

THE CARIBBEAN INTELLECTUAL PROPERTY  
OFFICE (CARIPO):  
NEW, USEFUL, AND NECESSARY

*Darryl C. Wilson\**

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INTRODUCTION

As the Caribbean market attempts to maximize its regional economies of scale, officials in the region should take note of similar historical global events as well as ongoing international efforts which indicate that successfully achieving its objectives is predicated in significant part on the establishment of strong intellectual property rights (IPRs). Strong intellectual property (IP) regulation is something foreign to the Caribbean, as many nation states are without developed domestic IP offices and therefore IP enforcement throughout the Caribbean is relatively weak. In

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\* Professor of Law, Stetson University College of Law, B.B.A./B.F.A. 1982, Southern Methodist University, J.D. 1984, University of Florida, LL.M. (IP) 1989, John Marshall Law School (Chicago). The author wishes to thank his excellent research assistants, Ms. Terrica Jennings and Ms. Lisa Only, the dedicated faculty support staff, his beautiful understanding family, and of course, The One.

order to avoid hindering efforts at reaching noteworthy trade goals, an intellectual property office should be established that facilitates one-stop registration opportunities for the whole region. Although there are some practical hurdles in light of the language variations and relative economic postures of the varied states that constitute the Caribbean, there is enough similarity and interaction amongst a broad number of the states that an intellectual property office can be established for the vast majority of nations. Such an office will bear favorably upon the states that may need extra time to gear up their infrastructures to a level that will allow their association with the office.

The Caribbean has an established entity for purposes of facilitating a community single market economy (CSME) known as CARICOM.<sup>1</sup> CARICOM has existed since 1973 and includes the majority of nations that comprise the Caribbean at least from a political perspective as opposed to a merely geographic standpoint.<sup>2</sup> In fact, the twenty countries identified as currently having membership in CARICOM is beyond what many designate as truly representative of the political backdrop of the region. Some identify the Caribbean for political purposes as consisting of fourteen countries and twelve provinces or territories.<sup>3</sup> Thus, CARICOM encompasses all the independent nations as well as some states that are still principally run by the countries that originally exercised imperial control over them.<sup>4</sup> The

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1. CARICOM is an outgrowth of the former Caribbean Free Trade Association or CARIFTA. CARIFTA was established in 1965 by the execution of the Dickenson Bay Agreement. The initial signatories were Antigua and Barbuda, Guyana and Trinidad and Tobago. In 1968 the countries of Dominica, Grenada, St. Kitts-Nevis-Anguilla, Saint Lucia and St. Vincent and the Grenadines, Montserrat and Jamaica joined. Belize signed in 1971 and in 1972 the Commonwealth Caribbean leaders established the Caribbean common market. See Richard Bernal, *Regional Trade Arrangements in the Western Hemisphere*, 8 AM. U. J. INT'L L. & POL'Y 683, 688 (1993). See also *The Caribbean Free Trade Association*, THE CARIBBEAN COMMUNITY (CARICOM), <http://www.caricom.org/jsp/community/carifta.jsp?menu=community> (last visited Mar. 1, 2011).

2. The CARICOM full member countries are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. Associate member countries include Anguilla, Bermuda, British Virgin Islands, the Turks and Caicos. The Bahamas is not a member of the Common Market. Barbados, Guyana, Jamaica, Suriname, Trinidad and Tobago were listed as More Developed Countries while other members were designated as Less Developed Countries. *CARICOM Member States*, THE CARIBBEAN COMMUNITY (CARICOM), [http://www.caricom.org/jsp/community/member\\_states.jsp?menu=community](http://www.caricom.org/jsp/community/member_states.jsp?menu=community) (last visited Mar. 16, 2011).

3. See Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C.J. INT'L L. & COM. REG. 145, 154-156 (2005). See also *Countries in the Caribbean*, ANEKI.COM, <http://www.aneki.com/caribbean.html> (last visited Feb. 28, 2011) (separating the independent countries from the many still under some degree of colonial control by the United States, the United Kingdom, the Netherlands and France).

4. *Id.* The non-independent inhabited areas are generally known as possessions of the sovereignty. In the United States they are commonly referred to as an insular area which encompasses the even more commonly labeled territories. An insular area is a jurisdiction

provinces and territories currently benefit from the intellectual property laws of their initial conquerors, but many have their own functioning legislative bodies and would certainly want to have a stake in a regional intellectual property office since many of those territories hope to gain independence someday.<sup>5</sup>

This Article focuses on how CARICOM's prospects for successfully achieving its goals can be helped through the establishment of an initial intellectual property office that handles the processing and regulation of IP for all the CARICOM countries.<sup>6</sup> While it might be identified as the CARICOM Intellectual Property Office, it probably makes sense to make a pre-emptive strike and establish a Caribbean Intellectual Property Office since the whole of the region is relatively small, and doing so will make it easier to later work in the other countries that face logistical issues at the outset.

Although most Caribbean countries have established ongoing relationships with international intellectual property bodies, no agreements have been reached for establishing a regional intellectual property office that can facilitate protections for interested applicants on a transnational

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that is neither a part of one of the recognized American States nor a Federal district. A U.S. territory is an unincorporated U.S. insular area. The three in the Caribbean are Puerto Rico, the U.S. Virgin Islands and Navassa Island. See *Definitions of Insular Area Political Organizations*, U.S. DEP'T OF THE INTERIOR, OFFICE OF INSULAR AFF., [http://www.doi.gov/oia/Islandpages/political\\_types.htm](http://www.doi.gov/oia/Islandpages/political_types.htm) (last visited Mar. 2, 2011).

5. Independence movements have long been part of the political landscape of Puerto Rico and some of the possessions of the other sovereign nations as well. See generally Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123 (2009); Johnny Smith, Note, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263 (2007); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S. Flag Islands*, 14 U. HAW. L. REV. 445 (1992).

6. While the official treaty establishing CARICOM was signed in 1973 several revisions have occurred since that time. Between 1993 and 2000, the Inter-Governmental Task Force (IGTF) which was composed of representatives of all Member States, produced nine Protocols, for the purpose of amending the Treaty. These nine Protocols were later combined to create a new version of the Treaty, called formally, The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy. The objectives of the Community, identified in Article 6 of the Revised Treaty, are: to improve standards of living and work; the full employment of labor and other factors of production; accelerated, coordinated and sustained economic development and convergence; expansion of trade and economic relations with third States; enhanced levels of international competitiveness; organization for increased production and productivity; achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description and the enhanced co-ordination of Member States' foreign and foreign economic policies and enhanced functional co-operation. See generally *Objectives of the Community*, THE CARIBBEAN COMMUNITY (CARICOM), <http://www.caricom.org/jsp/community/objectives.jsp?menu=community> (last visited Mar. 2, 2011).

basis.<sup>7</sup> This Article will look at the history and development of some of the globally noteworthy trade movements and IP responses to glean what Caribbean officials can learn that can help facilitate the establishment of a Caribbean IP office and in turn support the region's economic goals. The importance of intellectual property regulation has steadily increased in international recognition and it is now universally recognized that trade goals cannot be achieved without a firm grasp of these rights.

The World Trade Organization (WTO) is the principal international entity involved in regulating trade between its 153 members, which includes most nations in the world.<sup>8</sup> The WTO was established in 1995 as nations attempted to amend the 1947 General Agreement on Tariffs and Trade (GATT).<sup>9</sup> Unlike previous efforts at reaching consensus, the negotiating states recognized that their goals could not be successfully reached without addressing intellectual property issues. This realization was the impetus for TRIPS, which was drafted with the assistance of the World Intellectual Property Organization (WIPO).<sup>10</sup> TRIPS, which stands for the Agreement on Trade-Related Aspects of Intellectual Property Rights, set the minimum global standard for protection of IP amongst trading nations and plays an integral role in assuring that the differences in domestic attention to IP protection can be systematically addressed on a global stage with some measure of consistency.<sup>11</sup>

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7. Most of the nations identified above as constituting the Caribbean have relationships with the World Intellectual Property Organization (WIPO). The WIPO has many divisions including the Bureau for Latin America and the Caribbean. *Bureau for Latin America and the Caribbean*, WIPO, <http://www.wipo.int/lac/en/> (last visited Mar. 1, 2011). The WIPO is a specialized agency of the United Nations that is dedicated to developing a balanced and accessible international intellectual property system through cooperation amongst states and collaboration amongst international organizations. The WIPO was established in 1967 but is actually the modern extension of BIRPI. The United International Bureau for the Protection of Intellectual Property was best known by its French acronym BIRPI and was established in 1893 as the first international organization for intellectual property. See, William T. Flyer, *Global IP Development: A Recommendation to Increase WIPO and WTO Cooperation*, 9 U. BALT. INTELL. PROP. L.J. 171, 174-75, (2001).

8. *What is the World Trade Organization?*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Feb. 22, 2011).

9. *Id.* See also David Shaw, *The Specter of Water Piracy: The World Trade Organization Threatening Water Security in Developing Nations*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 129, 145 (2008) (reviewing the history of the WTO and GATT).

10. The WIPO is a specialized agency of the United Nations that was established in 1967. Its objective is to develop a "balanced and accessible international intellectual property (IP) system" through cooperation with states and other international organizations. See *What is WIPO?*, WIPO, [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html) (last visited Mar. 1, 2011).

11. TRIPS, which introduced IP consideration into the multi-lateral trading system for the first time evolved from various rounds of international negotiation during 1986-1994. See *Understanding the WTO: The Agreements, Intellectual Property: Protection and Enforcement*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last

This Article initially tracks the recognition of the importance of intellectual property protection on a global basis as the modern foundation for maximizing international trade. It then looks at the particulars of individual and collective movement amongst nation states in geographical regions in response to the newly stressed international significance of maintaining minimum intellectual property standards. These responses are discussed on a comparative basis with the most prominently known intellectual property office of arguably “regional” significance, which is the United States Patent and Trademark Office (USPTO), a notoriety shared in part with the Copyright Office housed in the United States Library of Congress (LOC). While one does not usually think of these as regional establishments due to the federalism that ties the various states in America together, the fact is that the individual states of the American union are quite comparable to the countries and nation states that comprise the rest of the world.<sup>12</sup> Many U.S. cities are more heavily populated than most countries in the Caribbean.<sup>13</sup> While the U.S. was formed to “make a more perfect union,” it took some time for the states to give up their control of intellectual property rights within their respective borders.<sup>14</sup> In fact, a

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visited Mar. 1, 2011). See also Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKLEY TECH. L.J. 867 (2008).

12. Federalism here is used in a general sense as indicative of the overall U.S. government structure. One basic definition of federalism states that it is “a system of government which has created, by written agreement, a central and national government to which it has distributed specified legislative (law-making) powers, and called the federal government and regional governments (or sometimes called provinces or states) governments to which is distributed other, specified legislative powers.” *Federalism Definition*, DUHAIME.ORG, <http://www.duhaime.org/legaldictionary/f/federalism.aspx> (last visited Mar. 1, 2011).

13. For example, the ten largest cities in the U.S. all have a population near or in excess of 1 million with the largest having a population of nearly 9 million people. *Top 50 Cities in the U.S. by Population and Rank*, INFOPLEASE, <http://www.infoplease.com/ipa/A0763098.html> (last visited Mar. 1, 2011). The most heavily populated “nations” in the Caribbean—Cuba, The Dominican Republic, and Haiti—each have 10-11 million citizens but there is a significant drop amongst the rest of the states in the region. Jamaica is the most heavily populated of the CARICOM countries with a population nearing 3 million and Trinidad & Tobago has a population of more than 1 million but no other nation has a half-million citizens and most have populations around 100,000 or less. The total population of the Caribbean is about 37 million, not counting the U.S. territories. *List of Caribbean Island Countries by Population*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_Caribbean\\_island\\_countries\\_by\\_population](http://en.wikipedia.org/wiki/List_of_Caribbean_island_countries_by_population) (last visited Feb. 28, 2011). The combined population of the three largest U.S. “states,” California, Texas and New York, is in excess of 60 million residents. *United States – States; and Puerto Rico*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&-box\\_head\\_nbr=GCT-T1-R&-ds\\_name=PEP\\_2007\\_EST&-redoLog=false&-mt\\_name=PEP\\_2005\\_EST\\_GCTT1R\\_US9S&-format=US-9S](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-box_head_nbr=GCT-T1-R&-ds_name=PEP_2007_EST&-redoLog=false&-mt_name=PEP_2005_EST_GCTT1R_US9S&-format=US-9S) (last visited Feb. 28, 2011).

14. The preamble to the U.S. Constitution states:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the

complete turnover of IP regulation in some areas to federal authorities is something of a recent phenomenon in the U.S., and even at that it is not complete.<sup>15</sup>

These regional organizations are then compared to the present state of affairs in the Caribbean. The glaring lack of consistent attention to intellectual property rights will be reviewed in light of piecemeal attempts by various states to address this apparent void in the region's attempt at setting a comprehensive market strategy. Recognizing the desires of that region to form a successful single market economy, the conclusion naturally follows that establishing a regional intellectual property office will greatly benefit the region as a whole while helping bring much needed revenue to individual nations.<sup>16</sup>

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blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

*See* U.S. CONST. pmbl. Having a tie between the nations in a federalist sense as noted above has been considered as a way of overcoming some of the legislative and judicial hurdles faced by many regional trade organizations but these efforts have been largely unsuccessful due to the strong sovereign desires of the various nation states. *See generally* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89, 92-93 (2008) (discussing the failed efforts at adopting a constitution for the EU). Numerous efforts have been made by various nations in the Caribbean to unite via constitution or federation as well. *See* Alan L. Karras, *Colonists and Settlers, British in the Caribbean*, in 1 BRITAIN AND THE AMERICAS: CULTURE, POLITICS, AND HISTORY 242, 245-46 (Will Kaufman & Heidi Slettedahl Macpherson eds., 2006).

15. Copyrights and patents were expressly recognized in the U.S. Constitution as drafted and adopted in 1787. U.S. CONST. art. I, § 8, cl. 8. However, patent law did not become exclusively federal until 1964, when the U.S. Supreme Court evoked the Supremacy Clause in the name of maintaining a proper balance between promoting innovation and granting exclusive monopolies to creators of qualifying subject matter. *See* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). In 1978, the pre-emption provision of the Copyright Act of 1976 became effective thereby invalidating any efforts at common law or state rights comparable to those set forth in the act. 17 U.S.C. § 301(a) (2006). Prior to that time, states routinely provided protection for copyrightable subject matter. The U.S. Supreme Court endorsed state regulation, and as such, supported the only legislative protection recording artists had from piracy until the 1976 Act became effective. *See* *Goldstein v. California*, 412 U.S. 546 (1973). Unfair competition law which generally encompasses trademark, trade dress and trade secrets is still subject to interpretation on a common law level as well as on a state and federal level. Federal trademark law, commonly known as The Lanham Act, 15 U.S.C. §§ 1051-1141 (2009), contains no such language of supremacy.

16. *See generally*, Andrea Ewart, *Caribbean Single Market & Economy: What is it and Can it Deliver?*, 11 ILSA J. INT'L & COMP. L. 39 (2004).

## I. INTERNATIONAL INTELLECTUAL PROPERTY AND TRADE

## A. TRIPS

Global trade policy issues became more pronounced after the Second World War (WWII) as countries around the world sought to rebuild physically, socially, and economically from the destructive effects of that international conflict. Where protectionism had once ruled the day as characterized by high tariffs, systemic preferences, and other types of non-tariff barriers erected by imperialistic governments of well-developed countries, a new cooperative structure was sought to reverse the discrimination inherent in those bureaucratic regimes. At the behest of the U.S. and the Allied forces, a body of the United Nations held an international conference in 1946 to determine how best to liberalize, regulate, and monitor trade and post-war development.<sup>17</sup> The intent of the conference was to establish the International Trade Organization, but this never came to fruition, and instead, the 1947 General Agreement on Tariffs and Trade (GATT) was signed by various countries.<sup>18</sup>

GATT progressed through several successful rounds of negotiation over the decades, leading up to the Uruguay Round that took place from 1986-1994 and resulted in the creation of the WTO.<sup>19</sup> Although the initial rounds dealt with a variety of topics, it became clear that for the WTO to be successful, IPRs needed to be addressed. While looking to increase investment in less developed countries so that they could become adept trading partners and benefit from the globalization of the business economy, developed countries wanted to first be assured that their intellectual property rights were going to be protected.<sup>20</sup>

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17. *From the GATT to the WTO*, GEO. UNIV. L. LIBR., [http://www.ll.georgetown.edu/intl/guides/gattwto/gatt\\_1.html](http://www.ll.georgetown.edu/intl/guides/gattwto/gatt_1.html) (last visited Feb. 20, 2011).

18. Twenty-three countries signed the original agreement. *General Agreements on Tariffs and Trades*, IOWA ST. UNIV., <http://econ2.econ.iastate.edu/classes/econ355/choi/gatt.htm> (last visited Feb. 28, 2011). See also Daisuke Beppu, Note, *When Cultural Value Justifies Protectionism: Interpreting the Language of the GATT to Find a Limited Cultural Exception to the National Treatment Principle*, 29 CARDOZO L. REV. 1765 (2008).

19. See *What is the World Trade Organization*, *supra* note 8. See also *The WTO in Brief: Part 1, The Multilateral Trading System-Past, Present and Future*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr01\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm) (last visited Mar. 1, 2011). See also Richard N. Gardner, *The Bretton Woods-GATT System After Sixty Five Years: A Balance Sheet of Success and Failure*, 47 COLUM. J. TRANSNAT'L L. 31 (2008). See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979 (2009).

20. Yu, *supra* note 19. See also *History: Derestricted Uruguay Round Negotiating Documents on TRIPS* material on the WTO website, providing information on the consultations and compromises that took place regarding intellectual property issues that led to the drafting of the TRIPS treaty. *TRIPS Material on the WTO Website*, WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e.htm) (last visited Mar. 1, 2011).

Developed countries were also concerned with the regulation of intellectual property rights, since either the strong enforcement or lack of enforcement of IPRs both presented themselves as anathema to the concept of the free movement of goods and services, which is a core principle of the WTO.<sup>21</sup> Strong enforcement of private intellectual property rights was perceived by some as a species of restrictive trade, albeit not a standard trade barrier. On the other hand, weak enforcement allowed for the possibility of the commercial misappropriation of the works of others at best and an opening of the proverbial floodgates of piracy at worst. Thus, TRIPS was drafted and implemented as part of the establishment of the WTO.<sup>22</sup>

By setting minimum intellectual property standards for all of its signatories, the TRIPS treaty spurred development in many countries that did not have effective intellectual property systems in place.<sup>23</sup> This development was not always voluntary or fast enough for the developed nations that wanted to take advantage of the new markets. Shortly after TRIPS was established, the most developed nations often took the lesser-developed states before the WTO's dispute resolution body to determine if they were progressing satisfactorily.<sup>24</sup> TRIPS generally gave nations more confidence that fair competition was routinely achievable in an international market economy, although there has been some substantial criticism.<sup>25</sup>

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21. Yu, *supra* note 19, at n.9. See also *Principles of the Trading System*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Mar. 1, 2011).

22. See Sean Pager, *TRIPS: A Link Too Far? A Proposal for Procedural Restraints On Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. (SPECIAL ISSUE) 215 (2006).

23. See Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 IDEA 167, 168-72 (2004) (discussing the designation scheme in TRIPS between developed, developing and least developed nations).

24. The WTO maintains a database of all the disputes that has been brought before it that is searchable in numerous ways including by subject matter. Almost all of the IP cases brought thus far have been initiated by the U.S. or EU against less developed nations. Recently, some of those less developed nations have shown a newfound knowledge and willingness to use the WTO dispute mechanism, leading to two cases brought by Brazil and one being brought by India. The WTO dispute resolution mechanism is for use by nations as a substitute for unilateral trade sanctions. Private IP dispute between citizens, legal or otherwise, of different nations must be brought in a different venue. For a list of cases involving intellectual property matters, see *Index of Disputes Issues*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm) (last visited Mar. 1, 2011).

25. See Peter K. Yu, *The First Ten Years of the TRIPS Agreement: TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 379-80 (2006) (stating that less developed countries have not received the trade benefits promised and that where received they still come out losers because their gains are in agriculture and industry as opposed to in technology and innovation that is essential for success in the new century); Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT'L L. 681, 684 (2006) (discussing whether TRIPS is an unfair contract in the eyes of developing

Despite the critics, there is a greater international belief that old protectionist views of trans-boundary trade have been shelved for good, and that intellectual property rights in light of the administration of TRIPS by the WTO in cooperation with the WIPO has been an overall benefit to the global economy.<sup>26</sup>

While undoubtedly most prominent, the WTO and WIPO are not the only entities involved with intellectual property rights on an international basis. Another noteworthy institution is the World Bank, since it can finance programs to facilitate technology transfer and training programs for those dealing in providing creative knowhow to developing countries.<sup>27</sup> The United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) all have vital roles related to the identification and protection of international intellectual property rights.<sup>28</sup> In addition to these multilateral organizations, recent years have

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countries who were forced to sign in order to gain the slight benefits they have seen as a result of their signing).

26. Jerome H. Reichman, *Nurturing A Transnational System of Innovation*, 16 J. TRANSNAT'L L. & POL'Y 143, 148 (2007) (noting that even the least developed countries are starting to challenge other major countries in terms of IP development). See also Christine Thelen, Comment, *Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPS Implementation*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 519, 543 (2005) (noting successes made by least developed countries as a result of coalition building amongst themselves).

27. The World Bank provides financial and technical assistance to developing countries. The assistance is in the form of low interest loans, interest free credits and grants for various types of endeavors across many substantive fields. They also conduct research to better understand the relationship between different economic policies and specific types of intellectual property protection. THE WORLD BANK, [www.worldbank.org](http://www.worldbank.org) (last visited Mar. 1, 2011).

28. UNCTAD promotes integration of developing countries into the world economy by assisting in ensuring that domestic policy and international action support sustainable development. Their activities include the establishment of an Intellectual Property Program Division on Investment and Enterprise. *About the Intellectual Property Programme Division on Investment and Enterprise*, UNCTAD, <http://www.unctad.org/Templates/Page.asp?intItemID=3424&lang=1> (last visited Mar. 1, 2011). The OECD's mission is to bring together governments committed to democracy and the market economy so that policy experiences can be compared, common problems identified, and good practice and approaches can worked out. The OECD has been particularly active in exploring the role of IPRs relative to high-tech industries. *Intellectual Property Rights*, OECD, [http://www.oecd.org/topic/0,3373,en\\_2649\\_34797\\_1\\_1\\_1\\_1\\_37437,00.html](http://www.oecd.org/topic/0,3373,en_2649_34797_1_1_1_1_37437,00.html) (last visited Mar. 1, 2011). The WHO provides leadership on global health matters, shaping the research agenda, setting norms and articulating policy options while giving technical support where needed. In May 2008 WHO adopted a Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property. *The Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property (GSPOA)*, WORLD HEALTH ORGANIZATION (WHO) [http://www.who.int/phi/implementation/phi\\_globstat\\_action/en/index.html](http://www.who.int/phi/implementation/phi_globstat_action/en/index.html) (last visited Mar. 1, 2011). The WHO provides leadership on global health matters, shaping the research agenda, setting norms and articulating policy options while giving technical support where needed. In May 2008, WHO adopted a Global Strategy and Plan of Action on Public

witnessed the steady growth of regional regulators of IPRs. Much of this growth can be linked to the increased establishment of regional trade agreements.

## B. Regional Trade Agreements

Despite the WTO's announced principles and goals of free and fair international trade, a mixture of logistical, economic, and political realities have allowed for exceptions to these basic principles to form the foundation of regional trade arrangements (RTAs).<sup>29</sup> These RTAs, which permit nations to enter into more favorable trading conditions between themselves than they have with other WTO members, are allowed pursuant to certain WTO rules.<sup>30</sup> These rules allow for customs unions and free-trade areas as a platform for the greater participation of developing countries in the global marketplace.<sup>31</sup>

RTAs have grown in such popularity that, as recently as 2005, only one WTO member, Mongolia, was not part of an agreement in force at the time.<sup>32</sup> With so many regional agreements allowed, it certainly creates an odd paradox relative to the goals of the WTO. One may wonder whether RTAs have become an instance of exceptions swallowing the rules. There is no standard format for an RTA as they generally are tailored to the needs and desires of the signing parties. In 2007, the WTO held a conference entitled "Multilateralizing Regionalism" where attendees brainstormed on ways to deal with the tangle of trade agreements currently crossing the global landscape.<sup>33</sup>

While there are presently nearly 300 RTAs in effect, some are much better known than others.<sup>34</sup> Those that are more widely known include the

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Health, Innovation and Intellectual Property. *Id.* See also Christopher M. Bruner, *Cultural, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products*, 40 N.Y.U. J. INT'L L. & POL. 351, 357 (2008) (discussing the 2005 adoption of the "Convention on the Protection and Promotion of the Diversity of Cultural Expressions.").

29. The WTO maintains an extensive database on RTAs including information regarding their evolution and proliferation and has a working committee on RTAs. See *Regional Trade Agreements*, WTO, [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (last visited Mar. 1, 2011) [hereinafter *Regional Trade Agreements*]. See also C. O'Neal Taylor, *The U.S. Approach to Regionalism: Recent Past and Future*, 15 ILSA J. INT'L & COMP. L. 411 (2009).

30. *Regional Trade Agreements*, *supra* note 29. The WTO rules that specifically permit RTAs include paragraphs 4-10 of Article XXIV and Article V of GATT (1994). *Id.*

31. *Id.*

32. See *Regional Trade Agreements*, *supra* note 29.

33. The conference proceedings can be ordered from the WTO at [http://www.wto.org/english/res\\_e/publications\\_e/multila\\_region\\_e.htm](http://www.wto.org/english/res_e/publications_e/multila_region_e.htm).

34. The WTO indicated that there were 271 RTAs in force as of February 2010. *Regional Trade Agreements*, *supra* note 29. See also Anselm Kamperman Sanders, *Intellectual Property, Free Trade Agreements and Economic Development*, 23 GA. ST. U. L. REV. 893 (2007) (discussing bilateralism in the intellectual property context).

European Union (EU), the European Free Trade Association (EFTA), the Common Market of the South (MERCOSUR), the Andean Pact, the North American Free Trade Agreement (NAFTA), the Association of Southeast Asian Nations (ASEAN), The Common Market of Eastern and Southern Africa (COMESA), the Central American Free Trade Agreement (CAFTA), and CARICOM.<sup>35</sup>

As stated above, WTO rules allow for RTAs in different forms. Some of the entities above are better characterized as single market economies or enterprises (SMEs) as opposed to free trade areas (FTAs). Both of these entities have free movement of capital, goods, people, and labor as core goals, but a SME has common economic policies. A SME includes a customs union, wherein the parties agree on a common external tariff and reach their shared economic approaches through a shared political approach. The higher level of integration between SME members has been shown to make single markets more effective at attaining trade liberalization than free trade areas.<sup>36</sup> Free trade areas are more loosely arranged with the member countries agreeing to eliminate tariffs between themselves, but maintaining their own domestically set tariffs on other countries.<sup>37</sup> The version of trade arrangement chosen has an effect on the type of impact on the intellectual property laws amongst the members. SMEs generally lead to a more unified approach to altering existing law or the establishment of new cross border rules and regulations. RTAs establishing free trade areas tend to set minimum standards for all members which trigger minor changes, albeit sometimes significant ones, in existing intellectual property laws.

Although RTAs allow for preferential treatment amongst members relative to other WTO nations and despite the lack of a standard form for these agreements, they basically mimic the principles of the WTO in regards to their signees. Thus free trade amongst members is at the forefront of group efforts, and to assist in that endeavor, attention is also

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35. See *Regional Trade Agreement*, *supra* note 29; see also Rachel Denae Thrasher & Kevin P. Gallagher, *21<sup>st</sup> Century Trade Agreements: Implications For Development Sovereignty*, 38 DENV. J. INT'L L. & POL'Y 313, 314 (2010) (reviewing the extent to which U.S. and EU based trade agreements with developing countries leave policy space for long term trade progress).

36. Innwon Park & Soonchan Park, *Free Trade Agreements Versus Customs Unions: An Examination of East Asia*, 8 ASIAN ECON. PAPERS 119 (2009); see also Anne O. Krueger, *Free Trade Agreements Versus Customs Unions*, 54 J. DEV. ECON. 169 (1997), available at <http://www.sciencedirect.com> (input author name, journal title and volume number in corresponding search fields).

37. *Id.* A common market establishes free trade in goods and services, sets common external tariffs among members and also allows for the free mobility of capital and labor across countries. The European Union was established as a common market by the Treaty of Rome in 1957, although it took a long time for the transition to take place. Today, EU citizens have a common passport, can work in any EU member country and can invest throughout the union without restriction. See also Steven Suranovic, *International Trade Theory and Policy*, THE INT'L ECON. STUDY CTR., <http://internationalecon.com/Trade/Tch110/T110-2.php> (last updated Apr. 1, 1998).

paid to the establishment and enforcement of intellectual property rights, since those rights can be viewed as barriers or restrictions on goods and services.<sup>38</sup>

## II. FREE TRADE AGREEMENTS AND INTELLECTUAL PROPERTY

As indicated above, RTAs generally take one of two possible forms, that being either a single market economy or a free trade area. The form adopted generally has a different impact on the intellectual property laws of the members involved. A closer examination of some of the globe's best known RTAs of each type help illustrate the differing IP effects.

### A. NAFTA<sup>39</sup>

NAFTA, which went into effect on January 1, 1994, was established to remove trade barriers between the US, Canada, and Mexico.<sup>40</sup> These obstacles included limitations on the movement of goods, services, labor, and capital. NAFTA does not have legislative power, and is headed by a free trade commission consisting of government officials from each signee's country.<sup>41</sup> Though NAFTA came into effect prior to TRIPS, the intellectual

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38. For a discussion of copyright enforcement as a potential trade barrier, see *Joined Cases C-92/92 and C-362/92, Phil Collins v. Imtrat Handelsgesellschaft mbH*, 1993 E.C.R. I-05145, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992J0092:EN:HTML>. See also Roberto Garza Barbosa, *Revisiting International Copyright*, 8 BARRY L. REV. 43, 101 (2007) (discussing the court's refusal to allow discriminatory application of minimum copyright standards in favor of German nationals at the expense of UK citizens).

39. NAFTA is the world's largest free trade area linking 444 million people producing \$17 trillion worth of goods and services. NAFTA is administered by the Office of the U.S. Trade Representative (USTR), which develops and coordinates U.S. international trade policy and oversees negotiations with other countries. *NAFTA*, OFFICE OF THE U.S. TRADE REP., <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Mar. 1, 2011).

40. *Id.* A full text of the Treaty can be found in numerous locations including the website of the Organization of American States (OAS) Foreign Trade Information System which centralizes information on all trade policy affecting the Americas. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can-Mex., 32 I.L.M. 289 [hereinafter NAFTA], available at <http://www.sice.oas.org/trade/nafta/naftatce.asp>.

41. See *id.* See also Lee Hudson Teslik, *NAFTA'S Economic Impact*, COUNCIL ON FOREIGN REL., [http://www.cfr.org/publication/15790/naftas\\_economic\\_impact.html](http://www.cfr.org/publication/15790/naftas_economic_impact.html) (last updated July 7, 2009). The CFR takes no institutional positions on matters of international policy and is an independent membership organization dedicated to being a resource, think tank, and task force sponsor entity. See also Harry First, *Controlling the Intellectual Property Grab: Protect Innovation, Not Innovators*, 38 RUTGERS L.J. 365, 366 (2007) (discussing reports from the CFR by scholars critiquing developments in patent law).

property sections of the treaty were based on working drafts of TRIPS, and thus are very similar to TRIPS in structure and language.<sup>42</sup>

NAFTA provides for minimum standards of IP protection in each of the nations, but since the U.S. and Canada were already in the group of most developed countries, there was not much change in their respective IP regimes. However, U.S. patent law required amendment due to its unique view of preferring the date of invention over the date of filing in regard to patent priority matters.<sup>43</sup> Canada also had to eliminate certain compulsory licensing provisions for pharmaceuticals.<sup>44</sup> Both of these matters required adjusting because of the potential negative effect these provisions had on their signing partners' willingness to trade and invest in each others' nations. Though not expressly protectionist, they were certainly preferential and thus possibly discriminatory. Mexico's IP system was totally outdated at the time, but anticipation of the signing of NAFTA led to a complete revamping of its IP statutes.<sup>45</sup> Mexico and Canada both negotiated for protection of their cultural industries, which involved subject matter related to arts and entertainment. These protections were effectuated to prevent the U.S. from saturating their societies with U.S. cultural material.<sup>46</sup>

While NAFTA did not lead to the establishment of a new regional IP office, it was responsible for arguably needed changes in the already well-developed IP systems in the U.S. and Canada, and a complete modernization of the IP system in Mexico. No regional IP office was really ever expected in light of the already highly developed nature of the U.S. and Canadian IPR regimes in addition to Mexico's reworked system, which was largely modeled after those two.

NAFTA set the tone for similar arrangements amongst other nations with shared cultures within close geographical proximity. Other "AFTAs" and variations thereof followed, using the NAFTA (and therefore the TRIPS) template as a guide. For example, the 2004 Central American Free Trade

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42. The IP section of NAFTA can be found at: NAFTA, *supra* note 40, pt. 6, ch. 17, available at <http://www.sice.oas.org/Trade/NAFTA/chap-171.asp#P.VI>.

43. The U.S. Patent system differs from others around the world in giving filing priority to the first to invent patentable subject matter as opposed to awarding the first to file a patent application. This system has been routinely criticized and is slowly moving toward the international standard. See Dennis D. Crouch, *Is Novelty Obsolete? Chronicling the Irrelevance of the Invention Date in U.S. Patent Law*, 16 MICH. TELECOMM. TECH. L. REV. 53, 68 (2009) (providing an empirical review of 21,000 patent filings and relevant priority issues); but see Rebecca C.E. McFadyen, *The "First-to-File" Patent System: Why Adoption is Not An Option!*, 14 RICH. J.L. & TECH. 1, 33 (2007) (arguing that a change to first-to-file will stifle innovation in the US).

44. See Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 845, (2007) (discussing Canada's long use of compulsory licensing prior to NAFTA and TRIPS).

45. See generally James A.R. Nafziger, *NAFTA's Regime For Intellectual Property: In The Mainstream of Public International Law*, 19 HOUS. J. INT'L L. 807, 819-20 (1997).

46. See generally John A. Ragosta, John R. Magnus & Kimberly L. Shaw, *Having Your Cake and Eating It Too: Are There Limits on Cultural Protectionism?*, 30 THE CANADIAN NEWSL. 1 (1996).

Area (CAFTA),<sup>47</sup> the 2006 South Asian Free Trade Area (SAFTA),<sup>48</sup> the 2005 Greater Arab Free Trade Area (GAFTA),<sup>49</sup> and the 2001 version of the Economic Community of West African States (ECOWAS).<sup>50</sup>

CAFTA aroused IP controversy relative to patent term calculation, confidentiality of proprietary data and plant variety protection.<sup>51</sup> SAFTA's intellectual property provisions were specifically directed to end the problems of piracy that were rampant, and still remain problematic, amongst the less developed signatories to that RTA.<sup>52</sup> GAFTA sought to address piracy, as well as problems with the lack of equalized trademark and patent leverage between signatories.<sup>53</sup> Biotechnology licensing was a particularly prickly area with ECOWAS.<sup>54</sup> These issues and others have been addressed individually and from a domestic standpoint, sensitive to a member's developmental stage, while keeping the common general goals of

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47. CAFTA's signatories are Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States. The agreement is meant to open new commercial opportunities between the U.S. and its Latin and Caribbean neighbors in the Western Hemisphere. *What is CAFTA?*, THE CAFTA INTELLIGENCE CTR., [http://www.caftaintelligencecenter.com/subpages/What\\_is\\_CAFTA.asp](http://www.caftaintelligencecenter.com/subpages/What_is_CAFTA.asp) (last visited Feb. 28, 2011).

48. SAFTA's current members are India, Pakistan, Nepal, Sri Lanka, Bangladesh, Bhutan and the Maldives. See Anna Turinova, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan-Mexico Economic Partnership Agreement*, 25 UCLA PAC. BASIN L.J. 336, 345-46 (2008) (discussing East Asia's reluctance to enter into regional institutionalization due to low economic status and the unpopularity of legal measures in seeking to effectuate cooperation).

49. GAFTA members are also members of the Arab League and included at the time of signing Jordan, Bahrain, the United Arab Emirates, Tunisia, Saudi Arabia, Syria, Iraq, Oman, Qatar, Kuwait, Lebanon, Libya, Egypt, Morocco, Sudan, Yemen and Palestine. *Greater Arab Free Trade Association*, MINISTRY OF INDUS. AND TRADE, THE HASHIMITE KINGDOM OF JORDAN, <http://www.mit.gov.jo/Default.aspx?tabid=732> (last visited Mar. 1, 2011).

50. ECOWAS member states include Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. *ECOWAS Member States*, ECOWAS, <http://www.ecowas.int/> (last visited Mar. 1, 2011). See also Ryan McCormick, *The African Growth and Opportunity Act: The Perils of Pursuing African Development Through U.S. Trade Law*, 41 TEX. INT'L L.J. 339, 378 (2006) (noting that, despite the appearances of freer trade, widespread corruption along the Western borders potentially offset any benefits through increased transaction costs).

51. Pacheco Coto, *CAFTA and Intellectual Property Rights- as published in "AmCham's Business Costa Rica"*, (2005) available at [http://www.hg.org/articles/article\\_1338.html](http://www.hg.org/articles/article_1338.html).

52. *Id.* See also Turinova, *supra* note 48.

53. See Turinova, *supra* note 48. See also Paul G. Johnson, *Shoring U.S. National Security and Encouraging Economic Reform in the Middle East: Advocating Free Trade with Egypt*, 15 MINN. J. INT'L L. 457 (2006).

54. *But see* Ken Ukaoha, *The ECOWAS EPA: A 'Funeral Oration' to Regional Integration?*, 8 TRADE NEGOTIATION INSIGHTS, June 2009 (hinting that bilateral and multilateral trade agreements between ECOWAS members and the EU is a signal of impending doom for ECOWAS as a viable entity). See also *Monday Roundup*, AFRO-IP (Feb. 16, 2011), [http://afro-ip.blogspot.com/2009\\_03\\_01\\_archive.html](http://afro-ip.blogspot.com/2009_03_01_archive.html).

liberalization in mind. The SMEs have shown much more dramatic change in terms of intellectual property due to the shared political status that characterizes them.

## B. The European Union

The European Union, or EU as it is most commonly referred to, is probably the best known SME and undoubtedly one of the most transformative where IPRs are concerned. The EU originated in the 1950s, shortly after the conclusion of WWII, with the idea that economic and political cooperation could bring an end to a history of deadly neighborly conflicts.<sup>55</sup> In the same decade that the EU was established, the Treaty of Rome created the European Economic Community (EEC), also known as the European common market.<sup>56</sup> As the global economy grew stronger, so did the cooperation between the EU's members with joint trade decisions on tariffs, food production, and other policy issues leading to the signing of the Single European Act of 1987.<sup>57</sup> Further adjustments were made in light of the fall of communism, leading to the official recognition of "the four freedoms" (those being free movement of goods, services, people, and money) and a continuing enlargement of the membership.<sup>58</sup> These freedoms were ushered in by the establishment of EU offices that facilitated developments like the EU passport, an EU currency, and the EU Court of Justice.<sup>59</sup> The EU has continued to evolve with a blurred sense of federalism, but the nation states have not given up their sovereign rights.<sup>60</sup> Thus, despite the consistent progress made in many areas, a curious

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55. See *Europa: Gateway to the European Union*, EUROPEAN UNION, [http://europa.eu/index\\_en.htm](http://europa.eu/index_en.htm) (last visited Feb. 20, 2011).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. The EU has attempted to federalize in a sense by passing an EU constitution. The battle over the proposed constitution has raged for nearly a decade but a constitutional framework has been adopted albeit in the form of a treaty known as the Treaty of Lisbon. The Treaty has allowed many states to opt out of provisions that they felt impinged upon their sovereignty in some important way although none have opted out in regard to intellectual property issues. See Jacques Ziller, *The Constitutionilization of the European Union: Comparative Perspectives*, 55 LOY. L. REV. 413, 415, 419 (2009) (attributing the concept of the "United States of Europe" to Winston Churchill in the 1940s and further noting the refusal of certain member countries to adopt any express documents of EU unification featuring the words "constitution" or "federalism"); Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 364 (2009) (discussing the amendatory nature of the Treaty in regards to the Treaty establishing the EU as opposed to the Treaty seeking to replace prior treaties via an overarching constitution); Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union's State-Like Attributes*, 14 U.C. DAVIS J. INT'L L. & POL'Y 1, 2-3 (2007) (noting that the official Treaty Establishing a Constitution for Europe that was originally put forth by EU members in 2004 saw its demise at the gathering of the European Council in June, 2007).

situation remains regarding the status of the EU as a political entity of its own relative to the rich independent historical backgrounds of its members.

The EU, much like the U.S., has had a continuously growing impact on regional and international IPRs. Much of this is due to the structure of the EU, which is recognized as having four principal institutions. These institutions are the Council, the Commission, the Parliament, and the Court of Justice.<sup>61</sup> The Council is where all legislative measures originate and consists of ministerial representatives from each state.<sup>62</sup> The Council acts by adopting directives, which require member states' legislation to conform with the Council's but leaves it up to the members on how that is to be achieved.<sup>63</sup> The Council may also issue regulations which apply directly to all members without any implementing regulation required in each state.<sup>64</sup> The Council also may issue a decision directed at the particular parties to a dispute.<sup>65</sup> Legislation in both forms has been issued that directly involves intellectual property. This legislation has included Database Protection and Customs Rules.<sup>66</sup> The Commission is responsible for assuring that EU law is implemented, for proposing legislative initiatives to the Council, and issuing regulations in limited circumstances.<sup>67</sup>

The Parliament consists of popularly elected officials who approve the President and designated members of the Commission. It also has the ability to amend and comment on intended legislation.<sup>68</sup> The European Court of Justice (ECJ) is the court of last resort and its decisions are final and take immediate effect, unless the opinion is in response to a national courts question on a matter of legal interpretation.<sup>69</sup> The court is advised by advocates generals who give preliminary rulings on each case. There is also

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61. Ralph H. Folsom, *European Community Law After 1992: The European Community Law-Making Machine*, in CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 113, 114 (Covey T. Oliver et al. eds., 4th ed. 1995) (1993). See also FREDERICK ABBOTT, THOMAS COTTIER & FRANCIS GURRY, THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS, 399-421 (1991).

62. *Id.*

63. See *id.*

64. CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, *supra* note 61, at 112, 113. See also *How Does the EU Work?*, EUROPEAN UNION, [http://europa.eu/abc/12lessons/lesson\\_4/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_4/index_en.htm) (last visited Feb. 20, 2011).

65. CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, *supra* note 61, at 112, 113. See also *How Does the EU Work?*, EUROPEAN UNION, [http://europa.eu/abc/12lessons/lesson\\_4/index\\_en.htm](http://europa.eu/abc/12lessons/lesson_4/index_en.htm) (last visited Feb. 20, 2011).

66. See generally Miriam Bitton, *Exploring European Union Copyright Policy Through the Lens of the Database Directive*, 23 BERKELEY TECH. L.J. 1411 (2008); Daniel H. Erskine, *The U.S.-EC Dispute Over Customs Matters: Trade Facilitation: Customs Unions, and the Meaning of WTO Obligations*, 18 FLA. J. INT'L L. 423 (2006).

67. See *How Does the EU Work?*, *supra* note 64.

68. Folsom, *supra* note 61, at 115.

69. See generally J.D. Louis, *The Community Legal Order*, in CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, *supra* note 61, at 116, 116-18. See also *European Court of Justice*, CIVITAS, <http://www.civitas.org.uk/eufacts/download/IN.5.ECJ.pdf>.

a Court of First Instance that hears staff cases and complex issues of competition law.<sup>70</sup>

Although competition law does not specifically deal with intellectual property issues, some aspects of it are related. Competition law in the EU is most favorably comparable to U.S. antitrust law. The EU goal in enforcing those laws is to make the markets work better and thus ensure that actions of rights enforcement whether they be IPR based or otherwise do not stem the flow of the four freedoms. The Court of First Instance is not an intellectual property court and despite calls for the establishment of such in the EU no such court for patent or copyright law has come into being as of yet.<sup>71</sup> The EU has established courts for resolving conflicts involving community trademarks.<sup>72</sup> The lack of specialty courts for IP is not out of the ordinary, as there are few if any regional courts of this type in existence anywhere today, although there are courts of reasonable approximation to that idea in the U.S. These include the Court of Appeal for the Federal Circuit, which is generally considered an IPR court and specifically handles all patent appeals from district courts as well as many trademark and international trade issues.<sup>73</sup> It also handles appeals from quasi-judicial administrative “courts” or bodies that occur due to adverse decisions made against applicants to specifically designated national offices such as the

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70. *European Court of Justice*, *supra* note 69. See Karen J. Alter, *The Law and Politics of International Delegation: Delegating to International Courts: Self-Binding vs. Other Binding Delegation*, 71 LAW & CONTEMP. PROB. 37, 68-70 (2007) (discussing the ECJ, the Court of First Instance and other international courts difficulty in balancing administrative review with efforts to ensure international legal protections match the domestic ones that judicial participants might expect in their own national courts). See also *Making Markets Work Better*, EUROPEAN COMM’N: COMPETITION, [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) (last visited Feb. 20, 2011).

71. See Kevin R. Casey, *The European Patent Situation*, 9 DEL. L. REV. 107, 108-10 (2007) (discussing the draft European Patent Litigation Agreement [EPLA] which proposes an integrated judicial system including uniform rules of procedure and a common appeal court).

72. The EU members have designated certain national courts and tribunals of first and second instance within their borders as “Community trade mark courts.” These courts have exclusive jurisdiction for all infringement actions as well as declaratory actions for non-infringement (if permitted under national law), for counterclaims for revocation and/or invalidity and for actions dealing with publication, registration and compensation for a community trademark. See *Judgments of the CTM Courts*, OFFICE FOR HARMONIZATION IN THE INTERNAL MKT. (OHIM), <http://oami.europa.eu/ows/rw/pages/CTM/caseLaw/judgementsCTMCourts.en.do> (last visited Feb. 28, 2011).

73. The Court of Appeals for the Federal Circuit was created in 1982 as part of the Federal Courts Improvements Act of 1982. The Act abolished the Court of Customs and Patent Appeals, which was the prior court that addressed patent disputes on an appellate level. See generally Liza Vertinsky, *Comparing Alternative Institutional Paths to Patent Reform*, 61 ALA. L. REV. 501 (2010); see also *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/about.html> (last visited Feb. 28, 2011).

USPTO's Board of Patent Appeals and Interferences (BPAI) and the Trademark Trial and Appeals Board (TTAB).<sup>74</sup>

Despite the small number of specially designated IP courts, the EU does have specially designated intellectual Property Offices. The U.S. bodies, and to a greater extent the European Patent Office (EPO), the Office for Harmonization in the Internal Market (OHIM), the African Regional Intellectual Property Organization (ARIPO), and the Organisation Africaine de la Propriete Intellectuelle (OAPI), provide an instructive template from which the Caribbean—and CARICOM in particular—can begin to establish its own regional intellectual property offices. While the U.S. has a central office that handles copyright matters in the Library of Congress, there is no centralized office for EU copyright matters. The EU has relied on Treaty law and the issuance of various directives, rules, and regulations in an effort to harmonize copyright law.<sup>75</sup> CARICOM and its goals will be better served if it follows the U.S. example and creates a centralized copyright authority. Especially in light of the fact that creative expression is the Caribbean's biggest protectable good at this time and looks to continue to be so for the foreseeable future.<sup>76</sup>

### III. REGIONAL INTELLECTUAL PROPERTY OFFICES

#### A. The European Patent Office (EPO)

The EPO was established in 1977 following the earlier signing of the European Patent Convention.<sup>77</sup> The EPO grants European patents for its members through a single patent granting procedure.<sup>78</sup> This procedure allows for the potential procurement of a bundle of national patents as

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74. Van Dyke, *supra* note 73.

75. See GRAEME B. DINWOODIE, *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* 611 (2008).

76. Intellectual property rights in the U.S. are generally dissected into distinct categories of copyright law, which covers creative expression, patents which cover utilitarian inventions and trademarks, which cover the identification of goods and services. Globally the category of industrial design is also used. As society has evolved technical innovation of one kind or another has been a primary driver in the patent area and that usually requires substantial investment in research and development that most CARICOM countries do not have. Instead most of the protectable subject matter from an IPR standpoint is based on cultural products such as music, literature and art that fall within the area of copyright protection and is exploited on a broad basis usually to the detriment of the creator's rights here in the US, as well as in the EU and other countries throughout the world. For a general discussion on the conflicting views of copyright protection in the U.S. and the Caribbean see Valerie L. Hummel, *The Search For a Solution to the U.S.-Caribbean Copyright Enforcement Controversy*, 16 *FORDHAM INT'L L.J.* 721 (1993).

77. See EUROPEAN PATENT OFFICE (EPO), <http://www.epo.org/> (last visited Feb. 20, 2011).

78. *Id.*

opposed to a single community patent.<sup>79</sup> The issue of a community patent, or COMPAT as it's also called, has been contentious for many reasons. Advocates tout the ability to end fragmentation and undue costs associated with so many national patents. However, critics dispute the costs figures, question the official language and designation of the patent and administrators as being wholly European, and express concern at the loss of sovereignty to an administrative body that is not freely elected.<sup>80</sup>

No one has to file for a patent through the EU, and applicants for patent protection may decide that it is more economically feasible to directly apply to certain selected nations through their national offices. An applicant for an EU patent files an application that is examined for viability, and if rejected, the applicant can go to one or more patent office appeals boards but, unlike the U.S., there is no judicial review of a final rejection by the EPO.<sup>81</sup> Although one receives a bundle of national patents, the EPO does not guarantee that a patent, once issued, is safe from attack domestically. Thus a national action may be brought in a member state, either judicially or administratively, that results in patent invalidity in that particular state.<sup>82</sup> On the other hand, there may be some states that allow a patent to issue despite a rejection from the EPO.

## B. The OHIM

The OHIM was established in 1996, and unlike the EPO, does offer its protections for the whole of the European community.<sup>83</sup> The OHIM protects trademarks and designs, and an applicant can file a single application and possibly receive protection for all of the countries in the EU.<sup>84</sup> A uniform law applies to trademark and industrial design law for the EU, thereby facilitating the goal of the single market economy.<sup>85</sup> The Community Trademark (CTM) does not replace the domestic trademark law

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79. *Id.* Parties have fought for the establishment of a single community patent for many years and some believe that such a development is imminent. Casey, *supra* note 71, at 108-10; see also Julius Melnitzer, *Taking Sides: European Judges Demand the Creation of a Unified Patent Court*, INSIDE COUNSEL, Feb. 2006, <http://www.insidecounsel.com/Issues/2006/February%202006/Pages/Taking-Sides.aspx>.

80. See Long and Winding Road to Single EU Patent and Patent Court System, FOSS PATENTS (May 6, 2010), <http://fospatents.blogspot.com/2010/05/long-and-winding-road-to-single-eu.html>.

81. See EPO, *supra* note 77.

82. See *How to Apply for a European Patent*, EPO, <http://www.epo.org/applying/basics.html> (last visited Feb. 28, 2011).

83. See OFFICE OF HARMONIZATION IN THE INTERNAL MARKET (OHIM), <http://oami.europa.eu/ows/rw/pages/index.en.do> (last visited Mar. 1, 2011).

84. *Id.*

85. *Id.* For a comparative evaluation of the EU system with U.S. trademark law see Eric E. Bowman, *Trademark Distinctiveness in a Multilingual Context: Harmonization of the Treatment of Marks in the European Union and the United States*, 4 SAN DIEGO INT'L L.J. 513 (2003).

of the member states. No one is obligated to procure a community trademark, and getting one does not prevent one from securing a national application as well. Thus, CTMs can be used as alternatives or as supplements to national rights.<sup>86</sup> The CTM has proven to be quite popular since its inception, with hundreds of thousands issued in a relatively short period of time.<sup>87</sup>

Despite its popularity, some significant problems remain. While the CTM application process is simple and cost efficient, there still may be significant tangential costs. Since the CTM does not replace the national system, it is very costly to do a trademark search in all of the member states. But it is judicious to make that type of expenditure since a CTM can be denied due to a conflicting national application or mark.<sup>88</sup> If a CTM is thought to be infringed, the lack of uniformity in EU law in terms of civil procedure and remedies can also make the CTM extremely costly to enforce.<sup>89</sup>

OHIM holds a judicial conference every two years on trademarks and design law.<sup>90</sup> These conferences are attended by Community judges and representatives from the ECJ and the Court of First Instance.<sup>91</sup> These Symposia help promote consistency and harmonization in the registration of protectable subject matter, as well as the interpretation of applicable Community law.<sup>92</sup>

### C. The African Regional Intellectual Property Office (ARIPO)

In the early seventies, a regional seminar on IPRs was held in Nairobi, Kenya, and amongst the outcomes was a recommendation for a regional intellectual property organization.<sup>93</sup> With the assistance of the United

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86. See OHIM, *supra* note 83. Unlike the European patent the Community trade mark does pose a problem relative to opposition in a particular member country. Because it is based on a single application and uniform rules invalidation in any member country will result in the invalidation of the Community trade mark throughout the EU. See DINWOODIE, *supra* note 75 at 895-906.

87. See OHIM, *supra* note 83. See also Lars Meyer, *Much Ado About Nothing?: Characteristics, Benefits, and Practical Implications of the European Community Trademark*, 5 CHI.-KENT J. INTELL. PROP. 158, 168 (2006) (discussing the more than 400,000 applications received between 1996 and 2005).

88. See *id.* at 169. A CTM application can also be turned into a national application if it faces particular hurdles in a member state.

89. J.F. Bretonniere & Cecile Cailac, Baker & McKenzie, *Cross-border: The National Trademark Versus the Community Trademark*, in IP VALUE 156 (2007), available at <http://www.buildingipvalue.com/07EU/p.156-159%20Baker%20McKenzie.pdf>.

90. See *Judges' Seminars and Symposiums*, OHIM, <http://oami.europa.eu/ows/rw/pages/QPLUS/networks/EJS.en.do> (last visited Feb. 28, 2011).

91. See *id.*

92. *Id.*

93. See AFR. REG'L INTELL. PROP. ORG. (ARIPO), <http://www.aripo.org/> (last visited Mar. 12, 2011).

Nations Economic Commission for Africa (UNECA) and the WIPO, an agreement was reached and ARIPO was established in 1976.<sup>94</sup> The objectives are to promote, harmonize and develop IPRs amongst the English speaking African states, although membership is not limited on the basis of language.<sup>95</sup> ARIPO established a filing and registration system for patents, trademarks, and industrial designs. Like the regional offices in the EU, it supplements the national systems of its members as opposed to operating as a substitute.<sup>96</sup> Instead of drafting regional patent legislation for the sake of consistency, the members ratified the Patent Cooperation Treaty (PCT).<sup>97</sup> There is no equivalent to a community trademark or community trademark law amongst the ARIPO members.

ARIPO was established in recognition of the benefit of pooling the limited resources of each of its member nations.<sup>98</sup> The countries understood early on that it was more economically and systemically feasible for them to join together, thus avoiding duplication of financial and human resources. Member states were largely undeveloped countries whose intellectual property rights were primarily governed by foreign laws, with laws of the United Kingdom being the most influential.<sup>99</sup>

The coexistence of regional and national systems has also raised concerns at times. For example, as recently as 2009, a ruling by the national court in Kenya caused consternation. A court there decided that Kenya's Industrial Property Tribunal had no jurisdiction to hear applications to revoke patents granted by ARIPO.<sup>100</sup> In that case, Chemsolve Cleaning Services sought to revoke a patent held by Sanitam (EA) Services Limited.<sup>101</sup> The ruling did not affect the ability of the Court to revoke a

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94. *Id.* The member states of ARIPO are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. *Membership*, ARIPO, [http://www.aripo.org/index.php?option=com\\_conteco&view=article&id=22&Itemid=56](http://www.aripo.org/index.php?option=com_conteco&view=article&id=22&Itemid=56) (last visited Mar. 12, 2011).

95. ARIPO, *supra* note 93.

96. *Id.*

97. *Id.* The Patent Cooperation Treaty (PCT) is an international treaty with more than 140 signatories. The treaty provides for a single patent application filing procedure. The application designates which of the member countries it is seeking protection in and a patent search is performed by an International Searching Authority (ISA). See Sean A. Pager, *Patents on a Shoestring: Making Patent Protection Work for Developing Countries*, 23 GA. ST. U. L. REV. 755, 781 (2007) (discussing the PCT as an option for developing countries to reduce the costs associated with developing their own patent systems); see also Jay Erstling & Isabelle Boutillon, *The Patent Cooperation Treaty: At the Center of the International Patent System*, 32 WM. MITCHELL L. REV. 1583 (2006).

98. See *Welcome to ARIPO*, ARIPO, [http://www.aripo.org/index.php?option=com\\_content&view=article&id=1:welcome-to-aripo&catid=1:latest-news&Itemid=18](http://www.aripo.org/index.php?option=com_content&view=article&id=1:welcome-to-aripo&catid=1:latest-news&Itemid=18) (last visited Mar. 1, 2011).

99. *Id.*

100. See Darren Olivier, *IP Litigation in Africa*, WIPO MAGAZINE (Feb. 2010), [http://www.wipo.int/wipo\\_magazine/en/2010/01/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2010/01/article_0006.html).

101. *Id.*

patent issued by Kenya's national patent office. The High Court has previously ruled that it is not their duty to decide on revocability issues, thus the question of infringement litigation and appeals in Kenya vis-à-vis ARIPO is somewhat unsettled at this time.<sup>102</sup>

#### D. The OAPI

The OAPI is a regional organization that was created in 1977 and is composed of the former French colonies.<sup>103</sup> The sixteen French-speaking countries include some of the least developed countries in the world and cover a territory inhabited by a population of approximately 100 million people.<sup>104</sup> The OAPI seeks to harmonize the laws of its members in order to “valorize” all the possibilities offered by patent rights.<sup>105</sup> To achieve this objective OAPI ensures the protection and publication of patent rights, as doing so is more likely to make its members attractive locations for private investment.<sup>106</sup>

The OAPI does not coexist with the national systems of its member states but instead implements and applies centralized administrative procedures and uniform legislation applicable in each member state.<sup>107</sup> There is a single application and deposit that covers all states and there is no separate designation necessary.<sup>108</sup> The lack of national designation is a double-edged sword though, because despite the simplicity, there is a lack of sovereignty amongst members relative to the ability to determine if something deemed inventive domestically is protectable. There is no other way to secure enforceable rights in OAPI states other than through the OAPI process. While this is acceptable in a country like the U.S. that has turned over IPR issues such as patents and copyright law to the exclusive jurisdiction of the federal government, there is no federalism covering the OAPI nations.

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102. *Cf. id.*

103. The member countries are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, and Togo. *African Intellectual Property Organization*, WIPO, [http://www.wipo.int/africa/en/partners\\_org/partners/oapi.html](http://www.wipo.int/africa/en/partners_org/partners/oapi.html) (last visited Mar. 1, 2011).

104. *Id.*

105. *Id.*

106. *Id.* But see Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1180 (2009) (questioning the validity of “high-protectionist rhetoric” regarding the development of strong IP systems as a precursor for foreign investment of capital and know-how).

107. See *African Intellectual Property Organization*, *supra* note 103.

108. *Id.*

## IV. INTELLECTUAL PROPERTY IN THE CARIBBEAN

Intellectual property protection has taken place in the Caribbean on a piecemeal basis in a manner that is somewhat expectedly related to the timing, circumstances, and degree of independence of each particular nation state.<sup>109</sup> Economies of scale also play an important role, as most of the nations are relatively small and therefore have not had the money or inclination to develop strong IPR regimes. While some critics are skeptical about the oft stated mantra that modernized intellectual property laws increase trading opportunities, benefit the economic standing, and improve the overall well-being of effected nations, there are no persuasive studies indicating that the development of an IPR regime, even at the behest of trading partners poised to take unfair advantage of new trade rules, has harmed a lesser developed country.<sup>110</sup> Speculation over the potential stifling

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109. While some nations like Haiti have “enjoyed” independence for more than 200 years the events surrounding the independence, more specifically a successful slave rebellion against an imperialistic powerhouse, and the political repercussions that followed has left that nation struggling every since and relinquished them to being recognized as the poorest country in the western hemisphere. Voluntary relinquishment of control by colonial overseers as a path to independence has placed many of the nations coming out of those exigencies in a better situation to take advantage of political and economic opportunities. For example, Jamaica, which gained full independence in 1962 but still remains a “commonwealth realm,” is in much better financial, political and economic shape than Haiti despite its relative short time of independence and the fact that Haiti is four times as populous. In Caribbean countries that remain part of the commonwealth realm, the Queen of England remains the Head of State and a constitutional fiction exists that places all official acts in Her Majesty’s name. The Queen is referred to in court documents and public servants are referred to as servants of the crown. There are royal police forces and prisons. Thus, certain ties are maintained, despite decolonization, that are utilized to achieve certain objectives that are more difficult for true republics. See generally FRED PHILLIPS, COMMONWEALTH CARIBBEAN CONSTITUTIONAL LAW (2d ed. 2002). Ironically, Jamaica and Haiti were chosen as Caribbean invitees to the recent G8 summit meetings in Toronto, Canada for talks on development and security. See Nelson A. King, *Jamaica, Haiti Invited to G8 Canada Meeting*, CARIBBEAN LIFE (June 18, 2010), [http://www.caribbeanlifeneews.com/stories/2010/6/2010\\_06\\_16\\_nk\\_g8\\_meeting.html](http://www.caribbeanlifeneews.com/stories/2010/6/2010_06_16_nk_g8_meeting.html).

110. See Reichman, *supra* note 106. Many others are critical of the agenda of the developed nations in pushing IPR norms and in fact there has been a constant wariness amongst the lesser developed nations since the establishment of the WTO and TRIPS. Lesser developed countries felt more kinship with organizations with altruistic missions seated in overall global well being hence their affinity for the WIPO and other United Nations based entities. These affiliations led to the dual roles of the WTO and WIPO in the establishment of TRIPS, recognizing that IPRs were not just there to facilitate private advancement but also were an important substantive component of public international law. For additional criticism or perhaps healthy skepticism of the interaction of IPR recognition and enforcement relative to developing countries, see Matthew Turk, *Bargaining and Intellectual Property Treaties: The Case for a Pro-development Interpretation of TRIPS but Not TRIPS Plus*, 42 N.Y.U. J. INT’L L. & POL. 981, 994 (2010) (discussing the coercion by the U.S. and other developed countries in TRIPS negotiations that led to an imbalanced result that was disadvantageous to developing countries); Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J.

of innovation or the possible exacerbation of piracy are poor arguments for maintaining the status quo, especially when updating IP laws is relatively simple and inherently beneficial regardless of the impetus for doing so.

The proliferation of RTAs has highlighted the wide range of trade benefits available especially where the U.S. is one of the trading partners.<sup>111</sup> The U.S. has also been one of the prime players in the fight for minimum intellectual property standard observation on an international basis, although arguably not from the standpoint of global goodwill, or at least with that objective being subservient to domestic economic goals.<sup>112</sup>

The Caribbean and CARICOM countries are in close proximity to the U.S., and many member states are sorely in need of the benefits that an effective trading relationship with the U.S. could provide. This is not to say, however, that some Caribbean states do not already realize good trading relations with the U.S. and other nations, as many bilateral and multilateral agreements have been executed between the U.S. and certain countries in the past.<sup>113</sup> CARICOM has also become active in executing its

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79, 83-84 (2008-09) (describing TRIPS as an 800 hundred pound gorilla in the room that focuses on wealthy nations IPRs and obscures more valuable discussion on how to truly assist lesser developed nations); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing A Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1233-34 (noting the inherent tension in trade agreements negative demands relative to removing trade barriers and the positive demands of TRIPS, erect new legal protections, which do not adequately take into account the national dynamics of developing states and that trade goals can be better served if they take intellectual property into consideration); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2847 (2006) (noting that developed countries operated from an insular standpoint in developing global IP policy whereas developing nations took an intersectional view whereby IPR were responsive to general social concerns).

111. See C. O'Neal Taylor, *The U.S. Approach to Regionalism: Recent Past and Future*, 15 ILSA J. INT'L & COMP. L. 411 (2009) (noting that developing countries partner with the U.S. in free trade agreements in order to avoid missing their chance at securing access to the world's largest market). *But see* Gardner *supra* note 19, at 60 (questioning if the presence of more than 300 RTAs indicate that they have become stumbling blocks as opposed to building blocks for trade liberalization).

112. Much of the U.S. concern has been driven by losses both real and perceived based on piracy from nations around the world who do not have developed IPR regimes. Numbers routinely are reflected in the hundreds of billions in terms of U.S. losses based on intellectual property theft as well as the alleged loss of hundreds of thousands of jobs. These losses cover every area of intellectual property from piracy of entertainment materials to medicine and technology. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, *INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS* (2010).

113. These include relationships that have grown from the Caribbean Basin Initiative (CBI), the Caribbean Basin Economic Recovery Act (CBERA) and the Caribbean Trade Partnership Act (CBTPA). See *Caribbean Basin Initiative*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/caribbean-basin-initiative-cbi> (last visited Mar. 12, 2011). See also Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 416 (2008) (noting the goals of U.S. trade policy include evaluating, renewing, and reforming where necessary to ensure that trade benefits were spread to

own RTAs with numerous nations through its own literal and figurative Caribbean Negotiating Machinery (CRNM).<sup>114</sup> Beyond entering more RTAs, the CRNM has also been engaged in the envisioning and establishment of various regional entities. These have included Petrocaribe, the development of the CARICOM Passport, and plans for many others.<sup>115</sup>

Most Caribbean nations have been signatories to TRIPS since its origination and are thus charged with maintaining the types of minimum IP protections that are outlined in the treaty.<sup>116</sup> None of the countries in CARICOM are considered developed under the TRIPS agreement, and many have historically been plagued with piracy and other types of behavior that infringes the IPRs of others.<sup>117</sup> Developing countries consider the domestic sale of pirated goods to be beneficial, as they are the basis of significant consumer spending from both citizens and tourists.

#### A. Significant Caribbean Intellectual Property Developments

A number of Caribbean states have taken the initiative in moving forward to modernize their intellectual property laws, despite their lesser-regarded status in the global marketplace. Others have simply relied on the pre-existing laws of their past colonial hosts. The latter tack has been

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countries abroad, including those of the poorest nations including those in the Caribbean especially in light of the imminent demise of certain aspects of the CBI program).

114. In 2009, at the thirtieth meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), the CRNM was officially changed to the Office of Trade Negotiations (OTN) and given extended responsibility for the execution of negotiating strategies for all Community external trade negotiations. *See Welcome to the Office of Trade Negotiations*, OFFICE OF TRADE NEGOTIATIONS CARIBBEAN COMTY. SECRETARIAT, <http://www.crnrm.org/> (last visited Mar. 1, 2011).

115. *See generally Caricom Projects*, CARIBBEAN CMTY. (CARICOM) SECRETARIAT, [http://www.caricom.org/jsp/projects/projects\\_index.jsp?menu=projects](http://www.caricom.org/jsp/projects/projects_index.jsp?menu=projects) (last visited Mar. 11). There are also four ‘Organs’ that assist the primary administrative bodies of CARICOM [the Conference of Heads of Government (the Bureau) and the Community Council]. These are the Councils for Finance and Planning, the Council for Trade and Economic Development, the Council for Foreign and Community Relations and the Council for Human and Social Development. While each entity is charged with undertaking activities that affect the development of CARICOM from various perspectives including social and health programs, banking and finance and all aspects of trade none specifically list intellectual property in full or part as a goal. *See generally Community Organs and Bodies*, CARIBBEAN CMTY. (CARICOM) SECRETARIAT [http://www.caricom.org/jsp/community\\_organs/community\\_organs\\_index.jsp?menu=cob](http://www.caricom.org/jsp/community_organs/community_organs_index.jsp?menu=cob) (last visited Feb. 20, 2011).

116. *See Understanding the WTO: The Organization, Members and Observers*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 1, 2011).

117. Although much of the discussion on international trade and intellectual property issues is qualified by reference to whether a nation state is most/highly developed or in some lesser state of development, there are official international definitions to assist in categorizing nations. WTO members self-select and other members may actually challenge the decision of a member to make use of provisions especially designated for developing countries. *See Who Are the Developing Countries in the WTO?*, WTO, [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Feb. 22, 2011).

unfortunate, especially in light of the fact that most of the former imperial powers have updated their laws while their former colonies have stood pat. In some instances, the older laws have been sufficient to meet the demands of TRIPS, as there have been no IPR disputes brought against any Caribbean nations at the WTO.<sup>118</sup> However, some of the Caribbean countries have been given additional time by the WTO to become TRIPS compliant or they may be deemed unworthy of pursuing actions against due to their current economic and/or judicial state of affairs.<sup>119</sup> A brief look at some of the active states indicates that progressive action is a matter of education, political will, and some measure of fiscal support as opposed to being dependent on the size of the nation or when it became independent. It may be that more recent independence and smaller size makes taking national action easier than being tied down with unfortunate history and burdensome customs.

### 1. Belize

Belize was granted independence in 1964 as British Honduras, and officially became Belize in 1973. The country of approximately 315,000 has one of the lowest population densities in the world and primarily sustains itself on tourism.<sup>120</sup> The Belize Intellectual Property Office (BELIPO) was established in 2000.<sup>121</sup> Its expressed mission is “[t]o create an efficient and modern intellectual property system leading to the emergence of a vibrant intellectual property culture in Belize.”<sup>122</sup> The office administers copyrights, industrial designs, patents, trademarks, plant

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118. It may also be that no one has thought that it is economically feasible to pursue intellectual property actions in some of these countries due to their distressed economic standing and antiquated laws. For example, Haiti is one of the world's poorest nations and its current patent law is based on a 1924 act. See WIPO, WIPO GUIDE TO INTELLECTUAL PROPERTY WORLDWIDE 248 (2000) (providing relevant intellectual property information for Haiti). See also *Dispute Settlement: The Disputes, Index of Dispute Issues*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#selected\\_subject](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject) (last visited Feb. 20, 2011).

119. Developing countries were initially given ten years of extra time to become TRIPS compliant, thus, when TRIPS came into effect in 1995 most Caribbean countries had until 2005 to become compliant. The least developed countries were given an extension until 2016 to become compliant but it is conceivable that time will continue to be extended for them given the economic and political postures many find themselves in. See Elizabeth Ferrill, *Clearing the Swamp for Intellectual Property Harmonization: Understanding and Appreciating the Barriers to Full TRIPS Compliance for Industrializing and Non-Industrialized Countries*, 15 U. BALT. INTELL. PROP. L. J. 137, 143 (2007) (discussing the history of TRIPS).

120. See *The World Factbook, Central America and Caribbean: Belize*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bh.html> (last visited Mar. 1, 2011).

121. See *Belipo Online! Trademarks Patents Designs Copyrights*, BELIZE INTELL. PROP. OFFICE (BELIPO), <http://www.belipo.bz/> (last visited Mar. 12, 2011).

122. *Id.*

varieties, and protection of integrated circuits.<sup>123</sup> The office is also involved in protecting traditional cultural knowledge as well.<sup>124</sup>

Belize was assisted in its efforts at modernization by the WIPO, which organized a national seminar on intellectual property in cooperation with the Government of Belize in 1999.<sup>125</sup> Government officials were also invited to participate in ongoing seminars and symposia that were conducted on a regular basis around that time period.<sup>126</sup> Belize has substantially revised all of its intellectual property laws during the last decade and is deemed in full compliance with its obligations under TRIPS.<sup>127</sup> BELIPO is automated to some degree, even allowing for searches to be done online as well as the procurement of filing forms. BELIPO also provides for copyright deposits although copyright registration is not required. Belize, through BELIPO, is at the forefront of intellectual property advancement in the Caribbean and can serve as both an incentive and model for comparable activities throughout the region. While these advancements are notable, representatives from the U.S. government remain wary of piracy in Belize and the seeming lack of political will to strongly enforce the new laws.<sup>128</sup>

## 2. Barbados

While not as up to date as the laws of Belize, Barbados has been another Caribbean state of note that is taking valuable steps toward the advancement of intellectual property rights. Barbados gained independence from the British in 1966, but like many Caribbean nations, it still retains some ties as part of the Commonwealth order.<sup>129</sup> It is another small Caribbean country of only about 300,000 people, but unlike Belize, it also has a relatively

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123. *Id.* See also Lisa M. Brownlee & Christopher Coye, *Trademark Law in Belize: Implementation of GATT Trips in a Developing Country*, 93 TRADEMARK REP. 1414 (2003).

124. See generally Rita Mae Hyde, *Belize Report on Protection of Traditional Knowledge*, SELA (May 2009), [http://www.sela.org/DB/ricsela/EDOCs/SRed/2009/05/T02360003488-0-Belize\\_Report\\_on\\_Protection\\_of\\_Traditional\\_Knowledge.pdf](http://www.sela.org/DB/ricsela/EDOCs/SRed/2009/05/T02360003488-0-Belize_Report_on_Protection_of_Traditional_Knowledge.pdf).

125. See *Conferences, Meetings and Seminars*, WIPO, [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3721](http://www.wipo.int/meetings/en/details.jsp?meeting_id=3721) (last visited Feb. 22, 2011).

126. The WIPO maintains a Bureau for Latin America and the Caribbean that is responsible for carrying out programs tailored to 33 countries in the region. WIPO seeks to develop and strengthen the IP systems of these countries so that IP can play a role in the policies relevant to the economic, social and technological progress of each country. See generally *Bureau for Latin America and the Caribbean*, WIPO, <http://www.wipo.int/lac/en/> (last visited Mar. 11, 2011).

127. See *Legislation Belize*, THE WORLD LAW GUIDE, <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweblz.htm> (last visited Feb. 22, 2011) (detailing Intellectual Property Laws in Belize).

128. See *2008 Investment Climate Statement-Belize*, U.S. DEP'T. OF STATE, <http://www.state.gov/e/eeb/ifd/2008/100823.htm> (last visited Mar. 12, 2011).

129. See *Central America and Caribbean: Belize*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bh.html> (last visited Mar. 12, 2011).

small physical size.<sup>130</sup> While tourism is very important, Barbados has developed other financial and offshore services that make it one of, if not the, per capita wealthiest nation of the Caribbean.<sup>131</sup>

Barbados intellectual property matters are handled by the Corporate Affairs and Intellectual Property Office (CAIPO).<sup>132</sup> The office is also responsible for advising government officials on technical and policy issues underlying the national intellectual property rights regime.<sup>133</sup> Most of the revisions to Bajan intellectual property law occurred in the late 1990s and were also motivated by WIPO outreach efforts as the WIPO sought to get the developing countries TRIPS compliant.<sup>134</sup> Barbados is also deemed TRIPS compliant, having had its intellectual property laws reviewed by the WTO TRIPS Council in 2001.<sup>135</sup> While Barbados is not currently on a special watch list, there has been some discussion concerning the lack of specific legislation directed at secondary liability for counterfeiting and piracy. However, Barbados's small size has led to little concern for infringement, at least from a U.S. perspective.<sup>136</sup> Curiously, Barbados does not allow registration for copyright.<sup>137</sup>

### 3. Jamaica

Jamaica achieved full independence in 1962, and is the largest English speaking Caribbean nation in the Caribbean with a population of approximately 3 million.<sup>138</sup> Jamaica is also part of the Commonwealth order (thus maintaining ties with the UK) and is dependent on tourism as well as mining as its largest economic resources.<sup>139</sup> Jamaica's economic

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130. *Id.* Belize land mass is 22,806 square kilometers while Barbados measures only 430 square kilometers.

131. *Id.*

132. *See General Information*, CORP. AFF. & INTELL. PROP. OFFICE (CAIPO), <http://www.caipo.gov.bb/intell/intell.html> (last visited Feb. 20, 2011).

133. *Id.*

134. Natives of Barbados are often identified by outsiders as Barbadians but are more commonly known amongst Caribbean people as Bajans. *Bajan*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/Bajan> (last visited Mar. 1, 2011).

135. *See generally Barbados: July 2002*, WTO, [http://www.wto.org/english/tratop\\_e/tp194\\_e.htm](http://www.wto.org/english/tratop_e/tp194_e.htm) (last visited Feb. 22, 2011).

136. *See 2010 Investment Climate Statement-Barbados*, U.S. DEP'T. OF STATE, <http://www.state.gov/e/eeb/rls/othr/ics/2010/138771.htm> (last visited Mar. 12, 2011).

137. *See Frequently Asked Questions*, CAIPO, <http://www.caipo.gov.bb/faqs/faqs.html> (last visited Mar. 12, 2011).

138. The most populous nation is Cuba with more than 11 million citizens followed by The Dominican Republic and Haiti which each have nearly 10 million inhabitants. *See Populations of Latin American and Caribbean Countries*, THE ENCYCLOPEDIA OF EARTH, [http://www.eoearth.org/article/Populations\\_of\\_Latin\\_American\\_and\\_the\\_Caribbean\\_Countries](http://www.eoearth.org/article/Populations_of_Latin_American_and_the_Caribbean_Countries) (last visited Mar. 1, 2011).

139. *Id.*

situation has increasingly faced significant challenges due to the surge of violent crime attributable to drug trafficking over the last decade.<sup>140</sup>

Jamaica substantially revised its intellectual property laws to become TRIPS compliant, and has seen an increase in the number of applicants seeking protection both domestically and from abroad.<sup>141</sup> This increase has been primarily in the area of trademarks and copyrights, as Jamaica has yet to put into effect any modern patent protection. The present patent law is the Patent Act of 1857, although updated bills have been under review for many years.<sup>142</sup> The U.S. has taken particular note of Jamaica's failures regarding patent law, but this has not stopped the U.S. from working with Jamaica in other areas of intellectual property.<sup>143</sup>

In 1994, Jamaica and the U.S. executed a bilateral agreement for intellectual property matters between the countries.<sup>144</sup> Pursuant to that agreement, its obligations under TRIPS, and other WIPO administered treaties, Jamaica has enacted modern laws for geographical indicators covering a wide range of products and has also taken exceptional steps in the area of copyright law. In 2001, Jamaica established the Jamaica Intellectual Property Office (JIPO).<sup>145</sup> JIPO centralized the administration of all IP matters, thus making registration more accessible and user friendly.

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140. See MARK P. SULLIVAN, CONG. RESEARCH SERV., RS 22372, JAMAICA: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 1-2, 4 (2006), available at <http://www.fas.org/sgp/crs/row/RS22372.pdf> (noting that in 2005 Jamaica had the world's highest murder rate).

141. For example, in 2004, of 1,465 trademark applications filed, 311 were from residents. From January to August 2006, 1,324 applications were filed with 503 of them being domestic. Some aspects of the latest applicable law, the Trade Marks Act of 1999, are still being reviewed such as issues involving concurrent use or registration, the registration of surname, and expanding the grounds for revocation. Nicole Foga, *Jamaica: Beyond The TRIPS Agreement*, MANAGING INTELL. PROP., (Oct. 1, 2007), <http://www.managingip.com/Article.aspx?ArticleID=1450368>.

142. See Jamaica: Patents (Designs), Bill, 2001. Jamaica's inability to get any new patent law passed is apparently the prime reason that they were placed on the United States Trade Representatives watch list in the latest edition of its Special 301 Report. For a copy of the 2010 report, see AMBASSADOR RON KIRK, U.S. TRADE REP., 2010 SPECIAL 301 REPORT, at 33 (2010), available at <http://www.derechodeautor.gov.co/htm/img/INFORME%20301%20DE%20PI.pdf>. The annual report reviews the state of global intellectual property from a U.S. perspective purportedly to indicate the U.S. government's resolve to encourage and maintain effective IPR protection and enforcement worldwide. Critics feel that the list is a way of improperly pressuring disadvantaged countries into capitulating to U.S. trade policy. See, e.g., Lina M. Montén, *The Inconsistency Between Section 301 and TRIPS: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 387, 402-403 (2005) (noting U.S. rights under Section 301 to bring unilateral trade sanctions against countries deemed noncompliant as well as the frustration of listed countries who feel that the USTR investigations are bogus and unfair for failing to involve countries in the process of reaching a conclusion).

143. *Id.*

144. See SULLIVAN, *supra* note 140, at 5.

145. See *History and Objectives*, JAMAICA INTELL. PROP. OFFICE, <http://www.jipo.gov.jm/?q=node/4> (last visited Feb. 28, 2011).

As in most Caribbean nations, the application and registration process has been largely manual, but the WIPO is taking steps to assist Jamaica in moving toward automation. JIPO notes that since its inception, it has consistently sought to advance the development and protection of IPRs in Jamaica for the purpose of enhancing and facilitating business competitiveness, despite a lack of sufficient financial and human capital.<sup>146</sup>

Jamaica has been particularly active in the area of copyright law due to its status as the world's recognized originator and primary producer of reggae and dancehall music. While the production of reggae music has been described as a multi-billion dollar industry, little of that money has been repatriated to Jamaican artists and citizens.<sup>147</sup> This is particularly significant as an economic problem, because while Jamaica and other Caribbean countries are collecting royalties for foreign music so that money can be paid out abroad, the lack of strong IPRs throughout the Caribbean means that there is no reciprocal economic benefit. As a result, numerous copyright-related organizations have arisen, such as the Jamaica Anti-Piracy Alliance (JAPA) in 2005 and the Jamaica Music Society (JAMMS) in 2006 as well as the Jamaican Copyright Licensing Agency (JAMCOPY).<sup>148</sup> Registration and notable litigation has increased in Jamaica as a result of these advancements.<sup>149</sup> Jamaica looks forward to further strengthening its recognition and protection of IPRs for the benefit of domestic and foreign rights holders and for the economic and trade benefits it receives through its bilateral and multilateral agreements.<sup>150</sup>

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146. *Id.*

147. See John McMillan, *Trench Town Rock: The Creation of Jamaica's Music Industry* (June 6, 2005) (unpublished paper), available at [http://faculty-gsb.stanford.edu/mcmillan/personal\\_page/documents/Jamaica%20music%20paper.pdf](http://faculty-gsb.stanford.edu/mcmillan/personal_page/documents/Jamaica%20music%20paper.pdf). See also, Zeljka Kozul-Wright & Lloyd Stanbury, *Becoming A Globally Competitive Player: The Case of the Music Industry in Jamaica*, (United Nations Committee on Trade and Development, Discussion paper No. 138, 1998) [http://www.unctad.org/en/docs/dp\\_138.en.pdf](http://www.unctad.org/en/docs/dp_138.en.pdf).

148. See *Welcome to JAMCOPY*, JAMCOPY, <http://www.jamcopy.com/> (last visited Apr. 2, 2011).

149. In an attempt to modernize its intellectual property system, Jamaica procured the services of the International Intellectual Property Institute (IPI) in 1999. The IPI is a non-profit international development organization and think tank dedicated to increasing awareness and understanding of the use of IP as a tool for economic growth, particularly in developing countries. The IPI focuses on establishing constituencies of policymakers, business leaders, and judicial stakeholders who understand that effective enforcement of properly regulated IPRs can stimulate outside investment. See generally INT'L INTELLECTUAL PROP. INST., [www.iipi.org](http://www.iipi.org) (last visited Mar. 1, 2011).

150. See Dianne Daley & Nicole Foga, *The IP War is Heating Up*, in BUILDING AND ENFORCING INTELLECTUAL PROPERTY VALUE 2007, 143 (2007). See also Nicole Foga, *Jamaica: Beyond The TRIPS Agreement*, MANAGING INTEL. PROP., (Oct. 1, 2007), <http://www.managingip.com/Article.aspx?ArticleID=1450368>.

#### 4. *Other Caribbean Country Developments*

Most of the other countries in the Caribbean are less developed than those identified above. The best resource for intellectual property developments throughout the Caribbean as a whole is the WIPO, through their Bureau of Latin America and the Caribbean. Unfortunately, it remains a constant challenge to maintain live links for the Caribbean nations listed.

Trinidad and Tobago rivals Barbados in terms of economic prosperity principally due to the discovery of oil there early in the twentieth century. It is one of the globe's major producers of petroleum and natural gas, and thus has been at the forefront of trade liberalization in the Caribbean.<sup>151</sup> Having attained its independence from Britain in 1962 as well, it trails only Jamaica in terms of English speaking Caribbean nations, with a population of approximately 1.3 million citizens.<sup>152</sup> Trinidad and Tobago signed on to TRIPS in 1994 and also executed a bilateral intellectual property agreement with the U.S. at the time. These actions led to a general overhaul of the nation's IP laws, including the drafting of new patent, copyright, trademark, and industrial design laws.<sup>153</sup> A new intellectual property office was also established with the express aims of stimulating creative efforts in industry and commerce by developing and promoting appropriate legislation for the protection of all forms of intellectual effort internationally.<sup>154</sup>

More recently, the nation of Antigua and Barbuda has updated many of its intellectual property laws. Precipitating these developments were the 2003 WIPO ministerial meetings held in that nation as well as meetings there between heads of other IP offices in the Caribbean.<sup>155</sup> An intellectual property office was established, but it has yet to become fully automated or technologically accessible. The meetings also spurred other nations to draft new laws and look into establishing intellectual property offices; however, few have successfully done so at this time.<sup>156</sup>

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151. See *Central America and Caribbean: Trinidad and Tobago*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/td.html> (last visited Mar. 12, 2011).

152. *Id.*

153. See *Collection of Laws for Electronic Access (CLEA)*, WIPO, [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=231](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=231) (last visited Feb. 22, 2011).

154. See *Mission Statement of The Intellectual Property Office, The Republic of Trinidad and Tobago*, INTELL. PROP. OFFICE, THE REP. OF TRIN & TOBAGO, <http://www.ipo.gov.tt/applicationloader.asp?app=articles&id=111> (last visited Feb. 28, 2011).

155. See *Conferences, Meetings and Seminars, Antigua and Barbuda*, WIPO, [http://www.wipo.int/meetings/en/archive\\_meeting.jsp?meeting\\_country=4](http://www.wipo.int/meetings/en/archive_meeting.jsp?meeting_country=4) (last visited Mar. 12, 2011).

156. See *The Intellectual Property Office Act 2003, No. 15 of 2003 (Ant. & Barb.)*, available at <http://www.laws.gov.ag/acts/2003/a2003-15.pdf>. The Act calls for an office to administer patents, trademarks and industrial designs but leaves out any mention of copyright law. This is unfortunate because Antigua and Barbuda represent another small Caribbean

The most populated nations in the Caribbean, those being Cuba, the Dominican Republic, and Puerto Rico, all have established intellectual property offices, albeit under varying circumstances.<sup>157</sup> Haiti also had established an intellectual property office as well; however, it was effectively dismantled along with all other aspects of government by the massive earthquake that recently savaged the country. Puerto Rico benefits from being a U.S. territory at least in terms of access to a developed IPR regime. Haiti, Cuba, and the Dominican Republic would obviously cause some pragmatic concerns in terms of their association with a Caribbean IP office due to differences in politics and language.<sup>158</sup>

## B. CARICOM Trade and Intellectual Property Developments

While CARICOM's mission statement and objectives do not expressly mention intellectual property, the treaty establishing the organization does.<sup>159</sup> Article 66 of the Revised Treaty of Chaguaramas is titled, "Intellectual Property," and speaks to joint action by CARICOM members including the regional administration for all intellectual property except copyright.<sup>160</sup> Although CARICOM has taken some minor steps as a

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island having less than 100,000 people and covering less 450 square kilometers where it's main interaction with global visitors is based on exposure to not only it's geographic beauty but also the creative endeavors of its people. It is the protection of the people's creative expression that is the easiest to protect and these expressions certainly warrant government attention as well since despite the fact that they may be theoretically protected from an international standpoint under TRIPS without government assistance individuals will not know the value or enforceability of these rights.

157. See *Directory of Intellectual Property Offices*, WIPO, <http://www.wipo.int/directory/en/urls.jsp> (last visited Feb. 22, 2011).

158. While it makes sense for CARICOM to establish an IP Office with English as the official language, some accommodation should be made for the present and with an eye towards the future for Spanish to become an official language as well. Disputes over language have held up efforts towards multinational advancements in IP between other nations even as recently as negotiations involving the prospects for a community patent in the EU. See *Long and Winding Road to Single EU Patent and Patent Court System*, *supra* note 80. Perhaps French or Creole can be added as well when Haiti is able to get back on its feet. Adding it sooner than later may provide some support for Haiti's efforts, certainly morally if not economically as it is a way to indicate respect for the contributions Haitians are making to creative expression and intellectuals endeavors. The prospect for multinational offices with different language bases working in concert is a realistic one as the joint efforts of the US, EU and Japan illustrate. A Tri-Lateral Cooperation was established by the patent offices of those three countries in 1983. The Trilateral Offices strive to harmonize administration and protection of industrial property rights and increase the efficiency of the global patent system. See TRILATERAL, <http://www.trilateral.net/index.html> (last visited Mar. 1, 2011).

159. See THE CARIBBEAN COMMUNITY (CARICOM), [http://www.caricom.org/jsp/community/community\\_index.jsp?menu=community](http://www.caricom.org/jsp/community/community_index.jsp?menu=community) (last visited Mar. 1, 2011).

160. The original Treaty was signed in 1973 and the revised one creating CARICOM was executed in 2001:

unified entity to address IP issues, it needs to accelerate its program and address these matters in a more progressive and decisive fashion. A recent meeting took place in 2008 on the role of CARICOM in establishing a regional system, but that focused on protecting folklore and traditional knowledge.<sup>161</sup> Prior to that time, a host of meetings took place primarily during the years 1998 and 2000 throughout the Caribbean with the principal goal of assuring that all WIPO member countries were TRIPS compliant. All of the meetings mentioned have been in conjunction with WIPO, and CARICOM has yet to show any strong initiative in undertaking the action set out in Article 66 without outside assistance. CARICOM members appeared at many of these meetings separate and apart from the national representatives of the countries.<sup>162</sup> In 2009, there was talk of establishing one regional patent office in Grenada, as only Belize and Trinidad and

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ARTICLE 66, Protection of Intellectual Property Rights

COTED shall promote the protection of intellectual property rights within the Community by, inter alia:

- (a) the strengthening of regimes for the protection of intellectual property rights and the simplification of registration procedures in the Member States;
- (b) the establishment of a regional administration for intellectual property rights except copyright;
- (c) the identification and establishment, by the Member States of mechanisms to ensure:
  - (i) the use of protected works for the enhanced benefit of the Member States;
  - (ii) the preservation of indigenous Caribbean culture; and
  - (iii) the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community;
- (d) increased dissemination and use of patent documentation as a source of technological information;
- (e) public education;
- (f) measures to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- (g) participation by the Member States in international regimes for the protection of intellectual property rights.

See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, art. 66, available at [http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf).

161. See *The Role of CARICOM in the Establishment of Regional Systems*, WIPO, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=114473](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=114473) (last visited Feb. 22, 2011).

162. See *Bureau for Latin America and the Caribbean-Meetings*, WIPO, <http://www.wipo.int/lac/en/meetings/> (last visited Feb. 22, 2011).

Tobago's patent offices were identified as being fully functional at the time; however, this office has yet to come into being.<sup>163</sup>

By ramping up its activities on IP consolidation, CARICOM's leadership will indicate to its members and their constituents that it is serious about pursuing every available option that can assist it in achieving its long-term trade goals. CARICOM can begin by embarking on an education campaign done both in web space and real space, alerting its members and indeed enlisting them to further communicate to the general public what intellectual property is, how it can be protected, and what CARICOM plans to do for its members to that end. As the CARICOM treaty realizes, a regional effort is necessary either along with, or in lieu of, the development of national laws and policies. Regional offices allow a pooling of initially unevenly divided resources for the benefit of the whole. It is somewhat ironic that African countries led the way in regional intellectual property offices, yet countries of primarily African descent who have the added benefit of proximity to a willing trading partner that is also the world's wealthiest nation cannot seem to get a similar regional organization up and running.

Despite the lull in CARICOM meetings, CARICOM has been active in pursuing trade agreements.<sup>164</sup> CARICOM has begun negotiations with various countries, such as Canada and the Dominican Republic, as well as with other RTAs such as MERCOSUR and SICA, all in furtherance of its

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163. See One Caribbean Patent Office, <http://www.klassicgrenada.com/index.pl/article?id=16247123> (on file with author); See also Caribbean Patent Office Recommended, [http://go-jamaica.com/news/read\\_article.php?id=14327](http://go-jamaica.com/news/read_article.php?id=14327) (last visited April 21, 2011).

164. A number of meetings have taken place between CARICOM and the WIPO during the last decade regarding the establishment of adequate intellectual property protection within the regional trade group, including the following:

- October 1996 WIPO Sub Regional Workshop for Industrial Property for Legislative Draftsmen of Caribbean Countries
- July 1997 Regional Meeting of Heads of IP Offices of Caribbean Countries; Trinidad
- April 1999 WIPO/CARICOM Seminar on IP
- April 1999 WIPO National Seminar on IP; Belize
- June 1999 Second Ministerial Level Meeting on IP in the Caribbean; Jamaica
- October 2000 Third Ministerial Level Meeting
- June 2001 WIPO Symposium for OECS
- April 2006 WIPO Outreach workshop for Officers and Officials

See WIPO Search, CARICOM <http://www.wipo.int/tools/en/gsearch.html?cx=000395567151317721298%3Aaqr59qtb0&cof=FORID%3A11&q=Caricom#1021> (last visited April 21, 2011).

efforts to liberate its trade relations, capitalize on the benefits of these larger markets, and move forward as an established single market economy.<sup>165</sup> In light of these ongoing activities and the mandates of the Treaty establishing it, CARICOM should earnestly begin working towards the establishment of a regional intellectual property office.

## V. CONCLUSION

CARICOM should immediately move forward in establishing a regional intellectual property office in the Caribbean. It can be known as “CARIPO,” since CAIPO and CIPO are already taken.<sup>166</sup> Such a designation would allow it to accommodate the integration of non-CARICOM member countries in the Caribbean at a later time. The regional office should be overseen by administrators or a council consisting of ministerial officials and intellectual property experts from each member state. The body should be able to set intellectual policy for all member countries, much like is done in the EU, the U.S., and the OAPI. Specialized intellectual property administrative bodies need to be established, as well as one or two IP courts. One or two is sufficient, since the relative area to be covered is currently small. Should the other more populous countries join at a later time, then other courts would have to be established.

There should be subdivisions for each major area of intellectual property. These subdivisions should be in the areas of copyright, trademarks and industrial design, and patent law. It may be feasible to have a branch office of competition established or at least have some tie in with the CARICOM Competition Commission.<sup>167</sup> That office already deals with matters related to unfair competition law, which is often intertwined with issues involving trademarks, trade dress, and trade secret law.

The laws, rules, and regulations governing the application and registration of subject matter should be standardized as issued by the central regional office. A good place to begin is the TRIPS minimum standards,

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165. See *Legal Framework of Integration at CARICOM*, OAS FOREIGN TRADE INFO. SYS., [http://www.sice.oas.org/CARICOM/instmt\\_e.asp](http://www.sice.oas.org/CARICOM/instmt_e.asp) (last visited Mar. 3, 2011).

166. CAIPO is the designation for Barbados Intellectual Property Office and CIPO is the designation for the Canadian Intellectual Property Office.

167. The CARICOM Competition Commission was established under the Revised Treaty and inaugurated in 2008. It consists of 7 part-time commissioners from various member states and functions to promote competition in the Community while preventing anti-competitive practices and arbitrating cross-border disputes. It also develops and disseminates information about Competition Policy and Consumer Protection. See *The CARICOM Competition Commission*, THE CARIBBEAN COMMUNITY (CARICOM), [http://www.caricom.org/jsp/community/competition\\_commission.jsp](http://www.caricom.org/jsp/community/competition_commission.jsp) (last visited Mar. 1, 2011). See also Delroy S. Beckford, *Enforcement of Competition Law in CARICOM: Perspectives on Challenges to Meeting Regional and Multilateral Obligation*, (Apr. 20-21, 2009) (paper presented), available at [http://www.sela.org/DB/ricsela/EDocs/SRed/2009/04/T023600003425-0-Enforcement\\_of\\_competition\\_law\\_in\\_CARICOM.pdf](http://www.sela.org/DB/ricsela/EDocs/SRed/2009/04/T023600003425-0-Enforcement_of_competition_law_in_CARICOM.pdf).

but characteristics shared by the members should also be taken into consideration in building upon the TRIPS minimums.<sup>168</sup> The legislation developed should cover all CARICOM members, but should coexist as a supplement as opposed to substituting for the existing national laws as is done in the EU, ARIPO, OAPI, and even the U.S. to a limited extent when one looks at U.S. trademark law.<sup>169</sup> The regional office should also house or provide a gateway to rights management centers to facilitate the reciprocal collection of royalties between those exporting and importing protectable subject matter to and from the Caribbean. These potential benefits are certainly greatest in the copyright area, as there is readily protectable subject matter throughout the Caribbean. Thus, a regional copyright office in the nature of the U.S. LOC is in order, as opposed to a mish mash of directives and rules loosely developed on a sporadic basis like the EU relies upon. The EU does have a centralized collection agency that can work on behalf of creators of copyrightable subject matter, although individual nations have their own as well.<sup>170</sup>

These activities will spawn similar organizations to become established domestically in member countries, thereby enhancing the existing agrarian and industrial entities in existence, protecting the extended creative industries, and inspiring new home grown technology and knowhow, which is the IP of the future. While it is true that new trade partners may have an inherent advantage that they look to expand upon, a new vigilant regional IP office can limit potential problems and certainly stem the detrimental

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168. Many of the wealthier CARICOM countries follow the model of developed nations by using home grown lobbyist and other stakeholders to assure that their IP concerns are worked into the language of prospective trade agreements. CARICOM must efficiently represent member states by also using trade agreements to capture economic value for the indigenous cultural symbols and manifestations of member states. Many of the bilateral intellectual property agreements executed by CARICOM member countries already contain what are commonly referred to currently as TRIPS-plus provisions whereby the minimum standards required by TRIPS are noted but additional protections are called for as a condition of the treaties. See Beatrice Lindstrom, *Scaling Back TRIPS-PLUS: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 925 (2010) (discussing the history and criticism of TRIPS plus and particularly noting that the leverage that developed countries have as potential trading partners is partially responsible for the proliferation of bilateral trade agreements along with a degree of forum shopping by the developed countries).

169. In the US, trademark law exists on three levels: common law, state law, and trademark law. Every state has its own trademark jurisprudence and offices that administer trademarks on a state level; however, these state trademarks are inferior to federal trademarks in the sense of prospective scope of protection. See generally Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and The Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827 (2009).

170. See SOCIETY OF EUROPEAN COMPOSERS AND AUTHORS (SESAC), <http://www.sesac.com/> (last visited Mar. 1, 2011). See generally Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 INTEL. PROP. L. 21 (2009). See also Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organization and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409 (2008).

exploitation that presently is associated with creative innovation from the Caribbean by those outside the region. A new CARIPO will attract more investors whose financial injection to the greater region can be used to modernize IP offices throughout CARICOM, thus insulating locals from the threat of lawsuit or trade sanctions and comforting outsiders by indicating that there is a structured standardized central location to handle intellectual property disputes.

Solidarity amongst the Caribbean nations is sorely needed and the establishment of CARIPO is an easy way to further identify that the governing bodies realize what is necessary for future progress. Perhaps establishing such an entity will help move members to show true and full independence by use of the administrative and judicial body set up to handle IP disputes. The members have thus far shown immaturity when given that option as the limited reach of the Caribbean Court of Justice illustrates.<sup>171</sup>

To paraphrase Sir Fred Phillips, the magnificent strides in Caribbean self-governance have been unfortunately accompanied by hideous fragmentation and proliferation. Independent jurisdictions, national honors, national flags, anthems, and airlines all abound. Is it not time to draw the curtain down on fragmentation in these many spheres?<sup>172</sup> This Author is not advocating the abolition of any of those particular items or nationalism

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171. CARICOM also provided for the establishment of the Caribbean Court of Justice (CCJ) so that CARICOM countries would have their own supreme court of final disposition. See *About the Caribbean Court of Justice*, CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtofjustice.org/about.htm> (last visited Mar. 1, 2011). The member nations already had court systems, but the court of final appeal was and is for most member states the Privy Council in the United Kingdom (UK). The Judicial Committee of the Privy Council is the court of final appeal for most CARICOM countries because, despite their independence, they retained the appeal right to the UK. See *Judicial Committee: Overview*, PRIVY COUNCIL OFFICE, <http://www.privy-council.org.uk/output/page5.asp> (last visited Mar. 1, 2011). All CARICOM members signed the agreement establishing the CCJ, but they needed individual legislative action to actually renounce their appeal rights to the UK and adopt the CCJ as their highest court. To date, only Belize, Barbados, and Guyana have taken the necessary steps and made the CCJ their final court of appeal, despite the fact that the other states signed the original documents and contributed money to get the CCJ up and running at its headquarters in Trinidad & Tobago. The continued use of the Privy Council has been questioned by many, including the Justices of the CCJ. See Oscar Ramjeet, *Will Jamaica Soon Abolish Appeals to the Privy Council?*, CARIBBEAN BLOG INT'L (June 19, 2010), <http://caribbean-webcrat.blogspot.com/2010/06/will-jamaica-soon-abolish-appeals-to.html> (addressing the fact that, although Jamaica has not yet accepted the CCJ despite early support, it may now consider abolishing appeals to the Privy Council to join the CCJ). See also David Lachana A/C Lachana, Sadonel Devi Lachana vs. Cooblal Arjune, [2008] CCJ 12 (AJ), where the Justices, when faced with acting de novo or instead acting in accord with Privy Council practice, noted that the Lordships of the Privy Council are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. The CCJ indicated that since it is a regional court having greater familiarity with the social and cultural dimensions of Caribbean cases, it will develop its own practice. See also MICHAEL THEODORE, LAW: THE AIR WE BREATHE, A LOOK AT LAW AND THE LEGAL SYSTEM IN THE CARIBBEAN 115 (1994).

172. See PHILLIPS, *supra* note 109, at 341.

in general. However, ending fragmentation in intellectual property will prevent further pauperization of the smallest states striving to get their IP offices off the ground, as well as help trade overall, possibly leading to the consolidation of many of the existing hard industries such as oil refineries, rum distilleries, cement and beer factories and the like that are often in neighboring countries, yet physically only 100 miles away from each other.<sup>173</sup>

CARICOM is mandated by treaty to take action in this area, and it is action that has little to no explicit downside. The biggest current negative is the continued slow pace which leaves the least developed states struggling and puts those more developed states in a potentially anti-competitive stance relative to each other, thus thwarting the goals of CARICOM. CARICOM needs to establish CARIPO now. Modeling it after the established regional IP offices elsewhere will not only be a case of flattered imitation, but a sensible move that lets them interface with the more experienced organizations while avoiding their mistakes. CARICOM should supplement their interactions with other regional offices with continued assistance from the WIPO and the IPI, as well as any other similar international IP organizations used collectively and by individual states in the past. Establishment of CARIPO will be new and invaluable, it will certainly be a useful tool in helping CARICOM achieve its long term goals and it is unquestionably necessary.

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173. See *id.* at 342. Phillips also notes that between 1962 and 2000, the nations of the Caribbean witnessed the installation of 3 Presidents, 9 Governors General, 6 Governors, 12 Prime Ministers, 1 Premier, 4 Chief Ministers, and 150-200 ministers of government as the top administrative machinery for a population of roughly 5 million [focusing on the West Indies only], which is less than half the population of the “city” of Shanghai, China. He further states, “[t]o the extent that politicians fail to discern that unity is strength, a thick chauvinistic darkness continues to engulf our leaders and we must look to a new generation to dispel the encircling gloom.” *Id.*