AND COPYRIGHT 1994, at 597 (PLI Pat., Copy, Trade & Lit. Prop. Course Handbook Series No. 393 (1990)) (U.K. effective date as a Berne member was January 2, 1990).

[28] *Id.* at 605 (Copyright, Designs and Patents Act 1988, articles 77, 84, 80, United Kingdom.)

[29] *See* June M. Besek, *supra* note 27, at 605 (Copyright Statute, Law No. 57-298 on Literary and Artistic Property (March 11, 1957) as amended, 6, 19, 32 (France)).

[30] *See* ROBERTO VILLAREAL GONDA, DERECHOS INTELECTUALES; LA NUEVA LEY MEXICANA EN MATERIA DE PROPIEDAD INDUSTRIAL 46 (1994) (translation by author).

commercial identification.[31] As Mexican laws were updated they allowed their nationals to compete with other industrialized nations that had sophisticated industrial property protections.

Copyrights in Mexico derive from Article 28[32] of their Constitution, and from its membership to Berne since September 20, 1974.[33] Their Civil Code, under the title Author's Rights, describes the moral and patrimonial rights protected.[34] They embrace the dualist approach to copyright and protect, under their patrimonial aspect of the copyright, the following: publication, reproduction, execution, representation, exhibition, adaptation and public use of the work. In 1991 the reform added the sale of the work, authorization for usage, rental or temporary exploitation.

The moral rights recognized by Mexican Legislation are: the recognition of paternity to the author of the work; the author can oppose any deformation, mutilation, or modification to his/her work, without his authorization; and any action that detriments the work itself, the author's honor, prestige or his/her reputation. The law clarifies that there will be no cause of action for free criticism of any work under the protection of the law based on scientific, literary, or artistic knowledge. These rights are united to the person of the author and are perpetual, inalienable, imprescriptible and not renounsable. Its exercise is transmittable to the legitimate heirs or any person assigned in his or her will. If the person dies without legal heirs or will, the Public Education Department will become the owner of those rights.[35]

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31 *Id.*

32 *See* EDWIN R. HARVEY, DERECHO CULTURAL LATINOAMERICANO, CENTROAMÉRICA, MÉXICO Y CARIBE 82 (1993) (Mexican Constitution of 1917, translation by author).

33 *Id.* at 84.

34 *See* Harvey, *supra* note 32, at 82.

35 *Id.* at 88-89.

El Salvador

The law of El Salvador provides for the protection of patrimonial and moral rights. It also has a dualistic approach to copyright. The protected patrimonial rights are the following: the reproduction of the work in any way that can be transmitted to the general public; the right to execute and present the work in any way that is compatible with its purpose; and the right to disseminate the work in any form of media. The pecuniary right can be transferred by contract or inheritance. In addition, the author can oppose any publication without his authorization and request compensation for damages.[36]

The following are protected moral rights: the right to publish the work in the way, means, and manner that the author pleases; to hide the name or use a fictitious one for publication; to destroy, redo, or keep unedited work, to retract, modify or correct it after its publication; to conserve and revindicate the paternity of the work; oppose plagiarism; to demand that every publication of the work carries the name or pseudonym of the author or that in any public communication of the work his or her name is announced; to oppose that his/her name is used in a mutilated work of his/hers or in a third person's work; to safeguard the integrity of his/her creation from any deformation, mutilation, modification or abbreviation of it or its title; and, to oppose any utilization of the work in detriment of his/her reputation as an author or of his/her honor. These rights are inalienable and imprescriptible. Any violation of them could be cause for compensation and restoration.[37] In addition any nonnational that publishes his/her works in El Salvador will have, under the doctrine of reciprocity, the same rights of nationals.[38]

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[36] *See* Harvey, *supra* nota 32, at 58.

[37] *Id.* at 58-59.

[38] *See* Harvey, *supra* nota 32, at 61.

IV. International Treaties

The protection of intellectual property rights has been an international concern since last century. The Berne Convention was the first attempt to provide an international guide for minimal protection on copyrights. Due to the international importance of this Convention and as the guiding light for NAFTA and TRIPS, it will be the first Treaty to be discussed. After the Berne Convention, NAFTA and TRIPS copyrights protection discussion will follow, with emphasis on the national treatment requirement of all three treaties.

A. The Berne Convention

Copyright laws are territorial.[39] Each country has its own set of copyright protection for their nationals. The issue arises when a national from one country seeks protection under the laws of copyrights from another country, in which his/her creation or invention is being used and exploited without his/her permission. The Berne Convention was the first attempt to provide some international standards of protection.

In 1886, countries united to set out minimum standards of protection that member countries must have in their national copyright laws.[40] Periodically, it has been revised, the last revision occurring in Paris in 1971, which is known as the Paris Act.[41] The Berne Convention is administered by the World Intellectual Property Organization (WIPO).[42]

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[39] *See* Besek, *supra* note 27, at 597.

[40] *See* Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. Introduction written November 1989. International Economic Law Documents IV-B.

[41] *Id.*

[42] *See* Monique L. Cordray, GATT V. WIPO, 76 J. PAT. & TRADEMARK OFF. SOC'Y. 121, 123 (1994), (Berne had eighty-eight members in 1994).

The goals of this treaty are:

1. To develop laws that are favorable to authors of all civilized countries,
2. to eliminate protection of intellectual property based on nationality,
3. to promote the creation of international legislation, and
4. to eliminate the formalities to recognize author's rights.[43]

The United States adhered to Berne (103 years after its creation), in March 1, 1989.[44] The United States decided to join the Berne Convention in order to obtain reciprocity of copyright protections with the countries that are part of it.[45] One reason behind the decision to join was the billions of dollars it was loosing due to counterfeit of copyrighted work.[46] Joining Berne was the first step for the United States to counter-fight piracy. In addition, it was a necessary step towards the culmination of GATT-TRIPS negotiation, that at the time were underway.[47]

The Berne Convention offers no enforcement mechanism.[48] Therefore, adherence to its articles depended solely on the individual country's national legislation or a newly created legislation to comply with the Convention. The power to enforce Berne has just come recently with GATT-TRIPS. It has given Berne the teeth it lacked in the enforcement of its principles in countries that belonged to the Convention, but did not comply with its minimum standards, therefore making their membership and commitment to Berne only symbolic.

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43 *See* Carlos J. Fernández Lugo, *Cambios recientes en el campo de los derechos morales de autor,* 32 REV. D. P. 141, 149-151 (1992) (translation by author).

44 *See* Berne, *supra* note 7.

45 *See* Berne Introduction, *supra* note 40, (Seventy-seven countries had joined Berne by January 1, 1988. Among them are: Argentina, Brazil, Canada, Chile, Costa Rica, Mexico, Uruguay, and Venezuela, all of which are countries that are being sized to join NAFTA in the near future).

46 *See* Fernández Lugo, *supra* note 43, at 150.

47 *See* Cordray, *supra* note 42, at 122.

48 *See* Besek, *supra* note 27.

Berne Protection extends to every production in the literary, scientific and artistic domain, whatever form of expression the author chooses to transmit it to the outerworld. Recently, an interpretation of Berne was extended to include computer programs.[49]

The Convention contains *three basic principles: national treatment, automatic protection and independence of protection*. Under the principle of *national treatment*, foreigners of a country enjoy the same copyright protection granted to the nationals of that country. Such protection is *automatic*, because it is not subject to preconditions or formalities to receive the protection. This protection is *independent* of any protection afforded under the copyright laws of the country of origin.[50] This last quality of the Berne Convention, the independence of the rights that it gives to nationals, along with the protection that the original country may provide, signifies that the intent of the Convention is to provide a minimum of protected rights, outlined in its content. Therefore, a national from a member country should find in another member country at least, the same minimal protection. A different issue is the national treatment requirement. This national treatment means that a country will protect the works of nonnationals with the same national laws that it uses for its citizens.[51] This is a separate treatment from the obligation the country pacted to provide as a minimum under Berne. The Convention allows the member countries to withhold national treatment in certain aspects. For example, if the national law of the country extends copyright protection beyond Berne's minimum standard of *life of the author plus fifty years*, they are not obligated to extend this protection to nonnationals. However, this is not the case of moral rights. As we will see, these rights are independently protected and if the country provides a more extensive

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[49] *Id.*

[50] See Berne Introduction, *supra* note 40.

[51] *See* Besek, *supra* note 27, at 600.

protection it must also be afforded to nonnationals due to national treatment.

As to the protection of moral rights, Article 6 (bis) of the Berne Convention has been the object of discussion for a long time now, even to the point that NAFTA and TRIPS both have affirmatively excluded Article 6 (bis) of the Berne Convention. What does this article say, that caused two major international treaties to exclude it from their final text? What is the reasoning behind it?

Article 6 (bis) of the Berne Convention was first introduced in 1928 by the Italian delegation at the Rome Conference. It read as follows:

1. Independently of the author's copyright, and even after the transfer of said copyright, the author shall have the right to claim authorship of the work, as well as the right to object any distortion, mutilation or other modification of said work that could be prejudicial to his honor or reputation.
2. The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.[52]

In 1948, Berne was revised in Brussels, where article 6 bis was modified to broaden its scope. It read, and still does, like this:

1. Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or the modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
2. The rights granted to the author in accordance with the preceding paragraph, shall after his death, be

[52] *See* Mac Murray, *supra* note 16, at 301-302.

> maintained, at least until the expiry (sic) of the economic rights, and shall be exercisable (sic) by the persons or institutions authorized by legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of this Act, does not provide for the protection after death of the author of all rights set forth in the preceding paragraph may provide that some of these rights, may, after his death, cease to be maintained.
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> 3. The means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed.[53]

From the text we can see that it grants the author, four rights:

1. paternity (moral),
2. integrity (moral),
3. limited post mortis transmission of moral rights (Monistic approach), and
4. national treatment (moral and patrimonial).

These rights that Berne adopted in 1948, have been described as minimalist.[54] As we saw in the definition and scope of moral rights adopted in most Civil Law countries, Berne offers only a limited amount of rights, compared to the rights that most European Communities and Latin American Countries offer their nationals.[55] For example, Germany adds at least two more rights: the divulgation rights and the right to repent or withdraw. In Spain, includes the right "to access the sole or rare copy ...in another person's possession".[56]

When the United States joined Berne in March 1, 1989, Congress had to pass a Bill implementing changes in their copyright laws, to comply with the minimal standards of the

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[53] *Id.*

[54] *See* Dietz, *supra* note 21, at 203.

[55] *Id.*

[56] *Id.*

Convention. Moral rights were not considered as needed, or specifically recognized, by the Berne Convention Implementation Act.[57] The legislative history shows that Congress believed these rights were already protected by their current Copyright Law.[58] In addition, they believed that moral rights should be legislated at each state and implemented through their torts actions. The position taken by the United States when implementing Berne was convenient. It only complied with the other minimal requirements dictated by the Convention (non-related to moral rights), and did away with the moral rights requisite. The United States had the support it needed for their noncompliance in the implementation of moral rights; the Director General of WIPO, at the time, sent a letter expressing his opinion that the U.S. did not have to amend their national law to add moral rights in order to adhere to Berne.[59] Now, both NAFTA and TRIPS, have excluded their recognition of moral rights as part of the intellectual property rights, which brings us to the conclusion that the United States has no intention to recognize these moral rights in the future at the national and international level.

Since their incorporation to Berne, the United States has only recognized moral rights to its nationals in their 1990 Visual Artist Rights Act (VARA).[60] This act protects the rights of paternity and integrity to certain expressions of Visual Arts that are nonreplaceable.[61] These rights are not transmittable, they last through the life of the author and can be renounced by contract.[62] In addition some states like California and New York have enacted legislation to protect moral rights.[63]

Nevertheless, the noncompliance and refusal to accept moral rights at the international level is unacceptable. There is no valid foundation for the unacceptance of moral rights and it

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57 *See* Berne, *supra* note 7; *see also* S. Rep. No. 100-352 (100th Cong., 2d. Sess. 1988).
58 *See*, Copyright Act of 1976, 17 U.S.C. § 101.
59 *See* Besek, *supra* note 27.
60 *See* VARA, *supra* note 14.
61 *Id.*
62 *Id.*
63 *Supra* note 13.

has become detrimental to current and future members of NAFTA.

In the next sections we will discuss only copyright protection of NAFTA and TRIPS, as in Civil Law countries moral rights are part of the copyrights afforded to nationals.

B. NAFTA

On February 5, 1991, the President of the United States notified Congress of the decision that Canada, Mexico, and the United States came to an agreement to negotiate the North America Free Trade Agreement.[64] It was a historic opportunity to create the largest market in the world: 360 million consumers and an output of 6 trillion dollars. The negotiations had high prospective due to Mexico's abandonment of protectionistic policies and its movement towards a more open trade and investment.[65]

As the United States saw it, the benefits outweighed the risks and safeguards were put into place to insure compliance. For example, the *Rule of Origin* was implemented. This rule specifies that only an original product from the NAFTA country can flow to the other countries; in other words, any product that is slightly processed, but not produced in the country is not be allowed to enter under the umbrella of the free trade.[66]

This *Rule of Origin* is intimately connected with the intellectual property rights that NAFTA creates, as the coverage of these rights will only apply to those products or inventions that fall within the description of NAFTA.

NAFTA was signed on December 17, 1992 by Mexico, Canada, and the United States and ratified by Congress on December 8, 1993.[67] In the Preamble of NAFTA the countries resolve, among other things, to:

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[64] *See Overview, supra* note 3.
[65] *Id.*
[66] *Id.*
[67] *See* NAFTA, *supra* note 1.

> FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights and...
>
> CREATE an expanded and secure market for the goods and services produced in their territories and...
>
> BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of Cooperation.[68]

The bases of these three resolutions are first, the promotion of creativity; second, the insurance of a secured market; and third, it lets the door open to any future negotiations with respect of their rights and obligations, depending on the outcome of GATT. These indicate clashing interests that shall be balanced for the benefit of the countries that are in the outlook of becoming a NAFTA country.

The basic objectives of NAFTA are the following:

1. (E)*liminate barriers to trade* in (sic), and facilitate the cross-border movement of, goods and services between the territories of the Parties;
2. promote conditions of *fair competition* in the free trade arena;
3. increase substantially investment opportunities in the territories of the Parties;
4. provide *adequate and effective* protection and enforcement of intellectual property right in each *Party's territory;*
5. create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
6. establish a *framework* for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.[69]

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[68] Preamble, North American Free Trade Agreement Between the United States of America, the Government of Canada and the Government of the United Mexican States, *available at*, WESTLAW, 1993 WL 572902 (N.A.F.T.A.).

These objectives guide any future interpretation of the Agreement.[70] The emphasized words illustrate the importance of these objectives in accomplishing a fair and equitable solution to any controversy that may a rise from the Agreement.

NAFTA covers not only Copyrights in its Intellectual Property Chapter,[71] but also Sound Recording,[72] Protection of Encrypted Program-Carrying Satellite Signals,[73] Trademarks,[74] Patents,[75] Layout Designs of Semiconductor Integrated Circuits,[76] Trade Secrets,[77] Geographical Indications,[78] and Industrial Designs.[79]

The obligations of each party to another, in the area of intellectual property rights, are described in Article 1701 of Chapter Seventeen of NAFTA. They must provide adequate and effective protection and enforcement of these rights (intellectual property rights) in their territory with the assurance that this enforcement will not become itself a barrier to free trade. In other words, free trade is the primary goal. In case of a violation of the copyright protection in which the solution interferes with free trade, the person asking for a remedy will have to go without one or with less than they would otherwise be entitled to in their own country.

NAFTA defines what is considered *adequate and effective* at a minimum, in article 1702. This article tells us what minimum is

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69 *See* NAFTA, *supra* note 1, art. 10 (emphasis added). *Also available at* WESTLAW, 1993 WL 572903 (N.A.F.T.A.).

70 *Id.* art. 102b.

71 *See* NAFTA, *supra* note 1Ch. 17. *Available also* at WESTLAW, 1993 WL 574442 (N.A.F.T.A.).

72 *Id.* art. 1706.

73 *Id.* art. 1707.

74 *Id.* art. 1708.

75 *Id*. art. 1709.

76 *Id*. art. 1710.

77 *Id*. art. 1711.

78 *Id*. art. 1712.

79 *Id*. art. 1713.

to be followed by listing the treaties that NAFTA countries must comply with:

1. The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971.
2. The Berne Convention for the Protection of Literary and Artistic Works, 1971.
3. The Paris Convention for the Protection of Industrial Property, 1967.
4. The International Convention for the Protection of New Varieties of Plants, 1991.

In Article 1702, the NAFTA countries agreed that each party may implement, in its domestic law, a more extensive protection than the minimum required by this Agreement, but it clarifies that it cannot be inconsistent with the Agreement. The text, however, does not define *inconsistent*. As a general conclusion, inconsistent could be any national law that interferes with free trade, and/or any of the before mentioned treaties that give nationals a right that will hinder free trade.

This last conclusion probably caused the clarification of Annex 1701.3, that reads as follows: "Notwithstanding, Art 1701 (2) (b), this Agreement confers no rights and imposes no obligation on the United States with respect to Article 6 (bis) of the Berne Convention, or the rights derived from that Article."[80] One possible explanation for this exclusion may be that the United States does not recognize moral rights to their own nationals;[81] therefore, it could not obligate itself to protect such rights to nonnationals. They do not recognize moral rights neither by law (VARA is the exception) nor by court decisions. On the other hand, they could consider moral rights a barrier to free trade falling within the *inconsistent category* of Article 1702. To support this last conclusion we have to look at the purpose of NAFTA. Free trade was sought to provide new economic avenues to depressed national economies; intellectual property rights were adopted as a safeguard against piracy. All of these

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[80] *Supra* notes 11, 13 & 14.

[81] *Supra* notes 13 & 14.

economic reasons supersede any other social reasons exposed in their statement of motives. If we look back for a minute to the dualist and monist approach to moral rights, we find that many Civil Law countries have legislated to separate the moral rights from the patrimonial rights. A difference between moral rights and patrimonial rights, among other things, is their term for expiration and the possibility of selling the exploitative rights. If we look at NAFTA from the economic perspective only and to the request of the United States for the exclusion of Article 6 (bis), we can conclude that this article was not seen as fundamental to pursue free trade and protect each country nationals against piracy.

Annex 1701.3, excluding any obligation that the United States may have with member countries in consideration of Berne's required protection on *moral rights*, closed the door to any possibility of future recognition of *moral rights* in the United States for its own nationals. At the same time, it positions its nationals in an advantageous position compared to nationals of Canada or Mexico, that are not afforded moral rights protection in the United States; yet, these countries will have to afford moral rights protection to U.S. nationals in their territory, due to NAFTA's national treatment. These inferences are supported by Article 1703.1, which states the following: "Each Party shall accord to nationals of another party treatment *no less* favorable than that it accords its own nationals regarding the protection and enforcement of all intellectual property rights."(supplied emphasis).[82]

As we saw in NAFTA's article 1702, Berne was the foundation to NAFTA's intellectual property rights protection. All parties agreed to follow Berne as a minimal for the protection on each parties rights and obligations. The problem is that in bilateral agreements the clauses of the pact bind one party in the same way it binds the other party. NAFTA's exclusion of article 6 (bis) of the Berne Convention provokes an unbalance of rights and obligations among the three countries.

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[82] *See* NAFTA, *supra* note 1, art. 1703.1.

Article 1705 lists what rights are included under NAFTA Copyrights:

1. Any original expression and works covered by Article 2 of Berne. These expressions include computer programs and compilations of data that, by the selection or arrangement, constitute intellectual creations.

2. Protect authors and her or his successor. Also the rights conferred by Berne, including the right to authorize or prohibit: Importation, Communication, First Public Distribution, Commercial Rental, of original and copy of computer programs.

3. Copyright protection shall be extended to those holding economic or acquiring rights, that have transferred those rights for the purpose of exploitation and enjoyment of the transferee, and who by virtue of a contract that transferred those rights, can claim it in its own name and fully enjoy the benefits derived from those rights.

4. Terms for the protection of the work: 50 years from the end of the first calendar year of the first authorized publication or failing to be the publication within 50 years from the making of the work, it shall be 50 years form the end of the calendar year of making.

5. Each party shall confine limitations or exceptions to the rights provided by this article, to certain special cases, that do not conflict with a normal exploitation of the work and do not unreasonably prejudice.

6. No party shall grant translation and reproduction licenses permitted under Berne, if legitimate needs of that Party's territory for copies or translations of the work could be met by the right's holder voluntary actions.[83]

Article 1714 describes in general the enforcement mechanism of these Copyrights and other intellectual property rights; the first section reads as follows: "Each Party must

[83] *Id*. art. 1705 (Copyright).

insure that enforcement procedures are available under its domestic law. There should be expeditious remedies to prevent and deter further infringements. But these, must be so that don't become barriers to free trade."[84]

This article continues with more specific procedures on how to present an action in the civil or criminal courts of the country where the claim is brought. Each country has jurisdiction over the subjects and the matter, and will apply their national substantive law to any issue arising from a violation of intellectual property right pacted under the agreement.

As a summary, NAFTA parties are required to:

1. Give national treatment to nonnationals, as the general goal. The exeption is that by adding Annex 1703.1, Mexico and Canada are the only ones obligated to provide moral rights to their nationals and nonnationals;
2. foster creativity and innovation;
3. avoid barriers to free trade;
4. provide adequate and effective enforcement of intellectual property rights in their territory; and
5. further expand the free trade zone.

C. GATT-TRIPS

The General Agreement of Tariffs and Trade[85] was first signed in 1947. Its purpose was to promote liberalized trade, which it accomplished through six rounds of multilateral trade. It was able to reduce tariff levels around the world, yet it was not able to overcome other trade barriers like: subsidies, corporate dumping and buy national requirements, that were not tariff related.[86]

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[84] *See* NAFTA, *supra* note 1, art. 1714 (Enforcement of Intellectual Property Rights: General Provisions).

[85] *See* GATT, *supra* note 4.

[86] *See* Judith H. Bello & Mary E. Foster, *Symposium: Uruguay Round-GATT/WTO,* 29 INT'L. LAW 335 (1995).

In September of 1986, GATT contracting parties met in Punta Este, Uruguay and agreed to begin negotiations to extend GATT to cover other issues, including the coverage of intellectual property rights.[87] The negotiations went on for years until the Final Act was signed in Marrakech, Morocco on April 15, 1994.[88] Congress approved the bill that changed U.S. Laws to comply with GATT on November 1994.[89]

The United States sponsored the initiation of the new GATT talks. In 1986, worldwide statistics of piracy of goods were staggering with the losses in the millions of dollars.[90] The menace of the formation of the European Economic Community was a major concern of the United States, along with the growing protectionistic sentiment that was felt in Congress.[91] GATT, to the difference of other organizations, did not have a voting bloc of Third World countries that would vote against any measure that may be counter-productive to one of its members. The United States used this opportunity to influence the countries to vote for major changes in intellectual property protections and insure that all other countries will comply or face trade sanctions.[92] All the countries that signed GATT obligated themselves to comply with the minimal intellectual property rights, based on Berne, again with the exclusion of Article 6 (bis). It is no coincidence that both NAFTA and TRIPS exclude this article; it shows the influence the United States exercised in the Pact.

The World Trade Organization (WTO) was created by the signing of the Final Act, with the purpose of combining the Uruguay Round and the previous GATT agreements under one

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87 *Id.* at 336.

88 *See* Reichman, *supra* note 5, at 346.

89 *Id.* at 340; *see also* Grant D. Aldonas, *The World Trade Organization, Revolution in International Trade Dispute Settlements,* DISP. RESOLUTION JOURNAL, July 1995, Vol. 50, No. 3, at 75; *see also* the Uruguay Round Agreement Act, Pub. L. 103-465, 108 Stat. 4809.

90 *See in general,* John T. Masterson, Jr., *Protection of Intellectual Property Rights in International Transaction* 1994, (PLI Corp. Law Course Handbook Series, No. 863, 1994).

91 *See* Bello & Foster, *supra* note 86, at 336.

92 *See* Reichman, *supra* note 5, at 340.

umbrella. In other words, WTO is the administrator and executor Organization of GATT. It will provide a framework for the conduct of trade relations among members and act as a forum for negotiations on further trade liberalization.[93]

As WTO integrates the GATT Agreements and makes its members bound by the Multilateral Agreements, each country is obligated to perform just as a developed country. The increased globalization of the world economy caused an increase in GATT membership of 25 new countries in 1986.[94]

The principal organ of WTO is the Ministerial Conference, composed of representatives of all member countries. It divides itself in three subcouncils: Council of the Trade of Goods, The Council of the Trade in Service, and The Council for Trade-Related Aspects of Intellectual Property Rights.[95] The decision making will be by consensus, and any amendments to TRIPS, GATT, and WTO will have to be made by unanimous vote of all members.[96]

All countries guarantee that intellectual property enforcement procedures are available under their national law. They are liable to comply or face trade sanctions if, after dispute settlement, the claims of violation of the intellectual property protection continue.[97]

National treatment is required as in Berne and NAFTA. TRIPS adds an additional limitation, named the *Most-Favored-Nation* (MFN).[98] This provision tries to avoid an offer from one member country to another member country that it will provide a better protection of intellectual property rights to them and then deny the same protection to other member countries. This MFN will not apply to treaties already in effect at the time of the Final Act signing.[99] Therefore, NAFTA is

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93 *See* Bello & Foster, *supra* note 86, at 340.
94 *Id.*
95 *See* Bello & Foster, *supra* note 86, at 341-342.
96 *Id.* at 342.
97 *See* TRIPS, *supra* note 5, art. 41.
98 *Id.* art. 4.
99 *See* Reichman, *supra* note 5, at 349.

exempt, technically, but it brings the question of whether this provision will apply as it expands to include other countries that are part of TRIPS.

GATT significance strives in the number of member countries it has, making their intellectual property rights protection extensive to over a hundred countries,[100] signifying a major step at the international level to stop piracy of goods.

IV. Legal Analysis for the Inclusion of Moral Rights in NAFTA

A. NAFTA in the Americas

NAFTA was a trilateral agreement negotiated by Canada, Mexico, and the United States seeking their own advancement in the international trade arena. There is nothing wrong with this statement; every contract signed worldwide has as goal the advancement of each party's interest. From an economic point of view, the opportunity created by NAFTA for the Americas possibly outweights any unequal treatment that the United States may provide for the protection of moral rights. Some may think that moral rights are a useless protection to provide, as the possible claims arising from its violation may be minimal compared to the monetary compensation provided for copyrights violations.[101]

In the recent Summit of the Americas[102] one of the topics discussed and agreed to work on immediately was the construction of the *Free Trade Area of the Americas*. This free

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[100] *See* VILLAREAL GONDA, *supra* note 30, at 64.

[101] *See* Dietz, *supra* note 21, at 227.

[102] Summit of the Americas: Declaration of Principles and Plan of Action, December 11, 1994, 34 I.L.M. 808, (the countries that signed the Declaration of Principles were: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, The Dominican Republic, Ecuador; El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, The United States of America, Uruguay and Venezuela).

trade area has a completion date of the year 2005, with substantial objectives put into place before the turn of the century.[103] To achieve this goal the countries agreed to build on current subregional and bilateral agreements, "[t]o broaden and deepen hemispheric economic integration and to bring the agreements together."[104] Furthermore, they agreed to a rapid implementation of the Uruguay Round, and multilateral negotiations with the World Trade Organization, as long as they are consistent with GATT and do not raise barriers to other nations. Interesting enough, there is a reiteration of basic principles of negotiation of any type of agreement among nations; it explicitly recognizes that decisions on trade agreements remain a sovereign right of each nation.

The countries also acknowledged "the importance of effective enforcement of international commitments, each nation will take the necessary action, according to its own legislation and procedures, to implement the agreements in the areas covered in this plan of action."[105] The Summit reiterates a basic principle of mutual agreement in which each nation, by its adherence to any multilateral or bilateral pact, is obligated to its terms and to the responsibility of taking the "necessary action" to change, modify or create new legislation in their own nations. This reminder is refreshing. Nations cannot just agree to provide new or expanded rights to their nationals and nonnationals at an international agreement and go home and not take the necessary actions to change their national legislation to comply with the treaty or agreement provisions. Unless the agreement specifies for a waiver or a time for compliance, it is unacceptable to introduce some of the pact clauses but ignore others that are not convenient. This inaction defeats the purpose of the pact and the trust of the other nations on the corresponding reciprocity.

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[103] *Id.* at 811.

[104] *Id.*

[105] Summit of the Americas, *supra* note 102, at 821.

In NAFTA and other bilateral agreements, the contracting parties did not stand in equal terms regarding technology, finances, education, and industrialization. In occasions one country might have been forced to agree to a clause because the benefits of the agreement as a whole outweighed any disagreement with a clause. It is undeniable that the prospective of pacting with such a powerful nation like the United States, can strongly influence a developing nation. We witness this in the Summit of the Americas, and we will see it soon as these countries work hard to comply with the changes necessary to produce a free trade zone in the Americas. The countries in South and Central America agreed in the Summit to pursue economic changes on this side of the globe by negotiating and promoting bilateral and multilateral free trade agreements, among themselves and with the United States in the near future. These countries of the Americas are changing their national legislation to comply with minimum standards of intellectual property rights that NAFTA or GATT requires. In the last six years, nineteen Central and South American countries have legislated to change existing national policies or create new ones, with the purpose of attracting foreign investors in to their territories.[106] However, they are keeping *moral rights* for their nationals.

The legislative changes that these countries have enacted and that will have to enact soon, are all part of their eagerness to join the new global economy and open their borders to investors and free trade. Countries like Argentina debated for years a bill that will change substantially their patent's law, recognizing that their legal protections at the time were not

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[106] Comisión Económica para América Latina y el Caribe, Desarrollo Productivo, *Tendencias recientes de la inversión extranjera directa en América Latina y el Caribe: Elementos de política y resultado,* U.N. Doc No. 19 Annex 1 (1994), (these countries are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, The Bahamas, Trinidad and Tobago, Venezuela).

sufficient to face the new world economy and competition from industrialized nations.[107]

B. Moral Rights as a Barrier to Free Trade

Moral rights are not and cannot be a barrier to free trade. NAFTA and GATT seek a *free* exchange of goods and services. They both have recognized that the patrimonial aspect of intellectual property rights must be protected to guarantee the economic benefit that all member countries sought by signing the agreement.

If NAFTA recognizes moral rights as part of the copyrights that members must provide to nationals and nonnationals, it shall not limit trade, but increase it, since possible motivation for an individual might be the production of a high quality and innovative work. The knowledge of the inventor that his work will be respected and credited to him, could motivate the creation itself. *It is a fallacy to believe that the only motivation a person has to complete creative work is the possible economic (exploitative) benefits it may acquire from it.* Even on the works *made for hire*, the creator may be in the obligation to create a specific work for his employer, but it is undeniable that the worker must feel some satisfaction from his/her creation and a sense of ownership attached to it. This is why France recognizes that moral rights apply to such employee. On the other hand, it may be that the creator is a rich person, and has no interest in the monetary payment of the work, yet it is very important the protection of his/her name and honor, therefore requiring some protection on the moral side.

The current state of NAFTA and GATT has created, in itself, a barrier to free trade. By excluding Berne's minimum protection of moral rights, it provided for a distortion of the required national treatment. As countries overcome the initial legislative changes in their own territories to measure up to the

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[107] *See* FÉLIX ROZANSKI, DERECHOS INTELECTUALES, ARMONIZACIÓN PARA LA INOVACIÓN Y EL INTERCAMBIO 38 (1994) (translation by author).

patrimonial intellectual property standards of NAFTA and GATT, they will realize the unequal treatment that their nationals receive in terms of *moral rights*.

There are three scenarios that will occur as NAFTA expands in the Americas.

1. Country *X* with moral rights, exchanges with Country *Y* with moral rights; we apply national treatment.

Result: No distinction; free trade rights and obligations fulfilled.

2. Country *X* with moral rights, exchanges with Country *Z* with no moral rights; we apply national treatment

Result: Distortion; Country *X* will provide the national of Country *Z* moral rights protection, but Country *Z* will not provide the national of country *X* moral rights protection.

3. Country *Z* with no moral rights, exchanges with Country *R* with no moral rights; we apply national treatment

Result: No distortion; there are no national moral rights to protect and provide in reciprocity. Free trade rights and obligations are fulfilled.

At this time, scenario number two applies to Mexico and the United States. As NAFTA expands we will see the proliferation of issues arising from this scenario. There are possible solutions to this controversy, which Central and South American Countries must negotiate when their time comes to meet with the United States. *They cannot permit the expansion of NAFTA without the inclusion of moral rights to protect their own nationals.* The following are suggested solutions to this controversy.

C. Suggested Solutions

1. Tort actions: The Berne Convention Implementation Act did not change U.S. law to protect moral rights. In addition, even if it had changed U.S. laws to cover moral rights, the statute does not allow for the rights that derive from Berne to become a cause of action.[108] At Berne Convention Implementation Act, Congress referred to other laws in the

[108] *See* Berne, *supra* note 7.

United States that protect moral rights indirectly; for example, authors must rectify damages to their reputation through contracts or torts' actions that may include causes of action for defamation, breach of contract, libel, and invasion of privacy.[109] These are all actions that allow compensation and are not exclusive for those who suffer a moral right violation. NAFTA members could insist in that these causes of actions become recognized to any nonnational seeking protection on the United States that suffers a violation of any moral right as defined in their country of origin.

2. Modify national treatment: NAFTA countries that recognize moral rights may revise NAFTA Chapter Seventeen, Article 1703, and exclude from national treatment the recognition of moral rights to the nationals of the United States and of any country that in the future becomes a member and does not recognize moral rights for their own nationals. In essence this position is similar to Berne's exceptions to national treatment discussed before. This solution is an unfavorable one, because it defeats the purpose and the essence for the protection of moral rights, which is the protection of human rights. This is why Germany specifically recognizes for nonnationals all moral rights it provides their nationals, and leaves the patrimonial aspect to the bilateral and multilateral negotiations.

3. Change of forum: Member countries and new member countries could negotiate the forum in which their nationals can claim their rights. If the cause of action was the violation of moral rights, the forum with jurisdiction could be the country that recognizes these rights. For example, if a national from Chile, who believes that the computer program that she created was modified or mutilated without her consent in the United States and in Mexico, instead of presenting her claim in the United States, she could present it in Mexico or Chile, and be afforded moral rights protection. The problem with this solution is that it limits the forums for nonnationals of those countries

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[109] *Id.*

with moral rights, but does not limit the forums to nationals of countries that do not recognize moral rights.

4. Moral rights waiver: This solution has been contemplated before in the United States, on the Visual Artists Rights Act of 1990 (this Act gives artist of certain works the rights of integrity and attribution). Arguments in favor and against the waiver are still in discussion. According to the text of the Act, these rights may be waived if the artist expressly agrees to such waiver in a written instrument.[110] The Berne Convention is silent as to whether moral rights can or cannot be waved. Many countries consider moral rights inalienable. Others, as Canada prohibit the assignment of the right, but the author may waive it in whole or in part. The mere assignment of the copyright does not constitute a waiver of moral rights.[111] Waivers could only be allowed at those countries that do not consider the right inalienable. Also, they must specify the work it covers and the time that the waiver will be in force. The negative aspect of this solution resides in the limited applicability to those countries that do no consider moral rights inalienable.

5. Add moral rights: *Last and most favorable solution will be to include moral rights recognition in future NAFTA negotiations*. It will provide for coverage for nonnationals that claim the moral rights in a country that do not recognize these rights to their nationals. The moral rights that all countries agree upon will be recognized as the minimum and listed in the NAFTA document, similar to Berne's independent protection. The addition of moral rights will result with the compliance of Berne Convention of all NAFTA members; the recognition of moral rights as part of the author's human rights; it will eliminate the unequal treatment of Civil Law authors and creators in the United States; and it will assure the continuation of an essential

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110 *See* Marybeth Peters, *Advanced Seminar on Copyright Law: 1995,* THE COPYRIGHT OFFICE, CONGRESS AND INTERNATIONAL ISSUES 1995, at 645 (PLI Pat., Copy., Trade & Lit. Prop. Course Handbook Series No. 411, 1995).

111 *See* Besek, *supra* note 27.

protection, recognized over a century ago by the Civil Law doctrine.

All of these solutions attempt to strike a balance of interest and stop the violation of rights that arise from the exclusion of moral rights in NAFTA and GATT-TRIPS. Some of them seem to provide for a solution that will protect primarily patrimonial rights over moral rights. Other solutions consider moral rights superior. The most equitable and just solution must be seeked among the countries, for the benefit of our human rights and the economic advancement of the Americas with NAFTA.

Conclusion

The status of our international economy in the brink of the twenty first century forces us to think that our national progress is permanently tied to international economic power, and unstopable advancement in technology and knowledge.

Our world has gone from an agrarian economy, to an industrialized economy, to today's intellectual economy. Knowledge is the axle of our new world economy. We no longer are in need of vast amount of raw materials, as our brain has become the prime source of wealth we have gone from a *manufacturing* to a *mindfacturing* economy.[112]

Our communication systems are breaking frontiers. Data, symbols, and ideas are constantly flowing around the world at the most incredible speed. Knowledge is used to produce more knowledge. The inventor has become the most valuable worker in the force. He/She can combine knowledge, imagination and action simultaneously and produce a unique creation.

To this new economic reality, law cannot be alienated, or it will risk becoming obsolete. "Law is a cultural creation of mankind, directed to serve the general interest of the society

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[112] DANIEL R. ZUCCHERINO & CARLOS O. MITELMAN, DERECHOS INTELECTUALES, UNA SÓLIDA PROTECCIÓN DE LOS DERECHOS DE PROPIEDAD INTELECTUAL COMO HERRAMIENTA DE DESARROLLO ECONÓMICO. EL CASO PARTÍCULAR DE LOS PRODUCTOS FARMACEÚTICOS 82 (1994) (translated by author).

from which it was created."[113] These last views where taken from an essay written by two law professors of Argentina, in which their motives for the essays were the implementation of Argentina's Patents Law. Similar debates are going on in many legislative, scientific, pedagogical, and commercial forums throughout South and Central America.

Our new world economy, based on intellectual creations was contemplated over a century ago. Our predecessors believed that those creations should be protected as part of our human rights. Now, more than ever before, we must protect and defend our moral rights. *NAFTA and GATT have done an excellent job in protecting intellectual property rights, in the patrimonial aspect of the work, but they have ignored the human side of a creation.* The economic benefits derived from the exploitation of a creation are not more important than the right of an author or inventor to protect the paternity and integrity of his/her work. These two rights are equally important in today's international economy. The preservation of moral rights at the international level must be acted on immediately; competition and accelerated technology can easily dehumanize us. We can easily loose contact with the reality that the human mind is the source of this new technology.

Many of the Constitutions and Civil Law legislations of the countries in the Americas describe as a primary goal of the state: the promotion of cultural development, scientific progress and artistic creativity. If international agreements recognize these goals as the means for the economic advancement of each member country, nationals of these countries will need at least a minimum protection of moral rights. To do otherwise will show the dehumanization of our national and international economy, in which monetary benefit takes a primary role in our society.

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[113] *Id.* at 83.