THE SOCIAL STRUCTURE OF JAPANESE INTELLECTUAL PROPERTY LAW

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I. INTRODUCTION

In a documentary entitled "The Japanese Version,"[1] the film-makers introduce us to a bar in Tokyo. The bar is dedicated to American cowboy culture. Western memorabilia hang on the walls; country and western music plays on the loudspeakers; and classic films play on video monitors. One customer in the bar, a dentist, regularly dresses like a character out of a Hoot Gibson movie. When asked why American Westerns are so popular in Japan, he answers without hesitation. The cowboy represents traditional Japanese society, the dentist says. Whenever there's trouble, the cowboys all gather together into a group and take care of each other's interests, just like people in Japan.

Of course, in America, the cowboy is the quintessential individualist, roaming the prairies alone and living by his own rules. Like the Lone Ranger, he rides into town, confronts evil, and then rides off into the sunset.

If both Japanese and Americans see an image as well-defined as the American cowboy so differently, it should come as no surprise that they also see intellectual property very differently.[2] To say that Japan is a group-oriented culture and America is an individualistic one is a cliché, but there is enough truth in the stereotypes to retain them despite the exceptions that can be found. With intellectual property, as with American Westerns, what you see depends on who you are.

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1. THE JAPANESE VERSION (The Center for New American Media 1990).

2. *See generally* Samson Helfgott, *Cultural Differences Between the U.S. and Japanese Patent Systems*, 72 J. PAT. [& TRADEMARK] OFF. SOC'Y 231-38 (1990).

In general, the intellectual property world is divided along two axes: (1) importing versus exporting nations, and (2) private enterprise versus non-market economies. On both of these scales, one would expect Japan to be a strong proponent of patent, trademark, and copyright laws. In the U.S., six of the top ten companies receiving patents are Japanese.[3] In Germany, as well, Japanese companies constitute the most prominent foreign applicants for patents, having applied for 2,910 in 1992, compared with 1,139 applications from American companies.[4] Japanese companies benefit greatly from trademark laws that prevent others from calling their cars "Honda Accord" or tape players "Sony Walkman." And although Japanese artistic works do not command worldwide audiences (because of the lack of knowledge of the Japanese language, not because of quality), Japanese corporations now export music and movies through their acquisition of American companies such as Columbia (Sony) and MCA (Matsushita), as well as the European EMI (Toshiba).

So, by all conventional measures, Japan should be a bastion of protection for intellectual property. And yet, compared with many Western countries and particularly the United States, the Japanese version of intellectual property law is porous and the

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3. *IBM Won Most U.S. Patents in '93*, UPI, Jan. 10, 1994, *available in* LEXIS, Nexis library, UPST92 File. In 1993, for the first time since 1985, an American company—IBM—was at the top of the list of patents issued, with 1,088. However, as in the previous year, six of the top ten companies were Japanese:

IBM (U.S.)	1,088
Toshiba (Japan)	1,064
Canon (Japan)	1,039
Eastman Kodak (Japan)	1,008
Hitachi (Japan)	949
Mitsubishi Denki (Japan)	944
General Electric (U.S.)	942
Motorola (U.S.)	731
Matsushita Electric (Japan)	722
Fuji (Japan)	634

Id.

The previous year, Canon Inc. received the largest number of patents in the United States—1,106. Second was Toshiba with 1,020. Mitsubishi Electric's 957 patents placed it third. The highest ranking American company was General Electric, which took fifth place. *Japan Firms Dominate Top 10 U.S. Patent Winners in 1992*, Japan Econ. Newswire, Feb. 25, 1993, *available in* LEXIS, Nexis Library, JEN File. Toshiba was first in 1991. *See* John Burgess, *After a Slide, Patently Superior*, WASH. POST, Jan. 13, 1994, at D10.

IBM's sudden rise may be followed by an equally sudden fall. In 1993, the company cut its research and development budget by $1 billion, the effect of which will be reflected in 1994's filings. *Id.*

4. In Germany, however, domestic companies are at the top of the list. The most active applicants, in order, in 1992 were Siemens AG, Boscho (Robert) Gmbh, Bayer AG, BASF AG, IBM (U.S.), Hoechest AG, and Canon (Japan). *Japan Tops German Patent List*, JAPAN TIMES, Apr. 21, 1993, at 10.

attitude is often ambivalent.[5] The roots of this lie in social attitudes towards the role of individuals within a society, interlocking relationships, the speed of progress, and interaction with outside entities. The argument put forward here is not that culture causes legal form, but rather that the law can best be understood as part of a much larger social system. This article will follow the threads of Japanese sociological thought and how they wind their way through patent, trade secret, trademark, and copyright.

II. TRADITIONAL JAPANESE THOUGHT AND THE ROLE OF INTELLECTUAL PROPERTY

In the United States, the copyright clause to the Constitution reveals the purpose of intellectual property law: "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] Copyright is a social bribe, or at least a payoff. We promise to give the artists or inventors the sole ability to make money from their work[7] to encourage them to continue producing.[8] In a system predicated on

5. Economic framework talks between the United States and Japan adjourned late in December of 1993 without any progress being made on intellectual property disagreements. Michael Kirk, the U.S. Assistant Commissioner of Patents and Trademarks for External Affairs, said, "Perhaps before the middle of 1994, we would be able to reach some agreement, but it is going to be very difficult . . . to reach a successful conclusion . . . . I am not optimistic about the direction of the talks." American complaints included long waits after the filing of patent and trademark applications; opposition to patents prior to their being granted, resulting in further delay; differences in court proceedings regarding patent enforcement; narrow judicial interpretation of patent claims; the failure to provide exclusive rental rights in sound recording for 50 years; and the failure to give trade secrets the same level of confidentiality they would receive in the United States. *International Trade: U.S., Japan Make No Progress in Intellectual Property Talks*, DAILY REP. FOR EXECUTIVES (BNA), Dec. 22, 1993. The talks resumed in January of 1994, focusing on marketing access, but the wide differences in position, along with the instability of the ruling coalition early in the year (due to rejection of an election reform plan by the upper house of the Japanese legislature and intra-coalition disagreement about tax revision), made substantial progress difficult. *Little Progress Expected in Trade Talks*, JAPAN TIMES, Jan. 24, 1994, at 1.

Earlier in 1993, the U.S. Chamber of Commerce named Japan as one of sixteen countries that it believed unfairly failed to protect American intellectual property interests. *Japan Seen as Not Protecting U.S. Patents*, JAPAN TIMES, Apr. 30, 1993, at 12.

6. U.S. CONST. art. I, § 8, cl. 8.

7. *See* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

8. The other competing viewpoint, especially associated with France, provides intellectual property rights not as an incentive but rather as a recognition of the creator's dignity. *See* Dan Rosen, *Artists' Moral Rights: A European Evolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983). Despite the theoretical aversion to the moral rights concept, it has made its way into American law, adjacent to copyright.

private gain, such an incentive seems not only appropriate, but also necessary. Without it, the fear is that talented people would select other ways to use their skills—ways in which they could maximize their own economic rewards.

In contrast, Japan's copyright law reveals a balancing of interests between individual inventors and society. Rather than securing exclusive rights, the law's purpose "is to prescribe the rights of authors."[9] Unlike American patent and copyright law, which assumes exclusive rights from the outset, Japanese copyright law speaks of "promot[ing] the protection of the rights of authors, etc., giving consideration to a fair exploitation of these cultural products, and thereby . . . contributing to the development of culture."[10]

In America, the most scarred battlefield of copyright law is the fair use doctrine. Section 107 of the Copyright Act attempts to consider the interests of the public within the context of the author's exclusive rights, but it does so in a hesitant and, at best, Delphic manner. A variety of factors are to be considered, none of which is talismanic.[11] Wars over photocopying,[12] home videorecording,[13] and getting a scoop on the memoirs of an ex-President have been waged over the interpretation of these factors.[14] The law assumes that the private right of the copyright holder prevails unless the would-be copier can show a strong reason to

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See, e.g., Russ VerSteeg, *Moral Rights for the Visual Artist: Contract Theory and Analysis*, 67 WASH. L. REV. 827 (1992); Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for the Visual Arts*, 39 CATH. U. L. REV. 945 (1990). *See generally* Carl H. Settlemeyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291 (1993).

9. Chosaku-ken Hō [Copyright Law], Law No. 48 of 1970, art. 1 (Japan).

10. *Id.*

11. *Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1988 & Supp. IV 1992).

12. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

13. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

14. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

be allowed a "free ride." In most fair use disputes, neither the plaintiff nor the defendant can be sanguine about the outcome.[15]

Japan takes a very different approach: simple and direct—one that prescribes the rights of authors and defines a fair exploitation. A copyrighted work "may be reproduced by a user for the purpose of his personal use, family use, or other use similar thereto within a limited area . . . ."[16] Japan does not make the interest of the public an exception to copyright; it includes the public interest in the allocation of rights. Article 33 further clarifies this "public welfare" idea. Article 33 provides publishers of government-approved school textbooks an absolute right to copy copyrighted material "for the use of children or pupils in their education in primary schools, junior and senior high schools or other similar schools."[17] The Commissioner of the Agency for Cultural Affairs then fixes an appropriate amount of payment for the use. In American copyright parlance, this is known as a compulsory license.[18] What is crucial here is that the ability to use the material is never in doubt because the public purpose is compelling.[19]

This illustrates a more general point that Japanese copyright law, like Japanese society, considers the interaction of individuals and the society simultaneously and values the correlative responsibilities at least as highly as the individual rights. American copyright law, like American society, begins with the premise that the whole prospers by giving as much protection to the individual as possible.[20]

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15. *See, e.g.*, L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249 (1992); Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 MIAMI L. REV. 233 (1988).

16. Chosaku-ken Hō, *supra* note 9, art. 30.

17. *Id.* art. 33.

18. Examples of compulsory license in American copyright law have included cable television retransmission of broadcast signals (17 U.S.C. § 111) (1988 & Supp. IV 1992), retransmission of satellite signals to home receiving dishes (17 U.S.C. § 119) (1988 & Supp. IV 1992), jukeboxes (17 U.S.C. §§ 116, 116A) (1988 & Supp. IV 1992), and the use of copyrighted nondramatic works by public broadcasting (17 U.S.C. § 118) (1988 & Supp. IV 1992).

19. American practice, in contrast, is the product of a compromise agreement reached among publishers', authors', educators', and trade organizations. It sets numerical limits on the amount of material that can be copied for classroom use, e.g., "an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words." *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions* II (ii) (b), *in* COPYRIGHT FOR THE NINETIES 645, 646 (Alan Latman et al. eds., 1989).

20. Recent cases to the contrary seem to result from an inability to control the technology, rather than from any redefinition of the rights of copyright holders. *See generally* Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769 (1984).

The origins of this theme may be found in Chinese Confucianism which even today exerts a strong (if perhaps silent) influence on Japanese society.[21] Confucianism posits a good society by mutual consideration of the needs of others. I take care of your needs; you take care of mine.[22] American thought is dominated by looking out for oneself. "Look out for number one." "Every man for himself." "It's a dog eat dog world." These are not idle proverbs.

Several writers, most notably Robert Whiting, have noted how this cultural difference affects the playing of America's national pastime in Japan. American players are accustomed to doing their best, and, by doing so, helping the entire team. The Japanese train their players to work incrementally for the progress of the team, each person sacrificing his personal goals (such as more home runs) to the immediate team objectives (bunt).[23] Later in this article, we will consider how the preference for incrementalism affects Japanese industry and industrial property, particularly patents.

Takeo Doi's book, *The Anatomy of Dependence*,[24] is so often cited for this proposition that perhaps no more elaboration

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21. Confucianism is emerging as a powerful alternative to the Western political model. The economic success of Asian nations, along with their relative safety (with, of course notable exceptions), contrasted with the rampant crime and disorder in many western countries, has bred a generation of neo-Confucianists. They assert that the fruit of unfettered individual liberty is social decay and gridlocked government. *See* Kishore Mahbubani, *Dangers of Decadence*, FOREIGN AFF., Fall 1993 at 10. (author is Deputy Secretary of Foreign Affairs, Singapore); Bill Powell, *Who Needs Democracy?*, NEWSWEEK (Int'l Ed.), Nov. 22, 1993, at 25.

Confucianism, however, is not without its own set of problems, not the least being the systematic denial of human rights by governments that claim to be operating for the good of the whole. Moreover, a government that is less democratic than that of the United States is not necessarily free of control by powerful special interests. The post-war political history of Japan, while successful in many ways, is also punctuated by recurring incidences of corruption by big money. The Lockheed scandal that led to the downfall of Prime Minister Tanaka in the 1960s; the Recruit scandal that ended Prime Minister Takeshita's control; and the Sagawa Kyubin scandal that brought down Prime Minister Miyazawa and long-time-behind-the-scenes strongman Kanemaru Shin in the 1990s: they all resulted from the excessive insulation of political officials who operated within what was supposed to be a benevolent environment. The motive was private profit. Similar accusations have been made about political officials in Korea, such as former President Chun Doo Hwan who spent two years in self-imposed exile in an isolated Buddhist temple after leaving office in 1988. *See Scandal Rocks South Korea*, JAPAN TIMES, Jan. 25, 1994, at 11.

22. Confucianism, however, frequently has been misused to justify rigid stratification and inflexible government. Some would argue that the Tokugawa shogunate in Japan adopted this approach implicitly. In seventeenth century China, it was used explicitly to strengthen the government's control. *See* JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 58-60 (1990).

23. ROBERT WHITING, YOU GOTTA HAVE WA (1989); ROBERT WHITING, THE CHRYSANTHEMUM AND THE BAT (1977).

24. TAKEO DOI, THE ANATOMY OF DEPENDENCE (John Bester trans., 1971).

is necessary. Unfortunately, the translation of the title of his work obscures Doi's point that the Japanese are trained from birth to rely on others rather than to operate independently. The Japanese word in question is *amaeru*. It is not simply dependence, but rather interdependence—an elaborate interlocking system in which people look to one another (often as a kind of surrogate family) to have their needs fulfilled while they, in turn, fulfill the needs of others.

What bedevils many Western nations is that Japan's economy operates this way as well. It is an oversimplification to say that American antitrust law discourages the conglomeration of corporate power while Japanese law encourages it,[25] but not much of one.[26] Banks all offer the same services at the same cost, despite ongoing deregulation.[27] A taxi company in Kyoto recently incurred the wrath of all of its competitors by lowering prices by ten percent at a time when the others wanted a rate increase. The government gave permission to offer the discount as an experiment. The government also regulates the prices of airline flights in Japan. Prices are higher than in the U.S., and business has been bad in recent years, but the quality of service is high.[28]

Shigenori Matsui has described succinctly the difference between the American and the Japanese views of uniformity and unbridled competition. "Whereas in the United States the governmental regulation tends to be deemed justified only where the market failure or malfunction exists, it tends to be deemed justified in Japan even when no market failure or malfunction exists

25. *See generally* MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW (1990); Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115 (1994).

26. *See generally* J.D. Richards, Comment, *Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices: An Illustration of Why Antitrust Law is a Weak Solution to U.S. Trade Problems With Japan*, 2 WIS. L. REV. 921 (1993).

27. For example, the Japanese subsidiary of Citibank, from the United States, is the only bank in Japan that has 24-hour automatic teller machines (ATMs).

28. Maintaining quality and guarding against the ill effects of unrestrained price competition are the main reasons given for government control of "excessive competition." *See generally* DANIEL OKIMOTO, BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY (1989). It should be noted that the airline business in the deregulated U.S. market has been bad too, with many carriers going out of business and others struggling. *See generally* AIRLINE DEREGULATION: THE EARLY EXPERIENCE (John R. Meyer & Clinton V. Oster, Jr. eds., 1981); ANTHONY E. BROWN, THE POLITICS OF AIRLINE DEREGULATION (1987); STEVEN MORRISON & CLIFFORD WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION (1986).

.... The role of the Government as a promoter and protector of the economy has long been accepted in Japan."[29]

Until quite recently, most Japanese corporations followed the lead of the Ministry of International Trade and Industry ("MITI"), in setting their goals. MITI set these goals by instigating interaction between corporate players, rather than by passing down Stalinistic decrees.[30] John Haley has called this process of Japanese administration "consensual administrative management."[31] The government would decide generally the most beneficial direction for industry, and then "Japan Inc.," as it was called sometimes, would head in that direction together; not like the legs of the same animal, but rather like the parade of different animals all headed toward Noah's ark. Everyone would be able to get on board, but each in its own way. Those who wanted more space, or who wished to steer the boat a different way, however, would be cast overboard quickly.

Frank Upham's retelling of the tale of Sato Taiji illustrates the point. Sato, a born iconoclast, decided it would be a good idea to import gas and sell it cheaply. Good for business and good for consumers. MITI, however, saw his plan differently. In its eyes, Sato's success would undermine the carefully maintained balance of oil company profitability, employment, and stability of supply. And so, MITI, through "administrative guidance" (*gyō-sei shidō*)[32] and its network of influence throughout the economy made sure that he would be stopped.[33]

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29. Shigenori Matsui, *Lochner v. New York in Japan: Protecting Economic Liberties in a Country Governed by Bureaucrats*, *in* LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 199, 299 (Philip S.C. Lewis ed. 1994). Professor Matsui, however, believes that "it is more likely that the term 'excessive competition' is used as a pretext for protectionist regulation for the industry." *See also* J. Mark Ramseyer, *The Cost of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985).

30. Western writers, especially, have many different interpretations of MITI's role. *See, e.g.*, CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE (1982); DAVID FRIEDMAN, THE MISUNDERSTOOD MIRACLE: INDUSTRIAL DEVELOPMENT AND POLITICAL CHANGE IN JAPAN (1988).

31. JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 144 (1991).

32. *See id.* at 160-66 (1991).

33. MITI's network of influence throughout the economy may extend as far as China—one of Sato's shipments never made it on the ship. Frank K. Upham, *The Man Who Would Import: A Cautionary Tale About Bucking the System in Japan*, 17 J. JAPANESE STUD. 323 (1991) (reviewing SATO TAIJI, ORE WA TSŪSANSHO NI BARASARETA! [I WAS BUTCHERED BY MITI!] (1986)).

In May of 1994, Nagoya-based Kanare Beikoku—a rice retailer—opened a discount gas station in Akomaki, Aichi prefecture, without a government license. It was said to be the first gas station in Japan to sell gas for less than ¥100 per liter. MITI refused the company's registration papers twice because it was unsatisfied with the documentation of the source of the gasoline. Eventually, in late June, MITI relented and the station received authorized status. *See Cheap Gas Fuels Debate*

In recent years, increased trading with countries that do not share this worldview has caused some breakdown in this system.[34] Later in this article, we will consider how increased international business contact has affected traditional Japanese ways of thinking and approaches to intellectual property.

A. INCREMENTALISM VERSUS THE BIG BANG

American industry is known for breakthrough products. In contrast, Japanese companies have adopted the practice of making continuous incremental progress. Surely the two most-uttered phrases in Japanese television commercials are "now on sale for the first time" (*shin hatsubai*) and "new product" (*shin tōjō*). The part that is "new" may seem small to American eyes, but over time, small changes evolve into a much better and, frequently, fundamentally different product.[35]

Over Regulations, DAILY YOMIURI, June 14, 1994, at 9; *Gas Station Gets License*, JAPAN TIMES, July 1, 1994, at 14.

34. Generally speaking, however, Japan as a society is more comfortable relying on "experts" than are countries in the West. To give but one example, the Anglo-American jury system has been well studied by Japanese researchers, but never implemented. One commonly heard reason is that the average citizen knows very little about law. The assumption is that a legally trained expert can do a much better job. This is not simply an opinion mouthed by academic elites. When one of our authors (Rosen) asks nonlawyers and nonjudges whether they would like to serve on a jury, this is the response that he usually hears. Controversial high-profile jury decisions in America (acquittal of police officers in the wake of the Rodney King matter; acquittal of perpetrators in the beating of Reginald Denny in the wake of the Rodney King matter; and acquittal of both John and Lorena Bobbitt in their respective marital/rape/vicious assault trials) seem to confirm to many Japanese that their way is preferable.

35. Ampex, the American company that made the big bang development of videotaping, abandoned the idea of selling home videotape recorders, after failing to bring a product to market successfully. Japanese companies took the basic idea, reworked it, and brought about a revolution in the relationship of viewers and broadcasters. No longer were consumers held captive to the networks' timetables. Time shifting allowed consumers to watch programs on their own schedules. Further miniaturization allowed consumers to become their own videotape producers with handheld camcorders. (This also altered the grammar of television news, as professional camcorders allowed photographers the flexibility of moving quickly, freed of cumbersome lights and cables, not to mention the delay occasioned by film processing. We have come to expect pictures from anywhere and the ability to see them instantaneously. This alone belies any suggestion that audiovideo innovations are merely toys.) *See* Jodi Zechowy, *Cheaper by the Dozen: Unauthorized Rental of Motion Picture Videocassettes and Videodiscs*, 34 FED. COMM. L.J. 259, 264 (1982).

Moreover, the further refining of home video players and recorders gave birth to another industry, that of movie rentals. The secondary market for motion pictures has altered the financial structure of the movie industry, allowing for another source of revenue, and it has given consumers much greater choice. It also has created new empires such as Miami based Blockbuster Video, which now covets a role as a multi-media conglomerate. *See Waynes' Spins on Sports*, SEATTLE TIMES, Oct. 18, 1994, at C1.

The portable stereo, commonly known by the Sony trademarked name "Walkman,"[36] is a good example. Although the "big bang" breakthrough (often called a "pioneer patent") of tape recording was not made in Japan, former Sony chairman Akio Morita, believed that consumers, especially young people, would like to carry their music with them. With this use in mind, he asked his engineers to look into ways of improving the basic product. Sony's reputation had been built on a similar foundation, when the company made radios portable.[37]

Sony introduced the Walkman in the early 1980s and the Walkman was an instant hit. Small and friendly, and reasonably priced, it captured the hearts of buyers and prompted them to open their wallets. Over the years, the product became smaller and smaller, and the features more and more extensive. This occurred through many incarnations of *shin tōjō*, no one of which seemed dramatically different from the previous one. However, comparing the Walkman of today with that of a decade ago is like setting a 1950s picture tube television next to one of Sharp Corporation's flat liquid crystal display ("LCD") video monitors of the 1990s. The LCD performs basically the same function as the picture tube, but in a way that expands and enhances the product's utility.

In the case of the Walkman, it bred portable players of compact discs ("CD"), digital audio tapes ("DAT"), and mini discs, each of which has itself been incrementally improved.[38] In the same way, Sharp Corporation has taken what began as a screen for calculators and steadily refined it into an indispensable element of portable computers, televisions, and multimedia systems.

Sharp was the first company to mass produce LCD calculators in the 1970s.[39] LCDs subsequently made their way into

36. "Walkman" is an example of a brand name that borders on becoming too successful. To many people, it has ceased to identify goods from Sony. Instead people use the brand name to refer to all products of that kind. When people talk about buying a Walkman, they often mean it in the same way they might say they are going to the Xerox machine when using any company's photocopier. Neither Walkman or Xerox has become generic, and thus subject to attack as a trademark, but constant vigilance is required by trademark owners to maintain secondary meaning of the mark. *See* 15 U.S.C. § 1125(a) (1988).

37. *See generally* AKIO MORITA, MADE IN JAPAN (1986). Morita suffered a stroke late in 1993 and has retired from most of his corporate responsibilities. Before his illness, he was expected to become the leader of Keidanren, the influential Japanese business association. *See Toyota Head Likely to Lead Trade Group*, N.Y. TIMES, Jan. 15, 1994, at 39.

38. The "Walkman" trademark has proven to be quite versatile. Sony now makes the Discman (portable compact disc player), Watchman (television), and Scoopman (portable tape recorder, especially useful for news reporters).

39. Calculators are another example of incremental improvement over a period of years resulting in an essentially fundamental change. When one of our authors

wristwatches, video games (the rise of Nintendo and Sega is yet another story), and black-and-white video displays. When LCDs turned color, a 3-inch color television appeared in 1987.

In 1993, Sharp substituted a four-inch LCD video monitor for the eyepiece viewfinder found in ordinary video cameras, and the era of the ViewCam was born. People no longer needed to close one eye and squint into a narrow tube to take a picture. Furthermore, immediately after taping, the ViewCam could replay the scene for everyone to watch at the same time. Two hundred thousand units were sold in the first ten months of production.

Next up: wall-hanging TVs. LCDs weigh only one-tenth as much as cathode ray tubes and are only one-tenth as thick. Sharp now controls 40 percent of the world LCD market,[40] which is expected to mature into a $20,000,000 industry in the 21st century.[41]

Given the practice of incrementalism in Japanese industry, it should come as no surprise that the Japanese patent system finds such steps patentable,[42] at the expense—many Americans claim—of American companies' patented technology.[43] This is one of the main issues that the United States emphasizes in trade talks with Japan.

In general, it is said that the United States issues broad patents while Japan issues narrow ones.[44] American patent claims must be made more concretely than those in Japan. Paradoxically, however, the American patent also radiates a protective zone beyond its specific boundaries, while the more vague Japanese patent is strictly confined to its terms.

(Rosen) studied statistics in the mid-1970s, he had to use calculators in what was called "The Wang Room" where telephone-size calculators were attached to a central power source. Soon thereafter, handheld calculators became available but at a cost exceeding $100. Recently, in appreciation for opening a modest savings account, Rosen was given a basic-function calculator for free by the Japanese post office. It's about the size and width of a credit card and runs on solar power.

40. *See Electronics Industry Aglow Over LCDs*, JAPAN TIMES, Jan. 26, 1994, at 3. The Sharp corporation has a humble origin—the ubiquitous "Eversharp" mechanical pencil.

41. Rosen used his post office calculator to convert the estimate from Japanese yen (¥2,000,000,000) into dollars, using a rough exchange rate of ¥100=$1.

42. *See* Toshiko Takenaka, *The Substantial Identity Rule Under The Japanese Novelty Standard*, 9 UCLA PAC. BASIN L.J. 220 (1991).

43. Tokkyō Hō [Patent Law], Law No. 121 of 1959, art. 29 (Japan), however, like the American Patent Law, 35 U.S.C. § 103 (1988), precludes the granting of a patent for that which would have been obvious, or easily made, by someone with ordinary skill or knowledge in the field to which the invention belongs.

44. *See generally* Michael T. Helfand, *How Valid Are U.S. Criticisms of the Japanese Patent System?*, 15 HASTINGS COMM. & ENT. L.J. 123, 150-54 (1992).

The American practice somewhat resembles the economic zones that some nations claim outside their territorial waters.[45] It is not that someone is crossing national boundaries, but rather that protection of those boundaries is thought to include the right to protect the adjacent area. Similarly, within its true area of sovereignty, one nation may prohibit another from catching fish and may even prohibit the other country from depleting a necessary fish supply just outside territorial waters.[46]

Similarly, an American patent does not include innovations other than those described in the application. However, American practice allows the patent holder to prosecute another innovator who strays close enough to the protected space to create a threat. This typically occurs in an infringement action against the later party.

Interpretation of claims has both defensive and offensive dimensions. In patent jargon, the defensive use involves the doctrine of equivalents.[47] Old wine in a new bottle may be patentable if the bottle itself is novel, as may new wine in an old bottle. The question is: is there anything new here? If not, the original vintner can invoke the doctrine to defend his technology and restrain the newcomer.

Patent equivalence is only slightly less opaque than "fair use" in copyright. Even within the American domestic system, substantial disagreement exists about what is equivalent and what is different enough to represent a patentable invention.[48] Thus, we would expect variations among different countries.

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45. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea[.]

U.N. Convention on the Law of the Sea, Oct. 7, 1982, art. 33, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 202-03 (4th ed. 1990).

46. The related doctrine of exclusive economic zones also affords nations certain rights in what would otherwise be high seas open to all. U.N. Convention on the Law of the Sea, Oct. 7, 1982, art. 56, 246, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261. *See generally* IAN BROWNLIE, *supra* note 45, at 224-25.

47. *See, e.g.*, Graver Tank & Mfg. Co. v. Linde Air Prods., 339 U.S. 605 (1950); Machine Co. v. Murphy, 97 U.S. 120 (1877).

48. *See, e.g.*, R.M. Klein, *Establishing Infringement Under the Doctrine of Equivalents After Malta*, 75 J. PAT. [& TRADEMARK] OFF. SOC'Y 5 (1993) (citing Malta v. Schulmerich Carillons, Inc., 952 F.2d 1320 (Fed. Cir. 1991)); J.M. Bailey, *The Doctrine of Equivalents After Wilson Sporting Goods*, 35 ARIZ. L. REV. 765 (1993) (citing Wilson Sporting Goods v. David Geoffrey and Associates, 904 F.2d 677 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 992 (1990)); G.J. Smith, *The Federal Circuit's Modern Doctrine of Equivalents in Patent Infringement*, 29 SANTA CLARA L. REV. 901 (1989); Fumitoshi Takahashi, *The American Patent System Disturbs the International Harmonization*, THE ASAHI RESEARCH, June 1, 1994 (No. 108), at 62 (in Japanese).

Critics of the Japanese system are at least half right. The Japanese system does allow others to stray closer to the sovereign boundaries of existing patents than the American system does. However, European (particularly German) practice also deviates from the American.[49] By itself, this doesn't prove an unfair trade practice, unless the meaning of "unfair" is anything that is not American. The critical question is whether foreign applicants are treated differently from domestic applicants. In Japan, the answer, except for the unusual cases, is "no."[50]

If American patent practice is a game of chess, in which stronger pieces capture weaker ones, the Japanese approach is more like the traditional Asian board game of "*Go*." In *Go*, one wins not by directly confronting the opponent, but rather by surrounding and isolating the opponent. Patent flooding, the offensive use of the strict interpretation of patent claims, is used to surround an existing patent with new, limited innovations. Over time, the original patent holder finds himself unable to maneuver. In Japan, patent flooding is not only common practice, but it is also fair play.

The patent flooding strategy fits perfectly within the Japanese system's recognition of incrementalism. Progress comes through the continuous efforts of many inventors, and so—from the systemic standpoint—allowing patent flooding is efficient. It provides an incentive to develop small, yet useful, changes. Of course, other patents may soon surround these patents as well. In the United States, such a system would result in a kind of gridlock. In Japan, the traffic continues to move, perhaps even faster than before, but American companies find the method oppressive.

Incrementalism, however, often comes at a cost, as the developers of the High Definition Television ("HDTV") at NHK, Japan's public broadcasting system, can attest. For twenty years, NHK worked on improving the home television picture. In the mid-1980s, it began to display its "High Vision" system publicly and to make plans to license it for world-wide development.

The most lucrative market, of course, was the United States, and NHK made a strong push for the Federal Communication Commission ("FCC") to adopt the NHK standard. Broadcasting is one industry in which the American government actually im-

49. *See generally* S.M. Bodenheimer, Jr., *Infringement by Equivalents in the United States and Europe: A Comparative Analysis*, 15 EUR. INTELL. PROP. REV. 83 (Mar. 1993).

50. American critics point out, however, that Japanese companies are able to take advantage of the more protective U.S. system, but American companies have to adapt to the Japanese system. Identical treatment with domestic applicants doesn't resolve the international disadvantage.

poses technical uniformity. All televisions employ the same basic technology in order to allow universal reception. The All-Channel Receiver Act requires manufacturers to equip every television to receive every authorized VHF and UHF channel. It also authorizes stereo AM radio so long as the broadcast signal would still be capable of reception on existing non-stereo receivers.

Thus, the FCC announced that it would consider proposals for HDTV, but that only one system would be selected as the industry standard. A long period of testing and evaluation followed. NHK, the first company with a working system, was ready to move forward. By moving only a half-step forward though, it lost the race.

NHK's system is an enhancement (albeit a significant one) of the same analog technology used in existing television broadcasting. Other companies, however, took advantage of the long development period to leapfrog over High Vision and perfect their own digital-based systems. The digital video technology, much like digital audio, is much cleaner than analog and less subject to distortion.[51] So by the time the FCC was ready to make a decision, analog had been superseded.[52]

B. COLLECTIVISM VERSUS INDIVIDUALISM

Japanese companies, whether the flooders or those flooded, almost always enter into a cross-licensing agreement in which all the technology holders enjoy the right to make use of all the patents. This comports well with the societal tendency toward collective activity. When everybody works together, each one usually gains, although to be sure, some more than others.

To American companies, it is painful to give up the advantage, and within the American system, it seems unfair. Within the Japanese corporate hierarchy, however, it is expected that major companies (the usual patent flooders) will maintain their

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51. Digital encoding is binary, consisting of various combinations of 0 and 1. Transmission and reproduction is precise because the receiver need only recognize 0 or 1 at any given point. Analog technology requires the receiver to decode waves that may be any number of points at any given time. Accuracy is thus more difficult to achieve.

This is not to say that digital is aesthetically better then analog, any more than a photograph is superior to a painting. For example, motion pictures are still produced on film, which has a warmer quality than video. Some artists and listeners prefer the sound of analog audio to that of digital, which at times can sound cold and steely.

52. The FCC is expected to choose a digital HDTV system in 1995. *See* William J. Cook et al., *Fast Lane to the Future*, U.S. NEWS, Jan. 17, 1994, at 56, 58; *cf.* Elise S. Brezis et al., *Leapfrogging in International Competition: A Theory of Cycles in National Technological Leadership*, 83 AM. ECON. REV. 1211 (1993) ("lagging" nations may leapfrog over "leading" nations by adopting newer technologies more readily).

dominance but that smaller specialists can find a place as well. The influence of Confucianism, with its emphasis on vertical relationships, is patent (no pun intended); inferiors will display deference to superiors, but superiors will not abuse their position and, indeed, will tend to the well-being of the inferiors. Ideals, by definition, are not always realized, and perhaps often are cynically abused. Nevertheless, they serve as a constant reminder of values and as some protection against sustained gross deviations.[53]

The case of Fusion Technology ("Fusion"), an American high tech company with a narrow but innovative process, symbolizes American frustration with the Japanese "share the wealth" system.[54] The founder of Fusion, an engineer named Don Spero, was by instinct among the least likely to be seduced by the Japanese approach. A competitive athlete, Spero ran for the United States in the Olympics. Understandably, when he turned his attention to business, he did so with the same intensity and desire to win.

For a while, he did win. Fusion's patented high-intensity ultraviolet lamp allowed the company to do a superior job of drying print on aluminum cans. Quickly, it acquired an impressive share of the Japanese market. This did not go unnoticed at the headquarters of Mitsubishi Electric, which had unsuccessfully opposed the initial patent grant to Fusion. Two years after Fusion entered the Japanese market in 1975, Mitsubishi purchased one of the Fusion lamps and reverse-engineered it—a perfectly legal practice. Then, they set out to make something different—different enough to provide a choice of methods to customers, in Mitsubishi's view. In Fusion's view, just different enough to harass the foreign interloper.

Within several years, Mitsubishi had filed almost 300 patents involving high-intensity lamps. Fusion, a newcomer in Japan, had not been watching. When it finally looked up, its patent was surrounded, just like one black stone on the *Go* board encircled by a sea of white. It had not happened all at once, but instead

53. The U.S. Constitution, for example, is full of such aspirations. The First Amendment prohibits any abridgement of freedom of speech or press. Nevertheless, except for absolutists such as Justices Black and Douglas, most judges and lawyers acknowledge the government's right to interfere with speech and press under certain circumstances. Justice Holmes's example of shouting "fire" in a crowded theater is nonetheless persuasive despite its age. Schenck v. United States, 249 U.S. 47 (1919). Even so, the absolute language of the First Amendment exerts a gravitational force that pulls the law in that direction. Deviation from the ideal is possible, but the burden is on the person who wants to move far away.

54. Donald M. Spero, *Patent Protection or Piracy—A CEO Views Japan*, 68 HARV. BUS. REV., Sept.-Oct. 1990, at 58 n.5. Spero's story also provided the structure for a PBS documentary entitled "Same Game, Different Rules."

slowly and incrementally, and, purely from the standpoint of gamesmanship, skillfully. After six months of negotiation, the conglomerate's response was predictable: let's cross-license. Under Mitsubishi's proposal, Fusion would have to pay royalties.

To Fusion, however, cross-licensing was tantamount to capitulation. Spero said that if Mitsubishi could use Fusion's technology, Japanese customers would follow the path of least resistance, and his business would be lost. So a decision was made to continue to fight each of Mitsubishi's patent applications. To do so would be unbelievably expensive for the small company. To not do so would be to lose its business.[55]

Fusion eventually sought the assistance of the American government by elevating the business dispute to a public policy structural impediment. At the outset, it seemed as though the Office of the U.S. Trade Representative would push forward with the matter. However, despite the opinion of the department's Japan section chief, who called it a "crystal clear"[56] illustration of abusive Japanese tactics, the Trade Representative himself concluded that it was only a private commercial matter.

Congressional hearings in 1989 offered little comfort to Fusion, and the dispute dragged on. Despite this, Fusion's exports to Japan grew at an annual rate of 35 percent and accounted for one-fourth of the company's $35 million in sales by 1991.[57] In July of 1993, the two companies finally reached a settlement agreement in which Mitsubishi granted Fusion a royalty-bearing license to make use of Mitsubishi's patents within Japan.[58] The settlement apparently hasn't hurt. Fusion's 1993 corporate revenues reached record levels ($47 million, 47 percent of which came from foreign sales) and late in the year, the company was considering going public.[59]

But the story is not over. Late in 1993, like a page out of *Rising Sun*,[60] the Senate Ethics Committee came across entries involving Mitsubishi in the diary of Senator Robert Packwood, and the Justice Department is now considering whether any laws were broken. Packwood originally was being investigated on charges of sexual harassment, and, in an attempt to defend him-

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55. *Id.* at 58.

56. Michael Tackett & Christopher Drew, *Foreigners' Extra Asset: Lobbyists*, CHI. TRIB., Dec. 9, 1992, at A1.

57. William Armbruster, *Fusion Succeeds in Japan Despite Patent Dispute*, J. OF COM., May 13, 1991, at A1, A7, *available in LEXIS*, Nexis Library, JCM File.

58. *Fusion Systems Resolves Mitsubishi Dispute*, REUTERS FIN. REP., July 9, 1993, *available in LEXIS*, Nexis Library, FINRPT File.

59. *Fusion Systems Considering Sale of Company or IPO*, REUTERS FIN. REP., Oct. 25, 1993, *available in LEXIS*, Nexis Library, FINRPT File.

60. MICHAEL CRICHTON, RISING SUN (1992).

self, gave portions of his diary to government investigators. Packwood happened to be a member of the Senate Finance Committee that held the hearings on the Fusion-Mitsubishi dispute. Spero said that he was incredulous that all of Packwood's questions at the time seemed designed to bolster Mitsubishi's position.[61] A year later, a lobbyist for Mitsubishi helped Packwood's former wife get a job with the company.[62]

To return to the main point, the Japanese preference for collectivism and leveling, as opposed to the American idea of winner-take-all, is felt throughout the society. Thus it would be unusual for the business of intellectual property to be any different.

During its negotiations with Fusion, "one Mitsubishi executive pounded his fist and said, 'Mr. Spero, it's not right! You have dominant market share in Japan. It's not fair. We're a small company too.' "

"Spero replied, 'That's ridiculous. You're a $20 billion company.' "

" 'In the lamp business we're small,' he replied."[63]

Another writer, Michael Todd Helfand, quoted this exchange in his article on American criticisms of the Japanese patent system as an example of "the importance of size and bargaining power." Clearly, he says, "smaller companies are likely to be victims."[64]

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61. Packwood's staff member on the Senate Finance Committee, Brad Figel, has said that he did not brief the Senator on the line of questions that was asked of Spero, leading to speculation that it may have been provided by Mitsubishi or its lobbyists. Michael Tackett, *U.S. Probes Packwood Ties to Mitsubishi*, CHI. TRIB., Nov. 23, 1993, at A1. In 1982, the Tribune revealed that Mitsubishi had hired James Lake, a personal friend and former assistant to U.S. Trade Representative Clayton Yeutter, to lobby him against making the Fusion case a government trade issue. The effort was successful. Tackett & Drew, *supra* note 56, at A1.

62. The telling of this story is not intended as a condemnation of legitimate lobbying by foreign companies, those of Japan or anywhere else, that have interests in the United States. Unlike bribery, lobbying is a matter of keeping channels of communication open. If members of Congress cannot be trusted to vote their conscience, the problem is one of the poor quality of Representatives and Senators. *But see* PAT CHOATE, AGENTS OF INFLUENCE (1990) (arguing that foreign lobbyists, especially those asserting Japanese interests, have captured the Congress and should be restricted).

Recently, the Japanese auto industry mounted a campaign urging employees of "transplant" companies in America to write letters to their representatives against making business more difficult for such companies. It was thought that the foreign interests and those of the American employees coincided. However, substantial adverse publicity resulted from the plan, and so it probably will not turn out to be successful.

63. Spero, *supra* note 54, at 67.

64. Helfand, *supra* note 44, at 159 n.242.

That is surely an American way of viewing the situation, and perhaps it is the correct way. Nevertheless, we believe there is another possibility. From the Japanese perspective, the dramatic dominance of one small company in the market might seem "unfair." From the perspective of Mitsubishi, if indeed it was a small player in the market, its representatives may well have felt that they weren't getting an appropriate share of the business. This is not necessarily a matter of abuse of power, but rather a playing out of the normal dynamic of the business environment.

Toyota has the largest share of the Japanese auto market, but there are many other strong competitors. If Toyota's position improved dramatically, or if one of the others' market share fell precipitously, everyone might well become uncomfortable, and steps would be taken to readjust the distribution of business.[65] Indeed, this often results in the investment of funds by one company in another with falling market share.

It may well be a perversion of the ideal, but the same concept of leveling and collective behavior in part explains the persistence of corruption within Japanese politics. Bid-rigging has been rampant for years, and no matter how many scandals bring it to light, the practice continues. Especially in public works projects, government officials consider various companies for the awards and divide up the business in a way that ensures each of the companies get some of the work. Later, these companies often provide money (illegally) to the government officials in gratitude for this consideration.

Again, the point is not to defend bribery, corruption and bid-rigging, but rather to illustrate that the strong preference for leveling and its power beyond the intellectual property/business context. The Japanese tax system (by American terms) is confiscatory at the upper-income levels (more than seventy percent). Inheritance tax is also steep. The result is a distribution of income in which the extremes, high and low, are much less pronounced than in the United States.[66]

The Japan of today is a much different country from that of the late 1800s, when Japan's first patent law was written. Indeed

65. JAMES ABEGGLEN, KAISHA (1985).

66. By early 1980s Japan achieved the lowest income inequalities among all industrial nations. Japan's tax policies, property structure, wage structure, emphasis on status (rather than income), and high educational achievement all contributed to this achievement. In fact, Japan has very little individual ownership of major means of production, and huge salaries to corporate executives are restrained. However, there is some evidence that income inequality started to rise in the late 1980s. *See* HAROLD KERBO, SOCIAL STRATIFICATION AND INEQUALITY 454-57 (1991).

the law went through several incarnations[67] prior to its present form.[68] The Meiji Restoration of 1868 began a period of rapid modernization, aimed at transforming a small agricultural nation into a technologically developed partner of the Western world.[69] The watchword of the day was "rich and strong country" (*fukoku kyōhei*).

Today, it's hard to imagine Japan as anything but the high-tech, robust country that it has become, but the fact is that Japan was a developing nation when its intellectual property system began. As such, the emphasis was on national strength, not the fortunes of any particular inventor or company. Technology was something to be shared and distributed as widely and rapidly as possible.

The need for sharing and distributing fit well with the national character and developed into today's practice of laying open technology. This is another of the complaints of patent applicants from the United States.[70] American practice maintains the secrecy of applications until the patent has been granted.[71] In Japan, eighteen months after the application is filed, it is published, no matter what the status of the file.[72]

Despite the fact that inventors are protected against someone else using their invention after its publication,[73] American applicants believe that publication prior to the grant of a patent diminishes the value of their invention.[74] In a sense, they are

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67. Ryoko Iseki, *Experimental Use Exception to Patent Infringement in the United States*, 229 DOSHISHA HŌGAKU 43, 92-93 (1993).

68. Tokkyō Hō, *supra* note 43.

69. The stated purpose of Japan's patent law is "to encourage inventions by promoting the protection and utilization of inventions and thereby, to contribute to the development of industry." Tokkyō Hō, *supra* note 43, art. 1.

70. *See* Helfand, *supra* note 44, at 148.

71. "Applications for patents shall be kept in confidence by the Patent and Trademark Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstance as may be determined by the Commissioner." 35 U.S.C. § 122 (1952) (amended 1975).

72. Tokkyō Hō, *supra* note 43, art. 65-2. On August 16, 1994, the United States and Japan signed an agreement to reform their patent laws. Among other things, the U.S. agreed to move to disclosure of patent applications after eighteen months and to extend to foreigners the benefit of the "first to invent" rule. Japan, in return, agreed to reduce the application review time to no more than three years and to allow foreign investors to file initial applications in English. Also, Japanese parties will be prevented from opposing the patent during the application phase. *See U.S., Japan in Accord on Patents*, N.Y. TIMES, Aug. 17, 1994, at 1.

73. *Id.*, arts. 65-3 (1), (3); 52.

74. *But see* P.A. Ragusa, *Eighteen Months to Publication: Should the United States Join Europe and Japan by Promptly Publishing Patent Applications?*, 26 GEO. WASH. J. INT'L L. & ECON. 143 (1992).

correct, but it is a diminishment that works equally against all applicants, foreign and domestic alike.

By laying open the technology, the Japanese system allows others to see what their competitors are working on. Although they cannot copy the applicant's invention, they can begin to work on their improvements and alternative technologies. As a result, by the time the patent is granted, which usually takes at least three years from the date of filing,[75] the inventor's competitors already have had a year and a half to develop something better.[76] Of course, their technology, in turn, is laid open as well.

The result is a system in which everyone knows what everyone else is working on. Technological information is effectively shared early on, and then again later, through cross-licensing. Consequently, innovation comes rapidly, especially given the Japanese practice of allowing new patents for less dramatic variations. Although the competitive advantage of any given inventor may be diminished, the Japanese believe that the goal of development is better served by disseminating information rather than by keeping it secret.

There are two ways of evaluating this Japanese approach. One is to take note of the country's industrial research and development strength and the speed with which innovation comes. From this perspective, the success of the collective seems unarguable.

Nevertheless, the surprising fact is that despite its reputation for innovation, Japan remains a net importer of technology, at least as measured by patent license royalties. In 1992, Japan's license royalty deficit was $4.1 billion dollars, compared with the $12.9 billion surplus in the U.S.[77] Viewed from this perspective, the American approach may seem superior. Indeed, in certain strategic industries such as supercomputers, microchips, and computer software, the U.S. is the leader. The American ap-

75. The norm in the United States is about twenty months. *See Low-Tech Problems With High-Tech Patents*, L.A. TIMES, Jan. 9, 1994, at D1.

76. They also can use the information to challenge the issuing of the patent. *Id.*

77. EDWARD J. LINCOLN, JAPAN'S NEW GLOBAL ROLE 93-95 (1993) (report by the Brookings Institution). Japanese patent royalty revenues increased almost tenfold, however, between 1980 and 1992. Moreover, the figures do not reflect the value of directly-owned technology that is used directly by Japanese companies in their manufacturing and sales abroad. For example, Sony sells thousands of products abroad under its own name, and thus—to the extent of its own patents are involved—no license royalty is involved. Similarly, Japanese companies sell in Japan, and many Japanese car companies directly manufacture in the United States and other countries. *See generally* ANDREW MUIR, HONDA'S GLOBAL LOCAL CORPORATION (1994).

proach doesn't seem to retard innovation. To the contrary, it encourages it.[78]

Some in Japan respond that this U.S. leadership underscores their own need for a continued cooperative national effort to encourage research and development. The problem may not be too much sharing of the information, but not enough. Indeed, some Americans are beginning to believe this and urge a relaxation of antitrust laws to allow more joint efforts and joint public/private partnerships. President Clinton has been particularly sympathetic to this idea in an attempt to bolster the auto industry.

On a personal level, the preference for collectivism versus individualism affects the work environment and the very definition of self. A Japanese worker when introducing himself will always say, "I am Yoshida Corporation's Akira Ando" rather than "I am Akira Ando from the Yoshida Corporation" as most Americans would. The introduction is unconscious, ingrained from youth. It is far more than a matter of semantics.

Japanese life, it has been said, consists of movement from "house" (*ie*) to "house." A person begins as a member of the family's house; then joins various schools, clubs, and finally a company. At each stage, sometimes simultaneously, membership in the house or houses defines a person's primary identification in society. In this way, a person fits into society and interacts with other parts of it. Without a person's house identification, others don't know what to make of them or how to relate to them; and neither do they know how to relate to others.

In polite Japanese, especially in the Kyoto area, another form of the word "house" (*uchi*) is the personal pronoun for "I" and "we."[79] House identity, once established, is almost never in jeopardy. And so, until recently, a Japanese salaried worker

78. Many American computer inventions are never patented at all, their owners opting for trade secret protection. IBM, for example, received only 128 patents for digital processing systems from 1980 to 1992. In 1986, Digital Equipment Corporation obtained only three such patents. Trade Secrets, to the extent that the secret can be kept, involve technology that is never made public. Recently, however, both of these companies have begun to rely more on patent protection. *See Low-Tech Problems with High-Tech Patents, supra* note 75, at D1. Software, on the other hand, typically is protected through copyright law, in which the contents can readily be seen.

79. In general Japanese, "I" is rarely used anyway. There's no need to inject oneself into the sentence.

"Onaka ga suita?"
"Sō ne. Kyō, mada tabete (i)nai."
"Uchi no ryōri wa amari oishikunai kedo, dōzo."

"Is stomach empty?"
"Well, haven't eaten yet today."
"The house's food isn't very good, but have some."

would no more consider changing companies than changing mothers.[80]

Loyalty to the house was partly a matter of honor and partly a matter of fear. The betrayal of one's family is perhaps the worst offense within Japanese society,[81] as well as in Confucian thought. One is indebted to the house for all that it has done, but also, one who is without a "house" has nowhere to go. He becomes a "wandering person" (*rōnin*).

Consequently, until 1990, Japan had no trade secret law. No employee would think of taking his house's secrets to another place.[82] Indeed defectors would be treated with suspicion by any subsequent employer, having proven that they could not be trusted.[83]

Moreover, the practices of laying open patent applications and the sharing of technology were widely accepted. Secrecy of technology, in this respect, was antithetical to the social goal of rapid diffusion—a kind of industrial selfishness. As such, the government had little incentive to protect those who didn't want to play the game in the ordinary way.

This is not to say that occasional trade secret problems did not arise; only that their infrequency underscored the lack of a

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80. The three pillars of Japanese labor relations were lifetime employment, lockstep progression, and use of company (rather than trade) unions.

81. The Japanese Penal Code, for example, prescribes a penalty of not less than three years imprisonment for murder (article 199), but murder of one's lineal ascendant carries a mandatory sentence of life imprisonment or death. KEIHŌ [PENAL CODE], Law No. 45 of 1907, arts. 199-200 (Japan). In contrast, Americans are more frightened by random violence caused by unrelated persons, and—as such—penalties for these crimes tend to be more severe. *See generally* MARC REIDEL, STRANGER VIOLENCE (1993).

82. Under the commercial code, officers and directors owe a general duty of loyalty to the company. SHŌHŌ [COMMERCIAL CODE], Law No. 48 of 1889, art. 264 (Japan). *See also* SHOHO, arts. 254-53 ("directors shall . . . perform their duties faithfully on behalf of the company"); MINPŌ [CIVIL CODE], Law No. 89 of 1896, art. 644 (Japan) ("manager is bound to manage the affairs entrusted to him with the care of a good manager . . . .").

83. It is not true that workers do not change jobs in Japan. It is also not true that every worker is given lifetime employment. Given the heavy concentration of small and medium-sized firms, job mobility rates (or career changes) are higher than one might expect, especially from medium-sized firms to small scale firms or from medium-sized firms to own or manage small firms. In fact, *overall* job mobility rates in Japan are quite comparable to those in Europe. Rather it is the job mobility rates in the United States that are higher than the international standards.

The concept of lifetime employment applies to workers in large firms and those in the public sector, which accounts for about 20-30% of the labor force. Job mobility rates among these workers are low. *See generally* ROBERT COLE, WORK, MOBILITY AND PARTICIPATION (1979), and Man Tsun Cheng, *The Japanese Permanent Employment System*, WORK AND OCCUPATIONS 18(2), 148-171 (1991).

persistent problem.[84] By contrast, theft of trade secrets has a long (if infamous) history in America, allowing the creation of a large and well-thought-out body of law.[85] Although there are exceptions, countries make laws to solve the problems they do have, not those they do not have.

Certainly by the 1990s, at least by the 1980s, and perhaps as early as the late 1970s, business pressures began to create changes in the Japanese social structure. Companies began laying off salaried workers; workers began pursuing sequential employment; pay began being linked to performance—providing an incentive to individuals to set themselves apart from their coworkers.[86] The prime motivating factor behind the passage of the Trade Secret Statute[87] was yet another aspect of the tensions in Japan's sociological structure—"pressure from the outside" (*gaiatsu*).

C. Outsiders and Insiders

Japanese history is made up of both painful and productive interaction with outsiders. As an island nation, Japan comes equipped with all the insularity that accompanies such geography, as well as the perceptions that insularity brings.[88] Foreigners and their countries have been viewed as barbarians, agitators, and objects of conquest. They also have been welcomed as messengers of learning, culture, and technology.

Japan, like essentially every other East Asian country, is heavily indebted to China. The written language was brought from the Middle Kingdom, along with the Confucian social ethic,

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84. Prior to the new law, only about two dozen trade secret theft court cases had been reported in Japan. *See* Kazuko Matsuo, *Recent Amendment to the Unfair Competition Prevention Law for the Protection of Trade Secrets*, 9 UCLA Pac. Basin L.J. 78, 80 n.6 (1991); *see also* Teruo Doi, The Intellectual Property Law of Japan 86 (1980).

85. Unif. Trade Secrets Act § 1(4), 14 U.L.A. 437 (1985); *see, e.g.*, Restatement (Second) of Torts § 757 (1939).

86. Beginning in June, of 1994, performance will be the sole determinant of managers' pay at Honda Corporation, up from 40 percent. At Nissan, merit-based pay is scheduled to increase 85 percent of the total, up from 60 percent. *Just Desserts*, Economist, Jan. 29, 1994, at 71.

87. The law actually is a set of amendments to the Unfair Competition Law. Fusei Kyōsō Bōshi Hō [Unfair Competition Prevention Act], Law No. 14 of 1934 (as amended 1990) (Japan).

88. In this respect, British and Japanese culture are not at all dissimilar. It was not until a few months ago that the Tunnel connecting Britain to the European mainland finally was completed, and even at that, it is not universally popular. The fear of disease and pestilence from the outside is no less strong in Britain than in Japan, not to mention the disruption of a relatively homogeneous society. Imperialism, of course, is no stranger to British history either, both close to home and on the other side of the world (India and, of course, Hong Kong, which will revert to China in 1997).

and early forms of Buddhism (some of which passed through Korea on the way). From Korea came the first forms of the earthy, natural pottery for which Japan now has become famous. And yet, both China and Korea later were colonized by Japan, perhaps as a way for Japan to psychologically deny that it ever needed anything from them in the first place.[89]

Japan's law is itself a product of foreign influence, both invited and uninvited. The Japanese modeled the Civil Code after the German and French codes, after the Japanese brought scholars from both countries to Japan during the Meiji Restoration. The Unfair Competition Law itself was based on German law. In contrast, American Occupation forces after World War II essentially imposed the Constitution on Japan.[90]

This tension between outside things brought in and those things forced upon Japan is an old story in the nation's history. Hundreds of years ago, the Japanese viewed "Dutch learning," brought by traders, as the leading edge of enlightenment. A craze for learning the Dutch language followed, as it was thought to be the language of the Western world. (Many Japanese who spent untold hours trying to master the language of Europe were surely shocked and disappointed when they could not converse with other Europeans who came later, such as the Jesuits.) For a while, the Jesuits enjoyed a celebrated and protected status in Kyushu. Subsequently, however, the Tokugawa shogunate viewed these representatives of the Pope as a threat to its control, and the foreigners were banished along with their religion.

Commodore Perry's black ships in the mid-1800s also were viewed with alarm, but Japan was forced to allow their arrival. Quickly, however, the country scrambled to learn what it was that made these foreign countries so powerful. The Meiji Restoration transformed the foreigners from invading hordes into keepers of the keys to the future. The hated Americans of World War II turned into the benevolent rebuilders of the Japanese infrastructure. Soon after the war, American pop culture—movies, music, and clothing—became highly prized in Japan, and it re-

89. There is some archeological evidence of more interaction between the elites of Japan and Korea than many Japanese are comfortable knowing about. *See generally* Dan Rosen, *The Koan of Law in Japan*, 18 N. KY. L. REV. 367 (1991).

90. *See generally* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION (1991). For two somewhat differing views of the process by which the Japanese constitution was adopted, *see* J. Mark Ramseyer, *Together Duped: How Japanese and Americans Negotiated a Constitution Without Communicating*, 23 LAW IN JAPAN 123 (1990), and Dan Rosen, *MacArthur's Japanese Constitution*, 37 LOY. L. REV. 1071 (1992) (both reviewing Inoue's book).

mains so to this day.[91] Whatever else might be said about the Japanese, they don't hold a grudge for long.

Although sometimes brutish and disrespectful, foreigners have played an important role in Japanese society. Because of the social structure, change is difficult to generate from the inside. People and institutions are secure within their roles, and the rewards of breaking out of them seem less substantial than simply going along. This does not mean that change is not welcome, however, only that incentive for any individual inside the society to agitate for change is rather low. (Recall the case of Mr. Sato and the imported oil, *supra* note 33.) And so, foreigners have often provided a useful service in agitating for change from the outside. This allows the government to concede to the change without having to take responsibility for it. (*Shikata ga nai.* "It couldn't be helped.") Later, the change simply becomes part of the status quo and ceases to be foreign.[92]

In this tradition, *gaiatsu* is what led to the enactment of Japan's new trade secret law. The United States, because of the dramatic increase in technology-based interaction with Japan in the 1980s, put pressure on the country to adopt a Western-style trade secret law. Japan demurred. The U.S. responded by placing Japan on the "Special 301" list, which would allow trade restrictions to be imposed because of inadequate protection of American intellectual property interests.[93]

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91. This results in a substantial market for the licensing of American trademarks and not an insubstantial amount of infringement. Retro-cool figures such as James Dean and Marilyn Monroe are especially popular currently. Japanese trademark law, like its patent law, rewards the first to file an application, not the first to use or invent. Shōhyō Hō [Trademark Law], Law No. 127 of 1959, art. 8 (Japan). The City of Beverly Hills is currently trying to license its name in Japan, but a 1970s registration of the name by a Japanese company has blocked its efforts. The city is trying to reclaim the use of its name, but in the meantime it is marketing under the name "BH Collection." *American Image Remains a Top Seller*, JAPAN TIMES, Nov. 13, 1993, at 3.

92. There are many examples of this, not the least of which is the importation of rice. Japan's post-war electoral system disproportionately favored farmers, and for more than thirty years the Liberal Democratic Party—which was beholden to rural constituents—blocked foreign rice from entering the country. Various consumer groups agitated for a relaxation, in part because the price of rice in Japan is so much higher than in other parts of the world.

A combination of events finally forced a change. First was the continued pressure from outside countries such as the United States. Second was a disastrous 1993 rice harvest in Japan. Third was the ending of LDP dominance in the 1993 elections, bringing a new coalition government to power that was less dependent on agricultural interests.

Some persons within Japan continue to resist the idea of buying imported rice; however, many others are willing to give it a try. If rice follows the usual pattern, within five years, a bowl of rice from Thailand will seem no more strange than tempura, which was originally brought from Europe.

93. 19 U.S.C. § 2411 (1988). *See also* 19 U.S.C. §§ 1337, 2412-42 (1988).

After several years of pressure, MITI endorsed amending the Unfair Competition Law to provide explicit trade secret protection, citing, among other things, pressure from the United States and the change in domestic job mobility (itself partially a result of exposure to outside influence).[94] For the first time, the law now allows injunctions against third parties who reveal a trade secret.[95]

To use an example from a well-known international trade secret dispute, it is alleged that former General Motors Executive Inaki Lopez took price lists and product designs with him when he moved to Volkswagen. Were the case in Japan and the allegations true, Lopez could be punished and enjoined from future bad acts under the previous law. Volkswagen, as the third party, could not be restrained without a contractual relationship with GM.[96]

Under the new amendments, Volkswagen could be enjoined,[97] but only if it knew that the information was misappropriated, or would have known but for gross negligence.[98]

Foreign influence also has taught Japanese companies how to alter their ordinary corporate behavior, at least outside of Japan. For many years, despite their rapid expansion in other countries, Japanese companies abroad continued to behave as they would in Japan.

"There used to be an old generalization that Japanese companies always settled and never fought," according to Matthew Howers, an intellectual property lawyer at San Francisco's Or-

94. *See generally* Holly E. Svetz, Note, *Japan's New Trade Secret Law: We Asked for It—Now What Have We Got?*, 26 GEO. WASH. J. INT'L L. & ECON. 413, 421-25 (1992).

95. South Korea passed similar legislation in 1991, also under trade pressure from the United States Unfair Competition Prevention Law, Law No. 4478 (1991) (Korea).

96. Somewhat similar facts were involved in a dispute between a German and Japanese company; however the Tokyo High Court refused to provide relief to the plaintiff. The German company had entered into a licensing agreement, allowing an American company to manufacture ship propeller shafts using secret technology. The American company was under a contractual duty to keep the technology secret. Instead, it entered into a joint venture with a Japanese company involving the secret technology. The German company requested an injunction against the Japanese company, but the High Court concluded that such remedies were not available against third parties. Judgment of Sept. 5, 1966, Tōkyō Kōsai [Tokyo High Court], 464 HANJI 34 (Japan). *See* TERUO DOI, THE INTELLECTUAL PROPERTY LAW OF JAPAN 88 (1980). Damage awards in more recent cases are summarized in Osamu Takura, *The Compensation of Damage in Court Decisions Concerning Intellectual Property*, PATENT STUDIES, Mar. 22, 1994 (No. 17), at 28 (in Japanese).

97. Fusei Kyōsō Bōshi Hō, art. 1(3)-(4).

98. *Id.* art. 1(3)(i)-(iii).

rick, Herrington and Sutcliffe.[99] Another lawyer, Ronald Laurie, with a California branch of the New York law firm Weil, Gotshal, and Manges, observed that "while their own system is very much one of avoiding confrontation . . . they've been beaten up pretty badly by American companies."[100]

That, however, is changing. "They're tired of always being sued and never being the one suing," said Howers. "What they notice," according to Laurie, "is sometimes when they fight back, they win."

In the United States, that means fighting patents and demanding royalties, not cross-licensing. When Motorola sued Hitachi in the U.S. for patent infringement, it may well have expected the Japanese company to agree to a settlement and pay royalties. Instead, Hitachi filed a countersuit, accusing Motorola of violating its patents. The result was a stalemate—both companies won their claims, but it put Hitachi in a much better position to reach a favorable settlement.[101]

Not surprisingly, such behavior has begun to affect the legal practices of Japanese multinational companies back at home. Fujitsu, a major developer of semiconductors, competes with Texas Instruments ("TI") worldwide. In Japan, TI had received 11 new patents close to Fujitsu's technology. Rather than immediately agreeing to cross-license and to pay royalties, Fujitsu adopted a new strategy: when dealing with Americans, do as they do in America. It filed suit in Japan, seeking to force TI to prove how Fujitsu might be infringing its patents.[102]

Such aggressive tactics against Japanese competitors within Japan may still be a ways off, but perhaps not much. The fear of importing Western, especially American, legal practices has prompted the government to keep foreign lawyers on a tight leash. Affiliations with Japanese law firms and the hiring of Japanese lawyers are prohibited, and admission to practice as a foreign lawyer in Japan is heavily regulated.[103]

The entertainment business is especially porous and subject to worldwide influence, as Japanese companies have embarked on a strategy of synergy—controlling both hardware and software distribution. The two giants, Matsushita and Sony, each control a major motion picture studio as well as a recording com-

99. Susan Orenstein, *Japanese Becoming More Litigious*, THE RECORDER, June 5, 1992, at 1, *available in* LEXIS, Nexis Library, RECRDR File.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See generally* Evan T. Bloom, *Symposium, Japan-American Society/ABA Seminar on American Lawyers in Japan*, 21 LAW IN JAPAN 1 (1988).

pany.[104] In such an environment, it is almost impossible to isolate Japanese contracts.

For example, Yamashita Tatsuro—long a popular singer/songwriter—has sued the BMG Victor record company for reissuing a greatest hits album in 1990. The album included different versions of five songs and was issued without Yamashita's permission, although it was advertised as "authorized." In fact, Yamashita's contract with the company (actually a predecessor company) expired in 1982.

Both Yamashita and BMG Victor claim ownership of the master recordings. Additionally, Yamashita wants a public apology and ¥10 million damages (about $100,000). Yamashita's lawyer has explicitly asked the court to consider foreign practice in determining how the case should be resolved in Japan. In particular, he has provided the court with press reports about litigation between British singer George Michael and his recording company, Sony.[105]

Conversely, one of Japan's domestic record companies is suing its best-selling artist for alleged failure to fulfill her contract. The suit between Taurus Records and Chikako Sawada seeks ¥133 million damages (about $1.3 million) because she did not record an album as expected. The dispute is a textbook example of the clash of legal cultures.

Both Sawada and Taurus agree on one fact: the contract did not specify how many albums or singles she must record. It is, instead, a typical Japanese contract in which the parties agree to cooperate in good faith. The glue that holds such a contract together is not the law but rather the relationship.

Taurus's practice is to work out a yearly release schedule and marketing plan with the artist's management agency. Accordingly, the company asked Sawada to finish recording an album by September of 1993. Sawada's lawyer said she wanted to release a new album, but not on Taurus. Her contract with the

104. The corporate permutations border on the Byzantine. For example, Sony Music Entertainment of Japan ("SME") plans to buy out Sony Pictures Entertainment of Japan ("SPE"). SPE is 85% owned by the U.S. company, Columbia Tristar Home Video, which is an affiliate of Sony Corporation. SPE has the rights to distribute Columbia Tristar movies to Japanese theaters, copy them on videotape, and broadcast them on television. SME recently set up a half and half joint venture with the parent Sony corporation to produce videogame software. *Sony Music Plans to Buy up Cinema Unit*, JAPAN TIMES, Jan. 29, 1994, at 9.

105. Following the filing of the lawsuit by Yamashita against BMG Victor, the British court ruled against George Michael in his attempt to extricate himself from a fifteen-year contract with Sony. *See George Michael Loses Suit Against Sony*, JAPAN TIMES, June 23, 1994, at 2. The court ruled that the 1988 contract was not a constraint on trade. *Id.*

company ended in 1993, and she was dissatisfied with its promotional ability.

Taurus Vice-president Funakai Minoru counters, "We helped Miss Sawada make her debut in this industry. She was a completely new face."[106]

A typical Chikako Sawada album sells between 150,000 and 250,000 copies, although her greatest hits album has sold 600,000 copies. At 250,000 copies, gross sales for the album would amount to ¥750 million (about $7.5 million).[107] For an independent record company, this is no small sum.

Both sides clearly have defensible positions. With nothing spelled out in the contract, and with dissatisfaction over the company's efforts on her behalf, Sawada had reason to believe that she owed nothing more. She had already made plenty of money for Taurus and will continue to, so long as her previous recordings sell. Indeed, Taurus has re-released her previous recordings on several best hits albums since Sawada left the company.

On the other hand, Taurus viewed the relationship from the traditional Japanese perspective. Explicit terms were thought unnecessary. Western contracts may be negotiated at arm's length, but Japanese contracts are entered into with arms linked. So long as the company didn't make unreasonable demands, it expected the artist to follow its plan.

The dispute underscores the influence of outside countries. This is exactly what caused the Tokugawa shogunate to close Japan's doors for 300 years. Outside contact brings many benefits, but it also unavoidably brings change. Japan's doors are open, however, and its companies have gone back and forth through them all over the world. They may have brought back more than they intended, and everyone—even purely domestic companies—may have to adapt to foreign influences.

The unknown element, however, is the Japanese court. Unlike American judges, who begin their careers as lawyers representing varying interests, Japanese judges enter the judiciary at the outset of their careers, are trained together, and remain within the institution until retirement. Thus, compared with its American counterpart, the quality of the Japanese judiciary is much more even, but its outlook is also much more uniform.

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106. The facts in this discussion are based on a newspaper story by writer Steve McClure and an interview by Rosen with Atushi Naito, the lawyer for both Yamashita and Sawada, on March 17, 1994, in Atushi's Tokyo office. Steve McClure, *Record Label's Suit Against Singer is First of Its Kind*, JAPAN TIMES, Jan. 22, 1994, at 15.

107. CD albums by Japanese pop artists sell for ¥3,000, although they are occasionally discounted.

Consequently, the courts have the ability to maintain traditional contract relationships in the face of outside influences. This may well resolve disputes under existing contracts. However, it may also have the contradictory effect of encouraging artists to demand more specific Western-style contracts in the future, precisely to avoid unspecified duties under the relationship-based agreement that, even today, is the norm in Japan. Especially in industries where Japanese companies operate worldwide, and have become accustomed to Western-style contracting, domestic parties are more likely than not to make such demands.

To be clear, we have been talking about two issues in this discussion of the insider/outsider dichotomy: (1) *gaiatsu* (which is pressure from the outside) and (2) the passive reception of outside ideas.

Gaiatsu usually is aimed at putting foreigners on an equal level with Japanese interests. For example, the 1899 revision of the Patent Law, in which foreigners first obtained the right to receive Japanese patents, resulted from outside pressure.[108] In order to obtain a favorable commerce treaty, Japan had to give in. Occasionally, however, *gaiatsu* has the effect of elevating foreigners above the Japanese. It has sometimes been said that a foreigner can be an honored guest in Japan but can never be a family member. On the other hand, the plight of foreigners from developing countries in Japan is often much different. Far from being admired, they may be suffered or even exploited.

And so, in intellectual property matters, foreign interests sometimes oscillate from being in a worse position than their Japanese competitors to being in a better one. In no area is this more clear than the resolution of record taping rights in Japan.

As entertainment is one of the United States' major exports, American companies and the United States government place great importance on the protection of exported entertainment products.[109] It did not go unnoticed that all the latest American CDs were available for rental throughout Japan.[110]

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108. Iseki, *supra* note 67.

109. One of the disappointments of the GATT agreement is that it left in place European restrictions on access of foreign entertainment. *See Final GATT Treaty Disappoints U.S. Entertainment Biz*, BILLBOARD, Dec. 25, 1993, at 5.

110. Total sales of CDs in Japan amount to $4 billion annually. *See generally* T.R. Reid, *End of the One-Night Disc?; Japan CD Rentals Run Afoul of New Law*, WASH. POST, Jan. 4, 1992, at C1. The record rental business is said to generate $600 million dollars of business. *See* Steve McClure, *Japan's Eventful Year Included Rental Rein-In*, BILLBOARD, Dec. 26, 1992, at 53. For a review of events prior to the new Japanese law, see Robert Adachi & Michael Fedrick, Note, *A Comparison of Responses to the Record Rental Industry Under Japanese and U.S. Copyright Law*, 9 UCLA PAC. BASIN L.J. 210 (1991).

The overnight rental fee is cheap, about ¥300. The purpose is not a one-night-stand, but rather a long-term relationship. The typical renter also buys a blank cassette tape, inserts both in his dual cassette deck stereo at home (the dual deck configuration is standard), and makes a copy. Total expenditure: about ¥500 ($5). The typical price of a foreign CD: ¥2400 ($24). Amount saved: ¥1900 ($19). Amount paid to the American record company and artist: ¥0 ($0).[111]

Japan's copyright law generously allows an individual to make one copy of a copyrighted work for his own personal use. So, the home taping was perfectly legal, and no law prevented the renting of CDs. Enter *gaiatsu*. The result: a revision of the Copyright Law that took effect on January 1, 1992. Pursuant to the new law, foreign companies can insist on a one-year delay in the rental of their releases. Japanese CDs, in contrast, are available for rental after they've been on the shelves for ten days.

But, who are the beneficiaries? Several years ago, Columbia Records led the fight to keep digital audio tape out of the U.S. Then, the company was bought by Sony. MCA is owned by Matsushita. EMI is part of Toshiba. Consequently, many of the "foreign" music companies protected under the new law are in fact Japanese. Moreover, many of the same companies are also producers of audio hardware and tape. Home taping increases the demand for their recording and playback equipment, especially the hand-held Walkman-type products.

And so, the story ends on a strange note: the foreigners won, but they weren't foreigners anymore.

D. Between East and West

Although Japan is, to be sure, an Asian country, it has often found itself caught between two worlds. Particularly during the Meiji Restoration (from 1868) and then again after World War II, Japan hoped to emulate and then surpass the nations of Europe and the United States, while at the same time retaining its national character. "Western technique; Eastern morality" was a catch phrase of the Meiji era.

Politically, this desire to "catch up" with the West led to foreign expansionism and colonization of both Korea and Manchuria. Great nations had great empires, or so it seemed. The British were all over Asia, for example. So, once Japan itself was forced open by the Americans, the government quite under-

111. A copy made on mini disc is more expensive, as blank discs cost about ¥1200; however, the result is a perfect digital reproduction, unlike an ordinary analog cassette tape, in which there is some loss of quality. Digital Audio Tape (DAT) recorders can achieve the same result.

standably came to equate foreign conquest with national development. The Russo-Japanese War proved that Japan could hold its own militarily and won for it substantial, grudging respect from other nations.

Like the arrival of Commodore Perry, Japan's defeat in World War II once again brought hidden fears of inferiority to the surface. Once again, the nation embarked on a quest to modernize, this time with the emphasis on business. Its previous ambition, including the attempt to dominate regional trade through The Greater East Asia Co-Prosperity Sphere, had created quite a few enemies. In the view of the other Asian countries, Japan was not to be trusted. It had cast its lot with the outsiders.

These days, in matters concerning intellectual property, Japan finds itself again caught between two worlds. In its relations with America, Japan is usually the object of complaints about inadequate protection and lax enforcement. In its dealings with other Asian nations, however, Japan is usually on the other side of the issue—urging greater protection of its own intellectual property interests.

Most of the nations of Asia, to a greater or lesser degree, are in the position that Japan was in when it first enacted intellectual property laws in the Meiji era. They are developing countries, in which the primary goal is rapid diffusion of knowledge. As such, the rights of individual authors and inventors are considered far less important than the national interest.

That by itself would be enough to produce conflict. The additional salient factor, however, is that some of the Asian countries—most notably China—adhere to non-market economics. They are not against economic expansion, but the idea of private ownership driving the expansion is not nearly as acceptable. Still, the notion of private ownership that underlies intellectual property law in capitalist countries is noticeably awkward in nations that have opted for a publicly-owned economy.

Consider, for example, the Copyright Law of China, which took effect in 1991. The law speaks of protecting the rights of authors but also "of encouraging the creation and dissemination of works which would contribute to the construction of socialist culture and ethics and material civilization, and of promoting the development and flourishing of the socialist culture and sciences."[112]

112. China Copyright Law, Law No. 7 of 1990, art. 1. China's Patent Law has similar goals. *See generally* Liwei Wang, *China's Patent Law and the Economic Reform Today*, 9 UCLA PAC. BASIN L.J. 254 (1991); Jianyang Yu, *Review of Patent Infringement Litigation in the People's Republic of China*, 5 J. CHINESE L. 297 (1991).

The new law was drafted primarily in response to *gaiatsu* from developed nations. In 1992, China finally agreed to join the international copyright treaties, known as the Universal Copyright Convention and the Berne Convention.[113] China exports very little in the way of books, music, and movies—let alone high-tech computer software. As such, it stands to gain very little in the worldwide protection of its authors' rights. Rather, the purpose of the law is to provide copyright exporting nations with the protection they believe they need, in order to maintain favorable trade relations.

Even so, practices built up over many years are difficult to change overnight. Foreign materials long have been freely copied within China. Because of the similarity of language and style, as well as proximity, Japanese materials are among the most commonly reproduced works. Children's books and comics are particularly easy to adapt to Chinese readers, as the language is more simple and less plentiful.

Listening to Japanese publishers complain about China is like hearing American interests describe their problems with Japan. "There is hardly any concept for 'copyright' among publishers there," said Gomi Toshikazu, executive director of the Japan Book Publishers Association.[114]

The Chinese response may sound familiar to Japan, as China has often used similar words in trade negotiations with Western countries. According to Song Muwen, chairman of the Publishers Association of China and the Copyright Society of China, "emphasis is [being] placed on ensuring positive relations with Japan." Legal reform, he says, has opened the door to more fruitful discussions. Negotiations can go forward more smoothly than before.[115]

Ironically, a Japanese company's American arm is asking the United States government to impose upon China the very sanction which Japan resists having imposed upon itself. The Chairman of Nintendo of America, Howard C. Lincoln, has accused China's Tianjin New Star Electronic Co. of selling more than 300 video game titles, "[a]ll [of which] appear to be counterfeits sto-

113. Even before the 1949 revolution, China had twice refused invitations to join the Berne Convention—in 1913 and 1920—fearing that it would interfere with the economy and education system. In other words, information was needed for progress, and it was needed at a low cost. *See* ZHENG CHENGSI & MICHAEL PENDELTON, COPYRIGHT LAW IN CHINA 17 (1991).

114. *Asia Vies for Position in Publishing World*, JAPAN TIMES, Jan. 27, 1994, at 12. In 1994 there has been some movement toward greater enforcement of copyright in China. *See The Standing Committee of the Chinese Legislature Regarding the Decision of Punishment for Copyright Offenses*, PEOPLE'S DAILY (Overseas Ed.), July 7, 1994, at 3 (in Chinese).

115. *Id.* at 13.

len from Nintendo and affiliated American companies. A New York-based American arm of New Star's operation is actually seeking capital in U.S. markets to expand its counterfeiting in China and abroad."[116]

Lincoln contends that New Star is controlled by the Chinese government and that other companies in China have been responsible for 20 million counterfeit Nintendo hardware units being sold, leading to hardware and software losses in excess of $1 billion over the past several years. As a result, Nintendo of America requested the U.S. Trade Representative "to use its Special 301 power under the 1988 Trade Act[117] to designate China a Priority Foreign Country, vulnerable to retaliatory trade sanctions if it does not stop the theft of intellectual property."[118]

Although Nintendo of America and the original Japanese corporation are in many ways distinct, the resort to American trade pressure speaks volumes about the very different methods of negotiation used by the Japanese and American governments. There is no Special 301 in Japan.

Japan is rightfully unhappy about its loss of revenue in China, and yet American interests were just as understandably distressed by the copying of CDs in Japan.[119] Japan's multinational recording companies now are pressuring China to reduce the wholesale copying of its products in that country. China has 26 CD pressing plants, enough capacity to turn out 65 million discs per year; almost ten times the number of CDs legally sold in that country. The International Federation of the Phonographic Industry contends that almost all the plants make unauthorized copies. What record companies really fear, though, is large-scale exporting of bootlegged copies throughout Asia, if not the world.[120]

As both American and British pop music is popular worldwide, and as the Japanese companies such as Sony distribute much of this music, the interests of Japan and America are allied on this issue. Hong Kong, the British crown colony, which itself

116. Howard C. Lincoln, *Huge China Market, a Mirage*, ASIAN WALL ST. J., Mar. 24, 1994, at 8.

117. 19 U.S.C. § 2411 (1988).

118. Lincoln, *supra* note 116; *see also Gates of Beijing*, ASIAN WALL ST. J., Mar. 24, 1994, at 8 (editorial criticizing the Chinese government for awarding only $258 in damages against a government-owned institute for unauthorized reproduction of 650,000 metallic packaging holograms designed to ensure that software actually comes from the American company Microsoft).

119. Similarly, an American trade organization, The Business Software Alliance, estimates that 90% of the personal computer users in Japan use pirated software, at a loss to the industry of $3 billion. *See 90% of PCs Use Bootleg Programs, Report Says*, JAPAN TIMES, June 4, 1993, at 10.

120. *See Pirates of the High Cs*, TIME, Nov. 15, 1993, at 46.

leads a precarious existence between East and West, is also a big loser. Pirated Chinese-language CDs from Hong Kong cost the recording industry $6 million a year.

There is more than enough law to prevent unauthorized record copying in China. What is lacking is enforcement. At least one company, however, Japan's EMI, is looking toward traditional Asian methods of settling disputes. Instead of relying on law to solve the problem, it is reaching private agreements, including a first-of-its-kind licensing contract with the government-owned Shanghai Records to produce lawful copies of ten of EMI's most popular albums.[121]

Lack of law is also not a problem in South Korea, which—as a result of a flurry of activity in the late 1980s and early 1990s—now has state-of-the-art copyright,[122] trade secret, and trademark statutes, as well as specific laws covering computer software and semiconductor chips in addition to the customary patent protection.[123] Unlike China, Korea is firmly committed to capitalism, so there is no political orthodoxy that interferes with the protection of such individual property rights.

The problem in Korea is also one of enforcement. As Korea is a major center of manufacturing for clothes and shoes, trademarks are particularly vulnerable.[124] The U.S. Trade Representative placed Korea, along with Taiwan, on its "priority watch list" under Special 301, soon after the new Administration took office in 1993, citing "ineffective enforcement of its trademark and copyright laws. Piracy of computer software, compact discs and video and sound recordings and counterfeiting of U.S. trademarks (in such areas as footwear) have been rampant," he said.[125]

While encouraging the Korean government for making progress in enforcement, the Administration said "it is essential that there be a sustained enforcement of intellectual property laws, including judicial decisions and imposition of penalties that have a sufficiently deterrent effect on further piracy and counterfeiting."[126]

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121. *Id.*

122. *See generally* William Enger, *Korean Copyright Reform*, 7 UCLA PAC. BASIN L.J. 199 (1990).

123. *See generally* KIM & CHANG [law firm], MANUAL FOR KOREAN PATENT LAW (1990).

124. Many of those goods may be for export. In the twelve months ending in September of 1993, the Japanese custom office seized 361,694 misbranded goods, just under half of which came from Korea. China was second on the list, followed by Hong Kong.

125. *USTR Fact Sheet on Special 301 Released April 30, 1993*, INT'L TRADE REP. (BNA), May 5, 1993, *available in LEXIS*, Nexis Library, INTRAD File.

126. *Id.*

If enforcement lags behind the law in many Asian countries, it is because both are still developing. Japan, however, can make no such argument for itself. The fact that its laws began at a time when it was developing, however, creates a residual attitude toward intellectual property that resembles that of developing countries. Japan is now one of the most economically robust countries in the world. Like many of its citizens who made the Japanese "miracle," however, it still thinks of itself as poor and struggling.

Even in the U.S. there is controversy about the acquisition of private wealth at the expense of society. President Clinton, early in his administration, criticized pharmaceutical companies for earning large profits from the illnesses of American citizens. Medicine, Clinton said, should never be out of reach for those who are ill.

Drug companies, however, responded that making profits from their patented medicines is what made research and development of the next generation of medicines possible. In this, they were exactly in line with the spirit of the American Constitution's copyright (and patent) clause. Nevertheless, medicine poses the question in extreme form: are (or should there be) limits to the ability to generate private wealth from intellectual property?

This is probably the most crucial question in developing countries. It is one thing to ask the government to stop teenagers from making cheap copies of their favorite records. It is something altogether different to ask the government to stop companies from reproducing medicines unless they pay patent royalties to the inventors. The government of India almost faced a revolt in part of its Parliament for signing onto the GATT, which includes such a requirement as part of its overall economic framework.

Japan is famous for its ability to see problems from a long-term perspective. And so, as a developed nation and producer of patented medicines, it can assert quite honestly that the long-term interests of its developing neighbors will be served by enduring the short-term difficulty of paying for such drugs.[127] Still, making such an assertion is no simple matter for a nation that has endured much itself.

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127. *But see* Julio J. Nogués, *Social Costs and Benefits of Introducing Patent Protection for Pharmaceutical Drugs in Developing Countries*, 31 DEV. ECON. 24, 52 (1993) (developing countries may benefit from future discoveries only to the extent their disease patterns mirror those of the already developed countries that engage in this research).

III. CONCLUSION

American businesspersons and lawyers look at intellectual property laws through Western eyes. We think, for example, of the Statute of Anne[128] as being the world's first copyright law and Gutenberg's invention of moveable type as the beginning of printing. In fact, however, quite similar rights existed in China many years earlier, as did interchangeable wood blocks.[129]

If we can be myopic on facts, it is all the more likely that we will not see more ephemeral issues of socialization. Nevertheless, whether we see them or not, they have an important effect on the laws of any country.

In this paper, we have been concerned primarily with the intellectual property laws of Japan. Our excursion into sociology is not a matter purely of academic interest. Japan is both a major importer and exporter of intellectual property. And yet, Japan's unique cultural and political history has shaped its understanding of the role of an intellectual property system in a society differently from that of the United States.

When American interests intersect with those of Japan, both sides are often frustrated by what seem to be unreasonable demands or inexplicable refusals to grant concessions. The problem is that each is seeing the same thing, but having traveled a different road to get there, it looks quite different.

In order to resolve these differences and work together effectively,[130] both Americans and Japanese need to be able to imagine what the world looks like from the other road. The point is not just to be kind or empathetic, although those are worthy goals in themselves. Rather, as a matter of self-interest, making changes and working within each other's systems requires us to understand what each of us wants, and what we want depends on how we have grown up. An American wants bacon and eggs for breakfast. A Japanese wants rice and seaweed and miso soup. These are not genetic differences; they are matters of socialization.

The encouraging point is that both sides are hungry. By setting a table that includes each of our preferences, we can dine together. Perhaps, in time, we Americans can even stomach some seaweed in the morning. Our Japanese counterparts already sample our morning fare from time to time: it's called "American breakfast."

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128. 1709 (8 Anne C. 19).

129. ZHENG CHENGSI & MICHAEL PENDELTON, *supra* note 113, at 114-15.

130. *See generally* Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991).

Together, Europe, America, and Japan can afford a big intellectual property banquet.

Bon appetit.

Let's eat.

Shokuji shimashō.