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# Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property

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## INTRODUCTION

Cultural or symbolic goods are increasingly important sources of capital accumulation in the world economy, as manifested by the incorporation of intellectual property rights (“IPRs”) in the global trade regime via the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). This has been paralleled by a growing appreciation for the value of cultural diversity, an

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acknowledgment of the relationship between biological and cultural diversity, recognition of distinctive cultural traditions as the basis for alternative forms of sustainable development, and a revitalization of interest in cultural rights in the human rights arena. IPRs are clearly identified as cultural rights rather than property or economic rights within the international human rights framework.<sup>1</sup> Their capacities are in no way exhausted by or limited to their predominant role in protecting corporate market shares.

If IPRs are fundamental to a new economy characterized by the rise of information capital, they are also being called upon to accommodate new valuations of cultural distinction and to adapt themselves as tools in struggles for rural development and social justice. We will argue that these two movements *are* integrally related, but the expansion of IPRs cannot be evaluated merely as the inevitable encroachment of and colonization by the commodity form. Although stimulating innovation and protecting investment has become the dominant ideological rationale for IPRs, there are other values embedded within intellectual property (“IP”) regimes. They permit us to protect traditional production systems, prevent commercial misrepresentation, keep valuable secrets, recognize non-pecuniary interests in works, respect public sensibilities, and enable the valuation of local distinctions. This (possibly endangered)<sup>2</sup> “counter-current” in IPRs has still untapped potential for the creation of new forms of IP that may ironically “de-fetishize”<sup>3</sup> commodities or

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<sup>1</sup> See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Sixth Session*, art. 29, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994) (prepared by Osman El-Hajjé) (“Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.”).

<sup>2</sup> The endangerment prognosis is supported by the fact that moral rights have not been incorporated into TRIPS and in international trade deliberations most states still resist the expansion of geographical indicators to products other than wine and spirits, attempts to set limitations on patentable subject matter have been resisted, and domestic exemptions to infringement have been challenged. It is not surprising that in the trade arena aspects of IPRs that do not primarily facilitate or are perceived to impede commerce will be scrutinized. We contend, however, that there are other equally important IP deliberations taking place in arenas where other considerations motivate the parties and that the World Intellectual Property Organization’s (“WIPO”) efforts in the full range of U.N. bodies promises to be more indicative than those of the World Trade organization (“WTO”) for the future of IPRs. The recent U.N.-mandated appeal to WIPO to adopt a “development agenda” and developing countries’ attempts to legislatively implement new sui generis rights to meet environmental commitments and to protect minorities also indicate changing expectations for IPRs.

<sup>3</sup> As Karl Marx observed, an important consequence of the emergence of

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enable communities to refuse the logic of the commodity form altogether. After summarizing the emergence of informational capital and its protection in international law, we will explore a series of examples in which IPRs are being used for new purposes or new IPRs are being forged. We stress that the use of “culture as a resource”<sup>4</sup> is a strategy fraught with political dangers as well as social and economic possibility. Nevertheless, these dangers may be avoided if we insist that the exercise of IPRs, considered as cultural rights, entails respect for the full range of human rights norms.

#### I. INFORMATIONAL CAPITAL AND INTERNATIONAL TRADE

The globalization of the economy is fueled by developments in information technologies that enable information to flow instantaneously to control the production, distribution, and circulation of goods. In a prescient and succinct discussion of informational capital, Arun Kundnani explains that all forms of cultural content can be compressed and made available through digital communications networks that create a world market conceived of as a unified information system.<sup>5</sup> IPRs enable the informational and symbolic goods that “flow” through these networks (films, music, programming, databases, software, etc.) to yield a continuing stream of royalties or subscription fees. Meanwhile, industries in other sectors remain competitive via investment in the symbolic components of goods — design and branding, for instance. The capacity to respond to market knowledge with new forms of symbolic

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industrial production was the elevation of the value of the commodity and the reduction of the value of workers’ labor; hence the concept “commodity fetishism.” Ascribing value to the means, location, or method of production would challenge this process of fetishization by urging consumers to purchase products that reflect the social lives of the producers; hence the term “de-fetishization.” See Anne Meneley, *Extra Virgin Olive Oil and Slow Food*, 46 *ANTHROPOLOGICA* 165, 173 (2004).

<sup>4</sup> George Yúdice argues that “culture-as-resource is much more than commodity; it is the lynchpin of a new epistemic framework in which ideology and much of what Foucault called disciplinary society . . . are absorbed into an economic or ecological rationality, such that management, conservation, access, distribution, and investment — in ‘culture’ and the outcomes thereof — take priority.” GEORGE YÚDICE, *THE EXPEDIENCY OF CULTURE: USES OF CULTURE IN THE GLOBAL ERA I* (2003).

<sup>5</sup> Arun Kundnani, *Where Do You Want to Go Today? The Rise of Information Capital*, 40 *RACE & CLASS* 49, 51-52 (1998); see Wendy A. Adams, *Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve*, 10 *INT’L J.L. INFO. & TECH.* 71, 73 (2002) (describing how “[n]ew technologies . . . permit and in some cases encourage an increasing percentage of goods to be constituted as digital products and disseminated through virtual channels inherently global in nature”) (citation omitted).

distinction is now an indicator of competitiveness. Trademarks assume greater importance. Technological advances in DNA sequencing have also turned many elements of nature into informational goods; material resources become genetic resources from which information can be extracted and owned under patent.<sup>6</sup>

All informational goods are by nature non-rivalrous; only through the extension of IPRs do they cease to be public goods and become private monopolies that yield rents in global markets.<sup>7</sup> Not surprisingly, state housing industries that are highly dependent upon IPRs have a vested interest in objecting to foreign legislation that respects public ownership of culture and knowledge.<sup>8</sup> The coercive fashion in which a U.S.-based industry coalition achieved the negotiation of TRIPS under the umbrella of the World Trade Organization (“WTO”) is now well-known.<sup>9</sup> Expanded IPRs coupled with new broadcasting and telecommunications legislation ensured that the full capacities afforded by digital communications could be realized. In the process, as many critics note, states abandoned national sovereignty in the sphere of culture.<sup>10</sup> As one trenchant observer notes:

[A] central aspect of information capitalism is the accumulation of hitherto socially-owned knowledge, culture

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<sup>6</sup> See BRONWYN PARRY, *TRADING THE GENOME: INVESTIGATING THE COMMODIFICATION OF BIO-INFORMATION* 68-69, 90-92 (2004).

<sup>7</sup> For a summary of the economic rationale of IP (patent) protection, see Maxwell R. Morgan, *Medicines for the Developing World: Promoting Access and Innovation in the Post-TRIPS Environment*, 64 U. TORONTO FAC. L. REV. 45, 55-56 (2006).

<sup>8</sup> See F. Willem Grosheide, *General Introduction to INTELLECTUAL PROPERTY LAW, 2002: ARTICLES ON THE LEGAL PROTECTION OF CULTURAL EXPRESSIONS AND INDIGENOUS KNOWLEDGE* 1, 6 (F. Willem Grosheide & Jan J. Brinkhof eds., 2002).

<sup>9</sup> See Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 6-19 (1995), reprinted in *INTELLECTUAL PROPERTY*, at 419 (Peter Drahos ed., 1999); see also SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY* 96-97 (2003). See generally Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Property Lawmaking*, 29 YALE J. INT'L L. 1, 20-23 (2004) (discussing benefits of shifting IP lawmaking from WIPO to GATT for United States and European Community).

<sup>10</sup> See Francisco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1210-11 (2004) (discussing evolving relationship between states, culture, and international community and emergence of “proto-federal structure [which transcends] the nation State and [the ensuing development of] a new transnational constitution”); John Frow, *Public Domain and the New World Order in Knowledge*, 10 SOC. SEMIOTICS 173, 176 (2000); Shalini Venturelli, *Cultural Rights and World Trade Agreements in the Information Society*, 60 INT'L COMM. GAZ. 47, 51 (1998).

and information in the hands of private corporations, whence they are repackaged as informational goods and sent around the world through the networks of information flow. These struggles do not simply involve an opposition between Third World tradition on the one hand and western modernity on the other. The key issue is between social ownership of cultures and their development versus private ownership.<sup>11</sup>

TRIPS is one strand of a network of laws which attempts to create a legal and institutional framework favorable to the accumulation of capital in the era of globalization. It does this by removing barriers to capital investment and mobility and dismantling forms of redistribution effected by market interventions and price stabilizations. Digital technology has given capital much greater flexibility in choosing places of production, thereby freeing capital from the bargaining power of labor. Moreover, those who provide the creative material that is capitalized upon are either not recognized as “authors” or inventors, pressured to assign their IPRs (and waive their moral rights) as “content providers,” or they are engaged in “work for hire” — having their mental or creative labor expropriated by their employers.<sup>12</sup>

As Coombe has argued at length elsewhere, assertions of cultural distinction have emerged as a means of asserting rights by those who are disadvantaged in this new economy.<sup>13</sup> The so-called level playing field for international trade ensures that some goods (genetic resources, materials, design, timber, textiles, techniques, know-how, practices, and knowledge that are extracted from the “less developed countries”) flow freely. Other goods (genetically modified crops or industrially developed seeds, fabrics, fertilizers, pesticides, software, and pharmaceuticals), however, are channeled as IPR-protected works

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<sup>11</sup> Kundnani, *supra* note 5, at 70.

<sup>12</sup> Corporations are also appropriating creative labor in hugely profitable new industries, such as digital games, by insisting upon ownership of, or rights to expropriate, the IPRs that players of those games would otherwise hold in the works they create and contribute to the game space. See Andrew Herman et al., *Your Second Life? Goodwill and the Performativity of Intellectual Property in Online Digital Gaming*, 20 CULTURAL STUD. 184, 195 (2006).

<sup>13</sup> See Mohsen al Attar Ahmed, Nicole Aylwin & Rosemary J. Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, in 2 FIRST NATIONS' CULTURAL HERITAGE: RIGHTS AND RECONCILIATION (Catherine Bell & Robert Patterson eds., forthcoming 2007) (manuscript at 28, on file with author); Rosemary J. Coombe, *Works in Progress: Traditional Knowledge, Biological Diversity, and Intellectual Property in a Neoliberal Era*, in GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY 273, 293-94 (Richard W. Perry & Bill Maurer eds., 2003).

that command rents for each use of their informational content, even when they are derived from the “work” of others.<sup>14</sup>

If IPRs provide the legal means by which global flows of information are commodified, managed, and policed, they also appear to provide rhetorical resources for movements of social resistance to the violence of informationalization. Tactics of branding, adding symbolic value, and building recognizable distinctions of origin can be extended to new beneficiaries and seized upon by new agents. For example, the drive to represent local people’s knowledge, practices, and traditional cultural expressions as innovative works, integrally related to a traditional lifestyle and deserving of sui generis IP-like rights, asserts new claims of authorship for communities. Rural communities, indigenous peoples, subsistence farmers, forest dwellers, healers, and other marginalized groups now struggle to prevent local knowledge and resources from being reduced to mere data for the information-intensive industries of the new economy.<sup>15</sup> They do so increasingly by representing their traditions as sources of innovation, describing their ecosystems as inscribed environments or cultural landscapes, or insisting that their cultural distinctions be recognized as sources of value.<sup>16</sup> Positions of historical and contemporary disadvantage may thereby be transformed into places of competitive advantage. IPRs — particularly trademarks, appellations of origin, certification, and collective marks — may be used to link goods and services to their places of origin, the conditions under which they are produced, or the very identity of their producers. Such strategies may empower local communities — they may engender creative activity, revitalize traditions, and sustain or enhance local livelihoods.<sup>17</sup> They may also

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<sup>14</sup> See Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL’Y 313, 317-18 (2005) (relating how folklore and expressions of indigenous music “are often not protected by copyright” except when they are fixed in “a modern recording” or “a new book” even if they contain only “minimal new elements”). See generally Peter Drahos, *Intellectual Property Rights in the Knowledge Economy*, in HANDBOOK ON THE KNOWLEDGE ECONOMY 139, 145-46 (David Rooney ed., 2005), available at <http://cgkd.anu.edu.au/menus/PDFs/Rooney%20Chapter%2011.pdf> (critiquing many foundational economic principles underpinning pro-IPR rhetoric and suggesting that excessive IP protection in fact stifles rather than promotes intellectual innovation).

<sup>15</sup> See Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 170-78 (2006) (detailing several instances of corporate appropriation of traditional knowledge).

<sup>16</sup> See Graham & McJohn, *supra* note 14, at 319-20; Grosheide, *supra* note 8, at 25-26.

<sup>17</sup> For a specific Canadian example, see Wend B. Wendland, *Intellectual Property*

restrict people's freedoms, entrench the powers of local elites, or subject communities to greater state surveillance. Ultimately, we would argue, these new forms of symbolic capital accumulation need to be evaluated as forms of emerging governance, subject to requirements of transparency, accountability, and democratic values with respect to participation and equality of opportunity.

## II. BRANDING SPACE: ADDING SYMBOLIC VALUE TO LOCATION

If capital and services have attained greater global mobility in the new economy, labor has become increasingly intransitive. Controls on the movement of labor have become entrenched, with new legal mechanisms devised to contain the flight of refugees from impoverished regions into the areas of capital investment.<sup>18</sup> Globalization provides for increasing concentrations of capital in various developed urban centers, while many rural and peripheral zones find themselves on the "outside," with inhabitants facing few apparent options other than urban migration for wage labor subsistence.<sup>19</sup> States, however, find themselves without the means to

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*and the Protection of Cultural Expressions: The World of the World Intellectual Property Organization (WIPO)*, in *INTELLECTUAL PROPERTY LAW*, *supra* note 8, at 101, 131.

<sup>18</sup> At the same time that local impediments to capital investment have been removed and market-intervention-based laws of redistribution have been dismantled, a whole host of international legal conventions have collaborated to ensure that while capital becomes increasingly mobile, labor becomes increasingly confined. This is an unsurprising collusion of national and international legal measures, considering the migrations of labor which would likely otherwise flock from the impoverishment of underdeveloped areas toward concentrations of capital. Concomitant to increasing restrictions on visas, a primary means of confining labor has been pernicious attacks on liberal refugee regimes implemented after World War II. This has been manifested in a variety of ways, including heavy penalties levied against transportation companies who carry passengers without proper documentation; the establishment of rights-free "international zones" in national ports of entry, facilitating easy and arbitrary removal of unwanted individuals; the establishment of so-called safety zones within war-torn countries, areas that, while often terribly unsafe, discourage flights of refugees across the borders; the willingness demonstrated by many nations to return refugee claimants to the dangerous states from which they fled; strict criteria as to what constitutes refugee status; and the invocation of the "safe third country" concept, by which asylum seekers are denied entry if, en route, they passed through another country where they could have conceivably made an asylum claim. See B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, 34 *ECON. & POL. WKLY.* 337, 341-42 (1999). For a discussion on the linkages between international trade, labor standards, and labor regulation, see Richard N. Block et al., *Models of International Labor Standards*, 40 *INDUS. REL.* 258, 260-63 (2001).

<sup>19</sup> See Aileen Stockdale, *Rural Out-Migration: Community Consequences and Individual Migrant Experiences*, 44 *SOCIOLOGIA RURALIS* 167, 167 (2004) (discussing

provide the infrastructure necessary to support burgeoning urban populations or to cope with the social consequences of such unprecedented densities. As one report summarizing three world conferences held during the World Exhibition EXPO 2000 phrased it: “Stress was laid upon establishing a balanced partnership between urban and rural areas. Without keeping the people in the rural areas it will be more and more difficult to solve the problems of the urban areas.”<sup>20</sup> Indeed, under the restructuring and structural adjustment policies imposed by the WTO and the International Monetary Fund (“IMF”) over the last twenty years, even the most basic of public services had to be privatized, according to neoliberal logic, to improve conditions for foreign capital investment.<sup>21</sup> As one former World Bank manager acknowledged, “Everything we did from 1983 onwards was based on our new sense of mission to have the south ‘private[z]ed’ or die; towards this end we ignominiously created economic bedlam in Latin America and Africa.”<sup>22</sup>

Part of the drive to “privatize or die” involved recasting IPRs as private rights under TRIPS — minimizing their social import and their role in national cultural policy. As an acceptable “private” mechanism, then, it is not surprising that IPRs should be considered in terms of what economic opportunities they can offer peoples living in rural areas, so as to reduce or control the tides of urban migration. If people cannot escape from the global peripheries to take advantage of the opportunities available in global centers, and governments have an interest in preventing migration to provincial or national centers, then rural development becomes a priority. However, if labor is an increasingly less significant component of capital accumulation and agricultural subsidies are becoming increasingly illegitimate under global trade norms, then some means must be found to add symbolic value to labor kept in place. Areas otherwise disadvantaged by transformations wrought by economic globalization need to find some way of capturing rents in informational capitalism. IPRs that provide

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“community consequences and migrant experiences” as they relate to processes of rural out-migration and future of rural communities).

<sup>20</sup> Michael Klaus & Holger Magel, *Rural Community Development in a Civil Society*, in INTEGRATED LOCAL COMMUNITY DEVELOPMENT 97, 98 (2000), available at <http://www.apo-tokyo.org/icd/papers/E-Publications/02.IntegLocCommDev/02-05.pdf>.

<sup>21</sup> For an insightful sketch of the IMF’s privatization rhetoric when grounded in a particular case study, see generally John R. Dempsey, *Thailand’s Privatization of State Owned Enterprises During the Economic Downturn*, 31 LAW & POL’Y INT’L BUS. 373 (2000).

<sup>22</sup> Chimni, *supra* note 18, at 347 (citing ANKIE HOOGVELT, GLOBALISATION AND THE POSTCOLONIAL WORLD: THE NEW POLITICAL ECONOMY OF DEVELOPMENT 172 (1997)).

protection for indicators of geographic source and appellations of origin enable these areas to turn locales and specific conditions of production into symbolic capital.

Geographical indications (“GIs”) are a type of IPR that lend themselves to this practice because they mark both the origin and the quality and characteristics of the product that are linked to its geographical origin.<sup>23</sup> Ideally, GIs should do more than simply signify the origin of the good; they should “guarantee [the] quality and distinctiveness [of the product as] derived from a combination of unique regional, environmental, and human influences, such as climate, soil, subsoil, plants, and special methods of production —

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<sup>23</sup> The first international agreement to address the protection of GIs was the Paris Convention for the Protection of Industrial Property of 1883. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 38 Stat. 1645, T.S. 579. Though the agreement failed to define the conditions for protection, the Convention did require that members prohibit the importation or mandate the seizure of products that falsely identified the source of the product or misrepresented the identity of the producer. This article was amended in 1958, adding a further prohibition on indications deemed “liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.” *Id.* art. 10bis(3)(iii), as amended at Lisbon, Oct. 31, 1958, 13 U.S.T. 1, 828 U.N.T.S. 107. Although two subsequent international agreements have since been enacted to further define the protection of GIs — the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Apr. 14, 1891, 818 U.N.T.S. 163, and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, 923 U.N.T.S. 189 — they have failed to secure wide international support, presumably because they expanded the original level of protection afforded to GIs under the Paris Convention. The language adopted in article 22 of TRIPS — “indications which identify a good . . . where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” — is largely seen as either neutral in relation to the Paris Convention or slightly more inclusive. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS]. Despite the lack of international agreement, many states and groups of states continue to recognize rights based on the earlier agreements and to protect as GIs marks that indicate distinctive methods of production and traditions of making goods, thus considering cultural as well as natural factors. Developing countries are also introducing GIs into their trademark legislation to provide protection for traditional products and manufactures. For an account of the problems surrounding the protection of GIs, see generally José Manuel Cortés Martín, *TRIPS Agreement: Towards a Better Protection for Geographical Indications?*, 30 BROOK. J. INT’L L. 117 (2004) (detailing efforts by WTO to secure protection for GIs and outlining prospects for further developments); Tunisia L. Staten, *Geographical Indications Protection Under the TRIPS Agreement: Uniformity Not Extension*, 87 J. PAT. & TRADEMARK OFF. SOC’Y 221 (2005) (arguing for unification between “Old School” and “New School” interpretations of GIs and adoption of uniform international model of protection).

particularly traditional, collectively observed farming and processing techniques.”<sup>24</sup>

If local practices can be shown to give the product its distinctive characteristics, rights to exclusively use a GI may provide producers of goods with a lucrative form of market distinction.<sup>25</sup>

Within international trade law, GIs have largely been limited to distinct high-end agricultural goods, most notably wines and spirits. Many countries, including the United States, Japan, and Canada would like to so limit their application, if not abolish them altogether as obstacles to free trade. GIs may well be used to limit competition, preserve various forms of inequality, and “overly empower local elites.”<sup>26</sup> On the other hand, many developing countries want to embrace the possibility of having goods produced in traditional ways specific to an area or region internationally recognized as global brands, so that they too can compete in this field. India, for example, is aggressively marketing “traditional knowledge” products such as tea, silk, sarees, and various handicrafts.<sup>27</sup> In Europe, GIs continue to proliferate. Recently, Italian associations of Parma ham producers successfully sued the British supermarket chain Asda for slicing and packaging Parma ham outside of the Parma region, thus damaging the ham’s *characteristics*. According to the European Court of Justice: “Maintaining the quality and reputation of . . . Parma ham justifies the rule that the product must be . . . sliced and packaged in the region of production.”<sup>28</sup>

Anthropologist Robert Ulin shows how Michigan wine growers struggle to generate the kind of symbolic capital enjoyed by European wines by grafting narratives of “tradition,” “authenticity,” and quality onto their own appellations of origin, thereby creating symbolic

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<sup>24</sup> Kevin M. Murphy, Note and Comment, *Conflict, Confusion, and Bias Under TRIPS Articles 22-24*, 19 AM. U. INT’L L. REV. 1181, 1185 (2004).

<sup>25</sup> See Irene Calboli, *The First Ten Years of the TRIPS Agreement: Expanding the Protection of Geographical Indications of Origin Under TRIPS: Old Debate or New Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 200 (2006) (arguing for “reasonable expansion” of current protection offered by GIs so as to encourage greater economic development and national unity).

<sup>26</sup> Rosemary J. Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 LAW, CULTURE & HUMAN. 35, 46 (2005).

<sup>27</sup> See *Mysore Silk to Become a Global Brand*, DECCAN HERALD (Bangalore, India), Aug. 18, 2004, available at <http://www.deccanherald.com/deccanherald/aug182004/i4.asp>.

<sup>28</sup> Press Release, European Court of Justice, *Judgments of the Court of Justice in Cases C-469/00 and C-108/01* (May 20, 2003), available at <http://curia.europa.eu/en/actu/communiqués/cp03/aff/cp0342en.htm>.

capital so as to enjoy the advantages which many so-called privileged regions of the world — such as Bordeaux — have enjoyed for centuries.<sup>29</sup> Current structures of power — neoliberal economic policy, international trade-based IP law, and conventions addressing cultural rights — present this window of opportunity. They invite exploitation by those who may find themselves faced with scant options for leveraging rights claims and struggling for new forms of community development. Ulin rather naively celebrates these as activities of human agency that endow local worlds with new meaning in globalizing conditions, while he ignores the structures that enable them. Such windows of opportunity are not equitably distributed; they are made available by international law, shaped by its colonial history, and reflect its entrenchment of historical trade privileges.

We can see from this example how globalization is inviting the production of new localizations<sup>30</sup> that may be marketed as offering unique alternatives to the homogenization of goods that is so often used to caricature globalization itself. These are not simple reflexes of global processes, but strategic acts of calculation within restricted parameters shaped by international law. Such practices seem most widespread in Europe, where the use of GIs and appellations of origin has a longer history:

Popular strategies involve reifying local traditions and burnishing images of rustic authenticity onto goods, some of which were marginal products only two generations ago. For example, in some Italian mountain areas, the creation of *tallegio* — a particular kind of cheese — has become central to local development strategies. It has also transformed subsistence family farming into an “ecotourism” attraction as people produce images of a rural way of life for the consumption of others. The cheese is marketed with pictures of an idyllic, rural lifestyle set in a picturesque alpine landscape.<sup>31</sup>

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<sup>29</sup> Robert C. Ulin, *Globalization and Alternative Localities*, 46 *ANTHROPOLOGICA* 153, 156-62 (2004).

<sup>30</sup> This phenomenon is not limited to IPRs and trade law, but also appears to be engendered by environmental law and policy. See Marybeth L. Martello & Sheila Jasanoff, *Introduction* to *EARTHLY POLITICS: LOCAL AND GLOBAL IN ENVIRONMENTAL GOVERNANCE* 3-25 (Sheila Jasanoff & Marybeth L. Martello eds., 2004).

<sup>31</sup> Coombe, *supra* note 26, at 44-45 (citing Cristina Grasseni, *Packaging Skills: Calibrating Cheese to the Global Market*, in *COMMODYING EVERYTHING: RELATIONSHIPS OF THE MARKET* 259-88 (Susan Strasser ed., 2003)).

Geographers continually remind us that places “should not be regarded as enclosed spatial territories which have stable essential identities” but rather should be “seen as dynamic and open entities whose meanings and identities are constituted within a cross-cutting network of often global social relations and understanding.”<sup>32</sup> What these examples suggest, however, is that there are strong global pressures at work to project a place as having a stable and essential identity in a networked world of informational goods. Indeed, the growing field of expertise known as “place branding” is based on the premise that places require brands that are “authentic . . . being based on what a place is good at or what it does best.”<sup>33</sup> In an increasingly globally connected world, “every place must compete with every other place for its share of the world’s wealth, talent, and attention” and, thus, must distinguish itself based upon its physical, human, heritage, and cultural capital.<sup>34</sup> The brand for a place is being touted as “a key component of its overall economic development strategy.”<sup>35</sup> Only brands that can be protected are valuable, however, and, thus, IPRs will play an important role in this quest to create symbolic value in productions of place.

Few of the available studies enable us to fully evaluate this as a rural development strategy. We need to understand how these efforts affect relations between communities and the state, enhance a rural community’s recognition and political inclusion in the nation, and consider what impacts these strategies have upon local power relations, distributions of wealth, and availability of economic opportunity. In an analysis of emerging distinctions among forms of olive oil in Italy, anthropologist Anne Meneley squarely addresses the issue.<sup>36</sup> Tuscan extra virgin olive oil is a successful product, she suggests, because of its non-industrial production; the location and conditions of production are integral to the product.<sup>37</sup> It is thus a “de-fetishized” product. Place-specific artisanal modes of production are favorably contrasted to de-territorialized, industrially produced oil.

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<sup>32</sup> Jens Lachmund, *Knowing the Urban Wasteland: Ecological Expertise as Local Process*, in *EARTHLY POLITICS*, *supra* note 30, at 241, 242.

<sup>33</sup> *Find a Vision and Dump the Spinning*, AGENDA FOR LOCAL ECON. DEV., Feb. 2004, at 2, 2, available at [http://www.beyond-branding.com/Agenda\\_MSA\\_Article\\_Feb2004.pdf](http://www.beyond-branding.com/Agenda_MSA_Article_Feb2004.pdf).

<sup>34</sup> Malcolm Allan, Opinion, *Why Brand Places?*, AGENDA FOR LOCAL ECON. DEV., Feb. 2004, at 3, 3, available at [http://www.beyond-branding.com/Agenda\\_MSA\\_Article\\_Feb2004.pdf](http://www.beyond-branding.com/Agenda_MSA_Article_Feb2004.pdf).

<sup>35</sup> *Id.*

<sup>36</sup> Meneley, *supra* note 3, at 167-69.

<sup>37</sup> *Id.*

Although cooperatives all over Italy have conventions governing the growth, harvesting, and pressing of olives, as well as the means of distinguishing olive oils from different regions, some traditional producers have gone much further in developing “appellations of origin.” In 1990, a group of traditional producers (who appear to be holders of formerly aristocratic estates) banded together to create a restrictive set of production and quality controls for their oils. To bear the new appellation “Laudemio,” the spacing of trees, schedules for their pruning and picking, and duration from gathering to crushing the fruit as well as acidity limits are all carefully controlled. Moreover, “[e]ach estate bottles their oil in Laudemio’s signature bottle, affixing their own distinctive estate labels.”<sup>38</sup> In other words, the new appellation of origin not only fostered a new hierarchy of distinctions in Tuscany, it created finer cultural distinctions linked to the very estates on which the particular olives were grown. These are highly appreciated. Gourmands around the world claim that each of the thirty-three oils has its own flavor. Nonetheless, these oils are difficult to locate, even in large cities. If, as Meneley notes, even former aristocrats have difficulty finding means of marketing and distributing their oils in foreign markets, it is highly unlikely that such strategies would be feasible for regional collectives and family farms. Only, it appears, when producers also make wine and, thus, have access to liquor distribution networks do these finer distinctions yield profit (and even then it appears that there is more income to be made from agricultural tourism and hosting cooking schools). Such strategies are unlikely to yield rural development returns without investments that link producers to global distribution networks.

### III. MARKING NEW DISTINCTIONS: VALUING CONDITIONS OF PRODUCTION

Instead of obscuring conditions of production and thereby fetishizing<sup>39</sup> the commodity, it is now possible for conditions of production to become symbolically marked for consumption in niche markets. It might be more precise to suggest that although the product or service is integrated back into the conditions of its production for marketing purposes, those conditions of production may be aestheticized or reified through the use of symbols and narratives that may circulate as new forms of informational capital. Indeed, one highly successful example of this involves the use of a

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<sup>38</sup> *Id.* at 169.

<sup>39</sup> See discussion *supra* note 3.

branding strategy to distinguish a local place of production from the predominant conditions characteristic of global divisions of labor.

Informational capitalism, we have suggested, is characterized by high concentrations of ownership and highly networked multinational firms who, by controlling IPRs and networks of distribution, reduce their reliance upon labor. As Kundnani phrases it: “New technologies reduce the total contribution of labour to the production process and capital’s increased mobility means that work can be outsourced. . . . With outsourcing, the corporate brand name can be insulated from the seedy side of labour-capital relations. . . .”<sup>40</sup> However, other possibilities are emerging, as the next two examples illustrate.

The Los Angeles-based clothing company American Apparel is arguably one of the most successful examples in recent years of a company making the location and conditions of production a central component of the brand. The company has nearly doubled its business in the past two years alone — from \$80 million in sales in 2003 to an estimated \$150 million in 2005; its clothes are shipped to 40,000 wholesalers, as well as to its more than 75 retail locations, with new stores opening weekly.<sup>41</sup> Brain-child of 36-year-old, Montreal-born entrepreneur Dov Charney, American Apparel manufactures simple, logo-free casual wear — mostly t-shirts — and is marketed primarily to youth. There are multiple colors to choose from, but no patterns or logos adorn any of their products. Every label sewn into every American Apparel product boasts the same company logo found on all of its other advertising material, from postcards and catalogues to calendars and billboards: “Made in Downtown LA — Sweatshop Free.” Here the commodity becomes de-fetishized in two ways. First, the locale of its factories in downtown Los Angeles is invoked as a way of appealing to the patriotism of the “made-in-America-consumer” eager to support American industry in a time of unprecedented job loss due to outsourcing.<sup>42</sup>

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<sup>40</sup> Kundnani, *supra* note 5, at 61-62.

<sup>41</sup> David Gutnick, *The Apprenticeship of Dov Charney* (CBC radio broadcast Mar. 20, 2005).

<sup>42</sup> According to the U.S. Department of Labor, Bureau of Labor Statistics, over 2.8 million manufacturing jobs have been lost in America over the past 10 years (Jan. 1996 – May 2005). See U.S. Department of Labor, Bureau of Labor Statistics, *NAICS 31-33: Manufacturing* (Aug. 1, 2006), <http://www.bls.gov/iag/manufacturing.htm>. The American Manufacturing Trade Action Coalition posits that 961,200 of those jobs were in the textile and apparel industries, lost to outsourcing over roughly the same period of time (Dec. 1994 – Oct. 2006). American Manufacturing Trade Action Coalition, *Textile and Apparel Job Losses* (Nov. 3, 2006), <http://www.amtacdc.org/tradestats/charts/pdf/1c6.pdf> (listing U.S. trade and manufacturing data).

Second, “Sweatshop Free” informs the consumer that through the purchase of each product, they are supporting the American textile and apparel labor market — a remarkably rare feat given that 96% of clothing purchased in America is produced offshore.<sup>43</sup> Marketing the symbolic narrative “made in America” by drawing attention to “Downtown LA” has been a successful strategy garnering much coveted publicity, including a 2004 CNN special feature in which the company was celebrated for defying the trend of using cheap labor markets overseas by “proudly bearing the label ‘Made in America.’”<sup>44</sup> Other socially persuasive narratives involving the necessity of urban renewal in decaying American inner cities abandoned by businesses which fled to the relative safety and free parking of suburbia also come to mind.

“Sweatshop Free” baldly proclaims the conditions of production, appealing to the growing number of consumers increasingly concerned with the deplorable conditions in which their clothing is manufactured.<sup>45</sup> American Apparel markets itself to these consumers as an ethical alternative. While downtown Los Angeles may be seen as a welcome alternative to Honduras or Bangladesh, Los Angeles can by no means be acquitted of the crimes for which the ethical consumer convicts sweatshops in developing countries. Kimi Lee, director of the Los Angeles Garment Worker Center, a labor rights advocacy organization, calls Los Angeles the sweatshop capital of the United States. She maintains that most of the 5,000 garment factories housed in the city offer deplorable work conditions and illegal wages, with workers often working many more hours than they are paid for.<sup>46</sup> The U.S. Department of Labor estimates that two-thirds of Los Angeles garment factories violate both federal and state labor laws, and one-half violate health and safety standards.<sup>47</sup> In distinction, American Apparel pays its workers an average of \$13 per hour — double the wage of most other Los Angeles garment factories, and ten times what the mostly Mexican workers would make at home. The factory is

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<sup>43</sup> See Gutnick, *supra* note 41.

<sup>44</sup> *Lou Dobbs Tonight* (CNN television broadcast Feb. 9, 2004).

<sup>45</sup> For example, see Rosemary Coombe, *Sport Trademarks and Somatic Politics: Locating the Law in a Critical Cultural Studies*, in *SPORTCULT* 262, 280-81 (Randy Martin & Tony Miller eds., 1999) for a treatment of the public backlash toward Kathie Lee Gifford upon revelation that her clothing line was manufactured in sweatshop conditions — and right at home in America.

<sup>46</sup> See *The News Hour with Jim Lehrer: Profits & Principles* (PBS television broadcast Oct. 10, 2002).

<sup>47</sup> See Linda Baker, *Made in the U.S. of A?*, SALON.COM, Feb. 11, 2004, [http://archive.salon.com/tech/feature/2004/02/11/dov\\_charney/index.html](http://archive.salon.com/tech/feature/2004/02/11/dov_charney/index.html).

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purportedly clean, well-lit, heated and air-conditioned; workers are provided with health care, dental benefits, subsidized lunches, free use of telephones, paid vacation time, massages on the job(!), and free English classes after work.

Commenting upon the dehumanization engendered by most of the world's garment sweatshops, American Apparel prides itself on maintaining the dignity of everyone involved in the production process. Charney publicly maintains: "The benefits are important, but they're secondary to the dignity"; "This is basically the pitch: It's t-shirts that look good, t-shirts that feel good, and t-shirts that are made in a non-exploitative setting. Exploitation is not even an option. It's the third rail for us. We don't go there."<sup>48</sup> Charney, who views himself as a modern day Duddy Kravitz, defends his business model as both morally sound as well as economically efficient,<sup>49</sup> and one that he hopes will propel him to become the largest apparel operation in history.<sup>50</sup> As he puts it: "American Apparel is not altruism. It is capitalism. We treat our workers well to advance our business, to create an environment of efficiency, where everyone wins."<sup>51</sup> He is well aware of the branding capacity latent in the novelty of his approach; a huge banner drapes down the side of his Los Angeles complex, bearing the mantra, "American Apparel Is an Industrial Revolution."<sup>52</sup>

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<sup>48</sup> *The News Hour*, *supra* note 46. For a treatment of the exploitation of garment factory workers, see JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 65-75 (2004).

<sup>49</sup> American Apparel uses a unique modular vertical-integration manufacturing model, whereby workers work in teams as opposed to on an assembly line. Charney maintains this model maximizes productivity as well as efficiency: the faster the teams produce, the more the workers earn. The lack of the assembly line means changes can be implemented with relative ease, with the new results produced relatively quickly — far more so than a large factory based on an assembly line model of production. Charney also defends his location in North America, which gives him rapid access to the bulk of his market. Critics claim that American Apparel is only able to manufacture in the United States because the company produces only very simple garments and does not change its line seasonally. In other words, the demands that fashion imposes upon other garment manufacturers make American Apparel's manufacturing model impossible to replicate elsewhere.

<sup>50</sup> See Baker, *supra* note 47, para. 3; see also Interview by Jim Chapman with Dov Charney, CEO, American Apparel, 94.9 CHRW, in Ont., Can. (Apr. 13, 2005), available at <http://americanapparel.net/presscenter/articles/20050413chrw.html>.

<sup>51</sup> Kimberly Lloyd, *False Tribalism — The Hallmark of Contemporary Luxury*, M PUBLICATION, 2003, available at <http://www.americanapparel.net/presscenter/articles/2003mpublication.html>.

<sup>52</sup> Baker, *supra* note 47.

Conditions of production and the occupational lives of the workers are not rendered invisible here, but are highlighted as the symbolic value that attaches to the commodity in the brand strategy itself. Presumably, American Apparel has long since ceased to be generic and the company has exclusive rights to the term as a trademark and in the associated logos. Will “Sweatshop Free,” however, like other overused mantras, cease to arouse reflection and curiosity and become, like other trademarked logos, not an index for its referents, but rather an icon unto itself with its own value as a piece of informational capital? Could it be licensed for use on goods that are produced in other conditions? Legally, yes, but it would be foolish not to preserve the integrity of the brand or to suffer the negative publicity sure to ensue. More insidiously, rights to a phrase that might ideally describe a growing range of goods and services can now be exclusively claimed unless Charney is generous enough to liberally license it to other like-minded producers. Ironically, however, because the actual characteristics of the goods are not due to their place of geographic origin (even if this were expanded to include human factors), American Apparel can claim no GIs, even though their entire branding strategy depends precisely upon the goods’ conditions of origin as the basis of the symbolic value they assume in the market!

Igloo Diamonds provides another instance of this phenomenon of harnessing goodwill. Igloo is the current brand of a group of Internet diamond dealers that procures and promotes diamonds of Canadian origin as *ethical* investments. According to its promotional materials, their diamonds are “mined in Canada with the utmost regard to the environment, following careful environmental impact studies and the placement of a bond in damage guaranties . . . by manpower enjoying high labor standards.”<sup>53</sup> To substantiate these claims, purchasers of an Igloo diamond receive a certificate that attests to the diamond’s authenticity and the conformity of its conditions of origin to these standards. As well as marketing its own standards of production, the company also purports to seek redress for the injuries created by the sordid history of the global diamond trade by contributing to various community projects, such as the sponsoring of a landmine clearance program in Mozambique. These actions allow Igloo to boast that the purchase of one of their products aids in the “rebuilding [of] a ravished community,”<sup>54</sup> the prevention of injuries (presumably both to miners and victims of civil wars ignited and financed by diamond

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<sup>53</sup> Igloo Diamonds, *The Igloo Diamonds Brand*, <http://www.diamonds.ca/1to8/index.shtml> (last visited Jan. 26, 2007).

<sup>54</sup> *Id.*

mining), and the potential saving of lives. Igloo rather pretentiously claims that they sell diamonds that “better the world.”<sup>55</sup> Given their use in consumer societies as indicators of true love, devotion, and life-long commitment, the growing awareness of the conditions and consequences of diamonds’ global production created a form of dissonance that made these particular commodities ripe for narrative reconfiguration. Although there is no evidence that Igloo produces the gems using methods any different from those dictated by Canadian law, the very existence of such laws has allowed the company to create a niche market for diamonds from the Canadian North. Once again, ethics are juxtaposed with style to create both symbolic value and a saleable mark: “Beyond being a fashion statement, your Igloo Diamond is a statement of social conscientiousness and care. It is a true ethical diamond.”<sup>56</sup>

Ecotourism provides our final example. According to its critics, despite the short-term economic benefits of conventional tourism, it has caused substantial distress in many parts of the world because of the impact unsustainable levels of traffic and human extravagance have had on fragile environments and impoverished and vulnerable communities.<sup>57</sup> Environmental degradation, a common corollary to the enclave-based tourism model — including all-inclusive resorts, cruise ships, artificial lakes, and safari expeditions — disturb local ecosystems and undermine the livelihoods of those whose subsistence depends upon them. Moreover, the inequality of power and wealth that prevails in host-guest relationships negatively affects the self-esteem of local peoples, erodes cultural traditions, and further decreases an already waning quality of life. Many critics feel that this reproduces relations akin to Western colonialism and imperialism.<sup>58</sup>

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<sup>55</sup> Igloo Diamonds, *Mission Statement*, <http://www.diamonds.ca/curious/mission.shtml> (last visited Jan. 26, 2007).

<sup>56</sup> See Igloo Diamonds, *supra* note 53.

<sup>57</sup> See Brian King, Abraham Pizam & Ady Milman, *Social Impacts of Tourism: Host Perceptions*, 20 ANNALS TOURISM RES. 650, 651-53 (1993) (outlining positive and negative impacts of tourism in series of locations and based on variety of studies). For a more current example, see generally Joseph E. Mbaiwa, *The Socio-Cultural Impacts of Tourism Development in the Okavango Delta, Botswana*, 2 J. TOURISM & CULTURAL CHANGE 163 (2004), available at <http://www.multilingual-matters.net/jtc/002/0163/jtc0020163.pdf>.

<sup>58</sup> See DEBORAH McLAREN, RETHINKING TOURISM AND ECOTRAVEL 1-21 (2d ed. 2003); David T. Schaller, *Indigenous Ecotourism and Sustainable Development: A Case Study* (1996) (unpublished paper), available at <http://www.eduweb.com/schaller/Section2RioBlanco.html>.

Ecotourism emerged in the 1980s as an alternative tourism model capable of addressing some of these concerns while still taking advantage of the potential benefits of a prospering tourism economy. Although originally conceived as a kind of nature-based travel that saw enthusiasts adopt certain ecologically sustainable practices, ecotourism has come to signify both a concept and a model in which a very specific approach to *social* sustainability is advanced.<sup>59</sup>

Eco-tourism focuses on local cultures, wilderness adventures, volunteering, personal growth and learning new ways to live on our vulnerable planet. It is typically defined as travel to destinations where the flora, fauna, and cultural heritage are the primary attractions. Responsible ecotourism includes programs that minimize the adverse effects of traditional tourism on the natural environment, and enhance the cultural integrity of local people. Therefore, in addition to evaluating environmental and cultural factors, initiatives by hospitality providers to promote recycling, energy efficiency, water re-use, and the creation of economic opportunities for local communities are an integral part of ecotourism.<sup>60</sup>

At the heart of this model is an understanding of the close ties that exist between environmental conservation, economic development, cultural diversity, and inter-cultural exchange — an opportunity for people to learn about other peoples' cultures and lifestyles.

Early analyses of cultural tourism were quite critical and wary of the negative consequences of commodifying cultural forms for tourist consumption. Critics argued that ecotourism represented merely another form of capitalist appropriation in which “the physical environment, and within it human societies and historical remains, [are becoming] subtly redefined as global patrimony — universal property.”<sup>61</sup> Once prominence is given to the physical and human environments and peoples begin to market their own cultural distinctions, a potentially insidious self-branding process begins. To what extent does the marketing of cultural distinction demand that difference be artificially promoted and preserved to maintain its

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<sup>59</sup> See Global Development Research Center, *Sustainable Tourism*, <http://www.gdrc.org/uem/eco-tour/eco-tour.html> (last visited Jan. 26, 2007).

<sup>60</sup> Global Development Research Center, *Defining Eco-Tourism*, <http://www.gdrc.org/uem/eco-tour/etour-define.html> (last visited Jan. 26, 2007).

<sup>61</sup> Magali Daltabuit & Oriol Pi-Sunyer, *Tourism Development in Quintana Roo, Mexico*, 14 *CULTURAL SURVIVAL* Q. 9, 9-12 (1990), available at <http://www.culturalsurvival.org/publications/csq/csq-article.cfm?id=837>.

appeal? How do ecotourism proponents anticipate balancing the very fine line that exists between cultural valorization and cultural essentialization? What distinguishes ecotourism from earlier efforts at selling the *exotic* other? Again, evaluation often turns on questions of governance.

In France, for example, recent government tourist promotion focused on the Basque area. Marketing efforts developed the fiction of a pristine culture in which folklore and traditional customs dictated the lives of local peoples described as the “Indians of Europe.”<sup>62</sup> Entirely state sponsored, this instance of cultural tourism denigrated and objectified people whose lifestyles it valorized while providing them with few benefits from this increased attention. Rather than promoting their development or improving local economic opportunities, people in the region felt that they were being deliberately kept in an under-developed state — similar, as they saw it, to an impoverished Indian reservation. Seasonal employment based upon marketing folklore was experienced as lacking in dignity and relegation to second-class citizenship; the promotion of “authentic imagery” was denounced as “a tool of state oppression.”<sup>63</sup> Basic civil, political, and cultural rights appear to have been ignored here.

As the prime bearers of cultural distinction in the global imagination, indigenous peoples are key targets for and increasingly key players in this new industry. As one critic astutely notes, “Is there not an irony in the fact that at the very moment of inclusion of indigenous peoples in the global arena they are reaffirmed in their otherness?”<sup>64</sup> Social critics fear that the features of an authentic indigenous identity may hereafter be dictated by foreign market perceptions with pernicious effects on people’s self-perceptions. The reification of difference may contribute to the reinscription of colonial stereotypes, so that those who bear cultural distinction must continue to occupy the “primitive slot” of “tradition” in counter-distinction to the “progressive” life of their “modern” visitors. Certainly many states have demanded evidence of unbroken, continuous “traditions” as a precondition of recognizing aboriginal rights. Can “bearing distinction” be an opportunity for cultural revitalization and economic betterment — an expression of pride rather than an unbearable

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<sup>62</sup> See Julie A. Lacey & William A. Douglass, *Beyond Authenticity: The Meanings and Uses of Cultural Tourism*, 2 TOURIST STUD. 5, 11 (2002).

<sup>63</sup> *Id.* at 12.

<sup>64</sup> Lisa Wilder, *Local Futures? From Denunciation to Revalorization of the Indigenous Other*, in GLOBAL LAW WITHOUT A STATE 215, 217 (Gunther Teubner ed., 1997).

burden of expectations?

Empirical studies of ecotourism (and cultural tourism to which it is closely related) suggest that the process is a more complicated one in which both traditional cultural meanings and conceptions of modernity may shift. The meanings of tradition and modernity are themselves negotiated in tourist encounters that become sites of semiotic struggle or contestation. As Kathleen Buddle puts it, stereotypical expectations of primitivism are overcome in mutually constituted mediascapes where “modern Indigenoussness . . . dialogically interact[s] with official and global versions of Aboriginality and modernity.”<sup>65</sup> Traditions may be revitalized when local peoples are enabled to focus on the distinctive ways in which they offer hospitality as a means of livelihood that also empowers them politically.<sup>66</sup> For some aboriginal peoples, cultural tourism provides a means to draw attention to colonial history and the continuing legacies of marginalization that produce tourist expectations; in so doing these may be transformed.<sup>67</sup>

More recent articulations of ecotourism conceive of the practice in terms of an alternative *development* model, in which the knowledge, practices, customs, lifestyles, values, and opinions of local, often formerly marginalized, peoples are given precedence. Indeed, in Canada, aboriginal peoples have developed a model for tourism that claims as its vision “to represent Aboriginal people as world leaders in tourism in harmony with our cultures.”<sup>68</sup> Its key principles are commitment to the protection and preservation of aboriginal traditions and ways of life, the protection and preservation of the environment, the stewardship of renewable resources, the authenticity of aboriginal products, art, and experiences, the communication of cultural pride, and honoring spirituality and self-reliance.<sup>69</sup> These

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<sup>65</sup> Kathleen Buddle, *Media, Markets and Powwows: Matrices of Aboriginal Cultural Mediation in Canada*, 16 *CULTURAL DYNAMICS* 29, 34 (2004).

<sup>66</sup> See, e.g., Patricia Pierce Erikson, *Welcome to This House: A Century of Makah People Honoring Identity and Negotiating Cultural Tourism*, 50 *ETHNOHISTORY* 523, 526 (2003) (examining instances of mediation and appropriation of aspects of dominant culture — tourism for instance — as means of empowerment by hitherto marginalized groups).

<sup>67</sup> See Siegrid Deutschlander & Leslie J. Miller, *Politicizing Aboriginal Cultural Tourism: The Discourse of Primitivism in the Tourist Encounter*, 40 *CAN. REV. SOC. & ANTHROPOLOGY* 27, 38-39 (2003).

<sup>68</sup> ABORIGINAL TOURISM CANADA, *STRATEGIC PLAN 2003: GROWING CANADA'S ABORIGINAL TOURISM* 4 (2003), available at <http://www.aboriginaltourism.ca/documents/Strategic%20Plan%202003.doc>.

<sup>69</sup> See *id.*

new business models anticipate a huge expansion of aboriginal branding and the use of collective and certification marks to facilitate the growth of this symbolic capital.<sup>70</sup>

The United Nations characterizes ecotourism as ideally protecting natural areas by generating economic benefits for host communities managing natural areas with conservation purposes, thereby providing alternative employment and income opportunities and economic benefit for local communities.<sup>71</sup> According to anthropologist Barbara Johnston, indigenous peoples in Costa Rica and Panama have acquired greater political recognition and influence through their involvement in various ecotourism projects.<sup>72</sup> The “emerging participation of indigenous peoples in studying, discussing, and devising strategies to control or capture control over the development decision-making process”<sup>73</sup> represents an attempt by indigenous groups to restructure imbalanced power divisions, regain control over traditional territories, and achieve new forms of political autonomy. Through ecotourism, local cultural differences are gradually being transformed into symbolic capital and leading to the re-empowerment of otherwise marginalized communities. Ecotourism can only be successful if host communities have land tenure, political control over the process, and their traditional legal rights are recognized. New IPRs are being developed to assist these latter objectives.

#### IV. IPRS AND NEW CULTURAL RIGHTS

The World Intellectual Property Organization (“WIPO”) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (“IGC”) has become an important forum for the negotiation of principles to protect traditional knowledge (“TK”) and to recognize, protect, and promote the creativity and innovation of peoples who have traditionally been excluded from or otherwise failed to benefit from the conventional systems of IPRs.<sup>74</sup> The lively participation of indigenous peoples and

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<sup>70</sup> See ABORIGINAL TOURISM CANADA, TRAVELING WITH WISDOM: ABORIGINAL TOURISM INDUSTRY IN CANADA 4 (2004), available at <http://www.aboriginaltourism.ca/documents/Blueprint%20Final%20Draft.pdf>.

<sup>71</sup> United Nations Environment Programme, *About Ecotourism*, <http://www.unep.org/pc/tourism/ecotourism/home.htm> (last visited Jan. 26, 2007).

<sup>72</sup> Barbara R. Johnston, *Introduction: Breaking Out of the Tourist Trap*, 14 CULTURAL SURVIVAL Q. 1, 5 (1990), available at <http://www.cs.org/publications/csq/csq-article.cfm?id=836>.

<sup>73</sup> *Id.*

<sup>74</sup> For an account of the IGC, see Silke Von Lewinski, *The Protection of Folklore*,

non-governmental organizations (“NGOs”) representing the interests of rural peoples, women, the disabled, traditional healers, farmers, consumers, and traditional artisans, as well as food security, environmental, and human rights interests have worked to bring a diverse set of new interests and agendas into international IPR negotiations. We will briefly mention two areas of IGC research, inquiry, and negotiation.

The protection of TK is a complicated and controversial area of law and policy; new sui generis IPRs are being legislatively created and conventional forms of IPRs are being modified to achieve this objective.<sup>75</sup> Many proponents of sui generis regimes of protection now acknowledge that means for recognizing, preserving, and compensating for the use of TK must be developed to empower local communities, promote cultural revitalization, and further objectives of political autonomy, sustainable development, and territorial rights as fundamental to indigenous survival — although the states in which indigenous peoples are resident may resist many of these claims. Significantly, indigenous representatives at international meetings insist that customary law provides a viable basis for new rights regimes to protect and recognize their TK for most purposes. WIPO nominally supports the need to acknowledge and strengthen customary law as a source for the management and protection of TK. Customary or traditional methods of managing intangible cultural expressions may eventually be accorded recognition and respect in international and domestic law.<sup>76</sup> Given the level of hostility expressed toward conventional IPRs by indigenous peoples, it would be politically inexpedient to call these emerging forms of IP. Nonetheless, it is an

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11 CARDOZO J. INT'L & COMP L. 747, 756-57 (2003). See generally Wend B. Wendland, *Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program*, 33 INT'L REV. INDUS. PROP. & COPYRIGHT L. 485 (2002) (outlining WIPO's efforts in encouraging development of new approaches to protection of indigenous peoples' IPRs — including TK).

<sup>75</sup> The field of scholarship in this area is immense. See, e.g., GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY, BIOGENETIC RESOURCES AND TRADITIONAL KNOWLEDGE* (2004) (providing useful overview). Although it is oriented primarily towards agricultural knowledge, a good case for the propriety of using IPRs to protect TK is made in Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 565, 565-82 (Keith Maskus & Jerome Reichman eds., 2005) [hereinafter *INTERNATIONAL PUBLIC GOODS*].

<sup>76</sup> For a good case of this, see Anthony Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge*, in *INTERNATIONAL PUBLIC GOODS*, *supra* note 75, at 521-64.

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indication that new forms of legal pluralism with respect to the management of cultural resources may be emerging under conditions of informational capitalism.

Recognition of traditional cultural expressions (“TCEs”) — formerly known as “folklore” — has also received renewed attention by the IGC, for whom the initiative is an important dimension of recognizing the value that cultural distinction has achieved within the international policy framework. Amendments to existing IPRs or new IPRs will be necessary because (1) preservation and safeguarding of intangible cultural heritage, (2) promotion of cultural diversity, (3) respect for cultural rights, and (4) promotion of creativity and innovation — including that which is tradition-based — are understood to be ingredients of sustainable economic development.<sup>77</sup> Informational capitalism has made many traditional cultural forms available for new forms of cultural and commercial appropriation.<sup>78</sup> These may deprive people of economic opportunities or constitute unauthorized misappropriations that create misrepresentations as to origin, suggest sponsorship, harm reputations, are derogatory, or create offense. Draft provisions for the protection of TCEs are designed to “recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value.”<sup>79</sup> These provisions provide peoples with “practical means . . . to prevent . . . misappropriation,” “respect the continuing customary use, development, exchange and transmission of [TCEs],” and promote their use for community-based development, while creating an environment of greater “certainty, transparency, mutual respect and understanding” between communities.<sup>80</sup> The proposed provisions draw upon legal principles such as copyright, moral rights, performance rights, unfair competition, trademark, certification and collective marks, fiduciary obligation, consumer labeling, and public

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<sup>77</sup> See Intergovernmental Comm. on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, *Document Prepared by the Secretariat: Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, para. 8, WIPO/GRTKF/IC/5/3 (May 2, 2003).

<sup>78</sup> For an interesting review of the relationship between technology, law, and cultural appropriation, see generally David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 *SOC. & LEGAL STUD.* 53 (2006) (examining digital sampling by musicians and its relationship with “systemic forms of cultural inequality”).

<sup>79</sup> Intergovernmental Comm. on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, *Document Prepared by the Secretariat: The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, Annex, at 3, WIPO/GRTKF/IC/8/4 (Apr. 8, 2005).

<sup>80</sup> *Id.* at 3-4.

domain management; they are balanced by exemptions familiar in IPRs. The guiding principle, however, is a valuation of cultural distinction:

Protection should respond to the traditional character of TCEs . . . , namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community.<sup>81</sup>

Some dimensions of these new proposals to provide protection for TCEs provide exclusive rights that may be capitalized upon in markets, should communities seek to use their TCEs as the basis of economic development strategies. They also provide means to intervene in markets to demand remuneration and recognition of source or to insist that local customary protocols be followed. Significantly, some of these provisions enable communities to prevent expressions, indicia, or motifs that are characteristic of their cultural identity from being used in commerce altogether. This is a clear indication of the international organization's awareness that IPRs need to be shaped to respect the principles of cultural rights enshrined in the international human rights framework.

Finally, the emergence of rural social movements that express desires for greater local autonomy from global capital, respect from the state, and the human right to sustainable livelihoods on the basis of the value of their cultural distinction as peoples is perhaps the most radical reaction to informational capital and the one that is least likely to be addressed within an IPR framework (although rights that protect traditional cultural expression may have some appeal here). There is growing evidence, particularly in the Americas, of the legal evocation of culture by indigenous peoples and peasantries seeking to control the nature and pace of their integration into global markets. This may be accompanied by attempts to create place-based forms of alternative development that are, in significant ways, "de-linked" from globalized capital and the hegemony of neoliberalism:

The best known of these movements involves the Zapatistas in Chiapas, but similar struggles can be discerned in Columbia, Ecuador, Bolivia, and Peru. . . . [P]eoples who have been historically marginalized by the state and have retained subsistence livelihoods are making demands for collectively-

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<sup>81</sup> *Id.* at 8.

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held land, control over resources[,] and local political autonomy in cultural terms. . . .<sup>82</sup>

These movements stress the vital role of traditional institutions that “enable[s] them to assume their proper place in newly democratic states.”<sup>83</sup> These assertions fit uneasily within the international human rights framework, and for this reason are currently understood as cultural rights claims.<sup>84</sup>

#### CONCLUSION

The terrain we have traveled is perhaps fresh and unfamiliar territory to many scholars of IP. It is, however, necessary to begin to make the effort to map it, for it seems inevitable that IPRs will become increasingly imbricated in new plans for social reform and, thus, in new fields of governance. We have shown that there are economic and political forces at work that put pressure on governments, regions, and local communities to find means of creating informational capital; at the same time, international policymaking negotiations have incorporated the preservation and maintenance of cultural distinction into the agendas of governments, NGOs, and indigenous peoples.<sup>85</sup> IPRs lend themselves to these efforts. They can be used to protect both traditional and new forms of symbolic value produced in particular places as they circulate in global commodity markets, and they are being adapted to protect traditional indicia of cultural distinction from unauthorized appropriation and distortion in those same markets.<sup>86</sup> This should not surprise us. As a cultural right, the “right to benefit from the protection of the moral and material

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<sup>82</sup> Coombe, *supra* note 26, at 49.

<sup>83</sup> *Id.*

<sup>84</sup> See Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 *FLA. J. INT'L L.* 115, 115 (2005) (outlining empirical evidence for emergence of legal demands for protection of traditional environmental knowledge and role of social movements in stimulating these claims).

<sup>85</sup> The negotiations that produced the Draft Declaration on the Rights of Indigenous Peoples, the Daes Report, and the formation of the Permanent Forum of Indigenous Peoples appear to have been key processes in putting issues of IP and cultural distinction into international policy discussions and influencing WIPO's new understanding of the scope of its mandate in the 1990s. There does not appear to be any scholarship on this topic.

<sup>86</sup> See Wendland, *supra* note 17, at 101, 131.

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interests resulting from any scientific, literary or artistic production” is combined with rights to education and information, to cultural identity, to participate in cultural life, and rights to international cultural cooperation.<sup>87</sup> The new exercises of IPRs and the proposals for their expansion in the scope that we have explored here are all expressions of these cultural rights.

The use of IPRs in ethical marketing schemes, rural development projects, ecotourism enterprises, and cultural rights campaigns, however, appears to pose as many problems as those to which it provides solutions. As we have suggested, these are primarily questions of governance. If IPRs become the basis for new forms of commodity production, “sustainable development,” or political autonomy, because of the growing necessity to sequester symbolic value and to view culture as a resource, then it is imperative that we begin to subject IP management to new forms of scrutiny and its managers to enhanced standards of responsibility. Only if, and when, these new expressions and exercises of cultural rights are tempered with respect for civil and political rights will we have a basis for evaluating them as strategies to achieve greater social justice.

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<sup>87</sup> See Janusz Symonides, *The Implementation of Cultural Rights by the International Community*, 60 INT'L COMM. GAZ. 7, 11 (1998).