NAFTA: The Latest Gun in the Fight to Protect International Intellectual Property Rights

Karen Kontje Waller
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I. Introduction

In September 1992, Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA), and on November 17, 1993, the U.S. House of Representatives voted to approve NAFTA. In essence, this agreement removes all trade barriers between the three countries. Included within NAFTA is a chapter devoted exclusively to intellectual property rights.

In general, intellectual property includes intangible property, such as copyrights, trademarks, and patents. Although one may typically think of intellectual property as a subject for domestic law, this Comment will demonstrate that the protection of intellectual property rights is essential to ensure the expansion of international trade. For example, inventors may be hesitant to sell their products internationally because of a lack of patent protection in the importing country. Rather than cope with these problems, inventors may decide not to export their products. As a result, fewer products will be traded internationally, which will in turn negatively affect the world economy and keep needed products out of the international market.

Recognizing the importance of intellectual property rights to international trade, the drafters of NAFTA gave extensive coverage to the topic. However, to fully understand the import of NAFTA’s protection of intellectual property, both internationally and nationally, it must be analyzed in light of the current international intellectual property treaties and the domestic intellectual property law of each of its member nations. Accordingly, Part II of this Comment will review the current international intellectual property treaties, while Part III will discuss both the domestic intellectual property laws of the member nations, as well as NAFTA’s provisions on intellectual property. Part IV will then compare the protection of intellectual property rights in the international treaties and domestic laws to the protection of intellectual property rights in NAFTA. Finally, Part V will analyze how NAFTA’s protection of intellectual

3. NAFTA, supra note 1.
4. Id. ch. 17.
property rights will benefit not only its member nations, but all countries involved in international trade.

II. International Intellectual Property Treaties

Three important international intellectual property rights treaties are the Paris Convention, the Universal Copyright Convention, and the Berne Convention. The Paris Convention protects patents and trademarks, while both the Universal Copyright Convention and the Berne Convention protect copyrights. In addition, the recently amended General Agreement on Tariffs and Trade (GATT), a trade treaty, includes provisions for protection of intellectual property. Specifically, such provisions are found in the annex of GATT, titled Trade Related Aspects to Intellectual Property Rights. All of these treaties provide integral international protection of intellectual property rights. Nevertheless, each has its own deficiencies that impedes its ability to bestow comprehensive international protection.

A. The Paris Convention

The Paris Convention protects "industrial property," including "patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition." In general, the Convention directs

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10. Paris Convention, supra note 5, art. 1(2).
that each member country con-fer national treatment to other member nations. National treatment requires the member countries afford foreign intellectual property owners the same rights and protection as their own citizens. This includes affording national treatment to a foreign exporting company’s manufacturing processes.

As a part of affording national treatment to foreign countries, the Convention requires all countries to honor prior applications of patents, and registrations of utility models, industrial designs, or trademarks from a foreign country. In essence, this requires the foreign country to honor an applicant’s original filing date in their own country, as long as the time between the original filing date and the filing in the foreign country is not longer than the “priority period.” The period of priority begins at the date of filing the first application.

Although the Convention affords a substantial amount of control to the intellectual property owner, it is not absolute. Each member state has the right to grant compulsory licenses to prevent a patent holder from using an invention exclusively. In the extreme case, where granting compulsory licenses has not afforded the general population the benefit of the patented product, a Member may forfeit the patent holder’s rights. However, industrial designs are never forfeitable.

What the Paris Convention lacks is an explicit mechanism for settling disputes between member countries. While article 13 of the

11. “Member nations,” “Member,” or “member countries” will be used in this Comment to signify nations who are parties to a treaty.
12. Paris Convention, supra note 5, art. 2(1):
   Nationals of any country of the Union shall, as regards the protection of the industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nations are complied with.

Id.
13. Id.
14. Id. art. Squater.
15. Id. art. 4(a)(1).
16. Paris Convention, supra note 5, art. 4(c)(1). The priority period is twelve months for patents and utility models, and six months for industrial designs and trademarks. Id.
17. Id. note 5, art. 4(c)(2).
18. Compulsory licenses allow the use of a protected work without the express permission of the owner, although the owner still receives a royalty. BLACK’S LAW DICTIONARY 288 (6th ed. 1990). Compare to licensing, which is the express authority of the owner to authorize another to use their work. Id. at 920.
19. Paris Convention, supra note 5, art. 5(a)(2).
20. Id. art. 5(a)(3).
21. Id. art. 5(b).
Convention does establish an assembly, it merely allows the assembly to take "appropriate action designed to further the objectives of the Union."22 Such a provision does not give any guidance as to the power of the assembly or the procedure one must follow to make a complaint about a member country's activity. In addition, article 15 establishes an International Bureau that has the authority to "conduct studies" and "provide services, designed to facilitate the protection of industrial property."23 However, similar to the assembly, the scope of the Bureau's powers are not delineated, nor is there a set procedure for settling grievances.24

B. The Universal Copyright Convention

The Universal Copyright Convention (UCC) states that each member state will "provide for the adequate and effective protection of the rights of authors and other proprietors in literary, scientific, and artistic works, and including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculptures."25 The Convention also requires each member to give national treatment to other nations.26 The term of protection for each copyrighted work is the author's life plus twenty-five years.27 One exception is the protection of photographic or "works of applied art," which are protected for only ten years.28

The rights afforded the copyright holder include the author's exclusive right to authorize the reproduction of a public performance or broadcast in any manner.29 This includes both the original form and a form "recognizably derived from the original."30 The author also has the exclusive right to publish and authorize the making and publication of the translation of his works.31

Like the Paris Convention, the UCC does allow member nations to limit copyright protection. The member states can restrict the right to translate writings.32 If the author has not translated the work after seven years from the date of first publication, any national in the country may

22. Id. art. 13(2)(xi).
23. Id. art. 15(1)(5).
24. Paris Convention, supra note 5, art. 15(1)(5).
25. UCC, supra note 6, art. I.
26. Id. art. II.
27. Id. art. IV(2)(a).
28. Id. art. IV(2)(c).
29. Id. art. IV(1).
30. UCC, supra note 6, art. IV(1).
31. Id. art. V(1).
32. Id. art. V(2).
translate the work.\textsuperscript{33} The UCC also allows a national to distribute a work without the author’s consent if the translator uses the work for educational purposes or if the work has been distributed because of the public’s need of the information.\textsuperscript{34}

As with the Paris Convention, the UCC does not delineate a dispute settlement procedure. While the UCC does establish an International Court of Justice that will decide any disputes arising under the Treaty,\textsuperscript{35} no details are provided about the scope of the Court's authority or about the proper procedure for settling a dispute.

C. The Berne Convention

The Berne Convention protects “literary and artistic works,” including:

every production in literary, scientific and artistic domain . . . such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical [sic] works; choreographic works and entertainments . . . musical compositions . . . cinematographic works . . . works of drawing, painting, architecture, sculpture, engraving, and lithography; photographic works . . . works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.\textsuperscript{36}

The Convention also covers “translations, adaptations, arrangements of music and other alterations of a literary or artistic work.”\textsuperscript{37}

In addition, the Treaty requires national treatment\textsuperscript{38} and offers a term of protection of the author’s life plus fifty years.\textsuperscript{39} The author of the literary and artistic work is afforded the exclusive right of making translations,\textsuperscript{40} and reproduction of their works.\textsuperscript{41}

Like the Paris Convention and the UCC, the Berne Convention does not provide for enforcement measures, nor for dispute resolution.

\textsuperscript{33} Id. art. V(2)(a).
\textsuperscript{34} Id. art. V(2). An example of such a need might be a medical discovery regarding an infectious disease.
\textsuperscript{35} UCC, supra note 6, art. XV.
\textsuperscript{36} Berne Convention, supra note 7, art. 2(1).
\textsuperscript{37} Id. art. 2(3).
\textsuperscript{38} Id. art. 5.
\textsuperscript{39} Id. art. 7(1). However, like the UCC, photographic wares are protected for a lesser period of time, specifically, 25 years from the life of the photographer. Id. art. 7(4).
\textsuperscript{40} Berne Convention, supra note 7, art. 8.
\textsuperscript{41} Id. art. 9.
Although the Berne Convention does provide for an assembly, which has the obligation to "take any . . . appropriate action designed to further the objectives of the Union," the Convention does not further provide for any enforcement measures. The Convention also provides for an Executive Committee and an International Bureau. However, both of these groups are largely administrative.


In December 1992, Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA), and on November 17, 1993, the U.S. House of Representatives voted to approve NAFTA. This agreement is expected to have an enormous impact on over 350 million citizens of the member countries.

NAFTA’s main purpose is to establish a free trade zone. However, within its text, NAFTA has expressly stated that one of its six specific objectives is to protect and enforce intellectual property rights. Furthermore, NAFTA’s preamble states the members’ intention to “foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.” Aside from NAFTA’s stated goals and intentions, NAFTA’s emphasis on importance of intellectual property rights is evidenced by its extensive coverage of the topic. Indeed, chapter 17 of NAFTA is devoted entirely to the topic of intellectual property rights. Before detailing the provisions of NAFTA, however, this Comment will first examine Mexican, Canadian, and U.S. domestic intellectual property provisions, for it is only through assessing the domestic laws of the individual member nations that can one gain a full understanding of how NAFTA’s provisions will strengthen international intellectual property rights.

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42. Id. art. 22.
43. Id. art. 22 (2)(a)(xi).
44. Id. art. 23.
45. Berne Convention, supra note 7, art. 24.
46. See Berne Convention, supra note 5, arts. 23, 24.
50. NAFTA, supra note 1, art. 101.
51. Id. art. 102(1)(d).
52. Id. pmbl.
A. *Mexican Domestic Intellectual Property Laws*

Until 1985, Mexico practiced a “closed border policy” or an “import substitution” policy. To export products into Mexico, one had to obtain a license. While seemingly this did not appear to be a heavy burden, obtaining this license was very difficult. The Mexican government rationalized this policy, claiming it was protecting Mexican businesses. In reality, however, the policy stagnated Mexican commerce, as it “corrupted economic decision and turned an investment analysis into a speculative maneuver.”

Mexico has since begun to liberalize its trade policies. In 1985, Mexico took its first step towards joining the international trade world by joining GATT. Shortly thereafter, the Mexican government abandoned its “closed border policy.” Mexico also entered into an agreement with the United States to liberalize trade, thereby working toward the ultimate goal of free trade between the two countries. Finally, in 1988 and 1989, Mexico opened its border to foreign imports and basically dismantled its licensing system. This system was replaced with duties and tariffs that were substantially reduced from their previously high rates.

1. *Copyright Laws.*—Although Mexico made some major changes in their trade policies, it still had inadequate protection for international intellectual property rights. Such inadequate protection was demonstrated by $80 million lost by foreign companies through computer piracy in Mexico. The United States alone reported up to $75 million

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54. Id.
55. Id.
56. Id.
57. Id. at 56.
59. Id.
60. Id.
61. Id.
64. Id. Some tariffs that were up to 100% were reduced to 10%. Id.
66. Id. at 231.
lost because of sound recording piracy.\(^67\) In addition, U.S. firms reported losses of $12 million in 1990 from satellite broadcast piracy.\(^58\)

In response to international pressure, in July 1991, Mexico reformed its copyright legislation.\(^69\) This legislation extended copyright protection to computer programs,\(^70\) affording the copyright protection for fifty years from the date of the author's death.\(^71\) Further, computer programs were given protection under a separate category, rather than receiving protection under the general category of "literary works."\(^72\) Additionally, the Mexican law stipulates that the computer software authors need not register to receive protection,\(^73\) and affords the author the right to "use and exploit" his work for "financial gain," as well as the right to "publish, reproduce and adapt [the] work."\(^74\) The copyright law also extends protection to sound recordings and broadcasts.\(^75\)

The new copyright laws also detail enforcement procedures for copyright infringers.\(^76\) Criminal penalties were strengthened, as fines increased from four dollars to fifty days of minimum wage, while terms of imprisonment increased from two months to six years.\(^77\) Previously, Mexican law allowed injunctive relief in a civil action.\(^78\) Although this remedy is still provided for in the new law, many doubt its significance, considering the slow rate with which civil trials move in Mexico.\(^79\) Mexico has also initiated a campaign educating the public on copyright law, detailing the penalties for infringement of copyrights, in the hopes that this will deter future infringement.\(^80\)

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67. Id. at 232.
68. Satellite broadcasts from the United States, which are relayed through international satellites in Mexico, are intercepted and re-transmitted without authorization. Id. at 233.
70. Id. art. 70).
71. Id. art. 23.
72. Id. art. 7.
74. See id. arts. 2(Ill), 4.
75. Amended Copyright Law, supra note 69, art. 69bis; Copyright Law, supra note 73, art. 4.
76. Amended Copyright Law, supra note 69, art. 135-43.
77. Id.
78. Copyright Law, supra note 73, arts. 145-56.
79. Levinson, supra note 62, at 267.
80. Id.
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While the new Mexican copyright legislation is certainly an improvement over the previous intellectual property laws, there are still many deficiencies. In particular, more specificity is needed regarding the protection of computer programs. For instance, since computer programs are protected separately and not under the broad category of "literary works," as in the Berne Convention, it is not clear how much protection will be afforded to computer programs. Further, the law does not specifically state whether copyright owners will control the rental of computer programs or whether they can prevent the illegal importation of pirated copies. Finally, the law does not state whether computer databases will be protected.

The new legislation also leaves some gaps in its protection of sound recordings. Specifically, the new legislation permits authors to deny sound recording producers exclusive rental rights. Also, the definition of public performance rights does not explicitly delineate what activity is protected under this category. Finally, there is a need for improved penalties and enforcement provisions, which currently require an infringer to have a "profit motive" in order to be punished. Requiring a "profit motive" makes enforcement difficult because of the need to prove intent. In addition, the term "profit motive" has not even been

81. Id. at 268.
82. Id.
83. See Amended Copyright Law, supra note 69, art. 7 (discussing the separate category of computer programs).
84. Levinson supra note 62, at 270. See also Amended Copyright Law, supra note 69, art. 4.
85. Levinson, supra note 62, at 270.
86. Id.
87. See Amended Copyright Law, supra note 69, art. 87bis (protecting the rights of sound recording producers).
88. Id.
89. See id. art. 72 (providing definition of "public performance").
90. In particular, Mexico's copyright law provides strict penalties for unauthorized reproduction of computer programs:
   A penalty will be imposed of six months to six years in jail and on and an equivalent fine of fifty to five hundred days of minimum salary, in the following cases:
   III. To the editor, producer or recorder that produces the majority of copies to those authorized by the author or his assignees, or any person who, without authorization of this or these, reproduces for profit a computer program.
   Amended Copyright Law, supra note 69, art. 135(III)). However, these sanctions only apply if the infringer has a profit motive. Id. Mexico's copyright law also delineates severe penalties for phonogram producer rights:
   A penalty will be imposed of six months to six years in jail and an equivalent fine of fifty to five hundred days of minimum salary, to anyone who without the proper authorization, exploits or uses for profit records or phonograms intended for private performance.
   Id. art. 142.
91. See id. arts. 135(III), 142bis.
defined in the legislation, leaving prosecutors unsure of when they should pursue alleged infringers.92

2. Patent and Trademark Laws.—Although the 1991 changes in the Mexican copyright laws did improve this portion of intellectual property, improvement was still needed for protection of industrial property.93 Thus, in 1992, the Mexican legislature passed a new law, called the Industrial Property Law,94 which protects trademarks, slogans, trade names, appellations of origin, and patents.

The Industrial Property Law defines trademarks as those marks designating products and services, tri-dimensional shapes, and collective trademarks.95 Mexico recognizes the date of filing a trademark application as the starting date of protection.96 The law requires the Mexican government to honor prior foreign trademarks.97 Specifically, if a trademark was filed in a foreign country, prior to its registration in Mexico, the Mexican trademark office will honor the original date of foreign filing, as long as the trademark is filed in Mexico within six months.98

Additionally, the new law acknowledges Mexico’s obligation as a signatory to the Paris Convention, and thus provides that if a mark is filed in a foreign country before it is filed in Mexico, as long as Mexico has reciprocity99 with that nation, the Mexican application will be denied.100 However, if the Mexican application is somehow registered in Mexico, the foreign holder can nullify the trademark, if the request is made within one year.101 In this manner, Mexican law protects foreign trademarks.

92. Levinson, supra note 62, at 271.
95. Id. arts. 89, 96.
96. Id. art. 113.
97. Id. arts. 113, 117.
98. Id.
99. The term “reciprocity” means there is a relationship between two states or countries, where both agree to afford citizens of the respective state or country the same privileges. BLACK’S LAW DICTIONARY, 1270 (6th ed. 1990).
100. Industrial Property Law, supra note 94, arts. 113, 117; Paris Convention, supra note 5, art. 4.A.(1).
101. Industrial Property Law, supra note 94, art. 151.

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Under the new law, a trademark can be nullified within five years if the mark is found to be registered with false information, or if the trademark is identical or confusingly similar to a previously registered mark, or if the trademark is used on the same or similar products. A trademark can also be nullified at any time if the trademark is "erroneously determined to meet criteria for registration" or if it was "wrongfully registered by the agent, representative, user or distributor of the foreign holder of the mark." Slogans, trade names, and appellations of origin receive the same general protection under Mexican Industrial Property law. Slogans are those "phrases or sentences whose purpose is to advertise to the public commercial, industrial or service businesses, or products or services," while trade names include those names that identify a company, or industrial, commercial, or service establishment. Appellations of origin are designations of the geographic origin of the goods, usually appearing on the packaging, that imply the product is of the same quality or type of goods from that area. Unlike trademarks, slogans, and appellations of origin, trade names are not required to be registered to be protected. Nevertheless, if the applicants do register, they must include proof of use with their application. Patents are also included within the Industrial Property Law's scope of protection. The government's test to determine if an invention is patentable is whether the invention is "novel, [the]result of inventive activity, and susceptible to industrial application." If able to be patented, the coverage of protection for the patented invention is very broad, including chemicals, alloys, and "living matter." The term of

102. McNight & Muggenburg, supra note 93, at 36.
103. Id. See also Industrial Property Laws, supra note 94, art 151.
104. Industrial Property Law, supra note 94, art. 100.
105. McKnight & Muggenburg, supra note 93, at 36-37. See also Industrial Property Law, supra note 94, art. 100.
106. McNight & Muggenburg, supra note 93, at 37.
107. Id.
108. Id.
109. Id. at 37.
110. Id. at 30.
111. McKnight & Muggenburg, supra note 93, at 30. See also Industrial Property Law, supra note 94, art. 15.

Protected living matter includes:
(1) plant varieties;
(2) inventions related to microorganisms, such as those made by using them, inventions that are applied to microorganisms, or inventions that result therefrom. Included in this provision are all types of microorganisms, such as
protection for a patent has increased from fifteen to twenty years, and the
date of protection begins from the date of filing the application for
registration.\footnote{McNight & Nuggenburg, supra note 93, at 31.} The legislation also protects industrial or trade secrets, utility models, and industrial designs.\footnote{See Industrial Property Law, supra note 94, arts. 28, 82.}

Although the Mexican government has improved the industrial property laws, there are still some areas that need to be addressed.\footnote{Jana Sigars-Malina, Free Trade-Changes in the Legal Environment, Mexico and Beyond, 7 FLA. J. INT'L L. 55, 64 (1992).} For instance, there is no mention whether semi-conductors will be protected.\footnote{Id. See also Industrial Property Law, supra note 94, arts. 20, 82.} Also, the protection of trade secrets and biotechnology requires further explanation, as the current text does not specifically delineate the scope of protection.\footnote{McNight & Nuggenburg, supra note 93, at 40-42; Industrial Property Law, supra note 94, arts. 62, 63, 65, 66, 68, 69, 136, 138, 140, 141, 150, 153, 185.} Similarly, the legislation fails to address the compulsory licensing of cable retransmissions.\footnote{Id.}

By far, the area needing the most improvement is the civil enforcement provisions.\footnote{Id.} At the pretrial stage, there is no injunctive relief available.\footnote{Id.} As a result, property owners lose more money as their disputes await adjudication. Also, if administrative seizure is finally ordered by the courts, it can be blocked if the defendant requests constitutional review,\footnote{Id.} thereby resulting in more money lost to the property holder. Finally, recovery of damages is very difficult.\footnote{Id.}

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bacteria, fungi, algae, virus, microplasms, protozoan, and cells that do not reproduce sexually; and

(3) biotechnological processed for obtaining pharmochemicals, medicines, foods and beverages for animals and human consumption, fertilizers, herbicides, fungicides, or products with a biological activity.

\textit{Industrial Property Law, supra note 94, art. 20.}

\textit{Unprotected living matter includes:}

(1) Essentially biological processes for obtaining or reproducing plants, animals, or their varieties, including genetic processes or processes related to material capable of self-replication, by itself or by any other indirect manner, when the processes consist simply of selecting or isolating available biological material or leaving it to act under natural conditions;

(2) plant species and animal species and breeds;

(3) biological materials, as found in nature;

(4) genetic material; and

(5) inventions relating to the living matter that decomposes the human body.

\textit{Id.}

114. See Industrial Property Law, supra note 94, arts. 28, 82.
116. Id.
117. Id. See also Industrial Property Law, supra note 94, arts. 20, 82.
119. Sigars-Malina, supra note 115, at 64.
120. Id.
121. Id.
122. Id.
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Therefore, even if the property owners eventually win their infringement claims, they may not be able to recoup their losses. It is for this reason that many property owners seek retribution through criminal prosecution.123 Although no damages will be afforded the owner, the criminal procedures are more expedient, stopping the infringer more quickly,124 thus keeping the intellectual property owner’s losses to a minimum.

B. Canadian Domestic Intellectual Property Laws

Canadian intellectual property law protects copyrights, trademarks, and patents.

1. Copyright Law.—Canadian copyright law includes protection for “every original literary, dramatic, musical or artistic work . . .”125 and “any record, perforated roll or other contrivances by means of which sounds may be mechanically reproduced.”126 Registration is not required in order to receive protection.127 This broad scope also allows the artistic features of a trademark to be protected. However, protection is not granted for trademarks that are “mere words or short expressions.”128 In addition, computer programs are protected, fitting under the broad term of literary works.129 Likewise, the copyright law protects public performances.130

A Canadian copyright owner may assign their rights in a work.131 The Canadian copyright law does not give the owner exclusive rights to afford others the right to use their work, however. Rather, the Canadian copyright law requires anyone who desires a license to print or publish a book to apply to the Minister132 for a license.133 The Minister will

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123. See Industrial Property Law, supra note 94, art. 223 (enumerating criminal offenses for infringement of industrial property).
124. Sigars-Malina, supra note 115, at 64.
127. Id. § 5(1).
129. Id. at n.165 (citing I.B.M. v. Ordinateurs Spirales, 80 C.P.R.2d 187 (Fed Ct. Trial D. 1984) and Dynabec v. La Societe d’Informatique R.D.G., 6 C.P.R.3d 322 (C.A. 1985)).
130. Copyright Act, R.S.C., C-30, § 3 (1985).
131. Id. § 13(4).
132. “Minister” refers to the Minister of Consumer and Corporate Affairs. Id. § 2.
133. Id. § 16(1).
most likely grant the license, provided the owner has not printed the book in Canada or has not fulfilled the demand for such book.\footnote{134}

Further, where the author of a work has died, and the current owner of the copyright has not published or republished the work, the government may grant a compulsory license.\footnote{135} A compulsory license may also be issued if the owner of a copyright in an original composition has allowed another to record the composition.\footnote{136} That is, if the owner of the copyrighted material allows another to record the work, they risk losing their exclusive right to record the material, and other individuals may also attempt to obtain a license to record the work.

Furthermore, the law allows fair use of a copyright.\footnote{137} Fair use affords use of the work to a non-owner for "private study, research, criticism, review, or newspaper summary" without obtaining the owner's permission.\footnote{138}

A copyright owner whose rights are infringed may seek civil remedies.\footnote{139} Such remedies include injunction, damages, and recovery of the infringer's profits.\footnote{140} The court also has the discretion to require the infringing party to pay all costs of the proceedings.\footnote{141}

In addition to civil remedies, Canadian copyright law provides for criminal penalties for infringers of copyrights. Specifically, if an infringer knowingly distributes, sells, or otherwise infringes a copyright owner's rights, the infringer may be required to pay a fine up to five hundred dollars, or a sentence of up to four months in jail.\footnote{142} In some instances, the infringer may receive both a penalty and a fine.\footnote{143}

Despite the breadth of the Canadian copyright law, it does have some deficiencies. For instance, semi-conductor chips and transitory broadcasts are not mentioned.\footnote{144} Additionally, the law also does not give the copyright owner the right to "sell, rent, lease or lend" his work.\footnote{145}
2. **Canadian Trademark Law.**—Canadian trademark\(^{146}\) law requires that a trademark\(^{147}\) be "in use" before applying for registration.\(^{148}\) Further, the trademark owner can transfer a trademark, and may do this with or without the goodwill of the business.\(^{149}\) A trademark can also be licensed to another user, also known as a "registered user."\(^{150}\) To protect a trademark that has been licensed, the owner must register all licenses and control the quality of the goods and services provided by the licensee.\(^{151}\) Although, the Canadian law protects trademarks and certification marks, it does not protect collective marks.\(^{152}\)

In general, Canadian law gives the trademark holder the exclusive rights to the trademark, even in geographical areas outside the actual area in which the owner uses the trademark.\(^{153}\) A mark will be considered

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\(^{146}\) Although Canada spells the term trademark in two words (i.e. trade-mark), this Comment will use the U.S. spelling (i.e. trademark). *See* Hayhurst, *supra* note 125, at 106.

\(^{147}\) A trademark is defined as follows:
- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by other,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade-mark.

Trademark Act, R.S.C., T-10, § 2 (1985). A certification mark is defined as follows:
- a mark that is used for the purpose of distinguishing or so as to distinguish wares or services that are of a defined standard with respect to
  - (a) the character or quality or the wares or services,
  - (b) the working conditions under which the wares have been produced or the services performed,
  - (c) the class of persons by whom the wares have been reproduced or the services performed, or
  - (d) the area within which the wares have been produced or the services performed,
- from wares or services that are not of defined standard.

*Id.* § 3. A distinguishing guise is defined as follows:
- (a) a shaping of wares or their containers, or
- (b) a mode of wrapping or packing wares
- the appearance of which is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others.

*Id.* § 3.

\(^{148}\) *Id.* §§ 3, 16(1). A trademark is determined to be "in use" if, at the time of distribution of the product or service, the trademark is displayed on such product or service. *Id.* §§ 4(1), 4(2).

\(^{149}\) Hayhurst, *supra* note 125, at 110.

\(^{150}\) Trademark Act, R.S.C., T-10, § 50(1) (1985). However, a registered user may not transfer or assign the use of a trademark. *Id.* § 50(11).

\(^{151}\) Hayhurst, *supra* note 125, at 110.


to have infringed a registered trademark, if it is "likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed" by the person who owns the mark. 154

An infringer of a trademark may be liable to the trademark owner for damages or profits, and the court may also order the disposition of the infringing goods or materials used to make such goods. 155 However, the Canadian Trademark law does not allow for any criminal penalties against the infringer. 156

3. Canadian Patent Law.—Canadian patent law protects inventions, which are defined as "any new or useful article, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter." 157 This is the same scope of protection provided for in the U.S. patent law. 158 Computer related inventions are patentable, but not if they are "mere theorem" or "mere use of a computer to do calculations." 159 The patent provisions also protect "living matter." 160

Conversely, Canadian law holds that a substance used in food or medicine is not patentable. 161 Yet, the process to produce the substance may be patentable, as well as the substance itself, if it is produced by the patented process. 162 Methods of medical treatment are never patentable, however. 163

A patent is protected under Canadian law for twenty years from the date of filing the patent application. 164 The patent holder has the exclusive right to manufacture, use, and sell the invention. 165 In addition, the inventor may also assign their rights to the invention. 166 Canadian law also grants compulsory licenses of a patent, provided it is

206 and accompanying text.
155. Id. § 6.
156. Id. § 53.
159. See infra part III.C.3.
160. Hayhurst, supra note 125, at 97-98.
161. Id.
163. Id.
166. Id. § 42.
167. Id. § 50.
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established that the patentee has abused his rights of ownership. In fact, a patent may even be revoked if the patent holder has not corrected the problems of abuse.

The largest area of concern in Canadian patent law was the compulsory licensing of inventions for the production of pharmaceuticals. As soon as a patent was issued for the production of food or medicine, anyone was able to apply to the Commissioner of Patents for a license. However, this was corrected by the Canadian Bill C-91 in 1969, which repealed the compulsory licensing of pharmaceuticals.

C. U.S. Intellectual Property Law

Like its North American counterparts, the United States gives express protection to copyrights, trademarks, and patents.

I. U.S. Copyright Laws.—The U.S. copyright laws includes protection of:

original works or authorship fixed in any tangible medium of expression, now or known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings, and architectural works.

The ownership of the copyrighted material includes compilations and derivations of the work, but such protection is only extended to the material in the work that is contributed by the author. The U.S. law

168. Id. §§ 65, 66. A patent is determined to be abused if: (1) the patented article is not being sold in Canada; (2) the patented article is being sold in Canada but the imports of the patented article from abroad are hindering Canadian sales; (3) demand for the patented article are not being met; (4) the patent holder's repeated refusal to grant licenses; (5) the industry of the patented article is being prejudiced by the limitation of the patent or the patented article; or (6) the limitation of the use of the patent is unfairly prejudicing the Canadian industry that produces materials used in such patent. Id. § 65 (2).
171. Id.
172. Id.
174. Id. § 103(a).
175. Id. § 103(b).
also protects all copyrightable works that are unpublished, regardless of
the nationality of the author. However, the law only protects
published works of persons who are either citizens of the United States,
or are a party to a copyright treaty in which the United States is also a
party.

The term of a copyright is the life of the author plus fifty years. The
owners have the right to transfer their copyrights, but the
government may never transfer these rights or seize the copyright. The
copyright owner also has the exclusive right to do or authorize (1)
the reproduction of the work; (2) the preparation of derivative works; (3)
the distribution of the reproductions, whether through sale, rental, lease
or lending; (4) the performance of the copyrighted work publicly; and (5)
the control of the public display of the work. The U.S. copyright
law also forbids the importation into the United States of copies or
"phonorecords" of a work, without the copyright owners permission.

The U.S. copyright law limits the rights of the owner, however. Persons
who use the copyright or copy it by any means will not be
prosecuted as infringers if such copying or use was "fair use." Under
U.S. law, fair use means use of the work for "criticism, comment, news
reporting, teaching ... scholarship, or research."

If there is no fair use and a product does infringe another's
copyright, the owner may request the item be impounded or disposed,
along with requesting any of the materials used in making the infringing
product. Additionally, the copyright owner can also ask for damages
for the actual harm caused by infringement, as well as the profits the
infringer realized from their appropriation of the protected work.
Instead of receiving actual damages and profits from the defendant's
infringement, the copyright owner may choose to receive statutory
damages. The statutory amount is not less than $500 and not more

176. Id. § 104(a).
177. Id. § 104(b)(1).
179. Id. § 201(d).
180. Id. § 201(c).
181. Id. § 106.
182. Id. § 107.
184. Id.
185. Id. § 503.
186. Id. § 504(b).
187. Id. § 504(c)(1).
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than $20,000. Moreover, if the infringer has copied the work "willfully," the court can increase the amount to $100,000.

U.S. copyright law also provides for criminal penalties for copyright infringers who willfully infringe another's copyright for "commercial advantage or private financial gain." Infringers who reproduce or distribute at least ten copies or "phonorecords," within one hundred and eighty days, will be imprisoned up to five years. If it is an infringer's second offense, the imprisonment will be increased to ten years, and may also include heavy fines. The minimum penalties for an infringer under this section is imprisonment for more than one year, and may also include a fine.

2. U.S. Trademark Law.—The U.S. trademark law protects trademarks, service marks, certification marks, collective marks and trade names. Applicants may file a trademark if they are either currently using it in commerce or if they merely intend to use the mark in commerce.

Under the U.S. trademark law, the award of a trademark affords the owner the exclusive right to use the mark for ten years, with a right to renew at the end of this time period. However, the trademark must actually be used in commerce. Trademark owners also have the right

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189. Id.
190. Id. § 505(a). This section requires that a copyright infringer be punished under 18 U.S.C. § 2319 (Supp. 1994).
192. Id. § 2319(b)(2).
193. Id. § 2319(b)(3).
194. A trademark is "any word, name, symbol or device or any combination" used on goods. 15 U.S.C. § 1127 (1946).
195. A service mark is "any word, name, symbol or device, or any combination" that is used to identify services. Id.
196. A certification mark is "any word, name, symbol or device or any combination" that certifies the origin of goods, the material, the manufacturing process, quality or any other characteristics of the goods. Id.
197. A collective mark is a "trademark or service mark" which is "used by members of a cooperative, an association, or other collective group or organization, or which such groups have intent to use." Id.
198. A trade name is "any name used by a person to identify his or her business or vocation." Id.
199. The term "trademark" or "mark" will be used to include service marks, certification marks, collective marks, and trade names.
201. Id. § 1051(b).
203. Id. 1058(a). Proof of the mark in use in commerce can be established by sending the U.S. Patent and Trademark office an affidavit with a specimen or facsimile demonstrating the use of the
to assign their marks, with or without the goodwill of the business.\textsuperscript{204}

Moreover, unlike the Canadian trademark law, the trademark owner does not have the exclusive right to use the mark in all geographic territories.\textsuperscript{205} Under U.S. trademark law, the trademark owner must prove that the infringer’s use is in the same geographic trading area \textit{and} will cause a likelihood of confusion.\textsuperscript{206}

Trademark infringement is defined as use in commerce, without the owners consent, of any “reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution or advertising of any goods or services connected with which such use is likely to cause confusion, or to cause mistake, or to deceive;” or to do any of the above on “labels, signs, prints, packages, wrappers, receptacles or other advertisements.”\textsuperscript{207} The remedies available to the trademark owner are injunctions\textsuperscript{208} and damages.\textsuperscript{209} The owner can receive damages equal to the defendant’s profits from the infringing good, other actual damages, and the costs of bringing the legal action.\textsuperscript{210} The court can also order treble damages if the infringer intentionally used the mark in commerce, with knowledge of the previously registered mark.\textsuperscript{211} The court even has the authority to order even higher damages if the court deems the situation warrants such action.\textsuperscript{212} Additionally, if the infringer has counterfeited the trademark, the owner may request the seizure of the items while the case is waiting to be tried.\textsuperscript{213}

In addition, trademark owners can bring a criminal action against the infringer who counterfeits their mark.\textsuperscript{214} An individual infringer can be fined up to $250,000 or five years in jail, or both, and a corporation can be fined up to $1,000,000.\textsuperscript{215} If the infringer commits the act a second

\begin{itemize}
\item mark. \textit{Id.}
\item \textsuperscript{204} \textit{Id.} § 1060.
\item \textsuperscript{205} Trademark Act, R.S.C., T-10, § 19. \textit{See supra} part III.B.2.
\item \textsuperscript{206} 15 U.S.C. § 1114 (1988). \textit{See Dawn Donut Co. v. Hart’s Food Stores, Inc.,} 267 F.2d 358 (2d Cir. 1959) (use of the same or similar trademark outside of the trademark owner’s trading area does not cause a likelihood of confusion).
\item \textsuperscript{207} 15 U.S.C. § 1114 (1988).
\item \textsuperscript{208} \textit{Id.} § 1116.
\item \textsuperscript{209} \textit{Id.} § 1117.
\item \textsuperscript{210} \textit{Id.} § 1117(a).
\item \textsuperscript{211} Treble damages is a punitive measure, that allows the court to award damages in triple the amount of actual damages found.
\item \textsuperscript{212} \textit{Id.} § 1118.
\item \textsuperscript{215} \textit{Id.}
\end{itemize}
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time, they can be fined up to $1,000,000 or fifteen years in jail, or both, and a corporation can receive up to $5,000,000 in fines.\textsuperscript{216}

The United States will give a right of priority to an application filed in a foreign country, as long as the application was filed in the United States within six months from the filing date in a foreign country.\textsuperscript{217} The United States also gives national treatment to foreign trademark owners.\textsuperscript{218}

3. \textit{The U.S. Patent Laws.}—The U.S. patent law provides for protection for “whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement . . .”\textsuperscript{219} The United States will not grant a patent if the invention is or has been “known or used.”\textsuperscript{220} Further, a patent will not be granted if the invention is abandoned.\textsuperscript{221} Finally, the law will not protect an idea that inventors do not create themselves,\textsuperscript{222} nor will it protect an obvious idea.\textsuperscript{223}

The owner of a patent is granted the same right as that existing in personal property, including the right to assign the patent.\textsuperscript{224} The United States also gives priority to foreign patent holders, as long as they have filed their application in a foreign country within twelve months of filing it in the United States.\textsuperscript{225} However, if a patent has been made the subject of publication or patented more than one year before filing in the United States, or has been in “public use” or in commerce for more than one year before filing in the United States, the patent will not be granted.\textsuperscript{226} The patent law protects the patent from the date of invention, but does not allow the date of invention to be demonstrated with proof of use or knowledge that is gained in a foreign country.\textsuperscript{227}

To infringe a patent one must “make, use or sell” a patent within the United States,\textsuperscript{228} or “actively induce[ ]” another to do so.\textsuperscript{229} If one

\begin{itemize}
\item \textsuperscript{216} Id.
\item \textsuperscript{218} Id. § 1126 (b) & (i).
\item \textsuperscript{220} Id. § 102(a).
\item \textsuperscript{221} Id. § 102(c).
\item \textsuperscript{222} Id. § 102(f).
\item \textsuperscript{223} 35 U.S.C. § 103 (1988).
\item \textsuperscript{224} Id. § 261.
\item \textsuperscript{225} Id. § 119.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. § 104.
\item \textsuperscript{228} 35 U.S.C. § 271(a) (1988).
\item \textsuperscript{229} Id. § 271(b).
\end{itemize}
knowingly uses a material part of a patented machine or other patented material, they will also be considered an infringer.

Patent owners have the right to pursue a civil action against infringers. These actions can take the form of an injunction or damages. The law provides that the damages shall be no less than a "reasonable royalty" for the use of the invention, plus interests and costs. The court also has the option of awarding treble damages. As the statute does not specify the conditions in which treble damages may be used, one can only assume it is within the court's discretion. The only requirement for receiving monetary damages is that the patent holder use the term "patent" or "pat.," along with the patent number, on the patented property. If the patent owners fail to include the required markings on their product, they will have to prove that the infringer knew the patent existed before they infringed the patent. The only other limitation on the owner enforcing their rights is a six year statute of limitations.

D. NAFTA Provisions

In general, NAFTA mandates that its member nations adhere to various intellectual property treaties. The Treaty also specifies that the parties must give national treatment to other parties, and prohibits the use of domestic law licensing procedures that will abuse intellectual property rights. What follows is a closer inspection of the specific protection afforded in NAFTA.

I. Intellectual Property Protected.—The Treaty protects a broad variety of intellectual property, including copyrights, satellite transmissions, sound recordings, trademarks, patents, layout designs of semiconductors, trade secrets, geographical indicators and industrial designs. In addition to expansive protection of various forms of

230. Id. § 281.
231. Id. § 283.
232. Id. § 284.
234. Id.
235. Id. § 287(a).
236. Id. § 286.
237. NAFTA, supra note 1, art. 1701(2). Examples of such treaties include the Berne Convention, supra note 7, and the Paris Convention, supra note 5. Id.
238. NAFTA, supra note 1, arts. 1701(1), 1703.
239. Id. art. 1704.
240. NAFTA, supra note 1, ch. 17.
intellectual property, NAFTA details effective enforcement provisions to protect the holder's rights.\(^{241}\)

\(\text{(a) Copyrights.---\text{NAFTA provides for extensive protection of copyrights. Specifically, the Treaty requires the member nations to protect "works," as defined in the Berne Convention,}^{242}\text{ which includes "any work that embod[i]es original expression."}^{243}\text{ The Treaty further enunciates that computer programs are considered "literary works," as defined by the Berne Convention,}^{244}\text{ including "compilations of data or other material" that are "intellectual creations."}^{245}\text{ The member nations also may also preclude the prohibition or authorization of (1) the import of copies of the copyright holder's work without the owner's permission; (2) the "first public distribution of the original and each copy of the work by sale, rental or otherwise"; (3) the "communication of a work to the public"; and (4) the "commercial rental of the original or a copy of a computer program."}^{246}\text{ The term of the copyright is the author's life plus fifty years.}^{247}\text{ A Member may not allow translation and reproduction licenses for educational and public good unless the copyright holder has not provided a translation himself, and there were no obstacles preventing the owner from doing so.}^{248}\text{ The copyright holder also has the power to transfer his rights.}^{249}\text{ NAFTA specifically protects sound recordings by affording copyright holders the right to authorize or prohibit: (1) "direct or indirect reproduction of the sound recording"; (2) importation of copies made without the holder's authorization; (3) the "first public distribution of the original and each copy of the sound recording by sale, rental or otherwise; and (4) "commercial rental of the original or a copy of the sound recording."}^{246,250}\text{ The term of protection for a sound recording is fifty years.}^{251}\n
\(^{241}\) Id. arts. 1714, 1715, 1717, 1718.
\(^{242}\) Berne Convention, supra note 7, art. 2(1). See supra note 36.
\(^{243}\) NAFTA, supra note 1, art. 1705(1).
\(^{244}\) Id. art. 1705(1)(a).
\(^{245}\) Id. art. 1705(1)(b).
\(^{246}\) Id. art. 1705(2).
\(^{247}\) Id. art. 1706.
\(^{248}\) NAFTA, supra note 1, art. 1705(6).
\(^{249}\) Id. art. 1705(3).
\(^{250}\) Id. art. 1706(1).
\(^{251}\) Id. art. 1706(2).
Finally, NAFTA also designates protection for satellite transmissions, making it a criminal offense to "manufacture, import, sell, lease or otherwise make available a device or system that is primarily of assistance in decoding in encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal." It is also a civil offense to receive such a signal for use in commercial activities.

(b) Trademarks.—Trademarks are given explicit protection under NAFTA. NAFTA defines trademarks as "any sign, or any combination of signs, capable of distinguishing the goods or services of one person from those of another, including personal names, designs, letters, numerals, colors, figurative element, or the shape of goods or of their packaging." The Treaty also protects service marks, collective marks, and certification marks.

Trademark owners may prohibit the use of a trademark that is "identical or similar" to their trademark, for goods which are "identical or similar" to their goods, if the use would result in a "likelihood of confusion." When there is use of an identical trademark for identical goods or services, likelihood of confusion shall be assumed. There is no mention in NAFTA as to whether this assumption can be rebutted, however.

Member countries may require use of the trademark on goods prior to actual registration of the trademark, but shall not require use of the trademark in their application procedure. Member countries may file an application stating their intention to use the trademark, but must actually demonstrate this use within three years.

NAFTA specifies that the term of a trademark will initially be ten years, but is indefinitely renewable for periods of at least ten years. In order to have continued protection of a trademark, the owner is

252. Id. art. 1707.
253. NAFTA, supra note 1, art. 1707(a).
254. Id. art. 1701(b).
255. Id. art. 1708.
256. Id. art. 1708(1).
257. Id.
258. NAFTA, supra note 1, art. 1708(2).
259. Id. Cf. The U.S. trademark owner has the burden of proving likelihood of confusion. See supra note 206 and accompanying text.
260. NAFTA, supra note 1, art. 1708(3). Cf. U.S. procedure on actual use see supra note 203 and accompanying text.
261. NAFTA, supra note 1, art. 1708(3).
262. Id. art. 1708(7).
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required to demonstrate use of the trademark.\textsuperscript{263} If the owner cannot demonstrate use for two consecutive years and does not have a valid explanation for the non-use,\textsuperscript{264} the owner will lose the rights to the trademark.\textsuperscript{265} No country may grant compulsory licenses of trademarks.\textsuperscript{266} However, the owner does retain the right to assign the trademark, with or without the business to which it is associated.\textsuperscript{267} Countries are prohibited from granting trademarks of generic terms\textsuperscript{268} and are prohibited from granting protection to "immoral, deceptive or scandalous matter"\textsuperscript{269} or items that "disparage or falsely suggest a connection with persons, living or dead,\textsuperscript{270} institutions, beliefs or any party's national symbols or bring them into contempt or disrepute."\textsuperscript{271}

\textbf{(c) Patents.---}NAFTA also protects patents, defining a patentable invention as one which "results from inventive steps and are capable of industrial application."\textsuperscript{272} The test is whether an invention is "non-obvious" and "useful."\textsuperscript{273} Moreover, member states may deny a patent if the invention would jeopardize public safety, morality, health, human or plant life, or the environment.\textsuperscript{274} The parties to NAFTA may also exclude from patent protection for: (1) medical treatments for humans or animals;\textsuperscript{275} (2) plants or animal, as long as they are not microorganisms;\textsuperscript{276} and (3) "essential biological processes for the production of plants or animals, other than non-biological and microbiological processes for such production."\textsuperscript{277}

\begin{flushleft}
\footnotesize
263. NAFTA, supra note 1, art. 1708(8).
264. Valid defenses to non-use of a trademark include import restrictions or other government requirements on the goods or services identified by the trademark. \textit{Id.}
265. \textit{Id.}
266. \textit{Id.} art. 1708(11).
267. \textit{Id.}
268. An example of a generic term would be calling a moisturizing lotion "skin creme."
269. An example of an "immoral, deceptive or scandalous matter" would be a trademark that depicted a naked person.
270. An example of a trademark that suggested a connection with a person would be a trademark that used a picture of John F. Kennedy or Clint Eastwood, thus suggesting that these persons endorsed their product. \textit{Cf.} U.S. standards of registration of a trademark, see 15 U.S.C. § 1052(1) (1988) (trademark may not be registered if it "may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute").
271. NAFTA, supra note 1, art. 1708(14).
272. \textit{Id.} art. 1709(1).
273. \textit{Id.}
274. \textit{Id.} art. 1709(2).
275. \textit{Id.} art. 1709(3)(a).
276. NAFTA, supra note 1, art. 1709(3)(b).
277. \textit{Id.} art. 1709(3)(c). \textit{Cf.} Canada's exclusion of medical treatment, \textit{supra} part III.B.3., and Canada's treatment of pharmaceutical compulsory licensing, \textit{Id.} \textit{See also} Mexico's living matter
\end{flushleft}
The owner of the patent has the right to control who sells, makes, or uses his patent or process. Patent holders also have the right to assign and transfer their patents. A patent may be revoked only if there are facts that would constitute a reason to deny the grant in the first place, or if the grant of a compulsory license to correct a patent holder's exploitation has not worked.

(d) Layout Designs of Semi-Conductor Integrated Circuits.—Interestingly enough, NAFTA also provides for the protection of semi-conductors. In particular, the Treaty provides that it is unlawful for any individual to import, sell or distribute for commercial purposes, without the holder's authorization (1) a protected layout design; (2) an integrated circuit which has a protected layout design; or (3) an article which has an integrated circuit with a protected layout design. However, an individual will only be liable for infringing a layout design if they knowingly used a protected design. Finally, the Members may not grant any compulsory licenses for layout designs of integrated circuits.

In countries that require registration in order to receive protection, the term of protection will be ten years from the date of filing the first application, or the date of the first "commercial exploitation" anywhere in the world.

(e) Trade Secrets.—Trade secrets are also specifically protected under NAFTA. Trade secrets are defined as information that is not "generally known among or readily accessible to persons that normally deal with the kind of information in question." Further, a trade secret must include information that "has actual or potential commercial value because it is secret" and "the person lawfully in control of the
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information has taken reasonable steps under the circumstances to keep it secret."289 A party can require that the applicant demonstrate evidence of the "secret" through "documents, electronic or magnetic means, optical discs, microfilms, films or other similar instruments."290

Trade secrets are protected from disclosure, acquisition, or use with others.291 Further, the trade secret owner does have the right to license their trade secret.292

(f) Geographical Indicators.—NAFTA’s protection of geographical indicators prohibits anyone from misleading the public, through a designation or representation in or about their product, that such product comes from a place other than the actual geographic origin.293 This article also proscribes unfair competition, as set forth in article 10bis of the Paris Convention.294 NAFTA also provides for the protection of the Members, or its nationals, that have used an otherwise prohibited geographic indicator for ten years prior to the implementation of NAFTA.295 or in good faith before the member country signed NAFTA.296 Further, if a trademark owner has a mark that encompasses a geographic indicator that would be prohibited under this article, the owner will not be prohibited from use if the owner registered or acquired rights in good faith, and it was before NAFTA’s implementation, or before the particular geographic indicator was prohibited by the Member.297

Members may require that claims against the use of a geographical indicator be presented within five years of use or registration of the trademark.298 Further, a member nation does not have to protect a geographic indicator that is not officially declared protected, or is in disuse.299

289. NAFTA, supra note 1, art. 1711(1)(b)(7)(c).
290. Id. art. 1711(2).
291. Id. art. 1711(1).
292. Id. art. 1711(4).
293. Id. arts. 1712(1)(a), 1712(2).
294. NAFTA, supra note 1, art. 1712(1)(b). Article 10bis of the Paris Convention prohibits against unfair competition, particularly proscribing: (1) all acts that would create any confusion regarding a good, business, or activities of a competitor; (2) any false allegations while trading, to discredit a good, business, or activities of a competitor; or (3) any indicators or allegations that might mislead consumers as to the "nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods." Paris Convention, supra note 5, art. 10bis(3).
295. NAFTA, supra note 1, art. 1712(4)(a).
296. Id. art. 1712(4)(b).
297. Id. art. 1712(5).
298. Id. art. 1712(7).
299. Id. art. 1712(9).
(g) Industrial Designs.—The final group of intellectual property rights covered in NAFTA are industrial designs.\textsuperscript{300} The test to determine whether an industrial design warrants protection is whether the design is “new and original.”\textsuperscript{301} If a party demonstrates the applicant’s design does not “significantly differ from known designs or combinations of known design features,” they may reject the application.\textsuperscript{302} The term of protection is ten years.\textsuperscript{303} Unfortunately, NAFTA does not specify from what point the ten year term of protection will begin. Additionally, the treaty does not provide guidance as to whether the owner may license the use of their industrial designs.

2. Enforcement provisions.—Article 1714 of NAFTA establishes general provisions to enforce intellectual property rights. In particular, this article provides for due process.\textsuperscript{304} That is, an enforcement proceeding provides a trial proceeding, where both parties have the right to attend and present evidence. Moreover, there must be a written opinion of the proceedings that specifies reasons for the ultimate decision. Such an opinion must be promptly available.\textsuperscript{305} The article also gives the parties a right to a review of the decision.\textsuperscript{306}

Article 1715 states the specific requirements of a civil or administrative trial. Once again, due process is required,\textsuperscript{307} thereby mandating that the following rights be acknowledged: (1) defendant’s right to timely and sufficient notice of the basis of the claim; (2) both parties’ right to legal counsel at the “trial”; (3) disallowance of heavy demands for the parties’ appearance at the proceedings; (4) both parties’ right to present evidence; and (5) both parties’ right to have confidential information protected.\textsuperscript{308} Ultimately, if an infringement is found, the judiciary has the power to order the disposal of the goods and materials used in making the infringing good.\textsuperscript{309}

Article 1717 delineates the criminal procedures and penalties for infringing another’s intellectual property rights. The article mandates that the member nations establish criminal procedures and penalties for the

\textsuperscript{300} NAFTA, \textit{supra} note 1, art. 1713.
\textsuperscript{301} Id. art. 1713(1).
\textsuperscript{302} Id.
\textsuperscript{303} Id. art. 1713(5).
\textsuperscript{304} Id. art. 1714(3).
\textsuperscript{305} NAFTA, \textit{supra} note 1, art. 1714(3).
\textsuperscript{306} Id. art. 1714(4). Parties shall have the right to a review by the “judicial authority” of the member nation in which the violation occurred. Id.
\textsuperscript{307} Id. art. 1715.
\textsuperscript{308} Id. art. 1715(1).
\textsuperscript{309} NAFTA, \textit{supra} note 1, art. 1715(5).
“willful trademark counterfeiting or copyright piracy on a commercial scale." The penalties should include imprisonment, monetary fines, or both. The article also allows for the seizure, forfeiture, or destruction of the infringing goods and the “materials” or “implements” which assisted in making the goods. Finally, the article allows the member countries to establish other causes for criminal penalties where the infringer is found to have committed the act “willfully and on a commercial scale.”

Article 1718 sets up specific procedures for the enforcement of intellectual property rights at the parties’ borders. This article allows intellectual property holders who suspect that there will be an import of a product that infringes upon their intellectual property rights, to request the authorities who control importation to suspend importation of the goods.

Having detailed NAFTA’s provisions for protection of intellectual property, this Comment will now compare NAFTA’s coverage to that of the international intellectual property treaties and the domestic laws of the member nations. In this way, one can see how NAFTA’s intellectual property right provisions will strengthen international intellectual property rights.

IV. Comparison of NAFTA, Other International Treaties, and the Domestic Law of NAFTA’s Member Nations

At present, NAFTA provides expansive protection of intellectual property rights. Its attention to matters such as (1) the scope of intellectual property protected; (2) the property rights given intellectual property owners; and (3) the enforcement provision allowing prosecution of infringement claims allows NAFTA to surpass and remedy the deficiencies found in other international treaties and the domestic laws of NAFTA’s member nations.

A. Scope of Intellectual Property Protected

As compared to other international treaties, the scope of intellectual property protected under NAFTA is very broad. The Paris Convention does not protect trade secrets, biotechnology patents, or semi-conductor

310. Id. art. 1717(1).
311. Id.
312. Id. art. 1717(2).
313. Id. art. 1717(3).
314. NAFTA, supra note 1, art. 1718(1).
The UCC also is limited in protection, lacking specific coverage of computer programs, compilations of data, sound recordings, and satellite transmissions, and the Berne Convention does not include sound recordings or satellite transmissions.

Likewise, the domestic laws of NAFTA's member nations provide a narrow scope of protection for intellectual property rights, in comparison to NAFTA. Under the domestic laws of Canada, semiconductor chips are not protected, and neither are transitory broadcasts. Additionally, Canada's trademark laws do not protect collective marks. Furthermore, Mexican intellectual property laws do not protect databases, and computer programs are protected under a separate category, leaving uncertainty as to the scope of such protection. Moreover, Mexican law does not specify if semi-conductors, trade secrets, or biotechnology will be protected. Finally, Mexican trademark law does not protect certification marks.

NAFTA, on the other hand, protects copyrights protected by the Berne Convention, as well as any work with an original expression. As such, NAFTA's copyright protection extends beyond the Berne Convention, to embrace, among others, sound recordings, computer programs, satellite transmissions, and compilations of data. The Treaty's broad scope allows for the protection of works that have not yet been specifically delineated, including works not yet invented. This flexibility allows expansive protection for all future inventors.

Furthermore, NAFTA's extensive protection of patents includes certain biological patents and any other invention which is "non-obvious" and "useful." Finally, NAFTA's protection of intellectual property rights encompasses trademarks, trade secrets, semiconductor chips, industrial designs, and geographic indicators. In this manner, NAFTA is an example of one the most progressive international intellectual property right treaties in existence today.

B. Rights Given to Intellectual Property Owners

The rights given to the intellectual property holders in NAFTA are also more complete. With regard to other international treaties, under the

315. See supra part II.A.
316. See supra part II.B.
317. See supra part II.C.
318. See supra part III.B.
319. See supra part III.A.
320. See supra part III.D.1(a).
321. See supra part III.D.1(c).
322. See supra part III.D.1.
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UCC, if a copyright holder has not translated his work to the language of that country within seven years, anyone has the right to translate the work.223 The UCC also allows one to copy a holder’s work without their permission if they are using it for educational purposes or for the public good. The term of protection is twenty-five years plus the life of the author.224 Additionally, the UCC gives the property owner the exclusive right to authorize reproduction of his works.225

Under the Berne Convention, the term of protection is fifty years plus the life of the author, and the owner is given the exclusive right to authorize reproduction or translation of his work.226 However, the Berne Convention fails to mention some of the owner’s rights, as it does not restrict the importation of the work without the owner’s permission.

Further, the Paris Convention does allow issuance of compulsory licenses if the holder is using the patent for his exclusive use.227 A right to a patent can even be forfeited if the holders exclusive use is not corrected through the issuance of compulsory licenses.228

With respect to the domestic laws in NAFTA’s member nations, Canada does not give the copyright owner the right to sell, rent, or lease their work.229 Additionally, under Canadian trademark law, the owner has the exclusive right to the mark, even outside of the geographic area in which the owner uses the mark.230 Similarly, Mexican laws do not give rental rights to copyright owners, nor do they state whether copyright owners can control illegal importation of their works.231 The law also needs to explicitly delineate what activity is protected under their protection of public performances.232 Finally, the U.S. patent laws that determine the date of invention for patents, and hence the date protection begins, are discriminating.233 Currently, the U.S. laws do not allow an applicant to present evidence of use or knowledge which occurred in another country in order to prove their date of invention.234 Therefore, although the invention may indeed have been prior to another’s invention, since the idea initiated while the patent owner was in a foreign country,

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323. See supra part II.B.
324. UCC, supra note 6, art. IV(2)(a).
325. Id. art.IV(1)
326. See supra part II.C.
327. See supra part II.A.
328. Paris Convention, supra note 5, art. 5(a)(3).
329. See supra part III.B.
331. See supra part III.A.
332. See supra part III.A.1.
333. See supra part III.C.3.
334. Id.
they will not receive protection. Rather, the inventor with the later date of invention, but invented in the United States will receive the patent.

Under NAFTA, the rights afforded property owners are very expansive. The scope of rights afforded owner’s of computer programs is clear, following the guidelines of the Berne Convention. In addition, in contrast to Mexican and Canadian laws, rental rights and translation rights are with the holder of the intellectual property. Moreover, the term of the protection is fifty years plus the life of the author. Finally, unlike the U.C.C. and the Paris Convention, under NAFTA one may obtain the right to translate another’s work, but only if the owner does not translate the work themselves and the owner has not been precluded from doing so.

C. Enforcement Provisions

In the Paris Convention, the UCC, and the Berne Convention, there is no dispute settlement procedure. In Mexico, while there are provisions for civil enforcement of infringement claims, injunctive relief is not allowed. Furthermore, administrative seizures can be stopped if defendants claim their constitutional rights have been infringed. To make matters worse, recovery of civil damages are very difficult. Moreover, under Mexico’s provisions for criminal penalties, the requirement of proving a “profit motive” to prove copyright infringement makes enforcement very difficult. All in all, Mexico’s enforcement provisions, while provided for, hinder, rather than allow for enforcement. Further, although Canada does allow for strict copyright enforcement provisions, in the form of fines and jail sentences, the trademark provisions only provide for civil remedies.

Conversely, in NAFTA, the enforcement and dispute resolution provisions are explicitly delineated. There are detailed explanations of the procedures that a member country must follow to settle a dispute,
including the guaranty of procedural due process, and the required civil and a criminal trials. Further, these enforcement provisions do not require any "profit motive," allowing for more successful prosecutions. In addition, there are severe civil and criminal penalties provided for in NAFTA, including fines, imprisonment, and seizure of goods. Finally, the parties are protected from infringing goods at their borders.

V. NAFTA's Significance for Intellectual Property Rights for NAFTA Member Nations and the Entire Trading World

A. NAFTA's Significance for NAFTA Member Nations

The NAFTA agreement represents an opportunity for Canada, Mexico, and the United States to form a trading block. Together, these three countries represent over 360 million consumers. This is a huge market, representing billions of dollars for the countries' respective economies. In fact, the U.S. Department of Commerce announced that exports to Mexico reached forty-two billion dollars for the first eleven months of 1994. This has created a over a $1.7 billion trade surplus with Mexico. Specifically, it is estimated that U.S. exports to Mexico have averaged one billion a week since May 1994, which is twice the rate of U.S. exports to the rest of the world. This represents over a twenty-two percent increase in exports as compared to the same period last year.

The Commerce Department has also attributed 130,000 jobs created in late 1994 to NAFTA. While some critics question the validity of

347. Id. art. 1714.
348. Id. art. 1715.
349. Id. art. 1717.
350. NAFTA, supra note 1, art. 1717.
351. Id. art. 1718.
352. ABA Meeting Looks at NAFTA and Intellectual Property Rights, Int'l Trade Rep. (BNA) (April, 1992) [hereinafter ABA Meeting].
357. Id. Specifically, U.S. exports to Mexico, through October 1994, increased over 22.8% over the same period in 1993. Id.
358. Scott, supra note 356. See also Stephen Horn, Weekly Commentary, Congressional Press
such statistics, economic experts believe that NAFTA did have a positive impact on trade. In fact, one economist notes that the important point is that trade between Mexico and the United States increased. Further, although Mexico may have experienced some economic difficulties in the early part of 1995, this is not expected to significantly affect NAFTA's continued implementation or its success.

Specific industries have realized tremendous increases in sales to Mexico since NAFTA's implementation. Such industries include beef exports, agriculture exports, automobiles, aircraft,

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359. Vincent J. Schodolski, NAFTA, One Year After, Rancor and Rhetoric Ease, but Overall Effects Remain Unclear, CHI TRIB., Jan. 1, 1995, at 1. The congressional Joint Economic Committee claims that U.S. exports to Mexico have actually declined $500 million, during the first quarter of 1994. This study also claims that although 127,000 jobs were created from increased Mexican demand for U.S. goods, an increase in U.S. imports from Mexico actually destroyed 137,000 jobs, equating to a net loss of 10,000 jobs. Id.

360. Scott, supra note 356. Specifically, Gary Hufbauer of the Institute for International Economics in Washington challenges the methodology of the Committee's report. Id. In fact, using the same figures, Mr. Hufbauer found a net gain of 7,000 jobs. Id.

361. Schodolski, supra note 359 (statement from Mr. Hufbauer of the Institute of International Economics).


363. Kantor Says Peso Crisis Won't Set Back Free Trade, REUTERS, Jan. 4 1995. The U.S. Trade Representative Mickey Kantor claims that the Mexican currency devaluation will not affect NAFTA's implementation. Id. In fact, Mr. Kantor argue that the currency devaluation in Mexico could have been much more severe without NAFTA. Id. This is because of the increased investment into Mexico because of NAFTA. Id.

364. Harris, supra note 358. U.S. automobile exports from the "Big Three" auto manufacturers, reached 30,347 units in the first eight months of 1994. Id. This represents a 300% increase over
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electric components,\textsuperscript{368} apples,\textsuperscript{369} and chemicals.\textsuperscript{370} Indeed, major corporations, such as Dow Chemical Company, Honeywell Corporation, and Sara Lee Knit Product, reported tremendous increases in sales to Mexico.\textsuperscript{371}

One industry that saw an increase in sales, the computer software industry, is particularly telling. U.S. software sales in Mexico reached thirty-six million dollars, which is an increase of fifty-six percent for the third quarter of 1994.\textsuperscript{372} Further, software sales to Mexico for the first three quarters were thirty-five million dollars, which is an increase of twenty percent.\textsuperscript{373} Sources indicate that the intellectual property protection in NAFTA had a large part in such increases,\textsuperscript{374} which should only assist in increasing software sales even higher in the future. Moreover, such increases of software sales were noted in Latin America.\textsuperscript{375} This is very important, in light of the fact that goal of NAFTA members is to create an American free trade block.\textsuperscript{376}

\begin{itemize}
  \item 1993. Id.
  \item 367. Id. U.S. Aircraft exports increased 241\% Id.
  \item 368. Horn, supra note 358. U.S. exports of electronic components to Mexico are up 90\% over 1993. Id.
  \item 369. Id. U.S. exports of apples to Mexico are up 85\% from 1993. Id.
  \item See also Scott, supra note 356. Chemical exports to Mexico were claimed to be even higher in this report, where chemical exports to Mexico were claimed to have increased over 100\% as compared to 1993. Id.
  \item 371. Schodloski, supra note 359. Dow Chemical Co. announced an increased in exports to Mexico from \$95 million in 1992 to \$170 million in 1994. Id. Dow further estimates that it expects their sales to Mexico to increase to \$200 million in 1995. Id.
  \item Honeywell Corporation sales or computer products to Mexico rose 60\% in 1994. Id. Sara Lee Knit Products, the manufacturer of Hanes underwear and socks, increased their Mexican sales 50\% in 1994. Id.
  \item 372. \textit{Latin America Software Sales Reach \$41 Million for Q# 1994; Doubling of Sales in Brazil Paces Growth}, \textit{PR Newswire}, Dec. 19, 1994 [hereinafter \textit{Latin America Software Sales}]. The figures were announced by the Software Publishers Association. Id.
  \item 373. Id.
  \item 374. Id. (comment from David Tremblay, Research Director for The Software Publishers’s Association).
  \item 375. Id. Software sales to Latin America were \$41 million in the third quarter of 1994, which is an increase of 47\% from the same period of 1993. Latin America Software Sales, supra note 372. The first three quarters of 1994 showed \$102 million in sales of software to Latin America, which is an increase of 37\% from the prior year. Id. Further, unit sales of software to Latin America increased 178\% for the third quarter 1994, and 156\% for the first three quarters of 1994. Id.
  \item 376. \textit{Chile NAFTA Entry Not Affected by Mexico - Canada pm, Reuters}, Jan. 26 1995, available in \textit{LEXIS, News Library, CURNWS}. In a meeting in Miami, Florida in December 1994, the Summit of the Americas, the members of NAFTA agreed that Chile should be allowed to join the trade pact. Id. Eventually, NAFTA members want to create an American free trade zone, with a target date for such expansion being the year 2000. Id.
\end{itemize}
Specifically, Chile's recent invitation to join NAFTA is of particular importance, considering that the United States is Chile's largest trading partner. Moreover, in terms of intellectual property protection, Chile is said to have strong domestic intellectual property laws, demonstrating their serious commitment to this area of the law. Considering our heavy trading with Chile, and Chile's obvious commitment to intellectual property protection and joining NAFTA, this will only serve to increase U.S. exports to this country.

The United States has also increased their exports to Canada. During the first eleven months of 1994, U.S. exports to Canada reached over ninety-five billion dollars, an increase of twenty-three percent over the same period of 1993. Some specific areas of growth were noted in agricultural and software products. Specifically, in the software industry, the U.S. exports increased fifteen percent in the third quarter of 1994, and eleven percent for the first three quarters of 1994. Once again, much of this growth was attributed to NAFTA's intellectual property provisions. Likewise, Canada has experienced an increase in trade since NAFTA's implementation. For instance, Canadian exports to the United States reached $113 billion in the first eleven months of 1994, which is an increase of thirty percent for the same period of 1993.

NAFTA has already had a tremendous impact on the U.S. economy. This impact should only increase in the coming years, particularly with the creation of an American free trade zone. Further, with the protection of intellectual property, manufacturers will be less hesitant to distribute their products, because of a reduced chance of piracy. This has already been noted with the tremendous increase in exports of software and the increase in Honeywell Corporations' sales of computer products to Mexico.
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B. NAFTA's Significance for the Entire Trading World

Since World War II, countries have depended on international trade to sustain their economies. With such heavy reliance on international trade, countries need assurance that their products will not be infringed upon in the international marketplace. Indeed, the world has recognized a relationship between international trade and intellectual property rights.

The importance of the protection of intellectual property rights internationally is demonstrated by the severe economic consequence of a lack of intellectual property rights. It is estimated that between $150-200 billion of the world market consists of counterfeited and pirated goods. This is $150-200 billion of goods that should be in the hands of the actual inventors. This money not only represents lost money to the inventors, but to the world economy. If these counterfeit goods did not exist, one would be forced to buy the actual goods. Since the actual goods will probably be more expensive than the pirated goods, more money would be flowing through the international economy. Furthermore, if many people buy this lower priced, “pirated good,” there will be no market left for the actual good.

Indeed, in a study of 193 U.S. companies, there was an estimated loss of sales of over twenty-three million dollars because of inadequate protection of intellectual property rights. The industries that reported the highest losses were scientific and photographic equipment, computers and software, electronic equipment, entertainment, motor vehicles and parts, pharmaceutical, and chemicals. These are the same industries that are largely unprotected under the current international treaties and domestic intellectual property laws. Most of these industries are “high tech” growth industries. If these losses continue, one can only imagine the money that will be lost. The International Trade Commission estimated that, in 1986, the aggregate loss of sales because of inadequate intellectual property protection was between forty-three and sixty-one billion dollars.

390. Id.
392. Mall, supra note 389, at 273.
393. Id.
394. Id.
Loss of sales is not the only damage caused by inadequate intellectual property protection. U.S. firms also estimated that they lost ten percent of their profits because of infringement of their intellectual property rights. In addition, forty-three firms reported they lost 5,300 jobs because of inadequate intellectual property protection.

The world not only loses money and jobs when international intellectual property rights are infringed upon, but it also loses technology. In order to encourage innovation, inventors must be ensured that their property rights will be secure. Inventors will not invest their time and effort if they are at risk of losing their rights in their products. Therefore, much technology is kept from international trade. This lost technology includes computers and health related products — products that make this world not only more competitive, but also healthier. Financial benefits and an increase in technology are not the only reasons that NAFTA will assist the world trading market.

Some believe that the importance of NAFTA is largely political. Many believe that NAFTA will send a message to the trading world that the United States is serious about trading globally. Indeed, this message may have contributed to the resolution of GATT. An international trade treaty, with strong property right provisions, would cause international companies to feel secure that their products would receive at least a minimal amount of protection. This security may cause an increased interest in the international market, as NAFTA has caused an increased interest in the Mexican market, which would in turn increase economic activity worldwide.

Some argue that only developed nations will benefit from intellectual property protection. Since developed nations have the most research and development tied up in the products, they stand to lose the most financially if intellectual property rights are not protected. However, developing nations also have much to gain by protecting international intellectual property rights. First, intellectual property rights will foster economic development within the developing nations. Second, protection of intellectual property rights will bring technology into developing nations, thus creating more jobs and increasing their

395. Id.
396. Id.
397. Mall, supra note 389, at 273.
399. Id.
400. Id.
401. Id.
402. Id.
standard of living. Finally, developing nations, as well as developed nations, will benefit overall from new technologies, such as new medical procedures and other "high tech" products.

Thus, both developed and developing nations will benefit from the protection of intellectual property rights internationally. Developed nations will be more inclined to share their intellectual property, resulting in increased trade. This is especially true in light of the population explosion in the developing nations, which will open up a large, virtually untapped market to the companies in developed countries. On the other hand, developing nations will benefit economically as well as socially from the increased protection of intellectual property rights.

VI. Conclusion

NAFTA is not the first international treaty to recognize intellectual property rights. While other multilateral treaties, such as the Berne Convention, the Paris Convention, and the UCC protect intellectual property rights, none have afforded the expansive protection bestowed by NAFTA. Moreover, these treaties are not trade treaties. Thus, they do not envisage intellectual property rights in conjunction with international trade, even though the relationship between intellectual property rights and international trade is the integral ingredient in promoting either of the two subjects.

Accordingly, NAFTA represents a complete protection of intellectual property rights, with effective enforcement provisions, all within a trade treaty. Through this protection, NAFTA will not only increase trade between the three member nations, but will create a strong political and economic alliance. Indeed, NAFTA will create a free trade zone that can counter the threats of the Asian and European trade zones. Additionally, this Treaty may be a "model treaty," which other nations would do well to imitate. If so, NAFTA will have accomplished what many believe it can: Strengthen the intellectual property rights, not just for Canada, Mexico, and the United States, but for intellectual property owners worldwide.

Karen Kontje Waller

403. Lewis, supra note 398, at A35.
405. Id.
406. ABA Meeting, supra note 352.
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