

TRIPS THROUGH THE FAR EAST: HIGH TECH PRODUCT PIRACY AND THE NEED FOR ALTERNATIVE REGIONAL SOLUTIONS

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I. INTRODUCTION

At the Uruguay Round trade talks in the early 1990s, negotiators from around the world recognized the importance of intellectual property rights in the modern, global economy. While the spread of high technology and rapid increases in world trade have brought about new opportunities for business in global markets, these trends have been accompanied by a rise in product piracy. No facet of this trend has been more noticeable than the large-scale counterfeiting of recorded music and software products, and nowhere is this high technology piracy more acute and confounding than in East Asia.

In 1994, the founding members of the World Trade Organization (WTO) reached a landmark agreement protecting intellectual property rights, known as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹ TRIPS requires all WTO member countries to enact tough laws and enforcement measures to achieve certain standards of intellectual property rights protection.² As part of the agreement, newly-developed and developing countries received an extension for implementing the TRIPS provisions, a grace period that ended for most countries in East Asia on January 1, 2000.³

While TRIPS is a big step in the advancement of intellectual property rights protection, it has not created a positive system of enforcement. The agreement uses a blanket, one-size-fits-all approach, and it is designed to unilaterally serve the interests of larger developed nations. Meanwhile, newly-developed and developing countries gain little benefit from TRIPS and incur tremendous costs through its implementation.

This paper examines the matter of copyright infringement in East Asia with respect to the music and software industries, both of which are frequent subjects of large-scale product piracy. It illustrates the limitations of TRIPS in solving the region's piracy problems, suggesting that a blanket global approach using compulsion to achieve its means will not serve

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round 33 I.L.M. 81 (1994) [hereinafter, TRIPS Agreement].

² *Id.*

³ World Trade Organization (WTO), *Trade topics - TRIPS - Overview - TRIPS agreement* (visited February 22, 2001), available at <http://www.wto.org/english/tratop-e/intel2-e.htm>.

anyone's interests well in the long run. Instead, in East Asia and probably elsewhere, a more cooperative, regional framework would combat the piracy problem more effectively. Such a system could incorporate a dynamic variety of targeted programs and offer needed incentives to each of the major players for helping to improve the overall state of piracy. Finally, this paper examines several solutions discussed by other scholars and suggests additional goals and strategies which could form the basis of an alternative regional framework for copyright protection. Cooperative, mutually-beneficial solutions would produce a net gain for everyone from the present status quo and would be a better long-term alternative than the system inaugurated by TRIPS.

II. THE PIRATING PROBLEM

A. A GLOBAL PROBLEM

Pirate industries exist in most, if not all, of the world's market economies. From imitation Rolex watches in Bangkok street markets to music recordings downloaded from the Internet in Berlin, pirated or copied items beyond the legal chain of licensed protection are available nearly everywhere. While directly benefiting consumers by providing access to comparable products at lower prices, such piracy undeniably cuts into the profits of individual authors or inventors as well as the companies licensed to sell their work. Many argue that counterfeiting discourages would-be innovators and inventors who cannot capitalize on their work if they lack meaningful legal protection.

By some estimates, intellectual property crime in all its forms accounts for some six percent of all world trade.⁴ Even in the United States, where copyright laws are stringent and average incomes high, pirated compact disks (CDs) account for less than 10% of all music sold while about 25% of the software programs that Americans use are illegal copies.⁵ These rates are higher than one might imagine for an industrialized Western country, but they pale in comparison to piracy rates of 90% or more in parts of Asia and Eastern Europe.⁶

⁴ Aino Mohd, *New crackdown on piracy rings with advent of Optical Disc Act*, New Straits Times (Malaysia), Oct. 2, 2000, at 6, available at LEXIS, News Group File.

⁵ Cara Buckley, *One third of CDs around the world are copies*, Miami Herald, Oct. 3, 2000, available at LEXIS, News Group File; Raju Chellam, *US\$ 12b global software piracy loss last year*, Business Times (Singapore), Sept. 25, 2000, at 1.

⁶ *Id.*

B. SOME FACTORS DRIVING PRODUCT PIRACY IN THE EAST ASIAN REGION⁷

1. Expensive Imports and the Popularity of Foreign Pop Culture

A combination of factors make East Asia a battleground for intellectual property rights enforcement, particularly in the copyright realm. First, although few East Asian countries are among the poorest by global standards, most have newly-developed or developing economies and must pay foreign hard currency for imported products.⁸ For consumers in the region, imported items from richer industrialized countries are often expensive compared with local alternatives.⁹ Yet Western culture is immensely popular in these emerging markets, and this trend creates a huge demand for Western music CDs, cassette tapes, video cassettes, and video compact discs.¹⁰ American, Canadian, and European pop singers can command top dollar for concert tickets in countries such as Singapore and South Korea.¹¹ As once-traditional societies transform themselves overnight, many East Asians are attracted to the characters, themes, and stories in American movies; young people in East Asia are often better versed in Hollywood gossip than their counterparts in the United States. Younger generations in many East Asian countries are also embracing Japanese pop culture at a furious pace, while prices for imported Japanese goods remain expensive for them as well.¹²

⁷ In this paper, "East Asia" refers to countries and other territories in North and Southeast Asia. This includes China, Hong Kong, Macau, Taiwan, and South Korea ("Korea"), as well as most member states of ASEAN (the Association of Southeast Asian Nations). Japan is also a member of the region, but I do not deal with it directly in this paper because the country has a larger economic and diplomatic presence, and is subject to a different range of problems and solutions than its neighbors. I do not include North Korea or Burma (Myanmar) in my discussion due to their international isolation and lack of market economies.

⁸ World Trade Organization (WTO), *Trading into the Future - the organization - Least-developed countries* (visited Oct. 10, 2000), available at <http://www.wto.org/english/thewto-e/whatis-e/tif-e/eng7-e.htm>.

⁹ Jim Patterson, *Asia's street markets*, International Travel News, Oct. 1, 2000, at 60.

¹⁰ *S-E Asia is New Market for Western Artists*, The Straits Times, Sept. 15, 1993, at 7, available at LEXIS, News Group File.

¹¹ *Id.*

¹² *Advance of the amazonesu*, The Economist, July 22, 2000, available at LEXIS, News Group File.

2. *Rapid Growth of Economies and Markets*

Another important factor is the growth of markets in East Asia. With Japan and the so-called Asian Tiger economies of Hong Kong, South Korea, Singapore, and Taiwan leading the way, the region has led the world with staggering growth rates over the last half century.¹³ The Asian Development Bank notes that these newly industrialized economies "telescoped into four decades the process of social and economic development that took the advanced economies of Western Europe three centuries to achieve."¹⁴ As an example of this transition, South Korea's per capita gross national product in 1960 was \$80 per year, placing it just behind India and roughly even with Ghana and Sudan.¹⁵ But by the 1990s, after some three decades of growth averaging nearly 9% a year, Korea had become the world's eleventh-largest economy.¹⁶ Even as parts of East Asia continue to recover from the financial crisis of 1997-98, analysts predict that economies in the region will continue to grow, and this means that markets for foreign products will further expand.¹⁷

3. *The Importance of Technology and the Demand for Software*

Technology is a cornerstone of East Asia's financial success, and in addition to exporting large amounts of high-tech equipment and components, East Asians are themselves vigorous consumers of personal and business technology.¹⁸ The region-wide obsession with cellular phones is a good example of this demand and one that shows no signs of leveling off.¹⁹ While almost no one had a mobile phone in Asia a few years ago, some 200 million in the region now carry them.²⁰ Recent market research shows that cellular phone penetration rates in Hong Kong and Korea have both topped 50%, while rates in poorer countries like Thailand and the Philippines are already around 4-6% despite lingering impacts of the 1997-98 financial crisis.²¹ Gadget-crazy consumers are attracted by progressively sleeker designs,

¹³ Asian Development Bank, *Asian Development Outlook 2000* (2000), at 178.

¹⁴ *Id.*

¹⁵ Mark L. Clifford, *Troubled Tiger: businessmen, bureaucrats, and generals in South Korea* 9 (1998).

¹⁶ World Bank, *East Asia & Pacific Briefing Note* (1993), cited in Clifford, *supra* note 13.

¹⁷ International Monetary Fund, *2000 Annual Report* 21, 41 (2000).

¹⁸ Assif Shameen, *The Savior of Crisis Asia*, *Asiaweek*, Jan. 14, 2000, at 60.

¹⁹ *Id.*

²⁰ Allen T. Cheng, *Shopping by Cellphone*, *Asiaweek*, July 28, 2000, at 48.

²¹ *HOME REVIEW: Thailand's new high-tech toy - the digital slide*, *Bangkok Post*, Sept. 27, 2000, available at LEXIS, News Group File.

phones which play popular tunes or videogames, and new technologies providing wireless Internet access.²² Cellular phone use continues to grow by more than 30% a year throughout the region, making East Asia the world's largest and fastest growing market for cellular phones.²³

Although not nearly as quickly, the region is catching on to computers as well.²⁴ Computers and related components are often manufactured in East Asian countries, and are available at reasonable prices. In cities such as Kuala Lumpur, Hong Kong, Bangkok, and Seoul, Internet cafes and computer rooms have sprung up in large numbers, making it possible for those who do not own computers to gain access to them for a small hourly fee.²⁵ But along with this spread of hardware, consumers and businesses also need the latest software. Few East Asian companies have caught up with their Western counterparts in this regard, so imported operating systems and application software are indispensable. Among the most popular software programs are Microsoft applications and computer games, also the most frequently counterfeited products.²⁶

4. *Intellectual Property and Culture*

The Western legal tradition places a high value on private property rights, but this is not necessarily the case for other cultures outside of Europe and its historical sphere of influence.²⁷ The intellectual property right is basically a form of property, although the copyright, trademark, or patent holder only keeps his or her exclusive right for a set period of time.²⁸ Such a period is usually prescribed by law to avoid monopolization and a stagnancy of innovation.²⁹ In the West, property rights have been associated with natural law for thousands of years, and limited monopolies in copyrights and patents have been recognized in European law since at least 1460.³⁰

²² Heidi Jeter and Aleah Mickelson, *25 Innovative Devices*, *Wireless Week*, Sept. 18, 2000, at 62.

²³ Cheng, *supra* note 20.

²⁴ *Id.*

²⁵ Julie Schmit, *Cyberspace cafes catching on abroad*, *USA Today*, Apr. 14, 1999, at 8B.

²⁶ Sairoong Dhamachareon, *Software-Sellers Ask Thai ISPs To Police Web Sites*, *Newsbytes*, Sept. 14, 2000, available at LEXIS, News Group File.

²⁷ Richard E. Vaughan, *Defining Terms in Intellectual Property Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 *ILSA J Int'l & Comp L* 307, 308-10 (1996).

²⁸ *Id.* at 331.

²⁹ *Id.*

³⁰ The Venetian Senate recognized limited copyright monopolies in 1460, and several years later enacted a patent law. Paul A. David, *Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights and Trade Secrets in Economic Theory and History*, in *Global Dimensions of Intellectual Property Rights in Science and Technology* 51 (Wallerstein et al. eds., 1993), cited in Vaughan, *supra* note 27, at 307.

Many East Asians have different views from Western people towards intellectual property rights (IPR) and private property in general. Modern legal systems, in addition, are largely Western innovations which have been introduced relatively recently into many East Asian countries. While law and private property may be effective additions to these societies, other systems of property and problem-solving have existed in East Asia for thousands of years. Today, in countries like Taiwan, South Korea, Japan, Thailand, and Malaysia, the imported systems are functioning well, but only in that they have been accepted, absorbed, and redefined as part of a greater whole. Standardized concepts will not always work in consistent ways across cultural boundaries.

Also, though there are certain regional similarities throughout East Asia, it is difficult to make broad generalizations about the peoples or their cultures. The region stretches from the mountains of Burma to the ports of Japan, the plains of Mongolia to the jungles of Borneo. Social and cultural attitudes in East Asia have been shaped by a variety of forces, and there are great variations from area to area, country to country, and sometimes even village to village.

One example of an important regional variation is the influence of Islam, which spread from its beginnings in the Middle East to cover most of Malaysia, Indonesia, and Brunei. For hundreds of years, it has been a driving force in shaping society, culture, and law in these three countries. There has been some debate over whether the Koran and Islamic cultural traditions have a place for intellectual property rights or product piracy.³¹ This region's Islamic influence distinguishes it from other parts of East Asia and this illustrates that sweeping generalizations of Asian attitudes towards intellectual property can be dangerous. Intellectual property rights may be viewed very differently in Jakarta than they are in Tokyo.

That said, most parts of East Asia have been influenced in one way or another by China, a historical giant in the region. Buddhism, Taoism, and Confucian ethics and structure all reached much of East Asia through China. Many countries had relations with the imperial monarchy there, which influenced their systems of government and law. Chinese high culture has had an undeniable impact upon Japan, Korea, and China's neighbors in Indochina, while Taiwan and Hong Kong are direct descendents and Singapore is a largely Chinese city. Thus, an examination of attitudes towards intellectual property in the Chinese cultural tradition illustrates how many East Asians approach the matter from a different viewpoint than their counterparts in the West.

³¹ Vaughan, *supra* note 27, at 358-359.

In the strongly Confucian tradition of China, intellectual works belong not to the creator, but to the human society as a whole.³² Master scholars in ancient times wrote not for personal profit, but for "edification and moral renewal."³³ Thus, a major incentive for creativity in Confucian countries even today is cultural esteem rather than material gain.³⁴ In the Chinese tradition, copying and imitation are not condemned as plagiarism, but instead are seen as part of an accepted learning process.³⁵ Through copying the work of a master, the student both honors the original creator and betters his or her own abilities.

In the West, one sees art students at the great museums of Europe copying paintings by Renaissance masters. But this exercise is rarely regarded as an end in itself; it is designed to further students' abilities so that they may produce better creative works of their own. In much of Asia, copying is both the means and the end, because the original creator has produced the definitive work.³⁶ This acceptance of imitation, combined with the fact that original works traditionally became part of the public domain, has made it difficult for Western-style intellectual property protection to succeed in East Asia.³⁷

C. THE NATURE OF PRODUCT PIRACY

1. *An Entrenched Industry in East Asia*

Product piracy is an entrenched industry and a fact of life for legitimate businesses operating in East Asia.³⁸ Long before Microsoft introduced its Windows software, name-brand products and other expensive items were being counterfeited and sold for less in street stalls and large markets. Today, one can find shirts with Nike, Tommy Hilfiger, or Polo trademark logos for under two dollars in almost any market in an Asian

³² Patrick H. Hu, *Mickey Mouse in China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. Int'l L.J. 81, 104 (1996).

³³ William P. Alford, *To Steal A Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* 29 (1995), cited in Hu, *supra* note 32, at 85.

³⁴ Kyung-Won Kim, *A High Cost to Developing Countries*, New York Times, Oct. 5, 1986, at 2.

³⁵ Frankie Fook-Lun Leung, *Tradition of Copying in China Fuels the Piracy of Intellectual Property*, L.A. Times, Mar. 5, 1995, at D2, cited in Hu, *supra* note 32, at 104.

³⁶ *Id.*

³⁷ Victoria Slind-Flor, *IP Law in China Is Still Young*, Nat'l L.J., Dec. 13, 1993, at 35, cited in Hu, *supra* note 32.

³⁸ Yasmin Ghahremani, *Freeloading downloaders take on Hollywood*, Asiaweek, Sept. 22, 2000, at 67.

capital city.³⁹ Opening quotes on "Rolex" watches often start above US \$20, but they can be bargained down to around \$7.50 if one is good or lucky.⁴⁰ Some market vendors selling Gucci, Versace, and Prada handbags are savvy enough to keep a pocketful of various labels; once a customer chooses her favorite bag she can also select any name-brand tag and have it installed on the product before her very eyes.⁴¹ Except for naïve tourists, few people are meant to be fooled by product counterfeiting; most sales are not a matter of creating an illusion, but of creating an image where the real thing is more expensive than most local people would want to pay or can afford.

2. *The Copyrighting Problem: CDs and Software as Examples*

In the 1990s, compact disks became popular items to counterfeit, and explosive growth in the pirate CD industry easily outpaced rates of traditional product piracy.⁴² According to recent figures, CD piracy is continuing to increase, and total sales of pirate music CDs and CD-R recordable discs topped 600 million units in 2000.⁴³ Pirated music recordings accounted for more than one third of all worldwide CD and cassette sales in 2000, while global disc manufacturing capacity has more than doubled in the last five years.⁴⁴ In a 2001 report on music piracy, an international music industry association called Asia "the hub of pirate CD production" and noted that many of its countries and territories suffer from "chronic domestic piracy rates."⁴⁵

The growth in optical disc production capability represents not only the demand for music CDs, but also a proliferation of new optical disc formats with the spread of Recordable CDs, Video-CDs, and CD-ROM computer software.⁴⁶ According to a report commissioned for computer software industry groups, the global piracy rate for software applications is similar to that for music recordings at 36%, representing a \$12 billion loss to

³⁹ Judith Morgan, *Bargain days in K.L. — and they'll clean your glasses for free*, San Diego Union-Tribune, July 25, 2000, at F-12.

⁴⁰ Patterson, *supra* note 9.

⁴¹ *Id.*

⁴² Rebecca Lim, *One Third of World Piracy Sales are CDs*, The Straits Times, June 14, 1994, at 7, quoted in Linda W. Tai, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement Problem of International Conventions*, 16 Loy. L.A. Ent. L.J. 159, 162 (1995).

⁴³ International Federation of Phonographic Industries (IFPI), *Music Piracy Report 2001* (June 2001), at 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 2.

software companies.⁴⁷ With losses of this magnitude, it is no wonder that these industries have banded together on global, regional, and domestic levels to fight for tougher copyright laws and enforcement.⁴⁸ One such group taking a tough stance explains that product piracy “robs governments” of huge tax revenues, “erodes culture, destabilizes legitimate economic activity and nurtures serious crime.”⁴⁹

D. SOFTWARE, VIDEO AND MUSIC PIRACY: WHAT IT IS AND HOW IT WORKS

Though the traditional meaning of piracy is “robbery on the high seas,” the term is also defined today as “the unauthorized use of another’s production, invention, or conception, especially in infringement of a copyright.”⁵⁰ Piracy of music, software, movies, videos, and other recordings can work in a variety of ways. In recent years, Internet piracy has become a huge new source of illegal music duplication through file-sharing and pirate websites, though the actual impacts of this new wave are hard to quantify.⁵¹ In this article I focus primarily on physical forms of product pirating, because East Asia remains a hot spot for pirate production and the visibility of physical piracy probably makes it more amenable to regulation.⁵²

According to Microsoft, one common form of software piracy is called end-user copying, which occurs when an original purchased program is copied and distributed without license to individuals or businesses.⁵³ A second type of piracy is the duplication of software by Original Equipment Manufacturers (OEMs).⁵⁴ Many makers of personal computers sell their products with pre-loaded software for the convenience of the consumer; piracy occurs when an OEM uses a single licensed copy of software for installation on many machines without separate licenses for each eventual consumer.⁵⁵ A variation of preloading piracy that is common in East Asia occurs when computer dealers illegally duplicate software onto machines for

⁴⁷ International Planning and Research Corporation, 1999 Global Software Piracy Report (May 2000), at 2.

⁴⁸ *Id.*

⁴⁹ International Federation of Phonographic Industries (IFPI), Music Piracy Report 2000 (June 2000), at 4.

⁵⁰ Merriam-Webster’s Collegiate Dictionary, “Piracy” (visited Oct. 21, 2000), available at <http://www.m-w.com>.

⁵¹ IFPI, *supra* note 49, at 4.

⁵² *Id.* at 3.

⁵³ Microsoft, *Protecting against software piracy* (visited Oct. 21, 2000), available at <http://www.microsoft.com/piracy>.

⁵⁴ *Id.*

⁵⁵ *Id.*

sale.⁵⁶ One final form of prevalent software piracy on Microsoft's list is mischanneling, which occurs when discount software for academic purposes or high-volume customers is redistributed to others without such licenses.⁵⁷

While end-user copying and mischanneling are huge sources of illegal software, they generally occur on a smaller scale and, like Internet piracy, are so decentralized and widespread that they are difficult to pin down.⁵⁸ As a result, my discussion of copyright piracy in East Asia focuses mostly on counterfeiting, software preloading, and other large-scale methods of piracy. In the music and video industries, with the exception of Internet duplication, the largest piracy problems come from large-scale counterfeit operations which produce popular CDs, videos, and cassettes.⁵⁹ As with software, these counterfeited copies are packaged, distributed and sold as supposedly legal products.⁶⁰

One of the attractions of pirated products is that they often appear on the market more rapidly than their legal counterparts.⁶¹ Because pirates only need a single disc from an album or program's original market, they can begin production at foreign plants near their destination markets within twenty-four hours of an original release.⁶² On the other hand, importers who operate through legitimate channels generally ship albums or programs in large quantities from wherever they are legally made, and this can either take a long time by land and sea or be very expensive by air.⁶³ Even without this added burden, pirated copies of software, music, and movies are invariably much cheaper than legitimate ones, making it almost impossible for legal industries to offer preferred market choices in many parts of the world.⁶⁴

⁵⁶ *PIRACY: DIP steps up action over illegal software; Future on-site visits planned*, Bangkok Post, Sept. 13, 2000.

⁵⁷ Microsoft, *supra* note 53.

⁵⁸ *Id.*

⁵⁹ IFPI, *supra* note 49, at 2.

⁶⁰ Microsoft, *supra* note 53.

⁶¹ Tai, *supra* note 42, at 161.

⁶² James W. Peters, *Toward Negotiating a Remedy to Copyright Piracy in Singapore*, 7 NW. J. Int'l L. & Bus. 561, 464 (1986), cited in Tai, *supra* note 42, at 161.

⁶³ *Id.*

⁶⁴ Yvan Cohen, *Software Pirates Pile Up Profits in Afflicted Asia*, Christian Science Monitor, Dec. 29, 1997, at International Section 1.

III. THE PROS AND CONS OF PIRACY IN DEVELOPING AND NEWLY DEVELOPED COUNTRIES

A. THE BENEFITS

Product piracy enriches a host country in a number of ways. First, there is the obvious benefit to consumers: counterfeited products are cheaper than legally-made alternatives.⁶⁵ Even in a country believed to be a net exporter of pirated software or CDs (as defined by production capacity minus demand), there is invariably a strong domestic pirate market.⁶⁶ As long as there is consumer demand for pirate prices versus imported ones, counterfeiting will probably always exist at some level.

Buying pirated goods also strengthens local industry rather than supporting large corporations based in foreign countries. While pirate manufacturing and supply chains are not always domestic, they are at least regional, so a person buying pirated music in Hong Kong could be supporting a factory in China or Malaysia, with smuggling, distribution and sales taking place in between.⁶⁷ In other cases, an entire industry might be domestic. Piracy has increased the size of product markets by making goods available to people who might not otherwise be able to afford them. According to one software retailer in Bangkok, "if I sold (the real thing), I wouldn't even sell 10 percent of what I'm selling now."⁶⁸ Although most governments oppose piracy, it is easy to see why some in the developing world are quite happy to look the other way while their people reap the many benefits of product piracy.

Another argument supporting domestic piracy is that it facilitates technology transfers and expands a country's technology base.⁶⁹ For countries which are net importers of technology, as most are in Southeast Asia, it can seem a slow wait for local industries to develop and for foreign companies to invest while the modern world demands that the country import expensive technology to keep up with the modern world. The recent worldwide explosion in optical disc manufacturing capacity is a good example of this; in Taiwan, Hong Kong, Singapore, Macau, and Malaysia, pirate industries have contributed to building up the necessary structures for huge over-

⁶⁵ *Id.*

⁶⁶ IFPI, *supra* note 49, at 2.

⁶⁷ Tai, *supra* note 42, at 164-165.

⁶⁸ Cohen, *supra* note 64.

⁶⁹ J.H. Reichman and David Lange, *Bargaining Around the TRIPS agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 Duke J. Comp. & Int'l L. 11, 54 (1998).

capacities in optical disc production capabilities.⁷⁰ Total legitimate demand for all types of discs in Taiwan, for example, was 255 million units in 2000, while the country's current estimated production capacity has reached seven billion units.⁷¹ Legitimate or not, this is a huge benefit to Taiwan in terms of expanding its technology base. The growth in production facilities probably also means that more people have been trained to use them. If this is so, then we can also credit pirate industries (which account for at least some of the production) with promoting greater training and education for the host country's work force.

B. THE DRAWBACKS

In contrast to the above arguments, there are also many ways in which pirate industries block developing countries' progress. Probably the most important reason involves relations with other nations and companies which are net exporters of technology and can represent future sources of investment. For example, as long as the pirates in Country X continue to make and distribute counterfeit copies of Company A's software, Company A has little reason to build factories of its own and train a local work force to make legal products in Country X. Whether or not such investment would be a direct consequence of halting product piracy and whether gains from legitimate business in a country's tax revenues, employment, and lower prices would outweigh the loss of pirate industries remains to be seen in most of Asia. In any case, a technology-importing government must also be wary of its international standing and relations with richer trading partners.

Opponents of product piracy also point out that it has been linked to organized crime and argue that passive tolerance of piracy tends to worsen a country's problems of crime and public safety.⁷² The Italian mafia, Russian mob, and Chinese triads are reportedly behind some of the largest pirating operations in the world.⁷³ A recent news article points out that in late 1999, Latin American authorities tore down an illicit CD-producing factory in Paraguay.⁷⁴ The factory, which produced CDs for the Brazilian market, was run by Taiwanese nationals who were employed by a Chinese organized crime syndicate.⁷⁵ Because normal loans can be hard to obtain, counterfeiters often look to organized crime for the significant funds needed to start an

⁷⁰ IFPI, *supra* note 43, at 3.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Buckley, *supra* note 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

operation; in return, syndicates can make healthy returns on their investments and use counterfeit businesses for laundering money.⁷⁶

The most common argument against allowing pirate industries is that they hamper legitimate ones.⁷⁷ For example, bona fide software companies, suffer nearly \$3 billion in lost profits each year due to piracy in the Asia/Pacific region.⁷⁸ Some 85% of the Microsoft products on sale in Indonesia are fakes; such large foreign companies would certainly stand to gain if the pirates were put out of business.⁷⁹ But because the anti-piracy battle is often framed as a war between richer and poorer countries, one fact often forgotten is that local businesses can suffer just as much as foreign companies from piracy.⁸⁰ In Vietnam, for example, rising rates of counterfeit software production have prevented fledgling local software makers from gaining a foothold in the market.⁸¹ Quoted in a local daily, executives of legitimate companies said that their businesses would grow by 300-400% if the government stepped up copyright enforcement and trimmed piracy rates (currently at 98%) by 30-40%.⁸² Without more government protection, some of the firms were considering closing, as they continued to incur losses even as they produced more.⁸³ These should be serious considerations in a poor country which is struggling to develop a functional economy and industrial base; the choice is between the benefits of piracy and the benefits of stopping it.

⁷⁶ Anthony M. Keats & Jeffrey K. Joyner, *Counterfeiting Reaches New Levels*, in Global Trademark and Copyright 337, 337-51 (Siegrun D. Kane & Mark A. Steiner eds., 1997), cited in Rosielyn Alviar Pulmano, *In Search of Compliance with TRIPS Against Counterfeiting in the Philippines: When is Enough Enough?*, 12 Transnat'l Law. 241, 246.

⁷⁷ Chellam, *supra* note 5.

⁷⁸ International Planning and Research Corporation, *supra* note 47, at 7.

⁷⁹ *More people buying originals: Microsoft*, Jakarta Post, Sept. 26, 2000, available at LEXIS, News Group File.

⁸⁰ *Vietnam: Domestic software industry in need of Gov't support*, Saigon Times Daily, Aug. 16, 1999, available at LEXIS, News Group File.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

IV. INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION UNDER TRIPS

A. AN AGREEMENT WITH TEETH: TRIPS AS PART OF THE INTERNATIONAL ECONOMIC SYSTEM

The TRIPS agreement is annexed, along with other products of the Uruguay Round of GATT, to the agreement establishing the WTO.⁸⁴ TRIPS outlines minimum standards of international protection for intellectual property rights and specifies the responsibilities of WTO members to enforce these protections within their borders.⁸⁵ While pre-TRIPS intellectual property (IP) agreements covered trademark, copyright, and patent rights as well as other aspects of IP, none before TRIPS was linked directly to the system of international economic law.⁸⁶ These earlier agreements, most of which are still in effect and incorporated into TRIPS by reference, include the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Treaty on Intellectual Property in Respect of Integrated Circuits, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.⁸⁷ Prior to TRIPS, the World Intellectual Property Organization (WIPO) had primary responsibility for international IP law, and it is still charged with implementing these earlier conventions.⁸⁸

As Professor J.H. Reichman has written, TRIPS is the most ambitious intellectual property agreement ever attempted at the international level.⁸⁹ Though the Tokyo Round of GATT included negotiations on anticounterfeiting in 1978, it was only during the more recent Uruguay Round that IP became a major item on the global trading agenda.⁹⁰ Linking IP rights to the GATT and the WTO structure which emerged from the Uruguay

⁸⁴ TRIPS Agreement, *supra* note 1.

⁸⁵ Grace P. Nerona, *The Battle Against Software Piracy: Software Copyright Protection in the Philippines*, 9 Pac. Rim L. & Pol'y 651, 659, citing TRIPS Agreement, *supra* note 1, Preamble.

⁸⁶ Pulmano, *supra* note 76, at 261.

⁸⁷ TRIPS Agreement, *supra* note 1.

⁸⁸ World Intellectual Property Organization (WIPO), Ann. Rep 1999 (2000).

⁸⁹ J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 Vand. J. Transnat'l L. 363, 366 (1996).

⁹⁰ Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Symposium: Intellectual Property in the International Marketplace: Trade-Related Aspects of Intellectual Property Rights: Enforcement and Dispute Resolution: Principal Paper: Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 Va. J. Int'l L. 275, 276-7 (1997).

Round was controversial from the start.⁹¹ Developing countries questioned GATT's jurisdiction and lack of expertise in IP issues, and they worried that giving GATT this new area of mandate would allow richer countries to maintain their technological advantage, a stranglehold over the rest of the world.⁹² However, developing countries at the Uruguay Round negotiations settled for a bargain that would allow them extra time to implement TRIPS.⁹³ For newly-industrialized countries (NICs), this grace period ended on January 1, 2000, while lesser-developed countries (LDCs) have until July 1, 2006 to implement the provisions of the TRIPS agreement.⁹⁴

The decision to move IP from the realm of United Nations-affiliated international law and marry it with the Uruguay Round agreements and WTO trading structure gave IP an unprecedented enforcement mechanism: the WTO dispute settlement system.⁹⁵ Previous international IP agreements, such as the Berne and Paris Conventions, lacked teeth in that they put forth no meaningful systems of enforcing what they set out to accomplish.⁹⁶ In contrast, TRIPS compliance can be directly enforced through the WTO.⁹⁷ Whereas signatories to the earlier conventions could largely dispense with their obligations by passing statutes containing minimum standards of IP protection, WTO members under TRIPS must go much further.⁹⁸ A member state that passes a TRIPS-compliant statute must give force to this law by applying its minimum standards of protection in accordance with procedural and administrative requirements.⁹⁹ Countries must provide adequate remedies through administrative and judicial channels and, as Professor Reichman explains, "rights holders who cannot translate substantive victories into

⁹¹ Tuan N. Samahon, *Trips Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries*, 31 *Law & Pol'y Int'l Bus.* 1051, 1054-5 (2000).

⁹² Helena Stalson, *Nat'l Plan. Ass'n, Intellectual Property Rights and U.S. Competitiveness in Trade* 4 (1987), cited in Pulmano, *supra* note 76, at 262.

⁹³ WTO, *Trade Topics*, *supra* note 3.

⁹⁴ *Id.* TRIPS does not classify countries into categories of development or specify which organization's list is to be used. Though it defines least developed countries as those listed as such by the United Nations, I have relied on the WTO's classifications. This seems reasonable, since TRIPS is an annex to the WTO Agreement and has little relation to the UN. However, the question of classifications is still an open one, and it seems that countries may simply get to choose or negotiate, for example, whether they are to be considered 'developed' or 'newly developed'. See Samahon, *supra* note 91, at 1057.

⁹⁵ Dreyfuss & Lowenfield, *supra* note 90, at 277.

⁹⁶ J.H. Reichman, *Symposium: Intellectual Property in the International Marketplace: Trade-Related Aspects of Intellectual Property Rights: Enforcement and Dispute Resolution: Comment: Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 *Va. J. Int'l L.* 335, 338-9 (1997).

⁹⁷ TRIPS Agreement, *supra* note 1.

⁹⁸ Reichman, *supra* note 96.

⁹⁹ *Id.* citing TRIPS Agreement, *supra* note 1.

effective remedial action at the local level may eventually trigger the WTO's dispute-settlement machinery.¹⁰⁰

Emerging countries today who want to experience free trade benefits through the WTO must sign on to all of the Uruguay Round agreements as a package deal.¹⁰¹ These include TRIPS and the Understanding on Dispute Settlement (DSU), which empowers a WTO dispute settlement board, ad hoc panels, and a standing appellate body to decide questions arising under GATT, TRIPS, and other related agreements.¹⁰² WTO members thus agree to implement and enforce TRIPS domestically; those who do not risk an adverse panel recommendation, possible retaliation, and a much-weakened position at international negotiating tables.¹⁰³ The marriage of TRIPS with the global trading system has given international IP protection immense new power and also succeeded in bringing many new nations into the community of IP law.¹⁰⁴

B. COPYRIGHT PROVISIONS OF TRIPS

TRIPS incorporates Articles 1-21 of the Berne Convention, which are the foundation of its copyright section.¹⁰⁵ These provisions protect literary and artistic works and articulate a holder's rights to control reproduction, translation, and communication to the public.¹⁰⁶ The convention provides that illicit copies of a protected work may be seized.¹⁰⁷ TRIPS Article 10 adds to the list of protected works under the Berne Convention all computer programs and any data compilations which represent original intellectual creations.¹⁰⁸ Article 11 obligates member countries to provide exclusive rental rights with respect to computer programs and cinematographic works, though if widespread copying of cinematographic works results in material detriment to the author, rental rights need not be provided.¹⁰⁹ For most works, including

¹⁰⁰ Reichman, *supra* note 96.

¹⁰¹ J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 Int'l Law. 345, 385-86 (1995), cited in Dreyfuss & Lowenfield, *supra* note 80, at 277.

¹⁰² Dreyfuss & Lowenfield, *supra* note 90, at 279.

¹⁰³ *Uruguay Round Trade Agreement, Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes*, H.R. Doc. No. 103-316, Vol. I, at 1008-1036 (1994), excerpted in Raj Bhala, *International Trade Law: Cases and Materials* 149 (1996).

¹⁰⁴ Reichman, *supra* note 101.

¹⁰⁵ TRIPS Agreement, *supra* note 1, art. 9(1).

¹⁰⁶ John E. Giust, *Noncompliance with TRIPS by Developed and Developing Countries: Is TRIPS Working?*, 8 Ind. Int'l & Comp. L. Rev. 69, 73 (1997), citing Paris Act of 24 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works, available at WL I.E.L. IV-B.

¹⁰⁷ *Id.*

¹⁰⁸ TRIPS Agreement, *supra* note 1, art. 10.

¹⁰⁹ Bhala, *supra* note 103, at 993.

software and musical recordings, TRIPS requires a minimum term of protection of fifty years from the date of publication (or fifty years from the date of creation for unpublished works).¹¹⁰ TRIPS also requires that WTO members impose criminal penalties for commercial-scale copyright piracy and trademark infringement.¹¹¹

C. THE END OF THE GRACE PERIOD

Because most East Asian countries are classified as Newly-industrialized countries (NICs), their grace period for TRIPS implementation has ended.¹¹² Of the countries in the region, only Burma (a WTO member as Myanmar), Laos and Cambodia (acceding to the WTO), and Vietnam (a WTO observer) qualify as Least-developed countries (LDCs) with extended grace periods.¹¹³ However, the process of enacting and enforcing TRIPS-compliant laws has proved a challenge for many countries and remains incomplete in much of the world. As the following section indicates, the United States and other net exporters of high technology products are closely tracking the progress of these countries as they work to implement new laws and mechanisms of enforcement. With the expiration of the NICs' deadline, industrialized countries, industry associations, and large corporations with interests in IP protection are stepping up the pressure on many East Asian countries to move ahead with these efforts. Most developing and newly-developed countries do not need to be reminded that anything short of total compliance with TRIPS puts them at risk of WTO dispute settlement action and unilateral retaliation through measures such as the United States' Section 301.¹¹⁴

¹¹⁰ TRIPS Agreement, *supra* note 1, art. 12.

¹¹¹ Bhala, *supra* note 103, at 982, 984.

¹¹² World Trade Organization, *supra* note 8.

¹¹³ *Id.*

¹¹⁴ Office of the United States Trade Representative (USTR), 2001 Special 301 Report (April 30, 2001), at 2001 Special 301 Decisions. [In lieu of page numbers, citations to the USTR 2000 and 2001 reports will reference their subject headings and/or country listings].

V. RECENT IP PROTECTION EFFORTS AROUND THE REGION¹¹⁵

A survey of the countries and territories of the region and their recent efforts to protect intellectual property rights helps to paint a more complete picture of the piracy issue. While some countries have been more successful than others in addressing counterfeit production or retail, none have come close to eradicating it. In fact, in each market surveyed, legitimate software and music producers have a smaller market share than their imitators.¹¹⁶ Another purpose in documenting country-by-country enforcement is to show the overall futility of present approaches; even as one country improves in its efforts (which few have managed to do), counterfeit source producers can seek out the region's weakest link and move their operations there overnight. With numerous points of entry and scarce resources for border enforcement around the region, it will be a long time before smuggling is no longer viable. In absence of a stronger regional approach to copyright protection and enforcement, markets in East Asia will continue to function as they have for many years and product piracy will continue to thrive as it does today in these countries.

1. Indonesia

The Office of the United States Trade Representative (USTR) reports that Indonesia's enforcement regime for intellectual property protection remains seriously deficient.¹¹⁷ Indonesia has not yet passed TRIPS-compliant intellectual property laws.¹¹⁸ In 1999, Microsoft Indonesia was pleased by a 30% growth in its product sales, which may indicate some movement away from piracy on the part of the government, businesses and individual consumers.¹¹⁹ However, Indonesia still has some of the highest piracy rates in the world and it has become a hotbed for illegal optical media production.¹²⁰ The USTR recently reported that Indonesia's music and business software piracy rate is estimated to be 87%, with motion picture piracy at 90% and game software piracy at 99%.¹²¹ As long as corruption

¹¹⁵ For my definition of the region, its parameters, and the scope of this analysis, please see *supra* note 7.

¹¹⁶ USTR, *supra* note 114; International Planning and Research Corporation, *supra* note 47, at 7.

¹¹⁷ USTR, *supra* note 114.

¹¹⁸ *Id.*

¹¹⁹ *More people buying originals: Microsoft*, *supra* note 79.

¹²⁰ USTR, *supra* note 114.

¹²¹ *Id.*

continues in the country's non-transparent legal and judicial system, there will be no serious enforcement of intellectual property rights protections.¹²² Indonesia has experienced some political instability in recent years, and it is doubtful that the country will be able to enact a serious enforcement regime anytime soon.

2. Macau

Macau began 2000 on the USTR's "Priority Watch List" for possible 301 trade sanction actions, but its enactment of a tough, new TRIPS-compliant copyright law and other reforms led the USTR to lower its risk rating.¹²³ The government recently established an Intellectual Property Department to manage enforcement policy, and issued a decree requiring all government offices to use only licensed software.¹²⁴ Several months later, the government signed a Select Agreement with Microsoft to use the company's software in its forty-four government departments and units for a two-year period.¹²⁵ Whether Macau will successfully implement these measures through effective enforcement remains to be seen. The USTR has also been encouraged by Macau's adoption of a licensing requirement for raw materials used in optical disc manufacturing, but it points to the recent light sentence handed down by a Macau court to a major pirate CD manufacturer as evidence that the territory still needs to be more serious in confronting the problem.¹²⁶

3. China

With music and software piracy rates of about 90%, China is the top country on the international recording industry's domestic piracy priority list.¹²⁷ While these relative rates have not risen in recent years, they are illusory: China's pirate market has recently expanded by 100% even as legitimate sales of new optical disc formats have also increased.¹²⁸ China's accession to the World Trade Organization (WTO) is an important step for those favoring greater copyright enforcement, as the country will now be

¹²² *Id.*

¹²³ Office of the United States Trade Representative (USTR), 2000 Special 301 Report (May 2000), at Watch List, Macau.

¹²⁴ *Id.*

¹²⁵ *Macau lauded for role in \$21.8b software piracy battle*, Hong Kong Imail, Sept. 7, 2000, available at LEXIS, Newsgroup File.

¹²⁶ USTR, *supra* note 114, at Watch List, Macau.

¹²⁷ IFPI, *supra* note 43, at 6; International Planning and Research Corporation, *supra* note 47, at 7.

¹²⁸ IFPI, *supra* note 49, at 5.

bound by TRIPS and can be held accountable for its failures through the WTO's system of dispute resolution.¹²⁹ In 2000, China agreed, as part of the negotiations on its WTO accession, to implement the TRIPS agreement without the need of a transition period.¹³⁰ The USTR reports that ensuring proper implementation of China's 1992 and 1995 bilateral intellectual property agreements with the United States remains a high priority for its office.¹³¹ China has made some solid efforts to enforce optical media controls, mandated that its government ministries use only authorized software, and cracked down on both illegal replicating and smuggling.¹³² The latter is important because China has an overcapacity of production capability and has been both an exporter and large-scale importer of various pirated materials.¹³³ Though China has made some solid promises, "piracy and counterfeiting remain rampant," and the USTR has kept the country on its Section 306 monitoring list to ensure compliance with bilateral agreements between China and the United States.¹³⁴

4. Singapore

Singapore's software piracy rate in 1999 was 51%, lower than many of its neighbors.¹³⁵ However, the International Federation of Phonographic Industries (IFPI) estimated Singapore's disc pressing capacity at 490 million units, while the city-state's consumption in 1999 stood at around fifty million units.¹³⁶ This suggests a great export potential, and the USTR in 2000 mentioned that Singapore's border control efforts have been too lax, also insufficient to halt a strong in-flow of pirate articles from neighboring countries.¹³⁷ Counterfeit products including CDs, VCDs, and CD-ROMs are still openly displayed at retail stores in the city and Singapore's current approach to intellectual property enforcement puts the burden and costs of investigation and prosecution upon the copyright holder.¹³⁸ Current enforcement measures are not sufficient to seriously reduce production or sales of pirated goods in Singapore.¹³⁹ Although information about Singapore

¹²⁹ *Id.* at 3.

¹³⁰ USTR, *supra* note 123, at Section 306 Monitoring, China.

¹³¹ *Id.*

¹³² *Id.* at Controlling Optical Media Production; Examples of Progress During the Past Year.

¹³³ IFPI, *supra* note 49, at 2, 3.

¹³⁴ USTR, *supra* note 114, at 2001 Special 301 Decisions.

¹³⁵ International Planning and Research Corporation, *supra* note 47, at 7.

¹³⁶ IFPI, *supra* note 49, at 2.

¹³⁷ USTR, *supra* note 123, at Watch List, Singapore.

¹³⁸ *Id.*

¹³⁹ *Id.*

does not appear in the USTR's most recent Special 301 report, the music industry continues to list it as an important source of illegitimate discs.¹⁴⁰

5. Taiwan

As noted earlier, Taiwan is a huge producer of optical media and has the potential to be a large user and exporter of pirated discs without strong enforcement of intellectual property laws.¹⁴¹ In 2000, the music industry estimated Taiwan's disc production capacity at seven billion units, while total legitimate demand for all discs was approximately 255 million units.¹⁴² "Taiwan remains a haven for pirates," according to the USTR's most recent report.¹⁴³ In addition, the Taiwanese government has failed to enact strong optical media licensing legislation or shut down known pirate operations.¹⁴⁴ The USTR even doubts that Taiwan's copyright and patent laws are in compliance with TRIPS, although it hopes that these will be strengthened shortly.¹⁴⁵

6. Malaysia

In May 2000, the USTR placed Malaysia on its "Priority Watch List" as a country which has failed to sufficiently protect intellectual property rights.¹⁴⁶ With a software piracy rate of 71% in 1999 and an optical disc production capability that far outweighs domestic demand, Malaysia remains a hotbed of piracy.¹⁴⁷ Because demand for new media has increased throughout Southeast Asia and Hong Kong has cracked down on its copycats, a number of pirate syndicates have moved their operations to Malaysia.¹⁴⁸ The USTR's most recent report praises Malaysia for enacting new intellectual property protection laws, including the Optical Disc Act.¹⁴⁹ The key, as always, will be how well it is enforced, and the jury is still out on how or when this will be done.¹⁵⁰ The courts have been another big problem in Malaysia, since they have long dockets and have produced almost no criminal

¹⁴⁰ IFPI, *supra* note 43, at 3.

¹⁴¹ IFPI, *supra* note 49, at 2.

¹⁴² IFPI, *supra* note 43, at 3.

¹⁴³ USTR, *supra* note 114, at Priority Watch List, Taiwan.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ USTR, *supra* note 123, at Priority Watch List, Malaysia.

¹⁴⁷ International Planning and Research Corporation, *supra* note 47, at 7; IFPI, *supra* note 43, at 3.

¹⁴⁸ Mohd, *supra* note 4.

¹⁴⁹ USTR, *supra* note 114, at Priority Watch List, Malaysia.

¹⁵⁰ *Id.*

convictions for piracy.¹⁵¹ The government has been reluctant to invest resources in prosecuting counterfeiters, and a lack of prosecution and conviction has done little to deter pirates from committing future or repeat offenses.¹⁵²

7. Hong Kong

Hong Kong has had more success than its Asian neighbors in stamping out counterfeiting.¹⁵³ Authorities have recently closed about 90% of the retail outlets in Hong Kong that were selling pirated intellectual property items.¹⁵⁴ The USTR has praised Hong Kong's efforts to implement effective optical media controls and called it a model for other countries where piracy is rampant.¹⁵⁵ However, Hong Kong still had a 56% software piracy rate in 1999, a drop of only six points in the last five years.¹⁵⁶ And despite the territory's improvement, many pirate syndicates once based there have moved production to more tolerant countries like China and Malaysia.¹⁵⁷ As long as governments implement solutions domestically and not regionally, pirates will follow the easy money from country to country.¹⁵⁸ Production will thrive where it is tolerated, and copycats will continue to move products through distribution channels which capitalize on East Asia's many waterways, ports, and lax or corrupt border controls.¹⁵⁹

8. South Korea

While South Korea's relative rate of software piracy has declined, this has been in large measure due to an increase in overall software consumption; total revenue losses to piracy remain high.¹⁶⁰ Pirated goods are still widely available in South Korea and the USTR is particularly concerned about the country's lack of enforcement to protect against foreign software product counterfeiting.¹⁶¹ South Korea has recently stepped up copyright enforcement and established a standing organization to enforce intellectual

¹⁵¹ *Id.*; USTR, *supra* note 123, at Priority Watch List, Malaysia.

¹⁵² *Id.*

¹⁵³ Mohd, *supra* note 4.

¹⁵⁴ *HK Expecting Business Boom on China WTO Entry*, Asia Pulse, Oct. 3, 2000, available at LEXIS, Newsgroup File.

¹⁵⁵ USTR, *supra* note 123, at Controlling Optical Media Production and Internet Piracy.

¹⁵⁶ International Planning and Research Corporation, *supra* note 47, at 7.

¹⁵⁷ Mohd, *supra* note 4.

¹⁵⁸ *Id.*

¹⁵⁹ USTR, *supra* note 123, at Watch List, Singapore.

¹⁶⁰ International Planning and Research Corporation, *supra* note 47, at 7.

¹⁶¹ USTR, *supra* note 123, at Priority Watch List, Korea.

property rights.¹⁶² However, it is unclear how effective this enforcement will be, and the country's intellectual property laws still do not grant the full protections mandated by TRIPS.¹⁶³

9. *The Philippines*

The "love bug" computer virus epidemic in 2000 focused global attention on the growth of high technology training and manufacturing in the Philippines.¹⁶⁴ As the country's computer usage grows, so too does its need for software: demand for both legal and illegal types has increased in recent years.¹⁶⁵ The USTR states that the number of CD production lines in the Philippines has doubled in the last year, and the country is becoming a destination for counterfeiters forced out of other Asian countries with "more vigorous enforcement regimes."¹⁶⁶ Many kinds of counterfeiting have been widespread in the Philippines, and due to the general perception that copyright infringement is a minor offense, most judicial penalties for offenders have been light.¹⁶⁷ The Philippines has continued to work on legislation to properly implement its TRIPS obligations, but deficiencies and ambiguities remain in existing laws.¹⁶⁸ Intellectual property protection is one of a number of issues being considered by an economic reform task force under the current government.¹⁶⁹

10. *Thailand*

Counterfeiting is also common in Thailand, which has consistently experienced software piracy rates of 80% or more in recent years.¹⁷⁰ While the government has stepped up raids and other efforts to eradicate piracy in retail markets, growth in these same industries has outpaced their enforcement efforts.¹⁷¹ Optical media production has increased in Thailand, yet the government has not addressed this trend with an effective regulatory system.¹⁷² Despite conducting more raids, local police are susceptible to

¹⁶² USTR, *supra* note 114, at Priority Watch List, Korea.

¹⁶³ *Id.*

¹⁶⁴ Julie Chao, 'I just want respect for my work,' suspect in Love Bug case says, *Toronto Star*, Oct. 30, 2000, available at Lexis, News Group File.

¹⁶⁵ *Id.*

¹⁶⁶ USTR, *supra* note 114, at Priority Watch List, The Philippines.

¹⁶⁷ Pulmano, *supra* note 76, at 256.

¹⁶⁸ USTR, *supra* note 123, at Watch List, The Philippines.

¹⁶⁹ *Malacanang task force to lead reforms for economy*, *Bus. World*, Aug. 29, 2001, at 1.

¹⁷⁰ USTR 2000 Special Report, *supra* note 123, at Watch List, Thailand.

¹⁷¹ *Id.*

¹⁷² *Id.*

bribery. Furthermore, keeping local officers on the payroll to provide advanced notice of raids makes good business sense for some pirate merchants.¹⁷³ The USTR has recommended that Thai police keep such plans confidential and that they extend raids beyond business hours in order to improve the effectiveness of enforcement campaigns.¹⁷⁴ The USTR's most recent report states that despite the passage of significant intellectual property legislation, improved enforcement, and a more efficient court system, Thailand continues to show high rates of copyright piracy.¹⁷⁵

11. Other countries

The smallest and poorest countries of the region are still barely visible on the world trading system's radar. Of these, the nation that attracts the most attention is Vietnam, which recently concluded a bilateral trade agreement with the United States and now enjoys observer status at the World Trade Organization.¹⁷⁶ The two smaller countries of Indochina, Cambodia and Laos, are currently in the process of accession to the WTO.¹⁷⁷ When reliable information becomes available about their markets, Cambodia and Laos will arguably resemble their neighbor Vietnam with its 98% software piracy rate and total lack of enforcement structure for intellectual property protection.¹⁷⁸ As these countries become more integrated with the global economic system, they will become the East Asian trading region's weakest link and, thus, potential havens for counterfeit source production.

Even the region's final member, the tiny, oil-rich Brunei Darussalam on the island of Borneo, is not immune to piracy.¹⁷⁹ Though isolated and conservative, the Islamic kingdom has been effectively penetrated by pirates of mass culture.¹⁸⁰ As a recent news article indicates, counterfeit video-CDs are quite popular, and retailers display them openly.¹⁸¹ Recent complaints about these pirated discs have focused not on their counterfeit nature, but on

¹⁷³ Cohen, *supra* note 64.

¹⁷⁴ USTR, *supra* note 123, at Watch List, Thailand.

¹⁷⁵ USTR, *supra* note 114, at Watch List, Thailand.

¹⁷⁶ *Managing Exports Miscellany*, Managing Exports, Aug. 2001, available at LEXIS, News Group File; World Trade Organization, *Trading into the Future*, *supra* note 8.

¹⁷⁷ *Id.*

¹⁷⁸ International Planning and Research Corporation, *supra* note 47, at 7; *Vietnam: Domestic software industry in need of Gov't support*, *supra* note 80; Eric Unmacht, *Out of the international spotlight, piracy hits Cambodia's own producers*, Deutsch Presse-Agentur, Feb. 1, 2001, available at LEXIS, News Group File.

¹⁷⁹ *Brunei: Obscene VCDs displayed openly*, Borneo Bulletin, Aug. 28, 2000, available at LEXIS, News Group File.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

the fact that they include naked or half-naked women featured prominently on their covers.¹⁸²

VI. WHY TRIPS WILL BE SIMILARLY INEFFECTIVE

TRIPS is an inadequate solution to global and regional piracy problems for several reasons. First, it assumes that each WTO member nation will be able to exercise effective control over the private production, distribution, and sales of certain products within its borders. Yet in many of the countries with serious piracy problems, effective regulation or enforcement of any sort has proven elusive. For developing and newly-developed countries, enforcing the minimum levels of IP controls demanded by TRIPS means allocating precious resources to build, implement, and operate new regulation systems.

In addition, product piracy is a profitable domestic industry which provides a valuable service. Whether a counterfeit enterprise is funded through organized crime or is a purely local business, a host government cannot ignore the fact that it creates jobs and local income, while giving consumers affordable software and music. If not for the pirates, many businesses, schools, government offices, and individuals might not be able to afford name-brand software. While governments may lose out on tax revenue from legitimate music and software sales, kickbacks and bribes offer an alternative source of revenue at many levels. As long as the benefits of piracy outweigh the trouble it causes for a tolerant country's relations with foreign nations and investors, any steps which that country takes to protect intellectual property rights and enforce minimum standards will be largely symbolic or token in nature.

Recent enforcement attempts illustrate the futility of current programs. Given the impossibility of maintaining continuous active enforcement at a high level, crackdowns on pirate retailers are perhaps the most common embodiments of these enforcement programs in countries throughout the region.¹⁸³ Yet even these symbolic crackdowns are ineffective in places where corruption is rampant. In Thailand, for example, retailers learn about planned crackdowns from the local police long before they happen.¹⁸⁴ Even when they're unexpected, these crackdowns are viewed more as a business risk than a reason to shut down one's operations.

¹⁸² *Id.*

¹⁸³ *Pirated VCDs*, Business World (Philippines), Sept. 20, 2000, available at LEXIS, News Group File.

¹⁸⁴ Cohen, *supra* note 64.

Frustrated with the ineffectiveness of public enforcement programs, some software companies and industry groups take matters into their own hands. A recent news story from Vietnam indicated that the software company Novell had launched its own campaign to educate domestic companies and the public about the potential liabilities of using illicit software.¹⁸⁵ In the Philippines, the same corporation offers bounties of \$100-\$5,000 for tips on illegal use of its products.¹⁸⁶ In Thailand, Microsoft went to court to obtain a judgment against a computer assembly company which had been illegally copying its software.¹⁸⁷ But although the company was heavily fined and its executives jailed, the judgment failed to have the intended effect of deterring other pirates.¹⁸⁸ Recently, Microsoft found itself back in court again seeking a judgment against another company for a similar infringement; a company lawyer commented that "they haven't learned a thing from (the earlier) case, and this is a great disappointment."¹⁸⁹

Richer industrialized countries who are net exporters of technology hope that developing and newly-developed countries will bend under the weight of TRIPS. Through the WTO dispute settlement structure, a member can bring complaints against another member if it believes the country is not complying with its TRIPS obligations. If the party is found to be at fault, through a WTO panel and perhaps an Appellate Body ruling, that country can be compelled to comply with the decision or penalized through sanctioned retaliation. The deterrent effect of an adverse panel ruling will be a strong one, but until the first post-grace period TRIPS cases are decided by a panel, it will be hard to predict whether they will convince other WTO members to invest heavily in enforcement. Countries must also be mindful of possible unilateral sanctions if their laws and enforcement are inadequate, particularly from the United States under Section 301 of its Trade Act.¹⁹⁰

A number of scholars believe that adverse panel decisions and the rule of law approach will have a weak or questionable effect on nations' TRIPS enforcement.¹⁹¹ One commentator, Tuan N. Samahon, raised the possibility that some nations will enact TRIPS-compliant laws and enforcement measures, but not effectively implement them.¹⁹² He posed the

¹⁸⁵ *Software company says 'Buy Legal'*, The Vietnam Investment Review, Sept. 11, 2000, available at LEXIS, News Group File.

¹⁸⁶ Helen A. Jimenez, *Novell offers bounty for pirates*, Bus. World, Aug 29, 2000, at 20.

¹⁸⁷ *Microsoft Court Action Fails to Curb Copyright Infringements*, Business Day (Thailand), Sept. 5, 2000, available at LEXIS, News Group File.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ USTR, *supra* note 114, at overview.

¹⁹¹ Samahon, *supra* note 91, at 1052.

¹⁹² *Id.*

question, "May a developing country reply to a TRIPS violation claim that its statutory enactments fulfill WTO obligations (but) that the actual enforcement of its laws is uniquely a matter of prosecutorial or judicial discretion?"¹⁹³ This legal window remains open.

Even if textbook TRIPS compliance is required by the WTO, it will be difficult to clamp down on violations while they remain particularly widespread. As Professors J.H. Reichman and David Lange have written, factors tending to influence non-cooperative behavior remain strong.¹⁹⁴ As long as the status quo is the more attractive option, it is unlikely that many countries will yield to TRIPS compliance.¹⁹⁵ If few countries yield, an atmosphere of noncompliance will prevail and effective enforcement will be next to impossible.¹⁹⁶

In addition to the ineffectiveness of this TRIPS-centered system, a number of observers have criticized its effect upon democratic development.¹⁹⁷ Professor Neil Weinstock Netanel, who sees the traditional copyright as a democratic concept, believes that TRIPS damages the prospects of global democracy by requiring an upward harmonization of copyright laws.¹⁹⁸ Instead, he advocates an alternative system that encourages democracy by providing for limited copyrights and local flexibility in making and enforcing copyright laws.¹⁹⁹

In East Asia, the problem of product piracy is regional, not domestic, while TRIPS-based enforcement solutions are targeted at individual nations and not regions. Enforcement efforts on a country-by-country basis are ineffective in combating the overall problem of piracy, because counterfeit producers in Asia are mobile and will always seek out the region's weakest links. Of the countries in East Asia, only Laos lacks a substantial shoreline on the sea, yet even it shares long aquatic borders with its neighbors along the Mekong River.²⁰⁰ There are many holes to plug, and when one leak is stopped, others flow stronger while new ones spring. Unless progress is made to slow the overall drain, real progress will remain elusive.

TRIPS-compliant laws are a step forward for many developing and newly-developed countries in East Asia, but much more potential copyright revenue is lost through ineffective enforcement than through ineffective

¹⁹³ *Id.*

¹⁹⁴ Reichman & Lange, *supra* note 69, at 14-15.

¹⁹⁵ *Id.* at 15.

¹⁹⁶ *Id.*

¹⁹⁷ Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 Vand. L. Rev. 217, 222.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 222-224.

²⁰⁰ Rand McNally, *Atlas of the World* 110 (Masterpiece Edition, 1993).

laws.²⁰¹ Short-term measures like occasional crackdowns do not have much effect, because counterfeit operators evolve to fit the current patterns of regional enforcement. Few East Asian countries have the resources or the will to spend what it would take to seriously hamper high tech counterfeiters. Would a more regional approach to copyright protection be any more effective?

VII. ALTERNATIVES TO TRIPS

A. REGIONAL PATCHWORK SOLUTIONS VS. A GLOBAL BLANKET APPROACH

As past experience has proven, it is difficult to craft a one-size-fits-all approach to successfully address the problems of international product piracy and copyright infringement. Chronic high-tech piracy in East Asia seems far more amenable to a regional strategy of cooperative enforcement, and this may work better in other parts of the world as well. Rather than a single blanket solution, it seems more practical to weave together a patchwork of programs designed to fit common aims: drastically reducing the production and sale of illicit high-tech products, making legally licensed alternatives easily available to individuals and organizations (in terms of distribution and price), and helping local firms and individuals in poorer countries to acquire and utilize high technology. These programs could be centrally coordinated, facilitated, and even funded, but would be implemented locally or regionally by parties directly involved in the piracy issue and with a shared stake in improving the situation. Thus, solutions to the piracy problem as a whole would combine the central aims of combating the piracy problem and existing inequities with the only type of implementation that will succeed: flexible, local programs that offer direct benefits to those who make them happen.

Thus, comprehensive solutions should take the form of umbrella programs, designed to fulfill set goals through facilitating the implementation of smaller, targeted programs. These programs may be as large as cooperative regional initiatives or as small as contracts between a single software maker and a local government office, distributor, or school. It is important that they be designed to achieve common goals, and that the central planning of such solutions include several important considerations.

²⁰¹ Samahon, *supra* note 91, at 1052.

B. INVOLVING THE MAJOR PLAYERS: WORKING TOWARD
SOLUTIONS THAT BENEFIT EVERYONE

Strategies which address the problem of high-tech product piracy need to account for at least three major interests: copyright holders, host governments, and pirates themselves. To illustrate the importance of each group having a role in the process, it is helpful to briefly define the major actors and their principal interests. "Copyright holders" who must license any production or sale of their creations are usually represented by large corporations with bases in Europe or North America, and they are often supported in diplomatic arenas by their home nations. "Host governments" are the local countries which serve as bases for pirate production or market destinations for goods produced elsewhere in Asia. "Pirates" are primarily the producers of counterfeit material, but their influence also extends through the distribution and sale of pirate music and software products. On the periphery, "consumers" are another group whose interests must be considered; while not an organized interest group, they are the beginning and end of the market equation and wield tremendous influence through their buying choice.

Right holders are most interested in protecting their intellectual property from infringement, unlicensed reproduction, and ultimate losses in potential revenue; TRIPS is a codification of their interests at the global level, but has only promised to achieve these goals in international markets. Most governments would like good relations with their wealthier foreign counterparts and potential investors, but are also concerned with the well-being of their people, not only consumers but also those involved in manufacturing, retail, and other enterprises. Pirates are most interested in continuing to profit from the empires of production and distribution that they have created, and it is important that known organizations and networks be given the opportunity to profit from solutions strategies. Consumers in East Asia have clearly spoken for low-priced software and music; any "solutions" to the piracy problem must consider that higher prices would likely limit access to these items for certain individuals, businesses, government offices, hospitals, schools, and other institutions.

The best solutions to the piracy/infringement problem would give each side something in return for cooperation. While TRIPS proposes to achieve better rights protection, it also proposes to strip illicit producers of their income-generating enterprises and force host governments to spend great amounts of money on enforcement. Instead of promising impossible achievements for one side, comprehensive long-term solutions must aim for a net gain on each side. This can ensure not only full agreement between the real parties concerned (not just public governments), but also progress in

implementation (which international IP agreements to date have failed to accomplish). Such solutions demand some sacrifice as well, because real progress in this realm can only result from cooperative, negotiated solutions. In addition, the best solutions are those which do not attempt uniform approaches, but recognize the need for flexible measures that can be implemented according to local circumstance.

C. MORE SUGGESTIONS

Several scholars have suggested that regional anti-piracy programs in East Asia might present a better alternative than past efforts to protect IP at a global level.²⁰² Linda W. Tai profiled the Caribbean Basin Initiative (CBI) and suggested that its success might be replicated on a similar regional scale in the Pacific Rim.²⁰³ The CBI involved the United States and twenty-seven Caribbean nations, and it conditioned trade benefits and economic assistance on greater copyright protection.²⁰⁴ While similar in some ways to the WTO-TRIPS system of member benefits and compulsion by threat of losing those trade benefits, the CBI is different in that it is specifically tailored to fit the region and is designed to promote greater economic development for the emerging economies there.²⁰⁵

While lacking a regional trade body that encompasses all of East Asia, a number of institutions offer promise for cooperation in the region. Lorraine C. Cardenas and Arpaporn Buranakanits have noted generally that both the Asia Pacific Economic cooperation (APEC) forum and the Association of Southeast Asian Nations (ASEAN) could be put to greater effectiveness in solving problems in the region.²⁰⁶ If the European Union takes a leading role in East Asia in the Twenty-first Century, the Asia-Europe Meeting (ASEM) might be an effective forum as well.²⁰⁷

As a loose coalition of developed and developing countries from all sides of the Pacific, APEC could be a good forum for East Asian and Western countries to agree on new approaches to solving the high-tech piracy problem.²⁰⁸ Meanwhile, members of ASEAN have been successful in using that entity to set agendas for regional cooperation and economic

²⁰² Tai, *supra* note 42; Lorraine C. Cardenas and Arpaporn Buranakanits, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia*, 5 Ann. Surv. Int'l & Comp. L. 49, 67.

²⁰³ Tai, *supra* note 42, at 181.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 182-83.

²⁰⁶ Cardenas and Buranakanits, *supra* note 202.

²⁰⁷ Kamarul Yunus, *Asem to adopt specific measures for better results*, Business Times (Malaysia), Sept. 11, 2001, at 4.

²⁰⁸ Cardenas & Buranakanits, *supra* note 202, at 51.

development.²⁰⁹ The recording industry has also organized itself along ASEAN lines in Southeast Asia.²¹⁰ In recent years, ASEAN organization has effectively expanded its base of influence by including its richer Northeastern neighbors, Japan, China, and South Korea, in its ASEAN+3 ministerial meetings.²¹¹ Leaders of the region are moving ever closer to developing, through ASEAN+3, an "East Asian Economic Community" and free trade area.²¹² ASEAN+3 would thus seem to be a good candidate for setting an agenda of IP cooperation and perhaps helping to administer a regional anti-piracy strategy.

On a global scale, an improved system of IP protection could come out of the WTO itself, perhaps in conjunction with the World Intellectual Property Organization (WIPO). WIPO has in the past been charged with implementing intellectual property agreements, and has been instrumental in assisting developing nations with their compliance programs.²¹³ Although TRIPS has stripped WIPO of much of its power in the arena of global IP law administration, the organization is much respected in the developing world and can help facilitate the technology transfers and development assistance that must be part of a forward-looking global IP strategy.²¹⁴ At a recent meeting in Tokyo, heads of patent offices from countries throughout Asia made a joint plea for WIPO to take a more active role in protecting the needs of developing countries in the region.²¹⁵

As Professor Reichman writes:

What we need is a more positive approach built around constructive ideas and suggestions for reducing tensions through new forms of transnational cooperation. These efforts should aim specifically to enable developing and least-developed countries to lessen the transaction costs of implementing the TRIPS Agreement and to maximize the potential gains in domestic innovation and in technology transfer that may accrue from higher levels of intellectual property protection.²¹⁶

²⁰⁹ "ASEAN+3" officials meet to discuss WTO agenda, Asian Economic News, January 22, 2001, available at LEXIS, News Group File.

²¹⁰ IFPI Asia/Pacific Regional Meetings in Bangkok, International Federation of Phonographic Industries (IFPI), Press Release (September 3, 2001), available at <http://ifpi.org/press/20010903.html>.

²¹¹ *Id.*; Florence Chong, *Malaysia Rules OK, Backing ASEAN+Three as a trade foil to the West*, Asia Today, February 2001, available at LEXIS, News Group File.

²¹² *Id.*

²¹³ WIPO, *supra* note 88.

²¹⁴ Netanel, *supra* note 197, at 236; Reichman, *supra* note 96, at 354.

²¹⁵ Natsumi Mizumoto, *Asia-Pacific patent office chiefs agree to support LDCs*, Japan Economic Newswire, Sept. 13, 2001, available at LEXIS, News Group File.

²¹⁶ *Id.*

Professors Reichman and Lange have promoted public-private initiatives as a way to 'bargain around TRIPS.'²¹⁷ These enlist the support of both firms and governments to achieve contract solutions to the problems that global agreements have been unable to solve.²¹⁸ These authors do not advocate eliminating the TRIPS agreement, but believe that its requirements, rather than creating a strict set of rules to follow, should be seen more as a set of norms.²¹⁹ With these parameters as guideposts, smaller public-private partnerships and agreements can follow which will produce much better results than a rigid enforcement of TRIPS.²²⁰ Such programs are not only a dream but a reality; the Center for Global Information Technologies at Duke Law School has been actively promoting such initiatives as a means of successfully implementing IP protection.²²¹ Such a strategy of encouraging public-private cooperation on a smaller scale would fit well with a comprehensive program of regional cooperation.

Other innovative changes are beginning to appear as players on each side realize that short term sacrifices and cooperation can lead to long-term success and sustainability. A news article from Thailand indicates that Sun Microsystems, in order to combat product piracy, recently decided to release both a free office application for consumers and a free source code to the software for developers.²²² The Thai government has also negotiated with software companies to obtain leased and greatly discounted software for government agencies and schools.²²³ Microsoft, meanwhile, announced that it had reached a Select Agreement with the government of Macau to provide applications to its 44 government department units, a deal which will also allow the government to increase productivity and, therefore, reduce operating costs over a two-year period.²²⁴ In Korea, a government campaign to discourage household use of pirated software led Microsoft to offer a discounted price on its applications.²²⁵ Such transactions prove that cooperation can work and that each side can realize a net long-term benefit through compromise solutions while helping to improve the overall situation.

²¹⁷ Reichman and Lange, *supra* note 69.

²¹⁸ *Id.* at 11-16.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² OFFICE SUITES: Sun proposes free method to cut piracy: Will release Star source code soon, Bangkok Post, Oct. 4, 2000, available at LEXIS, News Group File.

²²³ Karnjana Karnjanatawe, Thai Govt Brokers MS Software Deal, Newsbytes, February 16, 2001; Talks on software leasing, Emerging Markets Datafile/Nation, Oct. 6, 2000, both available at LEXIS, News Group File.

²²⁴ Macau lauded for role in \$21.8b software piracy battle, Hong Kong Imail, Sept. 7, 2000, available at LEXIS, News Group File.

²²⁵ S KOREA IT BRIEFS OCT 6, 2000, Asia Pulse, Oct. 6, 2000, available at LEXIS, News Group File.

VIII. CONCLUSION

TRIPS is a big step for global intellectual property protection, but it is not a good end for the global community. The rigid enforcement that it demands will exact a high toll on the governments, firms, citizens, and consumers who bear the brunt of responsibility for implementing TRIPS and pain of absorbing its changes. The TRIPS program has led to unrealistic dreams of enforcement around the world; because these cannot be realized effectively and without great harm in developing countries, we need to pursue alternative solutions which focus on addressing these problems as a whole.

On a smaller scale, countries, corporations, pirates, and other groups can work together in the shadow of current international law to achieve better long-term solutions that will benefit everyone. A patchwork of cooperative regional strategies in East Asia can bring nurturing solutions to the developing countries of the region while providing technology-exporters with better access to Asian markets and local producers, distributors, and retailers with continued and legitimate involvement in the business. Each side must give up something, but will gain much more for its efforts in the long run. Such solutions will make global intellectual property protection much more of a reality than it is today.