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COMPETING INTERESTS: ANTI-PIRACY EFFORTS TRIUMPH UNDER TRIPS BUT NEW COPYING TECHNOLOGY UNDERMINES THE SUCCESS

I. INTRODUCTION

The practice of recording music and then selling those recordings for a profit, without the musicians' permission, has been a major problem pervading the music industry for decades. In fact, losses stemming from music piracy are currently estimated as costing "the \$12 billion U.S. recording industry nearly \$300 million annually."¹ Moreover, the bootleg business in unauthorized recordings of the band 'Grateful Dead' manages alone to exceed the GNP of France.² Certain countries in particular have caused the recording industry a major headache by retaining either outdated or insufficient copyright laws, and also turning a blind eye to their nation's booming pirate music market.³ By copying sound recordings or live performances of a musician without his or her consent, bootleggers and pirates all over the world have trampled on the fundamental rights of performing artists to regulate the use, distribution, and profits of their own performances.

The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was part of the revisions to the General Agreement on Tariffs and Trade⁴ (GATT), at-

1. Lauren Wiley, *Bootleggers Turning to Burning: RIAA says CD-R Piracy is on the Rise*, EMEDIA PROF., June 1, 1998, available in 1998 WL 9595630.

2. See Douglas McLennan, *Copyright Under the Gun From Digital Age Pirates*, SEATTLE POST-INTELLIGENCER, Apr. 27, 1998, available in 1998 WL 4292264.

3. See generally Jerry D. Brown, *U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy for Bootleggers*, 16 LOY. L.A. ENT. L.J. 1, 9-15 (1995). Brown analyzes particular regions across the globe and finds that Asia in particular had bootleg percentage rates almost double that of other international regions. See *id.* at 9. Another commentator similarly considers Asia a problem region, describing booming markets in China, Hong Kong, Taiwan, Korea, Malaysia, Phillippines, Indonesia, and Thailand. See 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, 163-168 (1995).

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M.

tempted to change these problems and promote artists' rights by including both an anti-bootlegging provision, and a provision protecting music producers. Article 14 of TRIPS provides artists with the right to prevent "the fixation of their unfixed performance"⁵ (i.e., recording a concert) and also to "prohibit the direct or indirect reproduction of their phonograms"⁶ (i.e., duplicating a compact disc (CD) or cassette tape). In order to comply with these copyright infringement provisions, countries traditionally well-known for producing vast amounts of pirate cassette tapes and CDs have slowly begun to amend their laws in the years following TRIPS.

Pursuant to TRIPS, the copyright systems in countries notorious for producing a high volume of pirate CDs have become stricter with respect to their anti-bootleg provisions.⁷ Although this outcome is quite promising because it suggests that efforts to abolish piracy are prevailing, in reality, current developments in sound technology are boosting the pirate CD market.⁸ It is unlikely that any country will sacrifice the development of new technology simply because that type of technology may result in future infringements of artists' copyrights. Rather, these new developments will make it exceedingly more difficult for countries to enforce anti-bootlegging and anti-piracy laws. This Note analyzes these two competing interests and theorizes that, in light of the Audio Home Recording Act of 1992,⁹ it is unlikely that new CD technology will be regulated in the future. Thus, TRIPS may have won this battle, but piracy is likely to win the war.

Part II of this Note will define piracy, and provide examples of the effect of the piracy market on the world-wide recording industry. Part II will also detail the historic international conventions which influenced the anti-bootleg clause in TRIPS, such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),¹⁰ the Univer-

1197 (1994) [hereinafter TRIPS].

5. *Id.* art. 14(1).

6. *Id.* art. 14(2).

7. See discussion *infra* Part IV.B.

8. See generally Wiley, *supra* note 1.

9. Audio Home Recording Act of 1992, 17 U.S.C. § 1008 (1992).

10. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Stockholm, July 14, 1967, 331 U.N.T.S. 217, amended in Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

sal Copyright Convention,¹¹ and the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations¹² (Rome Convention). Inadequacies of these multilateral conventions, and also the emerging economic implications of trade in intellectual property during the 1980's, prompted the development of TRIPS to rectify the previous deficiencies in these treaties and protect intellectual property rights in international trade.

Part III of this Note will summarize Article 14, the section of TRIPS entitled "Performers' Rights," which prohibits bootlegs, counterfeits, and pirated sound recordings. Part III will also include a discussion of how Article 14 of TRIPS has impacted the recording industry, and whether it has succeeded in reaching its goal of diminishing pirated works in the international trade market.

Part IV will focus primarily on China, a country infamous for producing bootleg music.¹³ China's attempts to reconcile its copyright laws with the provisions set forth in TRIPS are firm evidence that the international arena is committed to battling the piracy epidemic. Although China has been faced with many obstacles, it is diligently trying to amend its current laws and affirm its international obligations, putting a positive spin on the piracy issue.¹⁴ This section will also summarize prior problems with copyright infringement, and lax or non-existent bootleg clauses in Chinese law. China's slow-moving, yet promising attempts at lowering its rate of bootleg production will also be analyzed. Finally, this section will focus on the 1995 and 1996 bilateral trade agreements with the United States,¹⁵ which illustrate examples of China's stepped-up efforts to respect intellectual property rights.

11. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *Paris revision*, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC].

12. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

13. See Tai, *supra* note 3, at 163 (naming China "the world's largest pirate market").

14. See discussion *infra* Part IV.B-C.

15. Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, China-U.S., 34 I.L.M. 881 [hereinafter 1995 IPR Agreement]; *Statement by Acting USTR Charlene Barshefsky on Trade Talks with China on Intellectual Property Rights*, 13 INT'L TRADE REP. (BNA) 1036 (June 19, 1996) [hereinafter 1996 IPR Agreement].

Part V of this Note will describe the impacts of emerging digital home recording technology on the bootleg industry, and the increase in bootleg production that these new devices have created. CD-Recorder (CD-R) drives, CD-Recordable discs, and CD-Rewritable (CD-RW) discs are evidence of the recent technological advances in the sound recording industry. This section will analyze the conflict between allowing average, law-abiding people to use CD-R drives to record their favorite songs onto a CD-R in their own home, and permitting money-making bootleggers to abuse the technology by breaking the law.¹⁶ This Note will demonstrate that the advent of the CD-R will likely thwart foreign governments, such as China, from continuing down the path toward effectively eliminating bootlegs from the market.

II. CONCERNS FOR PIRACY LEVELS IN THE INTERNATIONAL ARENA CULMINATED IN TRIPS

A. *What Exactly is Piracy?*

There has been significant divergence among scholarly opinions within the world of copyright law concerning the exact definitions of piracy, bootlegging, and counterfeiting.¹⁷ The following analysis of legal opinions demonstrates that each category of copyright infringement seems to overlap one another. One commentator even refers to the categories as "interchangeable" as they mesh together, and he also blames fellow legal scholars' and commentators' incorrect usage of the terms for this interchangeability.¹⁸ Despite their specific differences, most broad conclusions describing piracy are similar. One general definition, specifically including the issue of profit-making, poses piracy in a narrower light as "stealing the results of other people's mental labour—intellectual property in order to reap colossal profits."¹⁹

16. See generally Wiley, *supra* note 1.

17. See, e.g., Brown, *supra* note 3, at 4 (providing elaborate definitions and helpful examples in order to clarify the current state of confusion concerning the definitions of copyright infringement categories).

18. Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory For Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 379 (1997).

19. Shen Rengan, *Combat Piracy and Safeguard the Rights and Interests of Authors*, CHINA PAT. & TRADEMARKS, Oct. 1994, at 5.

Some American authors have analyzed the matter in great depth and developed even more specific, narrower definitions for each category of infringement. According to Jerry D. Brown, there are three categories of copyright infringement with respect to music.²⁰ These categories (counterfeiting, piracy, and classic bootlegging) fall underneath the umbrella term of "bootlegging."²¹ Counterfeiting, according to Brown, "is the unauthorized duplication or sale of a pre-existing copyrighted work,"²² whereas piracy is the "unauthorized duplication or sale of a copyrighted work that was not released to the public,"²³ such as a song rehearsed in a recording studio that was not included on the released album. Brown further distinguishes classic bootlegging as the "unauthorized copy of a live performance of a copyrighted work,"²⁴ such as the illegal tape-recording of a concert.

Brown's theories on the categories of music infringement contrast sharply with the opinions of David Schwartz, another commentator, who broadly defines a bootleg as any copy of music otherwise before unavailable to the public, either in the form of a live concert or other performance.²⁵ Schwartz's definition of bootlegging seems to coincide more with Brown's account of a pirated work, while still incorporating Brown's idea that a classic bootleg's source is a live performance.²⁶

Yet another approach to defining music infringement was set forth by the United States Supreme Court in *Dowling v. United States*,²⁷ which stated that:

A "bootleg" phonorecord is one which contains an unauthorized copy of a commercially unreleased performance. As in this case, the bootleg material may come from various sources. For example, fans may record concert performances, motion picture soundtracks, or television appearances. Outsiders may obtain copies of "outtakes," those portions of the tapes

20. Brown, *supra* note 3, at 4.

21. *Id.* (dubbing the categories as the "three classes of bootlegging").

22. *Id.*

23. *Id.*

24. *Id.*

25. David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 613 (1995).

26. *Id.* See also Brown, *supra* note 3, at 4.

27. *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985) (describing and defining categories of bootlegged works).

recorded in the studio but not included in the "master," that is, the final edited version slated for release after transcription to phonorecords or commercial tapes Though the terms frequently are used interchangeably, a "bootleg" record is not the same as a "pirated" one, the latter being an unauthorized copy of a performance already commercially released.²⁸

The definition that the Supreme Court provides in *Dowling* incorporates both Brown and Schwartz's ideas that a bootleg's source may be a live performance, such as a concert. However, the *Dowling* opinion, by defining a pirated work as one already released, contradicts Brown's theory that a pirated work must be previously unreleased.

The Recording Industry Association of America (RIAA), a not-for-profit organization which represents artists, record companies, producers, and manufacturers of almost 90% of the United States' sound recordings,²⁹ creates another wrinkle in the issue of determining the definition of piracy. The RIAA has developed an anti-piracy unit which brings civil actions against infringers on behalf of its members to recover losses resulting from piracy. As a result of this expertise in the realm of music-related copyright infringement, the RIAA has developed its own conclusions regarding piracy. First, as a threshold classification, the RIAA describes piracy loosely as "the illegal duplication and distribution of sound recordings," and then further explains that it "takes three specific forms: counterfeit, pirate and bootleg."³⁰ Counterfeits, according to the RIAA, are duplicates of music already released to the public, in an attempt to look exactly like the original copy.³¹ Pirated works are duplicates of "only the sounds of one or more legitimate recordings," without the artist's permission.³² For instance, pirated works can take the form of a compilation, such as a "Greatest Hits" album, derived from a number of selected songs on various pre-released albums. In contrast, pirated works are not exact du-

28. *Id.*

29. *Anti-Piracy Press Kit*, (visited Oct. 14, 1998) <<http://www.riaa.com/anti-pir/releases/presskit.htm#tfop>> [hereinafter *Anti-Piracy Press Kit*].

30. *Id.*

31. *Id.*

32. *Id.*

plicates of one specific album, as in the case of a counterfeit work. A bootleg, according to the RIAA, differs from the two other forms of piracy in that it is the recording of an artist's live performance without his or her consent, and also without regard to whether the performance has been previously released or not.³³

The only clarification that an overview of these industry-related and scholarly opinions provides is that there is no standard set of rules regarding copyright music infringement definitions. It is helpful to note that the RIAA's definitions coincide directly with the Supreme Court's interpretation of piracy in *Dowling*. However, the RIAA conclusions, although persuasive, are not legal definitions. Also, the Supreme Court decision in *Dowling*, although legally binding in the United States, has no impact on the international community as a whole.

Perhaps the broadest definition of piracy is found in TRIPS itself. In Article 51, TRIPS explains that:

"pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.³⁴

Although the wording is lengthy, the meaning is obvious. Under the definition provided in Article 51 of TRIPS, any unauthorized copying constitutes piracy, and is thus illegal. The TRIPS definition does not speak directly to the related issues of counterfeiting or bootlegs, but rather lumps all unauthorized copies together as "pirated goods." Accordingly, for its broad inclusion of all "pirated" subject matter, its consistency with the RIAA's threshold definition of piracy, and its relevancy within the international community, the definition of piracy in TRIPS will be employed throughout the remainder of this Note. Thus, any copy or recording of an artist's music without

33. *Id.*

34. TRIPS, *supra* note 4, art. 51 n.14(b).

his or her permission will be referred to in this Note generally as a "pirated" good.

B. The Effects of Piracy: Recent Statistics

Although piracy has not yet been completely extinguished, there have been notable improvements since the 1980's. Indeed, the music industry has come a long way from that decade when pirated works, bootlegs, and counterfeit cassettes and albums were readily available. In 1983, one commentator even dubbed music piracy the "crisis gripping the American music industry."³⁵ Thankfully, the backdrop has changed for the better. According to the RIAA, in 1997 the approximate losses to all recording industries on the international level as a whole was roughly five billion dollars, while the United States' recording industry alone sustained losses amounting to nearly three hundred million dollars.³⁶ Although these figures appear staggering, surprisingly, they reflect significant improvement with certain forms of pirated recordings. For instance, the RIAA, in its 1997 Anti-Piracy Statistics, reported an 80% decrease in cassette piracy throughout the last five years, and a 62% decrease in 1997 in particular.³⁷ The total confiscation of CDs decreased in 1997,³⁸ and specifically, the confiscation of bootlegs decreased exceptionally in the six months between the RIAA's 1997 Year-End Anti-Piracy Statistics and its 1998 Mid-Year Anti-Piracy Statistics.³⁹

However, even in light of the substantial accomplishments of 1997 in the battle against piracy, CD piracy is rebounding and gaining strength from the advent of a new device called the CD-Recordable.⁴⁰ As explained by the RIAA, the CD-R is a home recording machine, which costs around four hundred dol-

35. Frank L. Fine, *Record Piracy and Modern Problems of Innocent Copyright Infringement*, 8 ART & L. 69, 70 (1983). See also Marshall Leaffer, *Protecting United States Intellectual Property Abroad: Towards a New Multilateralism*, 76 IOWA L. REV. 273, 298 (1991) (discussing the dollar losses to piracy prior to 1991).

36. See *Anti-Piracy Press Kit*, *supra* note 29, para. 1.

37. See RECORDING INDUSTRY ASSOCIATION OF AMERICA, 1997 ANNUAL REPORT 35 (1998) [hereinafter RIAA 1997 ANN. REP.].

38. *Id.*

39. RIAA Releases *Mid-Year Anti-Piracy Statistics* (visited Oct. 14, 1998) <<http://www.riaa.com/antipir/releases/apmid98.htm>> [hereinafter 1998 *Mid-Year Statistics*].

40. See RIAA 1997 ANN. REP., *supra* note 37.

lars, and can easily copy music and other sounds onto blank CDs for as little as one dollar.⁴¹ Steve D'Onofrio, RIAA Executive Vice President and Director of Anti-piracy, has commented that "piracy in this format [CD-R] is proving to be the next big boom."⁴² As a result of the looming threat of CD-R technology, the RIAA directed 80% of its anti-piracy campaign budget in 1997 to battle newly-developed forms of CD technology arising in the pirate market.⁴³

With the introduction of new CD technology, the promising efforts at eradicating pirate CDs and CD-Rs in previous years seemed to wane, and unfortunately piracy is once again thriving.⁴⁴ CD-Rs first appeared on the market in 1997.⁴⁵ That year, there were 442 bootleg, pirate, or counterfeit CD-Rs seized.⁴⁶ The figure rose drastically to 103,971 seizures in 1998.⁴⁷ Additionally, in regards to pirate CDs generally, there was an astounding increase of 163% from 1997 to 1998,⁴⁸ even after the promising decreases experienced up to that point. In 1998, there was an overall figure of 338,458 counterfeit and pirate CDs seized.⁴⁹

Efforts to battle piracy are perhaps at their strongest ever. Nevertheless, upon surveying the recording industry's statistics on revenue losses to piracy, it is quite apparent that artists, record companies, and producers still suffer from inadequate copyright protections. In the wake of new sound recording technology, the future may become even more bleak for

41. See *id.* (providing background on the rise of CD-Rs, and the economic benefit of its use to pirates).

42. 1998 *Mid-Year Statistics*, *supra* note 39.

43. See *RIAA Releases Year-End Anti-Piracy Statistics* (visited Oct. 14, 1998) <<http://www.riaa.com/antipir/releases/apyr97.htm>> [hereinafter 1997 *Year-End Statistics*]; Bill Holland, *RIAA Piracy Stats Show New-Tech Threat; On-Line Dangers Looming Large, As Cassette Concerns Lessen*, BILLBOARD, Mar. 21, 1998, at 5, available in 1998 WL 10913103.

44. See generally 1997 *Year-End Statistics*, *supra* note 43 (explaining that, although certain improvements have occurred in the past five years, "music piracy is rapidly moving towards the Internet and CD piracy").

45. See RIAA 1997 ANN. REP., *supra* note 37, at 35; 1997 *Year-End Statistics*, *supra* note 43.

46. See *RIAA Releases Yearend Anti-Piracy Statistics* (visited May 20, 1999) <<http://www.riaa.com/piracy/press/040699.htm>> [hereinafter 1998 *Year-End Statistics*].

47. *Id.*

48. *Id.*

49. *Id.*

copyright holders. These developments in home recording technology are accompanied with justifiable concerns that the devices will be used for illegal and infringing purposes. Reconciling the recent trend in current technology with international efforts to quash the pirate market is a difficult, and perhaps impossible, task. Hopefully, TRIPS' role in this dilemma will serve to keep anti-piracy efforts at the forefront of the issue, rather than allowing pirates to hide behind the mask of home recording rights.

C. Inadequate International Conventions in the Area of Copyright Law Prior to TRIPS

The most powerful treaty regarding copyright, prior to TRIPS, was the Berne Convention for the Protection of Literary and Artistic Works,⁵⁰ "the first multilateral treaty for international copyright law,"⁵¹ first established in 1886. The Berne Convention set up minimum standards of copyright protection for all its member nations, and concentrated on three major principles:⁵² national treatment,⁵³ abolition of formalities,⁵⁴ and minimum substantive standards for duration and scope.⁵⁵ It also provided that "[a]uthors of literary and artistic works . . . have the exclusive right of authorizing the reproduction of these works, in any manner or form,"⁵⁶ perhaps alluding to a musician's right to preclude others from recording his songs or performances without his consent.

The Berne Convention, however, was largely insufficient in the realm of piracy. First, its focus was centered primarily on literary and artistic works, as opposed to performances.⁵⁷ Second, no protection was given to producers of sound recordings because that particular medium was not included as a "literary

50. Berne Convention, *supra* note 10.

51. Tai, *supra* note 3, at 168.

52. See generally JOHN GURNSEY, COPYRIGHT THEFT 27-28 (1995) (discussing the focus of the Berne Convention, and summarizing its main principles).

53. See Berne Convention, *supra* note 10, art. 5(3). See generally Tai, *supra* note 3, at 169 (explaining "that foreign works should enjoy, in each member country, the same protection given works of that member country's nationals").

54. See Berne Convention, *supra* note 10, art. 5(2). See generally MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 377, 380 (2d ed. 1995) (discussing the provisions of the Berne Convention relating to formalities).

55. See Berne Convention, *supra* note 10, art. 2(1).

56. *Id.* art. 9(1).

57. See *id.* art. 2 (defining "literary and artistic works").

and artistic work.”⁵⁸ Third, pirating countries simply did not honor their obligations and responsibilities under the convention, and neglected to amend their own laws accordingly.⁵⁹ Finally, while the Berne Convention focused extensively on national treatment,⁶⁰ it overlooked necessary enforcement mechanisms, and also “did not create transnational rights for intellectual property.”⁶¹ Consequently, trade distortions and copyright infringement prevailed under the provisions of the Berne Convention.⁶²

Another multilateral treaty, the Universal Copyright Convention,⁶³ established in 1952, was an agreement attractive for countries that were reluctant to abolish their formality requirements. The fundamental difference between the Berne Convention and the Universal Copyright Convention is that the latter allowed its signatories to retain certain formalities.⁶⁴ Otherwise, the Universal Copyright Convention, which “was intended to work in parallel with the Berne Convention,”⁶⁵ contained similar provisions such as the standard of national treatment.⁶⁶ Nevertheless, the Universal Copyright Convention was deemed a weak convention by commentators, largely due to its acceptance of countries with insufficient copyright protection as members, and the fact that copyright remedies are limited to those provided by the country where the copyright was granted.⁶⁷

Another concern arising from both the Berne Convention and the Universal Copyright Convention stemmed from the concessions they allowed for developing countries. Both of

58. Note the absence of sound recordings from the definition of “literary and artistic works” in the Berne Convention. *Id.* art. 2(1). *See also* Tai, *supra* note 3, at 169.

59. *See* Tai, *supra* note 3, at 170. *See also* Leaffer, *supra* note 35, at 294 (describing the effects of non-compliance).

60. Berne Convention, *supra* note 10, art. 5(3).

61. Tai, *supra* note 3, at 170.

62. *See* GURNSEY, *supra* note 52, at 29 (describing international conventions on the whole as ineffective, and as indirectly promoting piracy).

63. UCC, *supra* note 11.

64. *Id.* art. III(2).

65. Daphne Yong-d'Hervé, *Pre-TRIPS International Legal Framework; TRIPS Structure*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT* 8-9 (International Chamber of Commerce ed., 1996).

66. *See* UCC, *supra* note 11, art. II.

67. *See* Tai, *supra* note 3, at 171.

these conventions made efforts to include the concerns of countries with growing and emerging economies, in the sense that they encouraged the enactment of copyright protection legislation in those countries.⁶⁸ However, this practice was met with criticism. Providing developing countries with concessions in order to increase the information access in those countries, although a notable concern, only resulted in a forum wherein piracy was indirectly encouraged to expand.⁶⁹

Another multilateral treaty, called the International Convention on the Protection of Performers, Producers of Phonograms and Broadcast Organizations,⁷⁰ arose in 1961. This treaty, popularly known as the Rome Convention, broadened the scope of rights granted in the Berne Convention to include musicians, record companies, and broadcast media. Focusing closely on the protection of performing artists' rights, the Rome Convention included provisions providing a performer and producer with the possibility of preventing "the fixation, without their consent, of [his] unfixed performance,"⁷¹ and the direct or indirect reproduction of his phonogram.⁷² However, despite its achievements, the Rome Convention has been criticized by the United States (which is not a signatory) because "[t]he United States believed that the minimum standards of the Rome Convention inadequately protected American sound recording copyright owners."⁷³

The revenue lost to piracy and other related intellectual property rights infringements made it clear that a more effective solution to the piracy crisis was necessary.⁷⁴ The problem had grown to such enormous proportions that it became impos-

68. For example, Tai notes that one of the main goals of the UCC was to obtain "the widest number of adherents." *Id.* This goal necessitated lax requirements and resulted in acceptance (as members) of developing countries with inadequate domestic copyright legislation. *Id.* Additionally, Gurnsey explains that both the Berne Convention and the UCC were aimed at "encouraging and facilitating the creation and enforcement of appropriate copyright laws," presumably in countries where copyright laws had not previously existed. GURNSEY, *supra* note 52, at 29.

69. See GURNSEY, *supra* note 52, at 29.

70. Rome Convention, *supra* note 12.

71. *Id.* art. 7(1)(b).

72. *Id.* art. 10.

73. Brown, *supra* note 3, at 44.

74. See generally Leaffer, *supra* note 35 (discussing profits lost to the piracy problem and the decision to form a multinational solution).

sible to attempt a solution by using separate domestic anti-bootlegging statutes, bilateral treaties, or even comprehensive treaties such as the Berne Convention.⁷⁵ A broad multinational solution became necessary to tackle the pervasive problem, and to establish uniform protection.⁷⁶ The existing international conventions, namely the Berne Convention and the Universal Copyright Convention, only provided a loose framework for intellectual property rights, but neglected to offer significant protection to artists.⁷⁷ Thus the United States pushed for the development of a single multilateral convention, as opposed to a scattered number of bilateral treaties as done in the past.⁷⁸

D. Trade-Related Issues Demanded a Stronger International Framework

The driving focus of TRIPS was concern for the resolution of problems inherent in the link between intellectual property, its value, and international trade.⁷⁹ As numerous commentators note, the "inadequate protection of intellectual property undermines the goal of free trade because it leads to trade distortions."⁸⁰ Without adequate rights and corresponding protections, an artist's incentive to create decreases rapidly. Pirates of intellectual property "enjoy lower production costs and are in a better position than legitimate producers to satisfy demands"⁸¹ in their respective countries. Modern technology makes the process of copying, or otherwise infringing upon

75. See discussion *infra* Part II.C.

76. See LEAFFER, *supra* note 54, at 394-395.

77. See Yong-d'Hervé, *supra* note 65, at 10.

78. See Rebecca F. Martin, Note, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 760 (1996); WILLIAM F. PATRY, COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT: 1995 SUPPLEMENT TO COPYRIGHT LAW AND PRACTICE 2 (1995).

79. See Tai, *supra* note 3, at 172-173.

80. LEAFFER, *supra* note 54, at 395. See also Yong-d'Hervé, *supra* note 65, at 10; Lynne Saylor & John Beton, *Why the TRIPS Agreement?*, in INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT 12 (International Chamber of Commerce ed., 1996); INTERNATIONAL INTELLECTUAL PROPERTY LAW 274 (Anthony D'Amato & Doris Estelle Long eds., 1997) [hereinafter D'Amato & Long]; Martin, *supra* note 78, at 760 (analyzing the effects inadequate copyright regimes have on trade relations, and resulting trade distortions).

81. See Leaffer, *supra* note 35, at 282.

intellectual property, a relatively simple task.⁸² While this makes life easier for copyright pirates, it puts a colossal strain on artists. They have practically no incentive to invest their time, energy, research, and development tactics into a project which is not likely to succeed economically or to be adequately protected by intellectual property rights enforcement.⁸³ Artists simply cannot make a profit with an abundance of inexpensive bootlegs flooding the market.⁸⁴ Thus, the practice of piracy has almost no risks and abundant rewards for pirates.⁸⁵ This tug-of-war between artists and pirates results in decreased production of legitimate works, less overall world trade, and resulting trade distortions.⁸⁶

Another fundamental premise considered during the development of TRIPS was that economic development would be negatively impacted by inadequate protection of intellectual property rights.⁸⁷ The piracy crisis which prompted the inclusion of TRIPS's Article 14 anti-bootlegging and sound recording provisions is proof of this sort of negative impact resulting from insufficient legislative protections. In developed countries like the United States that strongly supported the enactment of TRIPS, intellectual property rights are policed in large part because "industrialized countries are attempting to protect an increasingly important component of the national wealth."⁸⁸

Similarly, the economic growth of developing countries was also a concern in the international arena prior to the enactment of TRIPS, in the sense that piracy affected trade with those developing countries.⁸⁹ It is a common practice for devel-

82. For an example of current technology and the ease with which it can be employed, see Mark Alpert, *Soundtracks: You Now Have More Options Than Ever Before to Make High-Quality Recordings at Home*, POPULAR MECHANICS, Feb. 1, 1997, at 50.

83. See D'Amato & Long, *supra* note 80, at 269.

84. See generally Tai, *supra* note 3, at 159 (providing background for the rising costs of intellectual property creation, and subsequent discouragement of further creations).

85. See Leaffer, *supra* note 35, at 282.

86. *Id.* at 277.

87. The United States thought that GATT would be the appropriate forum to address intellectual property protection, due to the notion that inadequate intellectual property rights in some countries had "defined economic effects" on world trade. Tai, *supra* note 3, at 172-173.

88. D'Amato & Long, *supra* note 80, at 12.

89. Commentators have noted that "lack of foreign investment" in the pirating developing countries was hindering their efforts at economic development. See *id.*

oped countries to measure the impact of piracy in developing countries by the effect it has on Western markets.⁹⁰ However, piracy takes its toll within developing countries as well. Some countries have expressed concern over their "cultural dependence" on Western countries for artistic material.⁹¹ Also, such easy access to pirated versions of intellectual property decreases the incentive to engage in trade with the countries that produce the legitimate goods (usually developed countries). Consequently, producing unauthorized copies of intellectual property may have resulted in "trade barriers on the import of lawfully manufactured goods from the pirating countries."⁹² The countries owning rights to the legitimate goods often became reluctant to further invest in the pirating countries,⁹³ which resulted in increased production of pirated goods in order to overcome the resulting economic deficit of the developing countries. This cycle impeded international trade and hindered the economic growth of developing countries. The framing of intellectual property rights as a trade-related issue sought to remedy these inconsistencies in international trade and economic growth.

Additionally, many developing countries did not, and still do not, fully comprehend the concept of copyright.⁹⁴ In fact, copyright protection in some countries is a completely alien concept.⁹⁵ This misunderstanding results in problems with copyright legislation enactment and enforcement in these countries.⁹⁶ Developed countries, such as the United States, respond to the economic injuries they suffer from pirates by using forceful retaliatory measures such as threats of trade sanctions.⁹⁷ In order to avoid this unwanted form of retaliation, pirating countries hurriedly enforce copyright protections to appease the complaining countries.⁹⁸ Countries that do not

90. See GURNSEY, *supra* note 52, at 30.

91. *Id.* at 30-31.

92. D'Amato & Long, *supra* note 80, at 12.

93. *Id.*

94. See discussion *infra* Part IV.A.

95. See GURNSEY, *supra* note 52, at 31.

96. Gurnsey notes that in developing countries which have no copyright systems, "copyright is introduced with no real understanding of its aims and objectives," and thus the resulting copyright systems produce "some very odd results." *Id.*

97. See *infra* notes 101-11 and accompanying text.

98. See discussion *infra* Part IV.A (describing China's acquiescence as mere

fully appreciate copyright protections in general will project their inadequate understanding of the law into their own copyright system's development, culminating in inadequate systems.⁹⁹ This circular concept repeatedly results in trade sanctions and threats of trade wars against the pirating countries.¹⁰⁰

One typical trade-related retaliatory measure used by the United States against countries that do not respect intellectual property rights is the "Section 301" provisions in the Trade Act of 1974.¹⁰¹ Under Section 301, a country that is technically in compliance with TRIPS may still be found to adhere to unfair and inadequate intellectual property protections.¹⁰² Section 301 grants the United States Trade Representative (USTR) the authority to take action when she believes that "an act, policy, or practice of a foreign country" in some way "denies benefits to the United States under any trade agreement," or simply "restricts United States commerce."¹⁰³ The USTR, in her annual Special 301 reviews, designates problem countries under a set of categories.¹⁰⁴ The most severe category, the "priority foreign country," is one which has the most "egregious" or "onerous" policies in regards to intellectual property protection.¹⁰⁵ The next category, the "priority watch list," is reserved for countries without adequate intellectual property protection who nevertheless are not as severe offenders as the priority foreign countries.¹⁰⁶ The "watch list" category designates "countries considered to provide better IPR protection than those in the other two categories, but which the USTR feels still need to be monitored."¹⁰⁷ If the USTR makes an affirmative determi-

attempts to avert a trade war).

99. See GURNSEY, *supra* note 52, at 31.

100. See discussion *infra* Part IV.A (using China as an example).

101. Trade Act of 1974, 19 U.S.C. §§ 2411-2420 (1998) [hereinafter Section 301].

102. See *USTR Launches Attack on Greece, Cites Other Countries in Special 301 Report*, WORLD INTELL. PROP. REP., June 1998, at 188, 195 (outlining the Special 301 process).

103. Section 301, *supra* note 101, § 2411(a)(1).

104. Trade Act of 1974, 19 U.S.C. § 2242 (1998) [hereinafter Special 301].

105. See, e.g., *USTR Launches Attack on Greece, Cites Other Countries in Special 301 Report*, *supra* note 102, at 188, 195; *Intellectual Property Protection: 1998 USTR Special 301 Decisions*, E. ASIAN EXECUTIVE REP., Mar. 15, 1998, at 8 [hereinafter *Special 301 Decisions*].

106. See *Special 301 Decisions*, *supra* note 105, at 8, 20.

107. *Id.* at 8.

nation under one of the aforementioned categories, she may impose duties, enter into binding agreements, or suspend or withdraw benefits to that country.¹⁰⁸

Motivated by these concerns for the promotion of research and development, the incentive to create, and also the leveling of trade distortions, the United States pushed to place TRIPS on the agenda of the Uruguay Round (the multilateral trade negotiations aimed at revising the General Agreements on Tariffs and Trade 1947).¹⁰⁹ In fact, the United States itself became "the guiding force behind the adoption of TRIPS."¹¹⁰ When TRIPS finally came to fruition, the international community was pleased to see that it altered the focus of previous deficient international conventions by swaying more towards viewing intellectual property rights as a trade-related issue.¹¹¹

III. TRIPS

TRIPS provided a stricter international standard and more detailed rules for the protection of intellectual property rights.¹¹² TRIPS has been lauded by commentators as "the highest expression to date of binding intellectual property law in the international arena."¹¹³

Particularly, TRIPS made significant substantive inclusions in the realm of copyright piracy relating to music, where the previous treaties were silent. First, TRIPS mandated continued adherence to the substantive principles of previous major international intellectual property conventions, such as the Berne Convention.¹¹⁴ In fact, the incorporation of Articles 1 through 21 of the Berne Convention into TRIPS has been dubbed the "Berne plus" approach.¹¹⁵ The substantive provi-

108. See Section 301, *supra* note 101, § 2411(c)(1).

109. See Saylor & Beton, *supra* note 80, at 13. See also David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1390-1391 (1995) (providing an overview of the drive of the United States to include intellectual property standards in the Uruguay Round).

110. Nimmer, *supra* note 109, at 1391. See also GURNSEY, *supra* note 52, at 31 (describing the United States as "particularly anxious" to pinpoint intellectual property rights as the central focus of the Uruguay Round of GATT negotiations).

111. See Saylor & Beton, *supra* note 80, at 12.

112. See LEAFFER, *supra* note 54, at 396.

113. Nimmer, *supra* note 109, at 1391-1392.

114. TRIPS, *supra* note 4, art. 9(1), at 1201.

115. See LEAFFER, *supra* note 54, at 396. See also Nimmer, *supra* note 109, at

sions of the Rome Convention were not specifically incorporated into TRIPS, although Article 2(2) provided that the existing obligations of members under that treaty still apply.¹¹⁶ Interestingly, even without expressly incorporating the Rome Convention into TRIPS, its provisions concerning anti-bootlegging in Article 14(1) mirror those in Article 7(1)(b) and 7(1)(c) of the 1961 Rome Convention.¹¹⁷

After having solidified its foundation in the Berne Convention and other international conventions, TRIPS adds new protections to areas where the Berne Convention remains silent. For instance, Article 14 of TRIPS attempts to prevent piracy, and bootlegging in particular, by protecting sound recordings and live performances.¹¹⁸ Specifically, with respect to sound recordings, TRIPS provides that "[p]roducers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms."¹¹⁹ With respect to live performances such as concerts, TRIPS provides that "performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation."¹²⁰ The term "possibility of preventing" is often criticized for its absence of an explicit authorization for artists to prohibit reproductions of their performances without their consent.¹²¹ The same language was previously used in the Rome Convention due to concerns of music composers that a performer might prevent a broadcast of a performance, there-

1392; Paul Katzenberger, *TRIPS and Copyright Law*, in FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 59, 64-65 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996) (discussing the "Berne Plus" elements in TRIPS).

116. Rome Convention, *supra* note 12, art. 2(2).

117. See Peter Jaszi, *Goodbye to All That—A Reluctant (And Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L. 595, 601 (1996); Katzenberger, *supra* note 115, at 91. Nevertheless, the Rome Convention appears to be at least slightly broader than TRIPS because where Article 14(1) of TRIPS only provides protection for fixations of a performance on a "phonogram," Article 7(1)(b) of the Rome Convention provides rights for fixations on any "material support." See the discussion in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 157 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

118. TRIPS, *supra* note 4, art. 14.

119. *Id.* art. 14(2).

120. *Id.* art. 14(1).

121. See PATRY, *supra* note 78, at 7 n.23.

by denying the composer the profits that might have been made from the broadcast.¹²² On the other hand, the language has also been interpreted to allow members flexibility when implementing the right in their own countries' laws.¹²³

Although TRIPS covered a lot of ground, its achievements must be humbled by the fact that its success can only be measured by the continued efforts of member countries. Clearly, with respect to pirated goods, TRIPS established a stricter framework by which member countries of the WTO should amend their own copyright laws. But TRIPS is only referred to as a "framework" because it is not self-executing.¹²⁴ It is important to note that TRIPS is not a treaty, in this sense.¹²⁵ Each member country need not instantaneously abide by the provisions of TRIPS, rather, countries must "determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."¹²⁶ In order to reap the benefits which TRIPS made possible, members must remain committed to enhancing and enforcing intellectual property rights within their own countries.¹²⁷ Accordingly, studied further in this Note are the steps taken by a notorious intellectual property pirate, China,¹²⁸ to implement the substantive provisions of TRIPS into its own copyright system.

122. *See id.*

123. *See* DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 96 (1998).

124. PATRY, *supra* note 78, at 3. As a general matter, a treaty which is enforceable by its terms, without prior implementation of the treaty by domestic legislation of the signatories, is "self-executing." On the other hand, a "non-self-executing" treaty requires that domestic legislation of the signatories be enacted to make the treaty enforceable. For a discussion of "self-executing" versus "non-self-executing" treaties, see *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE*, *supra* note 117, at 118-20.

125. *See* Jaszi, *supra* note 117, at 602.

126. TRIPS, *supra* note 4, art. 1(1).

127. *See* Saylor & Beton, *supra* note 80, at 15 (explaining that "the commitment to an improved system of international intellectual property protection and enforcement must be retained if the potential benefits of the TRIPS Agreement are to be fully realised").

128. China is not yet a member of the WTO, but strongly wishes to be. A WTO Working Party was established to consider China's application for entry. *See* WORLD TRADE ORGANIZATION, 1997 ANNUAL REPORT 95.

IV. CHINA: PROMISING PROGRESSION TOWARD ERADICATING PIRACY

A close look at one specific country, China, will help illustrate how a previously infringing nation is now striving to comply with TRIPS, and also how piracy is slowly expiring in that country.

A. *China's History Surrounding Copyright and Piracy*

Throughout recent history, China has been deemed the heart of "the world's largest pirate market,"¹²⁹ and also "the biggest violator" of intellectual property rights.¹³⁰ However, these negative attributes were only affixed to China when the country was compared to Western nations. This practice, although logical from a Western point of view, undermines and diminishes the importance of understanding the culture in which pirating activities were born.¹³¹ Prior to the enactment of China's first copyright statute in 1991,¹³² intellectual property rights were not recognized at all. Piracy, in a technical legal sense, did not exist.¹³³

China did not have a copyright law prior to 1991¹³⁴ and,

129. Tai, *supra* note 3, at 163.

130. *Id.* 162.

131. See William P. Alford, *Making the World Safe For What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 140-146 (1997) (criticizing the United States' attitude toward China as a "disturbing indifference both to the legacy of China's past and the implications of its current political, legal, and economic circumstances").

132. Copyright Law of the People's Republic of China, adopted Sept. 7, 1990, effective June 1, 1991, *translated and reprinted in* CHINA PAT. & TRADEMARKS, Jan., 1991, at 65.

133. See Rengan, *supra* note 19, at 6.

134. China's original copyright statute was enacted in 1910, under the Qing Dynasty. In 1949, the Communist Party formed the People's Republic of China, and abolished that copyright law. Technically, the current copyright law is the first of its kind in the history of the post-1949 People's Republic of China. For a discussion of the history, see June Cohan Lazar, Note, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POLY INT'L BUS. 1185, 1186 (1996); INTRODUCTION TO CHINESE LAW 441 (Wang Chenguang & Zhang Xianchu eds., 1997); JAMES L. KENWORTHY, A GUIDE TO THE LAWS, REGULATIONS AND POLICIES OF THE PEOPLE'S REPUBLIC OF CHINA ON FOREIGN TRADE AND INVESTMENT 86 (1989). For a comparison of the assertion that China did not have a copyright law prior to 1991 with the opinions of commentators who disagree, arguing that although it was weak some protection did indeed exist, see Zheng Chengsi, *Chinese Copyright Law*, in CHINESE FOREIGN ECONOMIC LAW:

as noted earlier, barely understood the principles surrounding intellectual property rights. China's current copyright law is only a few years old, taking effect in 1991.¹³⁵ As one author notes, "comparatively speaking China is a baby in the international community of copyrights."¹³⁶ Considering the infancy of the Chinese copyright system, and the societal considerations arising from years of rule under the Communist regime which affects the successful performance of these new copyright laws, it is no wonder that piracy still thrives in China.¹³⁷ It is also no wonder that China, holding deep-rooted beliefs in the Confucian philosophy which traditionally abhorred litigation, has trouble enforcing its judicial procedures in copyright enforcement actions.¹³⁸

The leadership under Mao Tse-tung and the Chinese Communist Party in the early twentieth century also continues to influence Chinese beliefs regarding intellectual property rights today.¹³⁹ Under Mao Tse-tung, property rights arising from "products of the mind" were not recognized at all.¹⁴⁰ Ownership, according to Chinese Communist beliefs, was a capitalist concept, contradictory to selfless communist goals.¹⁴¹ Thus, in the face of changing ideals and fundamental beliefs, it is understandable that the Chinese government has difficulty enforcing copyright laws, and many Chinese pirates do not recognize their actions as illegal.¹⁴²

Efforts to reconstruct its copyright system arose over the

ANALYSIS AND COMMENTARY 16-1 (Rui Mu & Wang Guiguo eds., 1990) (Supp. no. 3 1994).

135. See Copyright Law of the People's Republic of China, *supra* note 132, at 65.

136. Rengan Shen, *Copyright Law in China*, in 1 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 73, 77 (Hugh C. Hanson ed., 1996).

137. See Kenyon S. Jenckes, Note, *Protection of Foreign Copyrights in China: the Intellectual Property Courts and Alternative Avenues of Protection*, 5 S. CAL. INTERDISC. L.J. 551, 553 (1997).

138. *Id.* at 553-554.

139. See *id.* at 554 (explaining that "although Communism has had a significant influence on the Chinese legal system, the modern system is a product of both traditional culture and Maosim"); Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1980 (1998) (discussing that "Maoist ideology exerted a major impact on the shaping of the modern Chinese legal system").

140. Jenckes, *supra* note 137, at 556.

141. *Id.*

142. *Id.*

years in large part due to the United States' threats of trade sanctions against China under section 301 of the Trade Act.¹⁴³ The United States thought that the possibility of a trade war would be so unattractive that it would serve as incentive for China to reform its intellectual property protections.¹⁴⁴ Unfortunately, however, a cycle developed between the two countries wherein the United States made threats of sanctions and China then enforced intellectual property protections randomly and sporadically.¹⁴⁵ In fact, the United States used its "Special 301" trade sanction threats against China three times, in 1992, 1995, and 1996.¹⁴⁶ Every one of these threats resulted in China's acquiescence, as demonstrated by signing trade agreements with the United States, promising intellectual property protection in the future.¹⁴⁷ Eventually the United States became skeptical of any enforcement efforts on China's part, considering them as "token" instances aimed simply at avoiding a trade war with the United States.¹⁴⁸

The long-standing trade battles between the United States and China arising out of China's intellectual property violations further culminated in threats from the United States to restrict China's entry into the World Trade Organization (WTO) as a founding member.¹⁴⁹ The relationship between China and the United States illustrates the previous discus-

143. See Section 301, *supra* note 101, § 2411(a). See also Cheng, *supra* note 139, at 1964 (explaining the external pressures from countries such as the United States, which affected China's copyright protection system).

144. See Helene Cooper & Kathy Chen, *China's Textiles to Top U.S. Hit List of Sanctions Aimed at Curbing Piracy*, WALL ST. J., May 14, 1996, at A2 ("Threatening sanctions, the U.S. hopes, will push China to enforce its intellectual property laws.").

145. See Cheng, *supra* note 139, at 1964.

146. See, e.g., Helene Cooper & Kathy Chen, *Sanctions Put U.S., China On Course to Trade War*, WALL ST. J., Feb. 6, 1995, at A3; Helene Cooper & Kathy Chen, *U.S., China Deadlock in Copyright Talks*, WALL ST. J., May 15, 1996, at A11. See also Cheng, *supra* note 139, at 1965-1966 (providing historical background of the ongoing intellectual property dispute between the United States and China).

147. See generally Memorandum of Understanding on the Protection of Intellectual Property, China-U.S., Jan. 17, 1992, 34 I.L.M. 676 [hereinafter 1992 MOU]; 1995 IPR Agreement, *supra* note 15; 1996 IPR Agreement, *supra* note 15.

148. See generally Cooper & Chen, *supra* note 144, at A2 (quoting a U.S. official as saying "the U.S. won't settle for a simple pledge from Beijing that isn't accompanied by action").

149. See Nimmer, *supra* note 109, at 1386.

sion regarding the effects of intellectual property piracy on overall trade between developed and developing countries. The possibility of debilitating trade wars and the denial of accession to the economy-boosting WTO were strong weapons in the United States' arsenal used against China. In fact, China's WTO membership was indeed denied due to the United States' efforts,¹⁵⁰ resulting from China's seemingly lax and unchanging attitude toward enforcement of intellectual property rights.¹⁵¹

B. China's Copyright System

Although there are a small number of problems in China's Copyright Law, on the whole it complies with the substantive provisions of TRIPS.¹⁵² Article 14 of TRIPS is dealt with in China's Copyright Law, which provides similar rights to performers, producers of sound recordings, and broadcasters.¹⁵³ Specifically, Article 36 of the law provides performers with the right to permit others to reproduce, distribute, or broadcast their performance, and also to receive compensation in light of the profit others may make from the use of their performance.¹⁵⁴ Article 39 provides substantially the same right to producers of sound recordings.¹⁵⁵

There is, however, an inherent weakness in the language of China's Copyright Law. The deficiency lies in the absence of an express prohibition of unauthorized recordings and distribu-

150. See Helene Cooper & Kathy Chen, *China Averts Trade War With the U.S., Promising a Campaign Against Piracy*, WALL ST. J., Feb. 27, 1995, at A3 (naming the United States as "the primary barrier to China's entry into the WTO"). It is important to note that China, to date, has still not formally been invited for membership in the WTO. WORLD TRADE ORGANIZATION, *supra* note 128, at 95. Therefore, China is technically not under any obligation provided in TRIPS to bring its copyright laws into compliance, although the desire to join the WTO propels China's efforts to comply.

151. See generally Brown, *supra* note 3, at 13-15 (detailing the history of the relationship between the United States and China in regards to intellectual property violations).

152. In fact, one commentator argues that China's "areas of continuing non-compliance with TRIPS are substantively minor." Michael Schlesinger, *Intellectual Property Law in China: Part I—Complying with TRIPS Requirements*, E. ASIAN EXECUTIVE REP., Jan. 15, 1997, at 9, 15.

153. See Copyright Law of the People's Republic of China, *supra* note 132, arts. 35-44, at 68

154. *Id.* art. 36.

155. *Id.* art. 39.

tions.¹⁵⁶ The law allows artists and producers the right to authorize reproduction and distribution of their works, but does not specifically suggest penalties for uses of the work without the author's consent.¹⁵⁷ TRIPS grants authors the possibility of preventing the unauthorized fixation of their performance.¹⁵⁸ Perhaps it is implied in the Chinese Copyright Law that if an author can allow someone else to copy his work, he can also prevent another person from copying it without his consent. Although this loose language in the Chinese Copyright Law is somewhat circular in respect to anti-piracy, the rights permitting authors under the Chinese Copyright Law to authorize reproductions of their works nevertheless complies with the language in Article 14 of TRIPS.¹⁵⁹

C. Further Efforts at Eradicating Piracy

In early 1992, China signed a bilateral agreement covering intellectual property with the United States, called the 1992 Memorandum of Understanding on the Protection of Intellectual Property Rights (1992 MOU).¹⁶⁰ The 1992 MOU is most notable for its requirement that China must accede to the Berne Convention.¹⁶¹ Additionally, the 1992 MOU ordered China to amend its Copyright Law and issue new regulations to comply with the Berne Convention.¹⁶² Thus, China enacted the Implementing International Copyright Treaties Provisions¹⁶³ (ICT Provisions) to incorporate the Berne Convention and the UCC into its laws, and also the Implementing Regulations¹⁶⁴ to add the 1992 MOU into its new Copyright Law.

Problems soon arose over the enforcement of these new copyright regulations, as evidenced by China's inclusion on the

156. See Reiko R. Feaver, *China's Copyright Law & the TRIPS Agreement*, 5 J. TRANSNAT'L L. & POL'Y 431, 448 (1996).

157. Copyright Law of the People's Republic of China, art. 10(5).

158. TRIPS, *supra* note 4, art. 14.

159. TRIPS, *supra* note 4, art. 14. For a discussion of TRIPS' requirements, see *supra* Part III.

160. See generally 1992 MOU, *supra* note 147.

161. *Id.* art. 3(1).

162. *Id.* art. 3(4).

163. See Implementing International Copyright Treaties Provisions, effective Sept. 30, 1992, translated in CHINA L. & PRAC., Jan. 14, 1993, at 36.

164. See Regulations for the Implementation of the Copyright Law of the People's Republic of China, effective June 1, 1991, translated in CHINA CURRENT L., Jan. 1991, at 5.

Special 301 priority foreign countries list in 1994.¹⁶⁵ So, in order to avoid a massive trade war launched by the United States, China signed an agreement in February of 1995, further enhancing intellectual property protection.¹⁶⁶

The 1995 IPR Agreement established new provisions affecting music piracy, and other related copyright infringements. First, it set up an agency called the Working Conference on Intellectual Property Rights to monitor the implementation of the copyright regulations and ensure that intellectual property rights are being respected.¹⁶⁷ It also mandated the cooperation of additional task forces at "sub-central levels" to participate in enforcement.¹⁶⁸ Also, a six month special enforcement period commenced on March 1, 1995, in order to intensify the efforts at eliminating piracy, and increase the number of investigations.¹⁶⁹ Article I(C)(4) of the 1995 IPR Agreement further increases the raid on illegal CD production by calling for unannounced inspections of all CD plants operating in China during the special enforcement period.¹⁷⁰ Additionally, Article I(D) proposes intensified inspections for imported and exported CDs, which would be subject to seizure, forfeiture, or destruction if found to be infringing.¹⁷¹ Finally, and perhaps most importantly, the 1995 IPR Agreement implements a unique identification verification system, which requires that all CD manufacturers conspicuously imprint their unique identifier on all CDs.¹⁷² In addition, every legitimate CD manufacturer must have a proper title registration authorizing the reproduction of copyrighted CDs.¹⁷³

Despite these lofty ideals set forth in the 1995 IPR Agreement, the United States' opinion was that the agreement

165. See Cheng, *supra* note 139, at 1969.

166. See generally 1995 IPR Agreement, *supra* note 15. For a summary of the agreement, see Tom Hope, *A Victory For IPR?*, ASIA L., March 1995, at 12.

167. See 1995 IPR Agreement, *supra* note 15, art. I(A).

168. *Id.* art. I(B). Cooperation among these task forces and the Working Conference was implemented in order to "accommodate the Chinese government's inexperience in enforcing laws against economic crime." Jenckes, *supra* note 137, at 567.

169. See 1995 IPR Agreement, *supra* note 15, art. I(C).

170. *Id.* art. I(C)(4).

171. *Id.* art. I(D)(1).

172. *Id.* art. I(H)(1).

173. *Id.* art. I(H)(2). See also Cheng, *supra* note 139, at 1974 n.226 (explaining the Source Identification Code (SID) process utilized in China).

turned out to be largely ineffective.¹⁷⁴ Illegal CD plants shut down during the special enforcement period were later re-opened.¹⁷⁵ In fact, while China agreed to increase investigations of twenty-nine generally pirating factories, the number of illegal production facilities actually increased to thirty-one.¹⁷⁶ Pirate CD production figures even managed to double in the six month special enforcement period.¹⁷⁷ Eventually, noncompliance with the 1995 IPR Agreement on China's part led once again to threats of trade sanctions,¹⁷⁸ and inclusion on the Special 301 priority foreign country list.¹⁷⁹

The Chinese promised to improve intellectual property protection once again with the United States in a 1996 IPR Agreement.¹⁸⁰ The agreements between the United States and China in 1995 and 1996 are largely the same. The 1996 IPR Agreement, in relation to CD production, called for the closure of fifteen illegal CD production plants, confiscation of CD production equipment used for illegal purposes, closure of six CD distribution markets in South China's Guangdong province, strengthened border surveillance, and twenty-four hour inspectors at CD factories to police the use of the mandatory verification system on all CDs.¹⁸¹ An additional seven month enforcement period would commence, as in 1995, and the Chinese government would not allow any new CD plants to open for an unspecified period.¹⁸² In summary, the 1995 IPR Agreement is revived in theory within the 1996 IPR Agreement, along with the addition of a few new measures aimed at further eradicating piracy.¹⁸³

174. See generally Cooper & Chen, *supra* note 144, at A2 (surveying industry dissatisfaction with the 1995 IPR Agreement); Cheng, *supra* note 139, at 1973 (noting that "Chinese efforts to implement the [1995 IPR Agreement] were far from adequate").

175. See Cheng, *supra* note 139, at 1973.

176. See Cooper & Chen, *supra* note 144, at A2.

177. See Maggie Farley & James Gerstenzang, *China Piracy of U.S. Products Surges Despite Accord*, L.A. TIMES, Oct. 10, 1995, at A1.

178. See generally Cooper & Chen, *supra* note 144, at A2.

179. See *Executive Briefing—China-U.S.: Intellectual Property Rights*, E. ASIAN EXECUTIVE REP., Apr. 15, 1996, at 4.

180. See generally 1996 IPR Agreement, *supra* note 15.

181. See Kathy Chen & Helene Cooper, *U.S. and China Reach an Agreement, Averting Trade Sanctions on Both Sides*, WALL ST. J., June 18, 1996, at A2; Tan Loke-Khoon & Jennifer Freidenrich, *Asia Pacific Review of the Year: China*, COPY-RIGHT WORLD, Feb. 1997, at 19, 20.

182. See 1996 IPR Agreement, *supra* note 15.

183. See Cheng, *supra* note 139, at 1976 (explaining that the 1996 IPR Agree-

The 1996 IPR Agreement was initially met with significant criticism and skepticism from music and related entertainment industry leaders for its resemblance to the failed 1995 IPR Agreement.¹⁸⁴ Even though these concerns were clearly justified in light of the 1995 Agreement's shortcomings, the Chinese government has made substantial steps towards progress regarding enforcement.¹⁸⁵ In fact, it has even been noted that "[t]he general consensus is that the Chinese authorities have shown steady progress in enforcing the 1996 IPR Agreement."¹⁸⁶ As a result, in 1997 the International Intellectual Property Alliance (IIPA), an independent agency, conducted its own annual "Special 301" review of the world-wide piracy problem, in order to submit recommendations to the USTR.¹⁸⁷ In collaboration with the RIAA, the IIPA's recommendation to the USTR was to "closely monitor developments in the People's Republic of China."¹⁸⁸ Although this language may sound negative, the IIPA did couple this warning with sincere praise of China by commenting favorably on China's solid attempts to shut down illegal counterfeit CD plants.¹⁸⁹

In the years following the 1996 IPR Agreement, the continuing efforts of the Chinese government to amend and enforce its laws in hope of gaining entry into the WTO were recognized by the USTR.¹⁹⁰ In her 1998 Special 301 review, the USTR acknowledged that "[b]ased on the 1995 and 1996 Bilateral IPR Agreements and extensive follow-up work with Chinese officials, China now has a functioning system to protect intellectual property rights."¹⁹¹ The USTR therefore ordered that China be monitored under Section 306 of the Trade Act,¹⁹² which meant that she could move immediately to

ment "reiterates provisions of the 1995 [IPR Agreement] and adds more promises to keep up the fight against copyright piracy").

184. See Chen & Cooper, *supra* note 181, at A2 (quoting Michael Johnson, president of Buena Vista Home Entertainment, as saying "We did this drill in 1995 . . . [t]he question is 'is this for real or not?'").

185. See Cheng, *supra* note 139, at 1976.

186. Loke-Khoon & Freidenrich, *supra* note 181, at 21, 24.

187. *United States: '301' Special Reviews*, COPYRIGHT WORLD, Apr. 1997, at 10.

188. *Id.* at 10, 11.

189. See *id.*

190. See *USTR Launches Attack on Greece, Cites Other Countries in Special 301 Report*, *supra* note 102, at 196.

191. *Id.*

192. Section 301, *supra* note 101, § 2416; *Special 301 Decisions*, *supra* note

trade sanctions if she "detects slippage in China's enforcement of bilateral intellectual property rights agreements."¹⁹³ Some Chinese officials were disappointed by China's inclusion under the Section 306 monitoring provision because it subjects China to continued scrutiny.¹⁹⁴ Others, however, viewed China's absence from the priority foreign country list, or even the watch list, as a victory.¹⁹⁵

As a further measure toward eradicating piracy, China revised its criminal law in 1997 to include intellectual property infringement as a class of punishment.¹⁹⁶ China's Criminal Law is more explicit than its Copyright Law with regard to its prohibition of music piracy.¹⁹⁷ It imposes punishment for unauthorized reproductions or distributions of musical works of both the copyright owners and the phonogram producers.¹⁹⁸ The law explains that "infringement of copyright . . . for the purpose of obtaining profit"¹⁹⁹ or "knowingly selling infringing reproductions of specified copyright materials for the purpose of obtaining profit"²⁰⁰ is prohibited. Also, in cases where the individual infringer's profits are "exceptionally large" (exceeding approximately \$12,500 United States dollars), he is also punishable under Article 218 for sales of infringing copies.²⁰¹ Additionally, criminal liability also gives rise to payment of compensatory damages to the injured copyright owners involved.²⁰² Finally, the crime warrants from three to seven years imprisonment, depending upon the amount of the

105, at 8.

193. *USTR Launches Attack on Greece, Cites Other Countries in Special 301 Report*, *supra* note 102, at 188.

194. *See China Vows to Beef Up Protection in Response to USTR Designation*, *WORLD INTELL. PROP. REP.*, June 1998, at 178.

195. *See Steve Mufson, Piracy Still Runs Rampant in China; Yet Industries Oppose Asking For Sanctions*, *WASH. POST*, Mar. 27, 1998, at E03 (quoting U.S. officials and industry members as optimistic towards China's efforts: "There are still things we'd like to see done, but we're moving in the right direction").

196. *See Revised Criminal Law of the People's Republic of China*, effective Oct. 1, 1997, arts. 213-220, *translated in CHINA L. & PRAC.*, June 1997, at 39, 43. For a helpful summary of the Revised Criminal Law, see Chen Meizhang, *New Moves Towards the Protection of Intellectual Property in China*, *CHINA PAT. & TRADE-MARKS*, Oct. 1997, at 11.

197. For a discussion of China's Copyright Law, see *supra* Part IV.B.

198. *See Meizhang, supra* note 196, at 11.

199. Revised Criminal Law of the People's Republic of China, art. 217.

200. *Id.* art. 218; Loke-Khoon & Freidenrich, *supra* note 181, at 21, 22.

201. Revised Criminal Law of the People's Republic of China, art. 218.

202. *Id.*

infringer's income derived from his illegal act, or other serious circumstances.²⁰³ Until the Criminal Law was revised in 1997, Chinese "legislation did not authorize resort to criminal punishment for even the most outrageous copyright violations."²⁰⁴ Thus, this development illustrates a step in the direction toward holding pirates not only liable under civil law for their violations, but also under criminal law.

One of the most severe sanctions in the history of China's new copyright regime since the 1996 IPR Agreement, and the newly-revised Criminal Law, prohibiting copyright theft was declared in 1997.²⁰⁵ On December 6, 1997, three CD pirates were sentenced to life imprisonment for possession of 383,000 pirated CDs, which the criminals intended to smuggle into nearby Hong Kong.²⁰⁶ This decision of the Chinese People's Court in South China's Guangdong province illustrates that the government is working painstakingly to enforce the 1996 IPR Agreement, and is ordering criminal punishment to deter illegal pirating behavior.

Additional efforts to enforce intellectual property rights and wipe out piracy in the past few years have been monumentally successful. The increase in raids and seizures of CD production equipment, and the arising incidence of intellectual property infringement civil cases demonstrate the effectiveness of the copyright regime as a whole.²⁰⁷ According to the RIAA, following the 1996 Special 301 review and the resulting 1996 IPR Agreement, Chinese officials stepped up pirate CD plant raids and seizures so that pirate CD production and export figures had dropped significantly by January 1997.²⁰⁸ Chinese officials report that, throughout the remainder of 1997, nearly 40 underground pirate CD factories were closed and customs border raids had resulted in the seizure of a wealth of CD

203. See Meizhang, *supra* note 196, at 11.

204. Jerome A. Cohen, *Enforcement of Intellectual Property Rights in Asia: the Case of China*, in INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY 63, 65 (Hugh C. Hanson ed., 1996).

205. See Loke-Khoon & Friederich, *supra* note 181, at 21, 23.

206. See *id.*; *Sentence of Life Imprisonment For CD Piracy Is Harshes So Far*, WORLD INTELL. PROP. REP., Jan. 1998, at 4.

207. See Loke-Khoon & Friederich, *supra* note 181, at 21. "The Supreme People's Court recently announced that between January 1996 and May 1997, courts across the country handled up to 5,296 IPR civil cases, 10 percent of which concerned overseas parties." *Id.* at 24.

208. See RIAA 1997 ANN. REP., *supra* note 37, at 27.

equipment.²⁰⁹ As a result, approximately 250 pirates were arrested and convicted, thanks to the strict enforcement of the revised Criminal Law.²¹⁰ In the words of the Commissioner of the Chinese Patent Office, "although China has had a late start, it has made rapid progress through its own energetic efforts and international cooperation"²¹¹ regarding intellectual property protection as a whole.

Numerous legal scholars have theorized that "the integration of China into the WTO and China's consequent adherence to the TRIPS agreement may be the best means of ensuring future improvements."²¹² Indeed, admitting China into the WTO would likely result in long-term benefits.²¹³ The United States would no longer need to rely on unilateral actions, such as threats of trade sanctions, to force China to comply. Instead, multilateral action under WTO Dispute Settlement mechanisms would prove to be more effective in dealing with China's violations. Also, as China develops status as an emerging world power, many commentators and analysts feel it is wise to grant China leeway so that it does not become resentful toward the United States.²¹⁴ Such resentment could later be problematic when China's economy rises to a level commensurate with the United States or other Western powers.

Upon analysis of the 1996 IPR Agreement and other related legislation affecting piracy, it is evident that "China's legislation for the protection of intellectual property is now relatively complete."²¹⁵ China is also currently undergoing an amendment to its Copyright Law,²¹⁶ the results of which will hopefully bring China into an even more favorable position regarding

209. See Loke-Khoon & Friederich, *supra* note 181, at 21, 24.

210. *Id.* at 24.

211. Gao Lulin, *China and the TRIPS Agreement*, CHINA PAT. & TRADEMARKS, Jan. 1997, at 5, 6.

212. Feaver, *supra* note 156, at 433. See also Cheng, *supra* note 139, at 2005 (suggesting that "[a]dmitting China into the WTO will encourage China to enforce its copyright protection and enhance the international community's position to contain China's piracy problem").

213. See Lazar, *supra* note 134, at 1211; Schlesinger, *supra* note 152, at 16; Feaver, *supra* note 156, at 433.

214. See Lazar, *supra* note 134, at 1209-1211. "It could prove disastrous to keep China out of the WTO, especially if China decides in twenty years to use its new economic power to unilaterally threaten the United States." *Id.* at 1211.

215. Loke-Khoon & Freidenrich, *supra* note 181, at 22.

216. See Meizhang, *supra* note 196, at 12.

TRIPS compliance. While it is obvious that the fight against piracy is nowhere near finished in China, significant steps have been taken to enforce intellectual property rights and stomp out piracy. These strenuous efforts have resulted in measured success. China may not always be functioning at a level consistent with the United States' demands, but compared to its history it has accomplished a great deal. Hopefully, continued efforts will accelerate intellectual property protection, thereby making it unnecessary for the United States to threaten trade sanctions or monitor China under Special 301 provisions at all.

V. IMPROVED CD COPYING TECHNOLOGY THREATENS TO UNDERMINE EFFORTS AT COMPLIANCE WITH TRIPS

Throughout the years prior to the surfacing of the CD-Recordable disc and the CD-Rewritable disc,²¹⁷ it was theorized that new technology for copying sound recordings would disrupt legitimate sales and increase the strength of the pirate market.²¹⁸ Today that concern is slowly proving itself true. The RIAA believes that the historically feared concept of "large-scale digital piracy has begun to assert itself,"²¹⁹ mostly due to the threat posed by easy access to cheap CD copying equipment. The latest technology is the CD-R, recently introduced in 1997, and commonly known as a "burner" because lasers from the CD-R machine burn information onto the CD-R disc.²²⁰ CD-Rs are becoming increasingly less expensive, as the device itself can be purchased for around three hundred to four hundred dollars, and the blank CD-R discs cost about one dollar.²²¹ As evidence of the rapidly increasing availability of

217. A CD-Rewritable disc (CD-RW) can have sounds copied onto it over and over again, in contrast to the CD-R which can only be copied to once. See Alpert, *supra* note 82, at 50, 52.

218. See Schwartz, *supra* note 25, at 613.

219. Holland, *supra* note 43, at 5.

220. See RIAA 1997 ANN. REP., *supra* note 37, at 35; *CD Piracy Continues to Raise Questions*, SEATTLE TIMES, Aug. 16, 1998, at C4, available in 1998 WL 3167406.

221. See RIAA 1997 ANN. REP., *supra* note 37, at 35; See also Doug Reece, *Sharp Jump Reported in CD-R Piracy*, BILLBOARD, Sept. 5, 1998, at 12, available in 1998 WL 10914762 (pricing CD-R drives at \$300, and CD-R discs at \$1 each); Stephen Nathans, *Sound to Burn: Audio Recording Tools For CD-R*, EMEDIA PROF., Feb. 1, 1998, at 46, available in 1998 WL 9595592.

CD-Rs on the market, a CD-R plant estimated to have produced an astounding nineteen million dollars worth of pirated CDs was raided on May 5, 1998.²²² The raid of the New York plant, which resulted in forty-three arrests and closed down the largest CD-R factory ever, opened the eyes of the music industry to the problem of CD-Rs.²²³

Indeed the RIAA has acknowledged this growing problem, and is working diligently to ensure that this new CD-R technology is not used for illegal purposes. The RIAA's stated goals (among many) are to "promote strong intellectual property protection and effective enforcement nationally and internationally; combat record piracy; . . . [and] meet the challenges of technology."²²⁴ Members and leaders of the RIAA are hesitant to accept these new products without hesitation.

Industry leaders, while appreciating the monumental advancements in sound recording technology, cannot ignore the ramifications it undoubtedly will have on copyright protection. They seem torn between lauding the accomplishments of the consumer electronics industry who invent and market these devices, and reprimanding them for creating new avenues in the pirate market. For instance, Hilary Rosen, president and CEO of the RIAA, suggests that "[r]ather than feel threatened by the changes that come with technological advancement, we can welcome the role of progress."²²⁵ On the other hand, the RIAA on the whole is much less positive than its president and CEO. David Stebbings, senior vice president of technology at the RIAA, notes that "[t]he growth and speed of developing technology has made it difficult to develop and implement protection standards."²²⁶ Stebbings admits that technology in the realm of music is an outstanding achievement, but he counters that praise with trepidation over whether copyright protection technology (to thwart pirating activity) will be incorporated into these new recording devices.²²⁷ Additionally, entertainment industry members are concerned that copying may be depriving artists of some revenue because it indirectly di-

222. See John Lannert, *RIAA Piracy Raids Highlight CD-R Concerns*, BILLBOARD, May 23, 1998, at 8, available in 1998 WL 10913358.

223. See *id.*

224. RIAA 1997 ANN. REP., *supra* note 37, at cover (1998).

225. *Id.* at 5.

226. *Id.* at 17.

227. See *id.*

ishes the financial success of any compilation they may later release.²²⁸

Nevertheless, the RIAA only reflects one faction in the dispute. In strong contrast, proponents of sound recording technology discount the effects on piracy as minimal, and actually see new copying technology as a boost to the music market.²²⁹ Supporters of technological advancement argue that allowing people to copy CDs and disseminate the music to a larger audience will result in an increased demand for the recording artist's work.²³⁰ Gary Shapiro, president of the Consumer Electronics Manufacturers Association, complains that new technology has continually been opposed by all performing arts industries, even though "every one of those technologies has made them money."²³¹

Additionally, most supporters of the CD-R take the view that consumers have a right to copy music which they legally own onto a CD-R for their own personal use.²³² Although they acknowledge the importance of the anti-piracy campaign, these supporters of the copying technology do not agree that all use of CD-Rs constitutes copyright infringement.²³³ Permitting music-loving consumers to coordinate their own compilations of CDs they own is considered a perfectly legal activity, according to the developers of the CD-R.²³⁴ As Jonathan Thompson, vice president of the Consumer Electronics Manufacturers Association suggests, "[t]here is nothing wrong with having this equipment for legitimate, in-home use."²³⁵

This argument is based on the Audio Home Recording Act

228. See Wiley, *supra* note 1, at 11 (quoting the RIAA as maintaining that "with consumers making their own music compilations and mixes, record companies and artists lose a portion of potential sales of their own products").

229. See *CD Piracy Continues to Raise Question*, *supra* note 220, at C4 (explaining that the supporters of the CD-R view the technology as providing an increased demand for the work of recording artists).

230. See *id.*

231. *Id.*

232. See Wiley, *supra* note 1, at 11.

233. See *id.* (quoting an industry vice president as declaring that CD-R "burning for pleasure and not for profit is not a crime").

234. See *id.* (quoting the president of the Consumer Electronics Manufacturers Association as saying that "almost nobody buys a CD with a whole bunch of songs and likes every song. People like to put their own combinations together").

235. Wiley, *supra* note 1, at 11.

of 1992 (AHRA),²³⁶ which permits consumers to use a "digital audio recording device," like the CD-R drive, to make copies of their favorite music for their own noncommercial use.²³⁷ Section 1008 of the AHRA provides that

[n]o action may be brought under this title [Copyright Act] based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.²³⁸

Much to the RIAA's dissatisfaction, the AHRA clearly does not prohibit the sale or manufacture of devices like the CD-R,²³⁹ even though they could conceivably be used for infringing purposes. The CD-R and its relative the CD-RW have been arguably constructed in compliance with the AHRA.²⁴⁰ According to the AHRA, a "digital audio recording device" is any type of machine designed to facilitate copying "for private use" by individuals.²⁴¹ The Act emphasizes that the primary purpose of the device should be for private use, and that it should be "commonly distributed to individuals for use by individuals."²⁴² The CD-R is presumptively designed for in-home use by consumers who are copying their favorite tracks, not intending to resell them. Thus it fits the criteria set forth in the AHRA, absolving its manufacturers of any responsibilities the RIAA believes they owe to recording artists.

Proponents of CD-R technology also rely heavily on the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*,²⁴³ in order to support their argument that CD-Rs and related home recording technology are perfectly legal. In that case, Sony developed and manufactured the

236. Audio Home Recording Act of 1992, 17 U.S.C. § 1008 (1992).

237. *Id.*

238. *Id.*

239. *Id.*

240. See Robert A. Starrett, *Copying Music to CD: the Right, the Wrong, and the Law*, EMEDIA PROF., Feb. 1, 1998, at 36, available in 1998 WL 9595590.

241. Audio Home Recording Act of 1992, § 1001.

242. *Id.*

243. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). This decision is commonly referred to as the "Betamax" case. See Starrett, *supra* note 240, at 36.

Betamax video tape recorder for home taping of television programs.²⁴⁴ Universal City Studios and Walt Disney, owners of the copyrights in certain broadcast television programs, sued Sony, alleging that taping a television program to be watched at a later date violated their respective copyrights in the television programs.²⁴⁵ This practice, dubbed "time shifting,"²⁴⁶ was alleged by Universal and Disney to be a copyright infringement, which subjected Sony to contributory copyright infringement for the sale of the Betamax recorder to the public.²⁴⁷ The Supreme Court disagreed with the complainants, holding that "time shifting for private home use must be characterized as a noncommercial, nonprofit activity"²⁴⁸ which does not constitute infringement. The Court supposes that "[i]f Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair."²⁴⁹ Additionally, the Court found it persuasive that the copying involved had no effect on the market for the copyrighted work.²⁵⁰ The Court explained that a "use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."²⁵¹

Supporters of copying technology, although acknowledging that the Betamax case involved video copying, believe that the decision fits squarely with the audio copying issue at hand.²⁵² They maintain that home CD copying has only a slight effect on the recording industry,²⁵³ precluding it from being prohibited as an infringement. Additionally, technology supporters believe that shifting the order of songs on one CD to a CD-R is analogous to time shifting, as done by users in the Betamax case.²⁵⁴ Furthermore, one member of the Consumer Electronics Manufacturers Association suggests that since the sale and

244. *See Sony*, 464 U.S. at 417.

245. *See id.*

246. *Id.* at 418.

247. *See id.* at 420.

248. *Id.* at 449.

249. *Id.* at 449.

250. *See Sony*, 464 U.S. at 450.

251. *Id.*

252. *See Wiley, supra* note 1, at 11.

253. *Id.*

254. *See Starrett, supra* note 240, at 36.

production of CD-R burners is not an infringement, the RIAA should be more concerned with the truly infringing activities of pirates.²⁵⁵

On the other side of the dispute, the RIAA would like to see copyright protection technology utilized to counter the possible negative implications of CD copying equipment.²⁵⁶ The RIAA has a difficult time swallowing the idea that the use of CD-Rs is unregulated and unmonitored once it is sold to a consumer. Electronics industry members have tried to assuage this concern by installing a Serial Copy Management System (SCMS) chip into CD burners as an anti-piracy measure.²⁵⁷ The chip "encodes each [CD-R] disc after a recording so that a digital copy of its content cannot be made."²⁵⁸ In short, if the SCMS chip is in place, a pirate cannot use his first CD-R copy as a 'master' to produce additional pirated copies. Although this is a commendable effort on the part of the electronics industry, it does not take into account that a pirate can copy the original copyrighted, legitimate CD onto an infinite number of CD-Rs without ever encountering any trouble with the SCMS chip.²⁵⁹ As an alternative method, the RIAA itself suggests "the use of embedded signals or watermarks buried inaudibly in audio....to control and regulate copying and unauthorized distribution of recordings."²⁶⁰

While the debate over the ills of technology rages on, the statistics further help unmask the problem. Figures derived from the RIAA's seizures clearly demonstrate the burst of CD-Rs on the pirate scene. Since the introduction of the CD-R, there were 87 counterfeit and pirate CD-Rs confiscated by the RIAA in 1997,²⁶¹ and the figure had grown enormously to 23,858 by the RIAA's 1998 Mid-Year Anti-Piracy Statistics released on August 21, 1998.²⁶² Apparently, this notable increase

255. See Wiley, *supra* note 1, at 11 (quoting Jonathan Thompson, vice president of the Consumer Electronics Manufacturers Association as maintaining that "[t]he equipment is not the problem. What's dangerous here is the behavior of the people. Go after these people and punish them.").

256. See generally RIAA 1997 ANN. REP., *supra* note 37, at 17.

257. See Nathans, *supra* note 221, at 46.

258. *Id.*

259. See *id.*

260. RIAA 1997 ANN. REP., *supra* note 37, at 17.

261. *Id.* at 35.

262. 1998 Mid-Year Statistics, *supra* note 39. See *Mid-year RIAA Figures Show Alarming Rise in CD-R Piracy*, ONE TO ONE, Sept. 1, 1998, at 20, available in

in such a short period of time reflects that the general CD format is still widely popular, the 'burners' and CD-R discs have decreased to an affordable price, and production is quite a simple task.²⁶³ Given that the increase in pirate CD-R seizures only reflects the RIAA's actual confiscation of such infringing CD-Rs, it would be incorrect to assume that these figures are an accurate assessment of the true number of CD-Rs on the market. Indeed, it is safe to say that there is a wealth of illegal CD-Rs still out there.

VI. CONCLUSION

Home recording rights do not violate Article 14 of TRIPS in a broad sense because the copying involved in the AHRA is presumptively done only on a personal, non-commercial level. Therefore, TRIPS's fundamental objective of abolishing piracy is not thwarted when individual consumers rearrange and copy their own favorite CDs onto CD-Rs. It is when copying becomes large-scale that problems arise. Because there is no way to ensure that consumers will not be tempted to set up their own small-scale pirating operation, there is also no way to know for sure that CD-Rs will not inevitably pose a threat to the objectives of TRIPS. In fact, it seems that there is a strong possibility that CD-Rs will contribute to activities which TRIPS prohibits.

These new copying devices are certain to make their way into international trade. Considering that United States federal and judicial law both permit copying on an individual basis, these CD-R burners and discs are sure to remain on the market here and abroad whether or not they contain sufficient copyright protection technology, as suggested by the RIAA. Given the indifferent attitude that some nations have traditionally had towards intellectual property protection, foreign governments will suffer setbacks when the CD-R arrives on their soil. Countries struggling to stomp out piracy will once again need to assess their laws to consider how CD-Rs affect

1998 WL 10068235; Reece, *supra* note 221, at 12.

263. See Reece, *supra* note 221, at 12 (theorizing that the crackdown on large-scale CD factories has forced some pirates to less risky venues, and that the ease of recording with CD-Rs facilitates these moves). "The obvious answer from pirates has been, 'I can set up my own CD factory in my kitchen.'" *Id.*

copyright protections under their respective copyright system. Nations like China, for example, could encounter massive difficulty when the CD-R boom hits its pirate market. Successful efforts to keep enforcement of intellectual property rights up to TRIPS's standards will undoubtedly be negatively impacted by the introduction of the new and affordable technology of the CD-R onto the pirate music scene. Reconciling these two competing interests will be a monumental task.

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