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The Copyright Divide

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INTRODUCTION

A strong, robust, and dynamic copyright regime requires support, and problems arise when support is deficient. Today, there is a wide gap between copyright holders and users of copyrighted works. While copyright holders are eager to protect what they have, many users neither understand copyright law nor believe in the system. As a result, copyright piracy is rampant and illegal file sharing has become the norm rather than the exception.[1]

To protect itself against Internet pirates, the recording industry filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute in April 2003, seeking billions of dollars in damages.[2] Since then, the Recording Industry Association of America ("RIAA") has launched a mass litigation campaign against file swappers across the country. Taking advantage of the subpoena power granted under the

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[1] *See generally* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. (forthcoming 2003).

[2] *See* Frank Ahrens, *4 Students Sued over Music Sites*, WASH. POST, Apr. 4, 2003, at E1; Jon Healey, *Students Hit with Song Piracy Lawsuits*, L.A. TIMES, Apr. 4, 2003, at 1.

Digital Millennium Copyright Act ("DMCA")[3] and the precedent set by *RIAA v. Verizon Internet Services*,[4] the recording industry sent out more than a thousand federal subpoenas, with new subpoenas approved virtually every day.[5]

On September 8, 2003, the RIAA filed 261 lawsuits against individuals who illegally downloaded and distributed a large amount of music via peer-to-peer file-sharing networks, such as KaZaA, Grokster, iMesh, and Gnutella.[6] In addition, the trade association offered a complementary Clean Slate Program that grants offenders "amnesty" from RIAA's lawsuits if they admit their wrongdoing, remove all illegal music files from their computers, and promise not to illegally copy and distribute music again.[7]

Although the industry's recent approach was controversial and resulted in major criticisms from legislators, academics, civil libertarians, consumer advocates, and university officials, the RIAA's aggressive tactics are not new. Indeed, copyright holders have been known for using, or encouraging their government to use, coercive power to protect their creative works. Only a decade ago, the U.S. copyright industries lobbied their government to use strong-armed tactics to coerce China into protecting intellectual property rights.[8] Succumbing to U.S. trade pressure, the Chinese authorities eventually

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[3] 17 U.S.C. § 512(h) (2000).

[4] *In re* Verizon Internet Services, Inc., 258 F. Supp. 2d 6 (2003).

[5] *See* Benny Evangelista, *Firm Sleuths out Illegal File Sharers*, SAN. FRAN. CHRON., July 21, 2003, at E1.

[6] *See* Amy Harmon, *The Price of Music: The Overview*, N.Y. TIMES, Sept. 9, 2003, at A1 [hereinafter Harmon, *The Price of Music*]. *See also* Peter K. Yu, *Music Industry Hits Wrong Note Against Piracy*, DETROIT NEWS, Sept. 14, 2003, at 13A (discussing the RIAA's litigation strategy).

[7] *See* Clean Slate Program Description, *available at* http://www.musicunited.org/cleanSlate Desc.pdf (last visited Oct. 10, 2003).

[8] *See generally* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995); ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN CHINA: THE ROOTS OF THE PROBLEM OF ENFORCEMENT (1996); Peter K. Yu, *The Second Coming of Intellectual Property Rights in China* (Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property No. 11 2002); 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 (1997) [hereinafter Alford, *Making the World Safe for What?*]; Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1 (1996); Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081 (1996); Patrick H. Hu, *"Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81 (1996); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1 (1998); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131 (2000) [hereinafter Yu, *From Pirates to Partners*]; Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*].

raided pirate factories[9] and handed out harsh penalties, including life imprisonment and even death penalty in severe cases.[10]

The similarities between the RIAA and China stories is more than a coincidence. In fact, the two stories can be further linked to a third story, which happened two centuries ago when the United States was still a less developed country. At that time, book piracy was rampant, and the United States was considered one of the most notorious pirating nations in the world.[11] Nevertheless, despite these striking similarities, copyright scholars rarely analyze the three stories together. Indeed, commentators rarely undertake comparative analysis in the copyright field,[12] except on a few selected topics, such as moral rights,[13] database

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[9] *See* Alford, *Making the World Safe for What?*, *supra* note 8, at 143.

[10] *See* ALFORD, *supra* note 8, at 91 (stating that China had imposed death penalty on at least 4 individuals, life sentences on no fewer than 5 others, and imprisonment on some 500 people for trademark violations); Tom Korski, *China Sentences Three to Life in Prison for CD Piracy in Harshest Sanction So Far*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Dec. 11, 1997) [hereinafter Korski, *China Sentences Three to Life*].

[11] *See* JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 3 (1996) (noting that the United States used to be the biggest pirate in the late eighteenth and early nineteenth centuries); Alford, *Making the World Safe for What?*, *supra* note 8, at 146 (stating that the United States has been "notorious for its singular" and "cavalier attitude toward the intellectual property of foreigners" during the time when it was a less developed country); Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255, 255 (1997) (stating that the United States failed to observe foreign intellectual property rights during its formative period and did not sign any international intellectual property agreements until the end of the nineteenth century).

[12] Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought*, 49 AM. J. COMP. L. 429, 441 (2001) (noting that "the mere fact that national courts are now engaging in serious copyright choice of law analysis and that they are contemplating the application of foreign law requires us to know foreign law more intimately and thus enhances the need for comparative work"); *id.* at 453 (noting that "the increasingly multidimensional nature of international intellectual property litigation may mean that only a comparativist can fully appreciate these dimensions and accord them the proper weight"). *See also* Graeme B. Dinwoodie, *Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 777 (2001) (noting that "[c]ultural assimilation and the ability of digitized works to evade national regulation make it significantly more likely that modern copyright litigation will entail analysis of different national laws"); Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT'L L.J. 218, 232-41 (2003) [hereinafter Yu, *The Harmonization Game*] (noting the need for courts and lawyers to have "a deeper understanding of foreign legal systems and laws").

[13] For discussions of the tension between U.S. copyright and moral rights in Europe, see, for example, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTTENBERG TO THE CELESTIAL JUKEBOX 165-96 (1994); Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1 (1997); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86-100 (1996). *Cf.* Visual Artists Rights Act, 17 U.S.C. § 106A (2000) (providing limited moral rights to visual art); CAL. CIV. CODE § 987 (West 1998) (California Art Preservation Act); N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984) (New York Artists' Authorship Rights Act).

protection,[14] and fair use.[15]

This Article attempts to fill this lacuna by bringing together eighteenth- and nineteenth-century America, twentieth-century China, and twenty-first-century cyberspace. Using a cross-cultural, cross-systemic, cross-temporal, and cross-sectoral approach, this Article highlights the striking similarities among the three stories and argues that these similarities provide insight into the war on piracy, intellectual property law reforms, and international harmonization efforts.

Part I of this Article focuses on book piracy in eighteenth- and nineteenth-century America. This Part explores why the United States offered very limited copyright protection to foreign authors despite their efforts in "promot[ing] the Progress of Science,"[16] the constitutional basis of the U.S. copyright system. This Part notes that the support for protection of foreign authors substantially increased as American literature flourished and as local authors began to attract readers (and pirates) abroad.

Part II describes software piracy in post-Mao China. Tracing the development of the piracy problem since China's reopening in the late 1970s, this Part notes that the problem has been significantly reduced since the late 1990s. This Part attributes the improvement in intellectual property protection to the increased awareness and understanding of intellectual property rights in China and the development of

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[14] For discussions of the expediency and constitutionality of U.S. database protection legislation, see generally Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605 (2000); Malla Pollack, *The Right to Know?; Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossraods: Recent Developments and Their Impact on Science and* Technology, 14 BERKELEY TECH. L.J. 793 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); Peter K. Yu, *Evolving Legal Protection for Databases*, *at* http://www.gigalaw.com/articles/2000/yu-2000-12.html (Dec. 2000).

[15] *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 87 (2000), arguing that

> an international fair use doctrine does not currently exist in the international law of copyright and that such a doctrine is vital for effectuating traditional copyright policy in a global market for copyrighted works as well as for capitalizing on the benefits of protecting intellectual property under the free trade system.

Id.; Tyler G. Newby, Note, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633 (1999) (discussing the distinctiveness of the fair use doctrine under U.S. copyright law). *Compare* Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (holding that reverse engineering for the purpose of gaining an understanding of the unprotected functional elements of a computer program qualifies as fair use), *with* Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs art. 6(1), 1991 O.J. (L 122) 42 (permitting reverse engineering only for the purpose of "obtain[ing] the information necessary to achieve the interoperability of an independently created computer program with other programs").

[16] U.S. CONST. art. I, § 8, cl. 8.

stakeholders in the Chinese copyright system, including the emergence of the indigenous software industry and a large Internet user community.[17]

Part III examines music piracy in cyberspace today. This Part explores the impact of digital technology on music distribution and the extensive Internet piracy problem.[18] It also discusses the recent responses by the recording industry, including its MP3[19] and Napster litigation,[20] the enactment of the DMCA,[21] and the development of copy-protection technologies.[22] In addition, this Part addresses the recent development of peer-to-peer file-sharing technologies, the impact of these technologies on the ability of copyright holders to protect creative works,[23] and the increased public consciousness of intellectual property issues.[24]

Part IV looks at the three stories together and analyzes them using a cross-cultural, cross-systemic, cross-temporal, and cross-sectoral approach. Part IV.A points out that, in each of the three stories, a copyright divide exists between the stakeholders and nonstakeholders.[25] Using the copyright divide construct, this Article argues that extensive copyright piracy can be seen as a battle between the stakeholders and nonstakeholders over the change and retention of the status quo. Unless the nonstakeholders understand why copyright needs to be protected and until they become the stakeholders or potential stakeholders, they will not be eager to abide by copyright laws or consent to stronger copyright protection.[26]

Part IV.B analyzes six different factors that commentators usually emphasize to distinguish the three stories. This Part argues that none of these factors *alone* account for the problem.[27] Rather, all the different factors are collectively responsible, even though some factors at times might be more influential and determinative than others. This Part argues that policymakers will not be able to stem the piracy problem until they can develop a *comprehensive* approach that targets the various factors, as compared to a piecemeal policy that focuses on simply one or two of these factors.[28]

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17 *See infra* text accompanying notes 305-310.

18 *See infra* text accompanying notes 329-382.

19 *See* TeeVee Toons v. MP3.com, Inc., 134 F. Supp. 2d 546 (S.D.N.Y. 2001); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

20 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

21 Pub. L. No. 105-204 (1998).

22 *See infra* text accompanying notes 441-449.

23 *See infra* text accompanying notes 437-440.

24 *See infra* text accompanying notes 491-495.

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

26 *See infra* text accompanying notes 508-531.

27 *See infra* text accompanying notes 535-639.

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

To guide this policy change, Part IV.C outlines four different areas on which policymakers should focus their remedial efforts.[29] First, the stakeholders must educate the nonstakeholders about the copyright system. They need to make the nonstakeholders understand what the copyright system protects and how the system can benefit the nonstakeholders in the long run. Second, the stakeholders need to help the nonstakeholders develop a stake in the system and understand how the nonstakeholders can protect stakeholder products and receive royalties. By doing so, the stakeholders effectively transform the nonstakeholders into stakeholders or potential stakeholders. Third, it is important for the stakeholders to help strengthen intellectual property laws and develop enforcement mechanisms. Finally, if products are needed, yet unaffordable by the of majority users, the stakeholders should develop legitimate alternatives.

Part V concludes by taking a critical look at the need for international harmonization and the limits of coercive tactics used by copyright holders to fight piracy in China and on the Internet. While this Part concedes that coercive tactics are sometimes needed to undermine the influence of those factors that militate against copyright law reforms and to prevent the development of an entrenched pirate industry, these tactics are of very limited use once reform barriers are removed or the pirate industry substantially undermined.[30]

I. BOOK PIRACY IN NINETEENTH-CENTURY AMERICA

> *Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest.*
>
> — Barbara A. Ringer[31]

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29 *See* discussion *infra* Part IV.C.

30 *See* discussion *infra* Part V.

31 Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968) [hereinafter Ringer, *The Role of the United States*].

> *We care because if no intellectual property protection exists regarding technical and entertainment information, then we have little to sell to the rest of the world. In the old days of selling cars, steel, and aluminum to the rest of the world, the kind of patent, trademark and copyright laws implemented by other nations did not make a lot of difference. Their intellectual property laws were their business. Now it is our business.*
>
> — J. Thomas McCarthy[32]

The first story begins shortly after the United States declared independence. At that time, most of the books sold in the country were imported, and newspapers and periodicals carried much of the local literary output in serialized form.[33] Although the press was regulated,[34] copyright laws were virtually nonexistent.[35] Rather, printers and publishers protected their markets by securing agreements among themselves.[36] These agreements were further protected by physical and communication barriers among the colonies.[37]

As communication and transportation improved and the demand for literature increased, local publishers became concerned about the lack of protection for works published outside their home states and the inconsistent copyright protection across the country. Led by Noah Webster, the author of the first American dictionary, publishers began to lobby the federal and state legislatures to enact copyright legislation.[38]

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[32] J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 U. DAYTON L. REV. 809 (1995).

[33] S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 2.17, at 24 (2d ed. 1989).

[34] As Stephen Stewart noted: "Although the Pilgrim Fathers undertook their voyage to the American colonies to escape from religious oppression, the regulation of the press and printing generally was not very different there. 'The traditional European idea of monopolising the press to cement the social order was successfully transplanted to the American shores.'" *Id.* (quoting DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 330 (1958)).

[35] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183 (1968) (noting that "[c]opyright was not secured by law in colonial America").

[36] Barbara Ringer, *Two Hundred Years of American Copyright Law*, *in* ABA, 200 YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK & COPYRIGHT LAW 117, 124 (1977).

[37] *Id.* (noting "the fundamental difficulties of colonial transportation and communication").

[38] STEWART, *supra* note 33, § 2.17, at 24 n.4 (noting Webster's success in persuading Congress to assist his campaign for state copyright legislation); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 44 (2001) (noting that Webster "was the most effective lobbyist"); Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 Green Bag 2d 37, 37-40 (2002) (discussing Webber's lobbying efforts). As Professor Nachbar noted: "Webster not only sowed the seeds of American statutory copyright law, he also started an American copyright tradition: seeking and obtaining from Congress extensions to the term of copyright." *Id.* at 38. Nonetheless, Nachbar conceded: "Although Webster's accomplishments were profound, it's not at all clear that the adoption of general copyright laws in these early States is among his

The first state to enact such legislation was Connecticut, which passed An Act for the Encouragement of Literature and Genius in January 1783.[39] Modeled after the English Statute of Anne,[40] the Connecticut statute granted U.S. authors and their heirs and assigns "the sole liberty of printing, publishing and vending" any new books, pamphlets, maps, or charts within the State of Connecticut for two renewable terms of fourteen years.[41] Taking the cue from Connecticut, Massachusetts[42] and Maryland[43] soon enacted their own copyright legislation. The Connecticut statute eventually served as a model for Georgia and New York,[44] whereas New Hampshire and Rhode Island copied the Massachusetts statute.[45]

In May 1783, the Continental Congress passed a resolution recommending the various states to secure to U.S. authors or publishers, as well as their executors, administrators, and assigns, copyright protection in books for a minimum term of fourteen years and to grant a minimum renewal term of fourteen years to authors, if then living, or their heirs and assigns.[46] In response to this recommendation, New Jersey,[47] New Hampshire,[48] Rhode Island,[49] Pennsylvania,[50] South

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achievements." *Id.*

39 An Act for the Encouragement of Literature and Genius (Jan. 1783), *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906, at 11 (Thorvald Solberg, ed., 2d rev. ed. 1906) [hereinafter COPYRIGHT ENACTMENTS].

40 An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, ch. 19 (1709).

41 *Id.*

42 *See* An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions for Twenty-one Years (Mar. 17, 1783), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 14.

43 *See* An Act Respecting Literary Property (Apr. 21, 1783), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 15.

44 PATTERSON, *supra* note 35, at 186.

45 *Id.* at 184.

46 Resolution Passed by the Colonial Congress, Recommending the Several States to Secure to the Authors or Publishers of New Books the Copyright of Such Books (May 2, 1783), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 11. The resolution provided:

> That it be recommended to several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as to the several States may seem proper.

Id.

47 *See* An Act for the Promotion and Encouragement of Literature (May 27, 1783), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 16.

48 *See* An Act for the Encouragement of Literature and Genius, and for Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions for Twenty Years (Nov.

Carolina,[51] Virginia,[52] North Carolina,[53] Georgia,[54] and New York[55] passed legislation to protect literary property. Concerned about the divergent protection offered by other states, more than half of the state copyright statutes contained reciprocity clauses that limited copyright protection to authors from states offering similar protection.[56] By the time the Constitutional Convention was held in 1787, all but Delaware had passed copyright legislation.[57]

Unlike the Articles of Confederation, which did not offer any protection to literary and artistic property, the United States Constitution included a copyright clause, which provides: "Congress shall have Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."[58] Derived from proposals introduced by James Madison[59] and Charles Pinckney,[60] this clause was adopted in its final form without any debate.[61] As the brief and ambiguous passage in *The*

7, 1793), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 18.

[49] *See* An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions for Twenty-one Years (Dec. 1783), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 19.

[50] *See* An Act for the Encouragement and Promotion of Learning by Vesting a Right to the Copies of Printed Books in the Authors or Purchasers of Such Copies During the Time Therein Mentioned (Mar. 15, 1784), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 20.

[51] *See* An Act for the Encouragement of Arts and Sciences (Mar. 26, 1784), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 21.

[52] *See* An Act for Securing to the Authors of Literary Works an Exclusive Property Therein for a Limited Time (Oct. 1785), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 24.

[53] *See* An Act for Securing Literary Property (Nov. 19, 1785), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 25.

[54] *See* An Act for Encouragement of Literature and Genius (Feb. 3, 1786), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 27.

[55] *See* An Act to Promote Literature (Apr. 29, 1786), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 39, at 29.

[56] STEWART, *supra* note 33, § 2.17, at 24.

[57] "Since these statutes existed for less than a decade before being supplanted by the federal copyright act, and since some of them by their own terms never became operative, the copyright they provided for apparently never came into existence." PATTERSON, *supra* note 35, at 187-88.

[58] U.S. CONST. art. I, § 8, cl. 8.

[59] James Madison proposed to include the following powers in the list of Congress's enumerated powers: "To secure to literary authors their copy rights for a limited time"; "To establish an university"; "To encourage by premiums & provisions, the advancement of useful knowledge and discoveries." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 477 (Adrienne Koch ed., 1966).

[60] Charles Pinckney proposed to include the following powers in the list of Congress's enumerated powers: "To establish seminaries for the promotion of literature and the arts & sciences"; "To grant patents for useful inventions"; "To secure to authors exclusive rights for a certain time." *Id.* at 478.

[61] *See id.* at 580-81; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[A], at 1-4 (1998); Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 515-16 [hereinafter Abrams, *Copyright, Misappropriation, and Preemption*]. For discussions of the origin of the Copyright Clause, see generally Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause* (Benjamin N. Cardozo School of Law

Federalist suggests,[62] copyright was a "comparatively insignificant" issue in the public debate over the ratification of the proposed constitution.[63]

Pursuant to this newfound enumerated power, Congress enacted the first copyright statute, the Copyright Act of 1790[64] ("1790 Act"), which secured to authors, publishers, or their legal representatives two fourteen-year terms of copyright protection in books, pamphlets, maps, and charts.[65] Notorious for its discrimination against foreign authors, the Act limited copyright protection to "a citizen or citizens of these United States, or resident therein."[66] Section 5 of the Act stated explicitly:

> [N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.[67]

Although many commentators criticized the early development of U.S. copyright law for its intention to meet the needs of a less developed country while exploiting the works of developed countries,[68]

Occasional Papers in Intellectual Property No. 5, 1999); PATTERSON, *supra* note 35, at 203-12; Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929); Ralph Oman, *The Copyright Clause: "A Charter for a Living People,"* 17 U. BALT. L. REV. 99 (1987).

62 James Madison offered the following commentary in *The Federalist*:

> The utility of [the copyright] power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of the common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

THE FEDERALIST No. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961).

63 Abrams, *supra* note 61, at 516 n.38.

64 Act of May 31, 1790, ch. 15, 1 Stat. 124.

65 *Id.* § 1.

66 *Id.* Despite the Act, "foreign authors enjoyed the same common law rights as the citizen, so long as their work remained unpublished." RICHARD C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 168 (1925). Nevertheless, these common law rights were "cold comfort at a time when publication was the only profitable way to disseminate a work." Ringer, *The Role of the United States*, *supra* note 31, at 1054-55.

67 Act of May 31, 1790, *supra* note 64, § 5.

68 *See, e.g.*, RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 775 (6th ed. 1995) (pointing out that "[i]t is perhaps not surprising that a have-not country should permit and even encourage poaching on foreign works"); PATTERSON, *supra* note 35, at 199 (noting the need to protect the new nation against the established trade in England); E. PLOWMAN & M. HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 16 (1980) ("Complete with a piracy provision it can be viewed as the action of a developing country to protect its burgeoning culture while exploiting the cultural products of more developed nations."); Bender & Sampliner, *supra* note 11, at 255 (arguing that the United States did not afford intellectual property protection for non-U.S. citizens until it became a major industrial power).

the 1790 Act was not created solely for this purpose. Rather, the lack of copyright protection to foreign authors was commonplace in the late eighteenth and early nineteenth centuries.[69] At that time, many countries "did not . . . regard the piracy of foreign authors' works as unfair or immoral. Some countries, in fact, openly countenanced piracy as contributing to their educational and social needs and as reducing the prices of books for their citizens."[70]

Because the Americans and the British speak the same language, the lack of copyright protection to foreign authors in the 1790 Act was particularly damaging to English authors.[71] Even worse, English literature flourished in the post-revolutionary period and was extensively read throughout the United States.[72] Between 1800 and 1860, almost half of the bestsellers in the United States were pirated, mostly from English novels.[73] Compared to a legitimate English

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Stephen Stewart noted the unfairness of these comments to less developed countries:

> [Such commentary] seems less than fair to many developing countries like India, or the Latin American countries, who [sic] accepted in their national laws general copyright principles from the beginning and even in 1971 only insisted on compulsory licenses for strictly defined and limited purposes. The large scale piracy of the whole of English literature which took place legally during the nineteenth century in the US would have been illegal under the laws of the leading developing countries then and now.

STEWART, *supra* note 33, § 2.18, at 25 n.3.

69 *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 231 (2000) (noting that "the copyright law of many other countries at that time was not any more protective of the rights of foreign authors" than the First U.S. Copyright Act); Henry G. Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 43 (1953) ("Until a century ago, the general rule, with a few standout exceptions, was that domestic works were eligible for protection and foreign works were not.") (footnote omitted); Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 12 (1986) (noting that piracy activities "had been a long-established feature of European social and cultural life"); Ringer, *The Role of the United States*, *supra* note 31, at 1051 (noting that "international copyright protection was the exception rather than the rule").

70 SAMUELS, *supra* note 69, at 231. *See also* 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 25 (1938) ("[I]n Belgium the general belief was that such unauthorized reprints of French books without any payment to the authors was a perfectly honorable thing.").

71 STEWART, *supra* note 33, § 2.18, at 25. *See also* LADAS, *supra* note 70, at 27 (noting that "systematic piracy was committed in the United States of works published in all foreign countries, especially in England"); Henn, *supra* note 69, at 52 ("The United States had been among the most parochial of nations so far as copyright protection for published works is concerned. For over a hundred years, this nation not only denied copyright protection to published works by foreigners, . . . but appeared to encourage the piracy of such works.").

72 S. REP. NO. 134, 24th Cong., 2d Sess. (1837), *reprinted in* R.R. BOWKER, COPYRIGHT, ITS HISTORY AND LAW: BEING A SUMMARY OF THE PRINCIPLES AND LAW OF COPYRIGHT, WITH SPECIAL REFERENCE TO BOOKS 341 (1912) [hereinafter CLAY'S REPORT]. Justice Holmes lamented the general lack of interest in American literature: "In the four quarters of the globe, who reads an American book?" United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 264 (1908) (quoting Sydney Smith writing in the *Edinburgh Review* in 1820). *See also* SAMUELS, *supra* note 69, at 231 (noting that very few American authors were accorded serious attention in England in the early nineteenth century).

73 STEWART, *supra* note 33, § 2.18, at 25 (quoting JOHN WILLIAM TEBBEL, A HISTORY OF

edition, an American pirated edition cost approximately one-tenth of the total cost.[74]

In the beginning, some English authors were able to secure from American publishers courtesy copyright, an unwritten custom of self-restraint whereby each major publishing house refrained from publishing editions of a foreign work that was the subject of a publishing agreement another publishing house had reached with the author.[75] This system not only "protected the first American publisher of a foreign work from the unfettered copying of his edition, [but also] gave the author the opportunity of earning some remuneration, even if he were unable to prevent the American publication of his work in the first place."[76] By virtue of courtesy copyright, some English authors, such as Charles Dickens and Anthony Trollope, "received large sums in respect of the American sales of their works, although they did not enjoy protection under United States copyright law."[77]

However, courtesy copyright was of limited use outside the United States,[78] and it became increasingly ineffective as competition in the United States became fierce and publication was no longer limited to major publishing houses.[79] Among the English authors who were greatly concerned about the lack of copyright protection in the United States were Charles Dickens,[80] Anthony Trollope,[81] and the famous duo of Gilbert and Sullivan.[82]

BOOK PUBLISHING IN THE UNITED STATES (1972)).

74 *Id.*; VAIDHYANATHAN, *supra* note 38, at 50 (noting that "[a] London reader who wanted a copy of Charles Dickens's *A Christmas Carol* would have to pay the equivalent of $2.50 in 1843 [while a]n American Dickens fan would have to pay only six cents per copy").

75 Ricketson, *supra* note 69, at 13-14. *See also* VAIDHYANATHAN, *supra* note 38, at 52 (discussing courtesy copyrights).

76 Ricketson, *supra* note 69, at 14.

77 *Id.*

78 *Id.* (noting that courtesy copyright "was not really of great significance outside the American market").

79 *See* VAIDHYANATHAN, *supra* note 38, at 52-53 (discussing the emergence of cheap library editions). As Professor Vaidhyanathan described:

> The paper was uniformly cheap and flimsy, the typesetting sloppy, and the format hard to read. Some of the earlier editions lacked covers to keep their costs low. But soon the cheap publishers realized that the spine was in many cases the most attractive—and most visible—part of a book. So by the 1880s, most of the cheap books libraries appeared in cloth bindings at a slightly higher price, but with the same cheap paper inside. Needless to say, none of these publishers were part of the eastern seaboard elite club of publishers who were led by Henry Holt [a leading publisher at the time]. So none of them conformed to the courtesy principle.

Id. at 53.

80 *See* Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, 10 CARDOZO ARTS & ENT. L.J. 523 (1992) (demonstrating how Dickens's novel reflects the author's distress over the United States' lack of copyright protection to British authors).

81 SAMUELS, *supra* note 69, at 238-39 (discussing Anthony Trollope's copyright problems in the United States).

82 *Id.* at 232-34 (discussing Gilbert and Sullivan's copyright problems in the United States).

In 1842, Lord Palmerston, the British prime minister, attempted to initiate high-level contacts with the American government in an effort to induce the United States to agree to a copyright treaty.[83] His effort failed. In that same year, Charles Dickens traveled to the United States to plead for the protection of British works. Frustrated by his American experience, Charles Dickens recounted his unsuccessful trip:

> I spoke, as you know, of international copyright, at Boston; and I spoke of it again at Hartford. My friends were paralysed with wonder at such audacious daring. The notion that I, a man alone by himself, in America, should venture to suggest to the Americans that there was one point on which they were neither just to their own countrymen nor to us, actually struck the boldest dumb! It is nothing that of all men living I am the greatest loser by it. It is nothing that I have to claim to speak and be heard. The wonder is that a breathing man can be found with temerity enough to suggest to the Americans the possibility of their having done wrong. I wish you could have seen the faces that I saw, down both sides of the table at Hartford, when I began to talk about Scott. I wish you could have heard how I gave it out. My blood so boiled as I thought of the monstrous injustice that I felt as if I were twelve feet high when I thrust it down their throats.[84]

Unlike Charles Dickens, who "strongly declared his conviction that nothing would induce an American to give up the power he possesses of pirating British literature," Anthony Trollope was more optimistic and did not blame the American people.[85] Rather, Trollope placed the blame squarely on "the book-selling leviathans, and . . . those politicians whom the leviathans [were] able to attach to their interests."[86]

In 1837, Senator Henry Clay submitted a report[87] recommending the enactment of international copyright legislation that sought to "extend U.S. copyright protection to British and French authors under rigorous conditions."[88] The report included an address and petition by several prominent British authors,[89] which maintained that British

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See also Carte v. Ford, 15 F. 439 (C.C.D. Md. 1883) (The *Iolanthe* Case); Carte v. Duff, 25 F. 183 (C.C.S.D.N.Y. 1885) (The *Mikado* Case); Carte v. Evans, 27 F. 861 (C.C.D. Mass. 1886).

83 *See* VAIDHYANATHAN, *supra* note 38, at 51.

84 Letter from Charles Dickens to John Foster (Feb. 24, 1842), *reprinted in* Hamish Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-V.L.A. J.L. & ARTS 89 (1986).

85 ANTHONY TROLLOPE, AN AUTOBIOGRAPHY 308 (Michael Sadleir & Frederick Page eds., Oxford Univ. Press 1980) (1883).

86 *Id.* Trollope continued: "It is the large speculator who becomes powerful in the lobbies of the House, and understands how wise it may be to incur a great expenditure either in the creation of a great business, or in protecting that which he has created from competition." *Id.*

87 CLAY'S REPORT, *supra* note 72.

88 Ringer, *The Role of the United States*, *supra* note 31, at 1055.

89 *See* CLAY'S REPORT, *supra* note 72.

authors were "exposed to injury in their reputation and property"[90] and that their works were "liable to be mutilated and altered, at the pleasure of [American] booksellers, or of any other persons who may have an interest in reducing the price of the works, or in conciliating the supposed principles or prejudice of purchasers in [the United States]."[91] The petition also appealed to the national interests of American authors and noted the lack of incentives for American publishers to afford to local authors a fair remuneration for their labors when these publishers could obtain foreign works "by unjust appropriation, instead of by equitable purchase."[92]

In addition, the petition warned that the lack of effective protection for foreign authors may confuse the American public "as to whether the books presented to them as the works of British authors . . . are the actual and complete productions of the writers whose names they bear."[93] The petition concluded with an emotional reminder about Walter Scott, who was extensively read in the United States and might have been able to survive from "the burden of debts and destructive toils" had he received remuneration from the American public for his creative endeavors.[94] Despite Senator Clay's efforts, Congress had yet to grant protection to foreign authors.[95]

In the meantime, American literature began to flourish, and stakeholders began to emerge in the United States. At that time, many American authors, such as James Fenimore Cooper, Ralph Waldo Emerson, Nathaniel Hawthorne, Washington Irving, Henry Wadsworth Longfellow, Herman Melville, Edgar Allan Poe, Harriet Beecher Stowe, Henry David Thoreau, and Walt Whitman, had attracted readership in England and other European countries.[96] Because most copyright laws were made conditional upon reciprocity in other countries, American authors continued to be denied their rights under foreign law just as foreign authors were denied rights under U.S. law.[97]

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90 *Id.* ¶ 1.

91 *Id.* ¶ 4.

92 *Id.* ¶ 8.

93 *Id.* ¶ 9.

94 *Id.* ¶ 10.

95 "The Clay bill was reintroduced several times between 1837 and 1842, but never reached a vote." Ringer, *The Role of the United States*, *supra* note 31, at 1055. Likewise, "[u]nsuccessful attempts to establish copyright treaty relations with Great Britain were made in 1837, 1863, and again in 1880-81, foundering each time on the opposition of American publishers who believed that their financial success depended upon being able to sell cheap reprints of British books." Sandison, *supra* note 84, at 92.

96 SAMUELS, *supra* note 69, at 231.

97 *Id.* at 232. Max Kempelman noted the lack of protection granted to American authors in England:

> Longfellow asserted a few years before his death that he had twenty-two publishers in England and Scotland, but that "only four of them took the slightest notice of my existence, even so far as to send me a copy of the book." Harriet Beecher Stowe too is

Moreover, the lack of copyright protection had created a lot of cheap imports that competed unfairly and directly against works written by indigenous authors.[98] American authors and a growing number of publishers became very concerned about the situation and sought to obtain "a more level playing field for their editions of American works."[99] Some openly discussed how Congress had failed to serve the interests of the American people by keeping foreign works cheap. As Mark Twain wrote in *Century Magazine* in 1886:

> The statistics of any public library will show that of every hundred books read by our people, about seventy are novels—and nine-tenths of them foreign ones. They fill the imagination with an unhealthy fascination with foreign life, with its dukes and earls and kings, its fuss and feathers, its graceful immoralities, its sugar-coated injustices and oppressions; and this fascination breeds a more or less pronounced dissatisfaction with our country and form of government, and contempt for our republican commonplaces and simplicities; it also breeds a longing for something "better" which presently crops out in the diseased shams and imitations of the ideal foreign spectacle: Hence the "dude."[100]

Fortunately, conditions upon which the rights of authors were based began to change in Europe.[101] In 1828, Denmark issued a decree

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reported to have received no return whatever for her *Uncle Tom's Cabin*, even though it sold more than 1/2 million copies in Great Britain during its first year alone.

Max Kempelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 413, 413 (1947). Nonetheless, as Professor Samuels pointed out:

> It was apparently possible under the existing laws for particularly resourceful Americans to obtain protection in England by simultaneous publication there, or for resourceful British citizens to obtain protection in the United States by simultaneous publication here, but protection apparently required that the author travel to the other country and reside there at the time of publication. Or an author might be able to convey the publication rights to a citizen of the other country before publication; but that rarely led to a very reasonable payment.

Id.

98 Max Kempelman explained in detail the plight of American authors:

> The practice hurt American authors . . . for their works had to meet the unfair competition of British books which were cheaper because they were not paid for. American readers were less inclined to read the novels of Cooper or Hawthorne for a dollar when they could buy a novel of Scott or Dickens for a quarter. . . . American men of letters were, therefore, apart from any other considerations, unable to rely on literature for a livelihood. Longfellow and Lowell were college professors; Hawthorne was in the government service; Emerson engaged in lecturing. And American readers were weaned on a literature not their own.

Id. at 413. *See also* Ringer, *The Role of the United States*, *supra* note 31, at 127 ("By protecting only works of American authors, the new law sanctioned the unrestrained reprinting of popular English writers, to the disastrous competitive disadvantage of the very indigenous American literature it was pledged to encourage.").

99 SAMUELS, *supra* note 69, at 235.

100 VAIDHYANATHAN, *supra* note 38, at 61 (quoting Mark Twain).

101 Stephen Ladas described the changing conditions:

> The nineteenth century brought profound changes in the conditions upon which the rights of authors were based. In the political field, the liberty of the press, the

to extend the protection of authors' rights to foreign works on the condition of reciprocity.[102] In addition, some countries began to negotiate bilateral treaties on the basis of strict reciprocity.[103] Prussia was the first country to enter into a bilateral copyright treaty. From 1827 to 1829, it entered into thirty-two bilateral agreements with other German States.[104] In 1840, Austria and Sardinia became the first autonomous states to enter into a bilateral copyright agreement.[105] Predominant powers like France[106] and Great Britain[107] soon followed. By the middle of the nineteenth century, a network of bilateral copyright conventions among major European powers had been established.[108]

Despite this network of copyright treaties, authors could expect very little uniformity in their protection other than what was offered in their home country.[109] This lack of uniformity was further complicated by the fact that the duration of a copyright treaty was sometimes tied to a broader commercial treaty.[110] Thus, copyright protection would be

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> destruction of the division of social classes, the dissemination of education, the reinforcement of national unity by the use of national languages instead of separate dialects; in the social and economic field, new processes of reproduction of literary and artistic works, the expansion of the press, the creation of new universities, libraries, museums and expositions, the development of bookselling and the wider circulation of books, the learning of foreign languages and the more general travelling of people from one country to another—all these facts created new conditions for the works of authors and artists. Writing and the cultivation of the arts came to be a real profession and those engaged in it expected to be supported by it and no longer by Maecenas and Royal Courts. As a result authors began to demand a fuller protection of their rights, and to raise much outcry against the injustice done them by the pirating of their works in foreign countries.

1 LADAS, *supra* note 70, at 24.

102 *Id.* at 22. "This [decree] is admitted to be the first provision for international protection of authors' rights, and it is the first enactment in which the principle of reciprocity is introduced in this field." *Id.*

103 Ricketson, *supra* note 69, at 14.

104 1 LADAS, *supra* note 70, at 44. "These early German agreements . . . were of a special character, as their purpose was to fill the gap left by the failure of the legislature of the Germanic Confederation to enact a federal copyright law." Ricketson, *supra* note 69, at 14-15.

105 1 LADAS, *supra* note 70, at 44.

106 France concluded a copyright convention with Sardinia in 1843. *Id.* "In 1851 France entered into conventions for the protection of literary and artistic property with Great Britain, Portugal, and Hanover." *Id.* at 45 (footnotes omitted).

107 In 1837, Great Britain passed the International Copyright Act of 1837. On the basis of this statute, Great Britain entered into a copyright convention with Prussia in 1846. This Convention was further extended to ten German States in 1847 and two more in 1853. *Id.* at 45. By 1886, Great Britain had entered into copyright conventions with Belgium, France, Germany, Italy, and Spain. *Id.* at 49.

108 Ricketson, *supra* note 69, at 15. "By 1886, there was an intricate network of bilateral copyright conventions in force between the majority of European states, as well as with several Latin American countries. Of these, France was party to the most agreements (13), followed closely by Belgium (9), Italy and Spain (8 each), the United Kingdom (5) and Germany (5)." *Id.*

109 *Id.* at 16.

110 *See* 1 LADAS, *supra* note 70, at 66-67; Ricketson, *supra* note 69, at 15.

deeply affected if the commercial treaty was revoked or renegotiated, and "authors were continuously exposed to the danger of forfeiting protection of their rights."[111] Even worse, some copyright treaties contained most-favored-nation clauses,[112] which allowed a contracting party to enjoy the more favorable benefits the other party granted to a third party in another treaty. Although these clauses did not result in any loss of protection for authors, they made it difficult for authors to ascertain the level of protection they would receive in a particular country.[113] As a result, authors, publishers, and policymakers began to look for better solutions.

In 1852, France issued the Decree of March 28, 1852,[114] unilaterally extending copyright protection to all works regardless of their country of origin.[115] The Decree can be attributed to three factors. First, the French believed that authors' rights were rooted in natural rights and "should [therefore] not be subject to artificial restraints such as nationality and political boundaries."[116] Second, France was concerned about its failure to negotiate bilateral treaties with Belgium and the Netherlands—"the two principal 'hotbeds' of French piracies"[117]—and "therefore hoped that the unilateral grant of protection to authors from these countries in France would 'shame' them into responding in like manner."[118] Third, the French at that time believed that "bargaining was not the best method of securing international protection of authors' rights, and that if France should begin declaring that piracy of a foreign work in France was a crime punishable by the law, the other governments would be more willing to take the same step."[119] Although it is hard to assess the impact and effectiveness of the 1852 Decree, the decree seemed to have improved France's copyright relations with other countries,[120] in particular Belgium and the

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111 1 LADAS, *supra* note 70, at 67.

112 *Id.* *See* Ricketson, *supra* note 69, at 15-16.

113 Ricketson, *supra* note 69, at 16.

114 Decree of March 28, 1852.

115 *Id.* "This remained a part of French law until the principle of reciprocity was introduced by Decree No. 67181 of Mar. 6, 1967." Ringer, *The Role of the United States*, *supra* note 31, at 1052.

116 Ricketson, *supra* note 69, at 14.

117 1 LADAS, *supra* note 70, at 27.

118 Ricketson, *supra* note 69, at 14.

119 1 LADAS, *supra* note 70, at 27. The 1852 Decree prohibited the counterfeiting in French territory of works published in foreign countries, as well as the sale, exportation, and transportation of counterfeited works. The Decree further required that no prosecution be instituted in France unless the author complied with the formality requirement prescribed under French law.

120 "During the decade from 1852 to 1862 France was able to conclude twenty-three treaties for the reciprocal protection of authors' rights. . . . In the previous decade she had been able to conclude but four treaties. Two of the treaties concluded after 1852 were with Belgium (August 22, 1852) and Holland (March 29, 1855). . . ." *Id.* at 29.

Netherlands, and accelerated the movement toward a multilateral copyright system.[121]

Driven by the impetus of the French Decree, authors and artists met at the Congress on Literary and Artistic Property in Brussels in 1858 to discuss the international protection of authors' rights.[122] More than three hundred members attended,[123] and fourteen countries were represented.[124] Three years later, a new Congress was called in Antwerp to induce countries to adopt uniform legislation that would provide authors "the greatest possible protection."[125] Although no more international congresses were held for several years after the Antwerp meeting, "important national meetings of authors and artists were held in several countries, particularly France and Germany, and the number of bilateral conventions that were made during this period increased rapidly."[126]

Two decades later, artists met at another Congress in Antwerp to celebrate the tercentenary of Rubens's birth.[127] While the Congress was in session, the attendees adopted a unanimous resolution to call upon the recently established Institute of International Law "to draft a project of world law on the protection of artistic works."[128] Despite the resolution and subsequent meetings by the Institute, no further progress was made.[129]

At the Universal Exposition of 1878 in Paris, the Literary Congress, which was presided over by French novelist Victor Hugo, met and "decided to create an international association of literary societies and authors.[130] This association soon extended its membership to include artists and expanded its role to cover both artistic and literary property. Reflecting its new, expanded role, the Association changed its name to the International Literary and Artistic Association, which is commonly known today as A.L.A.I., the abbreviation of its French name, *Association Littéraire et Artistique Internationale.*

In 1882, the Association met in Rome, and Paul Schmidt of the

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121 Ringer, *The Role of the United States*, *supra* note 31, at 1052 (noting that France's unilateral initiative accelerated the movement toward a multilateral copyright system even though it did not set a pattern).

122 *See* 1 LADAS, *supra* note 70, at 71-72 (discussing the Brussels Congress of 1858).

123 The attendees included "54 delegates of literary societies, 47 delegates of universities, 21 economists, 62 authors, 24 artists, 19 journalists, 29 lawyers, 29 librarians and printers, and about 40 members of political assemblies, magistrates etc." *Id.*

124 "The countries represented were Belgium, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Switzerland and the United States of America." *Id.* at 72.

125 *Id.* (discussing the Congress of 1861).

126 Ricketson, *supra* note 69, at 9.

127 1 LADAS, *supra* note 70, at 72-73 (discussing the Congress of 1877).

128 *Id.*

129 *Id.* at 73.

130 *Id.* at 74.

German Publishers Association proposed to establish a Union to protect literary property.[131] He "called upon the Executive Council of the Association to initiate a discussion of this matter by the press of all countries" and to convene a conference that would include all interested parties and whose aim would be to create a Union.[132] The Association unanimously approved the proposal, and the conference met in Berne in September 1883.[133] At the Berne meeting, a draft convention, which consisted of ten articles, was proposed,[134] and Switzerland agreed to communicate the project to "all civilized countries."[135]

For the next three years, intergovernmental conferences were held in Berne.[136] Although the meetings were not well received in the very beginning and countries disagreed as to how they should protect authors' rights, the participant countries eventually became receptive to the idea of having a multilateral convention. When the final conference met on September 5, 1886, twelve countries participated in the conference.[137] Except Japan[138] and the United States,[139] which only attended the conference as observers, all the participant countries signed

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131 Sam Ricketson considered Dr. Schmidt's motion "cannily conceived." As Ricketson described:

> [The motion] began by saying that this was not the time or place to begin discussion of a new international instrument on copyright. Widespread discussions and consultations were needed before this could be done, but with a view to beginning this process, the motion charged the office of ALAI with the task of undertaking:
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> > the necessary measures for initiating, in the press of all countries, as extensive and profound discussion as possible on the question of the formation of a Union of literary property, and for arranging at a date to be subsequently fixed, a conference composed of the organs and representatives of interested groups, to meet to discuss and settle a scheme for the creation of a Union of literary property.

Ricketson, *supra* note 69, at 19-20.

132 1 LADAS, *supra* note 70, at 75.

133 *Id.*

134 Ringer, *The Role of the United States*, *supra* note 31, at 1052.

135 Thorvald Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 81 (1926). "The Swiss Government did not submit the project adopted by the Congress of the International Association. It substituted a more complete draft convention of eighteen articles, which, however, did not differ fundamentally from that of 1883." 1 LADAS, *supra* note 70, at 77.

136 For a discussion of the intergovernmental conferences, see *id.* at 76-83.

137 These twelve countries included Belgium, France, Germany, Haiti, Italy, Japan, Liberia, Spain, Switzerland, Tunisia, the United Kingdom, and the United States.

138 Japan joined the Berne Convention in 1899 and became the first Asian country to do so.

139 Although the United States did not sign the original Berne Convention, its delegate, Boyd Winchester, held out the promise of accession if the circumstances should become appropriate:

> Whilst not prepare to join the proposed Convention as a full Signatory, the United States does not thereby wish to be understood as opposing the measure in any way, but on the contrary, desires to reserve without prejudice the privilege of future accession to the Convention, should it become expedient and practicable to do so .... This position and attitude of the United States is one of expectancy and reserve.

Ricketson, *supra* note 69, at 29-30. Little did the other signatory countries know at that time that the United States would not join the Berne Convention until more than a century later. The United States joined the Berne Convention in 1989.

the final instrument.[140] Upon ratification,[141] the Berne Convention for the Protection of Literary and Artistic Works[142] ("Berne Convention") entered into force on December 5, 1887.

The original Berne Convention was, by modern standards, "a modest beginning."[143] Nonetheless, it created "the first truly multilateral copyright treaty in history... [and] established some important basic principles."[144] First, the Convention created a "Union for the protection of authors over their literary and artistic works,"[145] which has an independent existence regardless of its membership[146] and remains "open to all states without restrictions, as long as they were prepared to comply with the obligations embodied therein."[147] Second, in lieu of reciprocity, the Convention adopted the principle of national treatment, which requires member states to grant to foreigners the same rights as they grant to their own nationals.[148] Third, the Convention provided merely *minimum* protection for translation[149] and public performance rights.[150] By doing so, it provided member states freedom to augment protection through other bilateral arrangements[151] while leaving room for further expansion of these minimum rights in subsequent revisions.[152]

Contemporaneously with the development of the Berne Union, countries in the American continent were exploring the possibility of creating Pan-American copyright conventions in a similar fashion to

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140 1 LADAS, *supra* note 70, at 82-83 (discussing the Final Conference of 1886).

141 Nine of the ten signatory countries ratified the Berne Convention. Liberia did not ratify the original Berne Convention, but acceded to the Convention in 1908.

142 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *reprinted in* 1 LADAS, *supra* note 70, at 1123-34. For a comprehensive discussion of the Berne Convention, see generally SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1886-1986 (1987). See also Symposium, *Conference Celebrating the Centenary of the Berne Convention*, 11 COLUM.-VLA J.L. & ARTS 1 (1986), for an excellent symposium on the Berne Convention.

143 Ringer, *The Role of the United States*, *supra* note 31, at 1053.

144 *Id.* *See* 1 LADAS, *supra* note 70, at 86 (noting that the Berne Convention "was a great step ahead in securing to authors and artists a more complete protection than they ever enjoyed up to that time in the international field.").

145 Berne Convention, *supra* note 142, art. I.

146 STEWART, *supra* note 33, § 5.06, at 101.

147 Ricketson, *supra* note 69, at 9.

148 Berne Convention, *supra* note 142, art. II.

149 The original Berne Convention required member states to protect translation rights for a minimum term of ten years. *Id.* art. V.

150 The original Berne Convention mandated that national treatment be applied to the public representation of dramatic or dramatico-musical works, to the public performance of an unpublished musical work, and to the public performance of a published musical work provided the author had expressly declared his intention to forbid public performance of the work. *Id.* art. IX.

151 Ricketson, *supra* note 69, at 22, 28.

152 The Berne Convention underwent revisions in 1908, 1928, 1948, 1967, and 1971. For a short discussion of the various revisions of the Berne Convention, see H.R. REP. NO. 609, 100th Cong. (1988).

what European countries did in Berne.[153] Backed by strong pressure from American authors and a growing number of publishers,[154] Congress actively considered proposals to provide reciprocal copyright protection to foreign authors within the United States. In 1891, Congress finally enacted the International Copyright Act of March 3, 1891,[155] which was commonly referred to as the Chace Act. Under this Act, foreign authors received copyright protection when the President proclaimed that their home country provided American citizens with "the benefit of copyright on substantially the same basis as its own citizens" or that such a country was a party to an international agreement that provided reciprocal copyright protection to its members and to which "the United States may, at its pleasure, become a party."[156]

Concerned about the threat from foreign, particularly British, publishers,[157] the American publishing industry demanded a compromise.[158] Under the Chace Act, authors could only secure

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153 Ringer, *The Role of the United States*, *supra* note 31, at 1060.

154 1 LADAS, *supra* note 70, at 27.

155 Ch. 565, 26 Stat. 1106 [hereinafter Chace Act].

156 *Id.* § 13. Section 13 of the Chace Act provides:

> That this act shall apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party to such agreement.

Id. "This system [of Presidential proclamations] has proved cumbersome and ineffective in comparison with the simplicity, certainty, and other advantages offered by multilateral arrangements." Ringer, *The Role of the United States*, *supra* note 31, at 1058. *See also* Roger C. Dixon, *Universal Copyright Convention and United States Bilateral Copyright Arrangements*, *in* UNIVERSAL COPYRIGHT CONVENTION ANALYZED 113, 118-23 (T. Kupferman & M. Foner eds., 1955) (discussing the advantages of the Universal Copyright Convention over the system of bilateral proclamation arrangements).

157 As Professor Samuels explained:

> What [the American publishers] were really afraid of was that the foreign, primarily British, publishers, would "ride the coattails" of the foreign authors' rights. Once a British edition of a book had been printed, the British publishers would export the edition to the United States, and, under power of the newly granted rights, would extend the monopoly that the British publishers had obtained from their British authors. And since the net flow of works was still from England to the United States, the threat to the powerful American publishing interests was great.

SAMUELS, *supra* note 69, at 236.

158 Initially, the printers' unions in the major eastern cities opposed granting copyright protection to foreign authors. However, they changed their position as printers were increasingly filled with American women:

> As book prices spiraled downward, squeezing profits from the established firms, the newer "cheap books" publishers had to cut costs as well. Many operated in cities where the printers' unions were weak, and most quickly abandoned unionized white men who were unwilling to print and bind books for pennies per day. Instead, many of the cheap publishers employed nonunion women and shared and reused printing plates to set type. The printers' unions realized that while the lack of international copyright was protecting the jobs of more American printers, the workers who filled those jobs were the wrong kind—women instead of men. By the late 1880s, the unions flipped

copyright by registering the work before publication and by depositing two copies of the work on or before the date of publication anywhere.[159] As far as "books, photograph, chromo or lithograph" were concerned, the Act included a manufacturing clause, requiring the two deposit copies be "printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."[160] Such a requirement "granted the foreign *authors* the rights that they demanded, while still denying foreign *publishers* any rights."[161] Because of the manufacturing clause, many commentators found the Chace Act "illusory."[162]

Since the introduction of the Chace Act, Congress has made major revisions to the 1909[163] and 1976 Copyright Acts[164] and has since abolished the manufacturing clause[165] and made the copyright notice optional.[166] At the international level, the United States has joined the Mexico City Convention of 1902,[167] the Buenos Aires Convention of 1910,[168] the Universal Copyright Convention,[169] and the Berne Convention[170] and has ratified the 1996 WIPO Internet Treaties.[171] In addition, as a member of the World Trade Organization ("WTO"), the United States abides by the Agreement on Trade-Related Aspects of

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sides and joined the major publishers and authors in support of some measure of international copyright.

VAIDHYANATHAN, *supra* note 38, at 55.

159 Chace Act, *supra* note 155, § 3.

160 *Id.*

161 SAMUELS, *supra* note 69, at 236.

162 *Id.* at 234; DEWOLF, *supra* note 66, at 169 (noting that the manufacturing clause "very much diminished the practical value of the" grant of copyright protection to foreigners).

163 Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

164 17 U.S.C. §§ 101-803 (2000).

165 The manufacturing clause retired in 1986. *See id.* § 601.

166 *See id.* § 401(a).

167 Mexico City Convention of 1902, *done* Jan. 27, 1902, 35 Stat. 1934. On April 9, 1908, the Mexico City Convention of 1902 became effective among Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, and the United States. Henn, *supra* note 69, at 53.

168 Buenos Aires Convention of 1910, *done* Aug. 11, 1910, 38 Stat. 1785, 155 L.N.T.S. 179. On July 13, 1914, the Buenos Aires Convention became effective. Henn, *supra* note 69, at 55.

169 Universal Copyright Convention, Sept. 6, 1952, *revised at Paris* July 24, 1971, 25 U.S.T. 1341.

170 *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.). *See also* Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47 (1989) (commenting on the short-term and long-term international effects of the United States' adherence to the Berne Convention); David Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27 (1989) (expressing the disappointment of the United States' minimalist approach to implementing the Berne Convention).

171 WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996).

Intellectual Property Rights[172] and is subject to the WTO dispute settlement procedure.[173]

Today, the United States is no longer the notorious pirate it was in the eighteenth and nineteenth centuries. Rather, it has become the champion of literary and artistic property and one of the predominant powers advocating strong intellectual property protection around the world.[174] Not only was it responsible for putting intellectual property on the international trade agenda,[175] but it also applies continual and constant pressure to induce foreign countries, in particular less developed countries, to reform their intellectual property regimes.[176] Within a hundred years, the United States has been transformed from the most notorious pirate to the most dreadful police.[177]

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172 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. 1197 (1994) [hereinafter TRIPs Agreement].

173 Article 64 of the TRIPs Agreement requires that all intellectual property disputes arising under the Agreement be settled by the dispute settlement procedure provided in the General Agreement of Trade and Tariffs. *Id.* art. 64, 33 I.L.M. at 1221.

174 For an interesting discussion of why the United States underwent a 180-degree change in its approach toward intellectual property protection, see McCarthy, *supra* note 32.

175 *See* Assafa Endeshaw, *Commentary: A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 337 (1996) (noting the United States' success "in placing intellectual property on an arguably 'international' pedestal"); Reichman & Samuelson, *supra* note 14, at 97 ("Universal intellectual property standards embodied in the TRIPs Agreement had become enforceable within the framework of a World Trade Organization, largely as a result of sustained pressures by a coalition of powerful manufacturing associations in Europe, the United States, and Japan.") (footnote omitted).

176 *See* 19 U.S.C. § 2242(a)(1)(A) (2000) (granting the United States Trade Representative power to investigate and identify foreign nations that do not provide adequate intellectual property protection or that deny American intellectual property goods fair or equitable market access); Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 39 (1995) (discussing Special 301 actions in Taiwan, China, and Thailand); Yu, *From Pirates to Partners*, *supra* note 8, at 140-48 (discussing the United States' success in using section 301 sanctions to pressure China to reform its intellectual property regime).

177 DEBORA J. HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS 79 (1999).

II. SOFTWARE PIRACY IN TWENTIETH-CENTURY CHINA

Although scholars both East and West credit the Chinese with having contributed paper, movable type, and ink to humankind, China has yet to develop comprehensive protection for what is created when one applies inked type to paper. To be sure, this has not been for a lack of effort in promulgating formal legal protections for intellectual property. . . . [Recent] developments notwithstanding, protection for intellectual property remains closer to rhetoric than reality on the Chinese mainland, and problems persists across the Taiwan Straits.

— William P. Alford[178]

We take copyright violations very seriously, but when it comes to copying a disk, most Chinese people don't see what's wrong.

— Xu Guoji[179]

[Building a copyright system is] like building a house. . . . You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time.

— Li Changxu[180]

The second story takes place on the other side of the Pacific Ocean more than a century later. Like the first, this story concerns a less developed country that is struggling to compete with other members of the international trading community. Unlike the first story, however, the protagonist of this one has a different political, social, economic, cultural, ideological, and historical background.[181] Rather than being a newly independent state, the country has more than 4000 years of history and is struggling with both internal and external problems.

After decades of imperialism, warlordism, wars, famines, revolutions, and political turmoil, China finally regained stability in the late 1970s. In December 1978, the Chinese Communist Party reopened the country to the international community, reversing Mao Zedong's seclusion policy, which was in force since 1958.[182] Unlike Mao, Deng

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178 ALFORD, *supra* note 8, at 1.

179 Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 (quoting Xu Guoji, senior official in Shanghai's Industrial and Commercial Administration).

180 Marcus W. Brauchli & Joseph Kahn, *Intellectual Property: China Moves Against Piracy as U.S. Trade Battle Looms*, ASIAN WALL ST. J., Jan. 6, 1995, at 1 (quoting Li Changxu, head of China United Intellectual Property Investigation Center).

181 *See* Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 16-37 (describing the various differences between China and the West).

182 Professor Hsü described the improvement in China's foreign trade since the open-door policy:

During the first decade of the People's Republic (1949-59), China maintained

Xiaoping believed in a pragmatic approach. Instead of putting "politics in command," Deng saw economic wealth as the foundation of China's power[183] and realized that China could not modernize in isolation without the benefits of foreign science, technology, capital, and management skills.[184] Thus, Deng and other leaders vigorously pushed for the Four Modernizations,[185] the establishment of Special Economic Zones,[186] and the renewal of diplomatic and commercial ties with the United States, Japan, and other Western developed countries.[187]

Among the earliest treaties signed shortly after China's reopening was the Agreement on Trade Relations Between the United States of America and the People's Republic of China.[188] This Agreement culminated from the improving relationship between the two countries[189] and covered a large variety of areas, which ranged from establishing businesses to enabling banking transactions and from maintaining trade and diplomatic ties to facilitating cultural exchanges.[190]

In the context of intellectual property, this Agreement provided that "each Party shall seek, under its laws and with due regard to

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diplomatic and commercial relations only with the Soviet Union and the Eastern European satellite states. There was no trade between China and the United States. After the Sino-Soviet split in 1960, China became extremely isolated in the international community, simultaneously facing both the Soviet Union and the United States as potential enemies. It was not until after the visit of President Richard Nixon to China in 1972 that limited commercial relations began. In 1972 American-Chinese trade amounted to only $92 million, but it rapidly grew to $1,189 million in 1978, $5,478 million in 1981, $8 billion in 1986, and $13.5 billion in 1988, amounting to approximately 10 percent of China's total foreign trade.

IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 858 (6th ed. 2000).

183 YONGNIAN ZHENG, DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY AND INTERNATIONAL RELATIONS 17 (1999); *id.* ("According to Deng, whether China could have a rightful place in the world of nations depended on China's domestic economic development.").

184 HSÜ, *supra* note 182, at 858.

185 The Four Modernizations aimed to develop China's world-class strength in agriculture, industry, science and technology, and national defense by 2000. See *Id.* at 803-14, for a comprehensive overview of the Four Modernizations.

186 The special economic zones seek to experiment with new economic forms within the framework of "socialist modernization." These zones allow for a substantial role for foreign investment in the private economy. Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 104 n.293 (1999) [hereinafter Yu, *Succession by Estoppel*]. *See also* George T. Crane, *'Special Things in Special Ways': National Economic Identity and China's Special Economic Zones, in* CHINESE NATIONALISM 148 (Jonathan Unger ed., 1996) (exploring China's economic identity as revealed in debates surrounding the establishment and expansion of special economic zones).

187 *See id.* at 858-69 for a discussion of the Open Door Policy adopted by the Chinese Communist Party in December 1978.

188 Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652 [hereinafter 1979 Agreement].

189 *See* HSÜ, *supra* note 182, at 785 (discussing the straining relationship between China and the United States during the 1970s).

190 *See id.*

international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party."[191] The Agreement also provided that "each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party."[192]

By virtue of this Agreement, "China assumed an international legal obligation for intellectual property rights protection [even] before it had established a domestic intellectual property protection system."[193] In 1980, China became a member of the World Intellectual Property Organization ("WIPO"). Five years later, China joined the Paris Convention for the Protection of Industrial Property.[194] In addition, China promulgated a new trademark law[195] in 1982 and a new patent statute[196] in 1984. Notwithstanding these new laws and multilateral agreements, China afforded authors and inventors very limited protection.[197]

At that time, Chinese leaders were still very reluctant to introduce private property, as they were concerned about the conflict intellectual property rights would create within the socialist economic system.[198] Thus, instead of creating new rights to protect individual authorship and inventions,[199] the new intellectual property statutes were drafted primarily to rehabilitate authors, inventors, and scientists by enhancing their position through legal recognition[200] while promoting "socialist

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191 *Id.* art. VI (3), 31 U.S.T. at 4658.

192 *Id.* art. VI (5).

193 HONG XUE & CHENGSI ZHENG, SOFTWARE PROTECTION IN CHINA: A COMPLETE GUIDE 5 (1999) [hereinafter XUE & ZHENG, SOFTWARE PROTECTION IN CHINA].

194 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last revised at the Stockholm Revision Conference*, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

195 Trademark Law of the People's Republic of China, *translated in* THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 305 (1987).

196 Patent Law of the People's Republic of China, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986, at 65 (1987).

197 Although the new trademark and patent laws granted individuals rights over their creations and inventions, these laws were designed mainly to promote "socialist legality with Chinese characteristics." ALFORD, *supra* note 8, at 70. Uneasy about the introduction of private property and the potential conflict between intellectual property rights and the national interest, the Chinese government placed substantial limits on the rights granted under the new statutes. *Id.*

198 *See* ALFORD, *supra* note 8, at 70.

199 Under the General Principles of the Civil Law of 1986, "intellectual property rights are classified as a kind of civil right, independent of property rights and personal rights." XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 4. *See also* General Principles of the Civil Law of 1986, arts. 94-97, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986, *supra* note 196.

200 ALFORD, *supra* note 8, at 70 (arguing that the intellectual property laws promulgated in the early 1980s were designed mainly to promote "socialist legality with Chinese characteristics"); Yu, *From Pirates to Partners*, *supra* note 8, at 136-37 (discussing the substantial limits on

legality with Chinese characteristics."[201] Although the trademark and patent laws granted individuals rights in their marks and inventions, these statutes included so many limits that the original grants became insignificant.[202] Intellectual property protection remained ineffective, and piracy was rampant throughout the country.

Consider computer software, for example. As China reopened in the late 1970s, "software development units found the sale of infringing tapes and disks of their programs, as well as plagiarized descriptions of these programs, in public bookstores by other units who had neither contacted the developers nor sought their permission."[203] Fearing immediate duplication of their work once it was put on the market, many developers "literally kept the software in their desk drawers."[204] Even though some eventually decided to release their products by publishing notices[205] or warnings in newspapers, their remedial efforts were of very limited effectiveness. After all, the consuming public knew that software developers could do nothing even if the software was reproduced and its replica sold.[206]

Frustrated by the lack of computer software protection, the chief engineer of an enterprise of the Ministry of Electronics Industry called for the establishment of a copyright system in China to protect computer software in 1984.[207] A few months later, executives from IBM submitted a draft for an Interim Copyright Law for the Protection of Software to the Ministry of Electronics Industry, "express[ing] an urgent desire for the establishment of a Chinese software protection system."[208] In 1985, Chinese experts from technical, foreign trade, and research departments and universities reached "a unanimous consensus . . . that it was essential for China to prepare a special

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intellectual property rights granted under the early intellectual property statutes). Indeed, the State Council noted in a White Paper released in 1994 that intellectual property laws aim "to rapidly develop social productive forces, promote overall social progress, meet the needs of developing a socialist market economy and expedite China's entry into the world economy." INFORMATION OFFICE, STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, INTELLECTUAL PROPERTY PROTECTION IN CHINA (1994), *translated in* BBC SUMMARY OF WORLD BROADCASTS, June 20, 1994, *available at* LEXIS, News Library, BBCSWB File.

201 ALFORD, *supra* note 8, at 70.

202 Patent Law of the People's Republic of China art. 6, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986, at 65 (1987).

203 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 31.

204 *Id.*

205 "For example, the Sixth Institute of the Ministry of Electronic Industries, when marketing their newly developed Chinese character base data system (Cdbase III), included a notice stating, 'No reproduction, transfer or resale is permissible.'" *Id.* at 32.

206 *Id.*

207 As Professors Xue Hong and Zheng Chengsi elaborated: "The main reason he suggested such a system be established was that the lack of satisfactory protection prevented software products being introduced to the Chinese market, and consequently the Chinese software industry could not develop. This was the first time such a system had been called for in China." *Id.* at 31.

208 *Id.* at 32.

protection regime for software in addition to possible general copyright protection in the future Chinese Copyright Law."[209] The State Council subsequently appointed the Ministry of Electronics Industry "to organize a working group to prepare a document, either as regulations or in another form, for the protection of software in China."[210]

Notwithstanding these legislative efforts, the drafting process was stalled by the changing development of software protection in the international community, as countries started to abandon earlier efforts to create a *sui generis* copyright regime for protecting software.[211] In the end, China met a similar fate as that of many other less developed countries, and software protection was created in response to U.S. trade pressure, rather than internal legislative initiatives.[212]

Concerned about the extensive piracy in audiovisual products and computer software, U.S. businesses lobbied their government heavily to increase pressure on China. In the late 1980s and early 1990s, the U.S. government repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China's entry into the WTO.[213] Such threats eventually led to the signing of the Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property ("1992 MOU") in 1992,[214] the Agreement Regarding Intellectual Property Rights ("1995 Agreement") in 1995,[215] and an accord that reiterated China's commitment to intellectual property protection in 1996.[216]

In retrospect, the 1992 MOU was effective in revamping China's intellectual property system. Pursuant to the 1992 MOU,[217] China acceded to the Berne Convention for the Protection of Literary and

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209 *Id.*

210 *Id.*

211 *Id.* at 33.

212 PETER FENG, INTELLECTUAL PROPERTY IN CHINA § 7.03, at 128 (1997).

213 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 140-51 (describing the United States' use of section 301 sanctions and various trade threats to induce China to protect intellectual property rights).

214 Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995). *See also* Yu, *From Pirates to Partners*, *supra* note 8, at 142-43 (discussing the 1992 Memorandum of Understanding).

215 Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement]. *See also* Yu, *From Pirates to Partners*, *supra* note 8, at 145-48 (discussing the 1995 Agreement).

216 China Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., *available at* http://www.mac.doc.gov/TCC/DATA/index.html. *See also* Yu, *From Pirates to Partners*, *supra* note 8, at 150-51 (discussing the 1996 Accord).

217 *See* Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995) [hereinafter 1992 MOU].

Artistic Works[218] and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.[219] China also amended the 1990 Copyright Law and issued new implementing regulations.[220] In addition, China subsequently adopted a new unfair competition law and provided trade secret protection.[221]

Likewise, the 1995 Agreement was effective in helping China create an institutional infrastructure that was conducive to protecting and enforcing rights created under the new intellectual property regime.[222] The Agreement introduced the State Council Working Conference on Intellectual Property Rights ("Working Conference")[223] and established the Enforcement Task Forces.[224]

To protect CDs, laser discs, and CD-ROMs, the 1995 Agreement also established a unique copyright verification system,[225] proposing to punish by administrative and judicial means any manufacturer of audiovisual products who failed to comply with the identifier requirement.[226]

In addition, the Agreement called for title registration of foreign

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218 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised in Paris*, July 24, 1971, 828 U.N.T.S. 221. *See also* 1992 MOU, *supra* note 217, art. 3(1), 34 I.L.M. at 680-81 (stipulating that China would adhere to the Berne Convention and would submit legislation authorizing such accession).

219 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309. *See also* 1992 MOU, *supra* note 217, art. 3(2), 34 I.L.M. at 681 (stipulating that China would accede to and ratify the Geneva Convention).

220 *See* 1992 MOU, *supra* note 217, art. 3(4), 34 I.L.M. at 681. The amended statute protects computer software programs as literary works for fifty years, removes formalities on copyright protection, and extends protection to all works originating in a Berne Union country, including sound recordings that have fallen into the public domain. *See id.* art. 3(6)-(8), 34 I.L.M. at 682.

221 *See id.* art. 4, 34 I.L.M. at 683.

222 *See* 1995 Agreement, *supra* note 215.

223 This working conference was responsible for the central organization and coordination of protection and enforcement of all intellectual property laws throughout the country. *Id.* § I[A], 34 I.L.M. at 887-89. In April 1998, the Chinese government replaced the State Council Working Conference on Intellectual Property Rights with the State Intellectual Property Office (SIPO). *See* XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 21-22.

224 Action Plan for Effective Protection and Enforcement of Intellectual Property Rights § I[B][1], *in* 1995 Agreement, *supra* note 215, 34 I.L.M. at 887, 890. The Task Forces comprised administrative and other authorities responsible for intellectual property protection, including the National Copyright Administration, the State Administration for Industry and Commerce, the Patent Office, police at various levels, and customs officials. They were authorized to enter and search premises that allegedly infringed on intellectual property rights, review books and records for evidence of infringement and damages, seal suspected goods, and confiscate materials and implements used to make infringing goods. *Id.* § I[B][1][b], 34 I.L.M. at 890. If they found infringement, they could impose fines; order a stoppage of production, reproduction and sale of infringing goods; revoke production permits; and confiscate and destroy the infringing goods and the materials and implements used to manufacture those products. *Id.* § I[B][1][c], 34 I.L.M. at 890.

225 *Id.* § I[H], 34 I.L.M. at 903.

226 *Id.* § I[H][1][b], 34 I.L.M. at 903.

audiovisual products and computer software in CD-ROM format with the National Copyright Administration and local copyright authorities.[227] The Agreement also required customs offices to intensify border protection for all imports and exports of CDs, laser discs, CD-ROMS, and trademarked goods.[228] Finally, the Agreement stipulated that relevant authorities would conduct training and education on intellectual property protection throughout China.[229] The Agreement further provided that the Working Conference would develop a transparent legal system[230] while compiling and publishing guidelines regarding application and protection in various areas of intellectual property law.[231]

Notwithstanding these two agreements, software piracy remained rampant in China. According to one industry estimation, 99% of all computer software in China was pirated in the late 1990s.[232] Because of this enormous piracy, some commentators labeled China a "one copy" country, implying that a single copy of computer software would satisfy the demand of the entire country through unlimited reproduction.[233] Although Chinese authorities firmly denied the 99% figure, a market survey conducted by *China ComputerWorld* in April 1998 indicated that "63 per cent of CD-ROMS used by users with college degrees were pirated, though the piracy rate was lower for users from other education backgrounds."[234] Even today, the U.S. software industry has lost close to $2 billion in China in annual retail software revenue.[235]

Commentators sometimes attributed China's extensive piracy problem to the country's Confucian past and its pro-copying culture. For example, they alluded to the importance of the past in the Chinese culture and how copyright "contradicts traditional Chinese moral standards"[236] by allowing a significant few to monopolize important materials needed by others to understand their life, culture, and society.[237] They also noted that the Chinese in the imperial past did not

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227 *Id.* § I[H][2][a], 34 I.L.M. at 903.

228 *Id.* § I[G], 34 I.L.M. at 900-03.

229 *Id.* § II[A]-[B], 34 I.L.M. at 905-06.

230 *Id.* § II[C], 34 I.L.M. at 906 (stipulating that the Working Conference would "make publicly available the laws, provisions, regulations, standards, edicts, decrees and interpretations regarding the authorization, management, and implementation of intellectual property rights").

231 *Id.* § II[D], 34 I.L.M. at 906-07.

232 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 15.

233 *See, e.g.*, KENNETH HO, A STUDY IN THE PROBLEM OF SOFTWARE PIRACY IN HONG KONG AND CHINA ¶ 2.6 (1995), *available at* http://info.gov.hk/ipd/eng/information/studyaids/piracy_hk_china.htm.

234 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 15 (citing *Subdivision Market Research of CD-ROM Publications*, CHINA COMPUTERWORLD, Apr. 13, 1998, at C15).

235 *See infra* text accompanying notes 606.

236 Hu, *supra* note 8, at 104.

237 Yu, *Piracy, Prejudice and* Perspectives, *supra* note 8, at 17. *See also* ALFORD, *supra* note

consider copying or imitation a moral offense, but rather "a noble art"[238]—a "time-honored learning process"[239] through which people manifested respect for their ancestors.[240] In addition, they observed that the Chinese considered creativity a collective benefit to their community and posterity[241] and discussed how Confucianism encouraged people to despise commerce,[242] as well as those who created works for sheer profit.[243]

While this culture-based explanation provides insight into one of the major barriers to successful intellectual property law reforms in China, other factors are equally important. For example, the socialist economic system makes it difficult for the Chinese to see the benefit of intellectual property ownership. As Professor Susan Tiefenbrun put it, "owning property [in a Socialist economic system] is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself."[244] In fact, many Chinese were reluctant to acknowledge their roles in creative and inventive activities,

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8, at 20 ("The indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese.").

238 Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 619 (1996) [hereinafter Hamilton, *TRIPS Agreement*]. A case in point is the art of *linmo*, a technique of hand-copying a master's work. As Professor Feng described:

> Hand-copying (*linmo*) of a master's work is a pedagogical regimen in traditional Chinese painting and calligraphy. As practised, *linmo* is usually done with the same tools and materials (brush, ink, pigments, paper, etc.) as the original. It differs from tracing, in that it involves not only demanding skills and discipline, but vigorous mental process and effort to absorb and express the master's technique, style and spirit. Hence good *linmo* is considered an art on its own right.

FENG, *supra* note 212, at 62. Because of the importance of this art, the Copyright Law includes a special *linmo* exception. Copyright Law of the People's Republic of China 1990 art. 22(10), *translated in* 2 China L. Foreign Bus. (CCH) P 11-700 (1993).

239 Hu, *supra* note 8, at 104.

240 *See* J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 30 (1995) ("Chinese writers, artists, and creators in all areas of knowledge had significant reverence and attachment for the past which resulted in legitimized copying."); *id.* at 31 ("[F]orgeries were not always stigmatized; emulation was regarded as a form of appreciation."). *See also* ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 254 (1952) ("Admiration induces imitation; the closer the imitation, the narrower the dividing line between it and outright copying.").

241 Hu, *supra* note 8, at 104. *See* Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 160 (1994) [hereinafter Yu, *Progress, Problems, and Proposals*]. *See also* ALFORD, *supra* note 8, at 29 ("[T]rue scholars wrote for edification and moral renewal, rather than profit.").

242 Merchants were considered the lowest among the four social classes in a traditional Chinese society. These four classes were, in descending order, scholar-official (*shih*), farmer (*nung*), artisan (*kung*), and merchant (*shang*).

243 ALFORD, *supra* note 8, at 29 ("[T]he Confucian disdain for commerce fostered an ideal . . . that true scholars wrote for edification and moral renewal rather than profit."). *See also* Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 NW. J. INT'L L. & BUS. 15, 36-56 (1993) (discussing how Confucianism smothered the impulse to commercial profit).

244 Tiefenbrun, *supra* note 8, at 37-38.

and there existed a strong aversion of private property among the Chinese, especially after the Cultural Revolution and the numerous mass campaigns and class struggles in the 1950s, 1960s, and 1970s.[245]

Under the socialist economic system, property belongs to the State and the people, rather than private owners. Authors thus create literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves.[246] It is therefore not surprising that the rationales behind intellectual property protection fail to resonate with much of the citizenry.

To rehabilitate the intelligentsia, post-Mao leaders sought to facilitate their endeavors and enhance their positions through legal recognition. Nevertheless, due to concerns about the conflict between intellectual property rights and the socialist economic system, intellectual property statutes in China were filled with substantial limits, and rights in individual creations and inventions were never fully developed. A case in point is Article 14 of the Regulations of Computer Software Protection,[247] which specified the conditions for determining the ownership of job-related software—the copyright in which was owned by the software developer, as compared to the unit in which the developer was employed.[248] Under Article 14, the copyright in a software belonged to the developer if the software was not developed in the course of one's normal or assigned duty or when one did not use the materials of the employing unit.[249] However, given the importance of a work unit in a socialist economy and the difficulty in securing sophisticated computer equipment or sizable capital in the early 1990s,[250] the provision was of limited effectiveness. Indeed, as Professor Peter Feng pointed out, the provision "contain[ed] a

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245 *See* ALFORD, *supra* note 8, at 64; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 21-22.

246 Hu, *supra* note 8, at 104. *See also* Tiefenbrun, *supra* note 8, at 11 ("The Soviet model reflected traditional Chinese attitudes toward intellectual property and expounded the socialist belief that by inventing or creating, individuals were engaging in social activities based on knowledge that belonged to all members of society.").

247 Computer Software Protection Rules 1991 art. 14, *translated in* 2 China L. Foreign Bus. (CCH) P 11-704 (1993).

248 Article 14 provides:

> If software developed by a citizen while working in an organisation is the product of work executed for the organisation, is developed in accordance with the clearly stipulated development goals for work in the organisation, or is the predictable or natural result of activities involved in the organisation's work, then the software's copyright belongs to the organisation.
>
> If software developed by a citizen is not the result of work executed for the organisation, has no direct relationship to the content of the work at the organisation in which the developer is engaged, and does not use the organisation's material technical conditions, the software's copyright belongs to the developer himself.

Id.

249 *Id.*

250 ALFORD, *supra* note 8, at 71.

legislative blunder"[251] that resulted in "the notorious classroom conundrum: who owns the copyright of software if it was developed outside one's normal and assigned duty, but with the assistance of the material means of the employing unit."[252]

Moreover, many Chinese were concerned that intellectual property rights would impose a substantial burden on the country, especially if sensitive innovative technology like computer software were to be protected. Since the Opium War in the 1840s, China had suffered from foreign invasion and semi-colonization.[253] Desperate to modernize the country, the Chinese had subscribed to a self-strengthening worldview—one that persisted even after the establishment of the Communist regime—under which attaining independence and liberating the nation became the country's first priority.[254] Thus, many Chinese continued to believe it was *right* to freely reproduce or to tolerate the unauthorized reproduction of foreign works that would help strengthen the country.[255] Some of them even believed copying was needed, or even necessary, for China to catch up with Western developed countries. Unlike what Westerners believe, many Chinese consider software piracy beneficial to their country, because "it speeds the nation's modernization at little or no cost."[256]

As China became stronger in the late 1990s, the self-strengthening worldview took on a nationalist overtone, and pirated software became

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251 FENG, *supra* note 212, § 7.10, at 132. *See also* HONG XUE & CHENGSI ZHENG, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY 45-46 (2002) (discussing the problems created by Article 14 of the Software Regulations) [hereinafter XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW].

252 FENG, *supra* note 212, § 7.10, at 132. Most recently, article 14(2) of the Software Regulations was modified:

> According to Article 13 of the MSR [Modified Software Regulations], in the following circumstances the copyright of the software developed by a natural person during his or her term of employment in a legal person or an entity without legal status shall vest in the legal person or the entity without legal status, and the legal person or the entity without legal status may grant awards to the software developer:
>
> 1. where the software is the result of performing the employee's duty with the development objective explicitly assigned in the line of duty;
>
> 2. where the software developed is foreseen or natural result of carrying out the employee's duty; and
>
> 3. where the software is developed through using the funds, exclusive facilities, unpublished exclusive information or any other material and technical conditions of the legal person or other entity without legal personality and under the responsibility of the legal person or other entity without legal personality.

XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, *supra* note 251, at 46.

253 *See* Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 22-23.

254 Xiang Rui Gong, *Constitutional Protection of Human Rights: The Chinese View Under the Notion of One Country, Two Systems*, *in* THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 492 (Johannes Chan & Yash Ghai eds., 1993).

255 *See* Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 259, 271 (1986) (noting the use and application by the Chinese of technology, techniques, and products developed in more advanced countries without paying any royalties).

256 James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B.

"patriotic software."[257] This nationalist overtone was further transformed into xenophobia, as the U.S.-China relations deteriorated and the misguided U.S.-China foreign policy backfired. Such transformation was demonstrated vividly in recent years by the hostile reaction to the United States' bombing of the Chinese embassy in Belgrade[258] and the standoff over the collision between the Chinese jet fighter and a U.S. reconnaissance plane.[259] Reflected in Geremie R. Barmé's book chapter entitled "To Screw Foreigners Is Patriotic," there existed feelings that equated screwing foreigners with patriotism.[260] To the xenophobes, there was no better way to serve the country than to commit software piracy, given the substantial damage piracy could inflict upon the U.S. economy.

In sum, many Chinese saw a higher stake in pirating foreign technologies than protecting them. To many of them, intellectual property rights were not tools to promote the country's economic development, foreign investment, and interstate relations,[261] but weapons the West specially designed to protect their dominant position. Under a Trojan horse theory, intellectual property rights would drain away China's scarce economic resources, divide the country, and erode its cultural identity.[262] They also would slow down China's economic progress and its rise in world affairs, and eventually would ensure that China would "follow the path of the former Soviet Union and Eastern Europe—toward economic decay, social unrest, and political instability."[263]

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257 *Id.*

258 Although the United States insisted that the bombing was an accident and apologized for the incident, many Chinese considered the bombing a deliberate attack to slow down China's rise in world affairs and to warn China against challenging American hegemony. STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD 81 (2000). *See also* John Pomfret & Michael Lavis, *China Suspends Some U.S. Ties; Protesters Trap Ambassador in Embassy*, WASH. POST, May 10, 1999, at A1 (reporting on the anti-American protests outside the U.S. embassy after the bombing of China's embassy in Belgrade).

259 *See* John Pomfret, *New Nationalism Drives Beijing; Hard Line Reflects Public Mood*, WASH. POST, Apr. 4, 2001, at A1 (attributing the recent standoff with Washington to the growing nationalist sentiments among the Chinese people); Elisabeth Rosenthal, *Many Voices for Beijing*, N.Y. TIMES, Apr. 10, 2001, at A1 (noting that anti-American feelings are running high in China).

260 To highlight these possibilities, one commentator entitled a chapter of his book "To Screw Foreigners Is Patriotic." GEREMIE R. BARMÉ, IN THE RED: ON CONTEMPORARY CHINESE CULTURE 255-80 (1999).

261 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 189; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 62.

262 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 189-90; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 61-62.

263 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 190 (quoting Harry Harding, *Breaking the Impasse over Human Rights*, *in* LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 165, 172 (Exra F. Vogel ed., 1997)). *But see* RICHARD BERNSTEIN & ROSS H. MUNRO, THE COMING CONFLICT WITH CHINA 204 (1998) ("The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms

Shortly after the 1996 negotiations, however, the Clinton administration changed its tactics and abandoned its coercive policy toward China.[264] This policy change was partly due to the failure of the coercive policy[265] and partly due to the loss of interest from U.S. businesses in continuing such a policy.[266] Ironically, just as the U.S. government backed away from its coercive tactics, intellectual property protection in China began to improve.

Since 1996, China has introduced many new intellectual property statutes and regulations and has entered into various international treaties. In 1996, China issued the Regulations on the Certification and Protection of Famous Trademarks[267] and the Regulations on the Protection of New Plant Varieties.[268] China also amended its Criminal Law by including a section on intellectual property crimes.[269] In April 2000, China became a member of the International Union for the Protection of New Varieties of Plants[270] and subsequently enacted a law to protect trademark holders against cybersquatters.[271]

In addition, China made various institutional reforms to improve the protection and enforcement of intellectual property rights. In April 1998, China upgraded the State Patent Bureau to the State Intellectual Property Office ("SIPO"), a ministry-level branch of the State Council.[272] China also developed training programs that facilitate

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proliferation."); Lee H. Hamilton, *Introduction* to BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS 1, 4 (James R. Lilley & Wendell L. Willkie II eds., 1994) ("China's stability is in the U.S. interest.").

264 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 154.

265 *See id.* (discussing the failure of the 1996 Agreement and the cycle of futility).

266 Steven Mufson, *Piracy Still Runs Rampant in China*, WASH. POST, Mar. 27, 1998, at E3 (reporting that U.S. industries, which drive the American international trade policy, opposed sanctions on China despite a persistent piracy problem).

267 *China: Laws Being Promulgated to Protect IPR*, CHINA DAILY, Nov. 10, 1997, *available at* 1997 WL 13647865.

268 *Id.*

269 *Id. See also* Mary L. Riley, *Criminal Sanctions in the Enforcement of Intellectual Property Rights*, *in* PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 91, 96-97 (Mary L. Riley ed., 1997) (discussing the 1997 amendments to the criminal law).

270 Shoukang Guo, *China: Status Report on the Protection of New Varieties of Plants in the PRC*, Pat. Trademark & Copyright L. Daily (BNA), at D5 (Sept. 1, 2000). For discussions of intellectual property protection for new plant varieties in China, see generally Lester Ross & Libin Zhang, *Agricultural Development and Intellectual Property Protection for Plant Varieties: China Joins the UPOV*, 17 UCLA PAC. BASIN L.J. 226 (2000); Chengfei Ding, Note, *The Protection for New Plant Varieties of American Businesses in China After China Enters the WTO*, 6 DRAKE J. AGRIC. L. 333 (2001).

271 Noah Smith, *China: New Chinese Law Protects Trademarks from Internet Squatters; Patent Law Revised*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Aug. 29, 2000).

272 The Web site of the State Intellectual Property Office is available at http://www.sipo.gov.cn/. SIPO replaced the State Council Working Conference on Intellectual Property Rights established by the 1995 Agreement. XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 21-22. Working closely with the State Administration of Industry and Commerce and the State Press and Publication Administration, SIPO is responsible for improving intellectual property protection and for coordinating regional intellectual property rights

research and training in the intellectual property field.[273] To meet the increasing demand for expertise in intellectual property laws, Chinese universities began to offer courses and degrees in intellectual property law.[274] Some even set up their own intellectual property law departments.[275]

As China prepared to enter the WTO, it revamped its entire intellectual property system at the turn of this century, amending copyright,[276] patent,[277] and trademark laws[278] while adopting a new regulation on the protection of layout designs of integrated circuits.[279] Consider copyright protection, for example. Entered into force in late 2001, the new copyright law amendments[280] strengthen copyright protection and improve the law's compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement").[281] Under the revised copyright law, administrative agencies and courts are authorized to order confiscation of illegal gains,

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departments to intensify enforcement of laws and regulations. *China: New IPR Commissioner Interviewed*, CHINA BUS. INFO. NETWORK, Apr. 14, 1998, *available at* 1998 WL 7561417. It is also responsible for building a patent information network, assisting enterprises and research institutions to protect their own technology and products, and cooperating with other countries to speed up China's intellectual property protection to meet international standards. *See id.*; *China to Launch Nationwide Patent Information Network*, CHINA BUS. INFO. NETWORK, Jan. 18, 2000, *available at* 2000 WL 3888595.

273 *See, e.g.*, *China: First IPR Protection Personnel Center Opens in Beijing*, CHINA BUS. INFO. NETWORK, Apr. 17, 1998, *available at* 1998 WL 7561463; *China: Training Centre to Help Strengthen IPR Protection*, CHINA BUS. INFO. NETWORK, Jan. 17, 1997, *available at* 1997 WL 9840723.

274 Yu, *Progress, Problems, and Proposals*, *supra* note 241, at 149 ("The People's University, the Huazhong Science and Technology University, and the Zhejiang University now offer a second bachelor degree in intellectual property law."); Liangjun Xie, *New School Starts on Rights Track*, CHINA DAILY, Dec. 16, 1993, *available at* 1993 WL 10866676 (reporting the opening of the Intellectual Property Rights School at Beijing University).

275 Agence France Presse, *Shanghai Protects Intellectual Property* (Oct. 31, 1994), *available at* LEXIS, News Library, ALLNWS File (reporting that Shanghai University has decided to open an intellectual property department and to communicate with foreign universities in the field)

276 Copyright Law of the People's Republic of China, *translated in* State Intellectual Property Office of the People's Republic of China, Laws and Regulations, *available at* http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/t20020416_5077.htm.

277 Patent Law of the People's Republic of China, *translated in* State Intellectual Property Office of the People's Republic of China, Laws and Regulations, *available at* http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/t20020327_4704.htm.

278 Trademark Law of the People's Republic of China, *translated in* State Intellectual Property Office of the People's Republic of China, Laws and Regulations, *available at* http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/t20020416_5078.htm.

279 Regulations on the Protection of Layout-Designs of Integrated Circuits of the People's Republic of China, *translated in* State Intellectual Property Office of the People's Republic of China, Laws and Regulations, *available at* http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/200204020002.htm.

280 For an excellent discussion of recent amendments to the Copyright Law, see generally Xiaoqing Feng & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC'Y U.S.A. 917 (2002).

281 TRIPs Agreement, *supra* note 172.

pirated copies, and materials, tools, and equipment used to conduct infringement activities.[282] Where the plaintiff's damage or the infringer's profits cannot be determined, the revised law allows for statutory damages of up to RMB 500,000.[283] In addition, the law provides access to preliminary injunctions[284] and places the burden on the accused infringer to prove the existence of a legitimate license.[285] The law also addresses for the first time copyright issues on the Internet[286] and includes a reference to China's contract law as a basis for the fulfillment of contractual obligations.[287]

Moreover, China recently modified the Regulations of Computer Software Protection, which were enacted in 1991 in response to U.S. trade pressure. These modifications were badly needed in light of China's recent transition from a command economy to a market economy and the increasing emphasis on a knowledge-based society. In the late 1990s, many software developers resigned from state enterprises and research institutes to work in the private sector, taking with them software products developed during the course of employment with state institutions.[288] As a result, state enterprises were unfairly deprived of the opportunity to recoup their investment while facing heavy competition from private software companies created by or stocked with their former employees. Thus, ownership disputes over job-related software have become a very hot issue, and the modified software regulations provide the much-needed relief in this area.

On the enforcement front, the Chinese authorities, from time to time, have launched large-scale crackdowns on pirated and counterfeit products. For example, the Chinese government started an anti-counterfeiting campaign in November 2000 and followed it up with a major crackdown on counterfeit products that posed health and safety risks, such as food, drugs, medical supplies, and agricultural products.[289] In 2002, the Chinese government initiated a new anti-counterfeiting and anti-piracy campaign, which in turn resulted in high numbers of seizures of infringing goods.[290] In addition, Chinese leaders, through public speeches and position papers, stressed the importance of intellectual property as an economic strategy.[291] There also appeared books,

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282 Copyright Law of the People's Republic of China, *supra* note 276, arts. 47, 51.

283 *Id.* art. 48.

284 *Id.* art. 49.

285 *Id.* art. 52.

286 *Id.* arts. 10(12), 37(6), 41, 47.

287 *Id.* art. 53.

288 XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, *supra* note 251, at 104-05.

289 OFFICE OF USTR, 2002 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 58-59 (2002).

290 OFFICE OF USTR, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 60 (2003) [hereinafter 2003 NTE REPORT].

291 *Id.* at 57. As two leading commentators in Chinese intellectual property law described:

television talk shows, media articles, and government and academic reports that highlighted the importance of intellectual property protection to China's economic development.[292]

Notwithstanding these crackdowns and reforming efforts, significant problems remain with the enforcement of intellectual property laws in China, especially at the grassroots level and in rural areas. These problems were further exacerbated by such institutional problems as "local protectionism and corruption, reluctance or inability on the part of enforcement officials to impose deterrent level penalties, and a low number of criminal prosecutions."[293] With the proliferation of peer-to-peer file-sharing networks, the Chinese authorities are expected to face new and even tougher challenges.

Moreover, compared to the 1980s and early 1990s, intellectual property protection has improved considerably in China. As the *2000 National Trade Estimate Report* stated: "Today, China has improved its legal framework—and it has virtually shut down the illegal production and export of pirated music and video CDs and CD-ROMS. Indeed, today it is an importer of such products from third countries."[294]

One might wonder why intellectual property protection in China has improved even though the U.S. government and American businesses backed away from their earlier coercive tactics. After all, the logic behind the coercive U.S.-China intellectual property policy was that the Chinese intellectual property regime could not sustain itself and, therefore, required foreign pushes to rejuvenate the system. While these foreign pushes were undoubtedly helpful in establishing the Chinese intellectual property system in the early 1990s, recent improvements in intellectual property protection in China can be largely attributed to three other factors.

First, although foreign companies and governments were generally reluctant to take any substantial effort to promote awareness of

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> On 11 July, 2001, Chinese President Jiang Zemin made a public speech titled "Safeguard and Promotion of the Healthy Development of the Information Network Through Rule of Law". In the speech, President Jiang emphasized the importance of expediting the legislative process and strengthening enforcement on information networks. The speech will further promote the development of Chinese Internet legislation and its enforcement.

XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, *supra* note 251, at xl.

292 2003 NTE REPORT, *supra* note 290, at 60.

293 OFFICE OF USTR, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) [hereinafter 2000 NTE REPORT]. *See also* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 11 (2000) ("Although the level of copyright piracy seems to have decreased recently in China due to aggressive campaigning by copyright owners, trademark counterfeiting continues to increase.") (footnote omitted); Tom Korski, *AV Piracy Still "Rampant" Despite Crackdowns, Chinese Authorities Say*, Pat. Trademark & Copyright L. Daily (BNA), at D3 (Jan. 21, 1998) ("[P]iracy of audio-visual products in China remains 'rampant' despite expanded police raids on black marketeers . . . .").

294 2000 NTE REPORT, *supra* note 293, at 50.

intellectual property rights among the Chinese people and to communicate to them why better protection would be in their interest,[295] foreign and local businesses, trade associations, and industry groups have been very active in promoting awareness and understanding among the Chinese people. A case in point is the joint effort by the Business Software Alliance and the Chinese Software Alliance to promote the use of original software in China.[296] Thanks to these efforts, the Chinese have become increasingly aware of the basic functions of, and the rationales behind, intellectual property rights. To many Chinese, these rights are no longer alien, abstract, and incomprehensible. Rather, they are closely related to their daily lives and the country's domestic growth and international reputation.

Furthermore, by the late 1990s, the Chinese—perhaps influenced by the developments in the United States and the European Union—have begun to realize the importance of a well-developed information economy.[297] All of a sudden, the phrase "knowledge economy" has become a catchphrase frequently seen in major Chinese newspapers, such as *Guangming Daily* and *The People's Daily*, and heard in presentations made by government officials.[298] Chinese businesses also quickly adopted words like "e-commerce" and "e-business" to enhance public recognition and stock market value.[299] In March 1998, the Chinese government established the Ministry of Information Industry by combining the Ministry of Posts and Telecommunications and the Ministry of Electronics Industry.[300] Two years later, the National People's Congress unveiled a five-year plan that includes information technology among the major goals of China's long-term economic

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295 Alford, *Making the World Safe for What?*, *supra* note 8, at 142 (noting that "[f]or all its much ballyhooed expressions of concern, neither the U.S. government nor many of the companies driving [the American foreign intellectual property] policy . . . have made any substantial attempt . . . to communicate to the Chinese why better intellectual property protection would be in their interest."); Chow, *supra* note 293, at 46 (noting that "brand owners are reluctant to commit the amount of resources necessary to achieve these goals or to risk seriously offending the Chinese government"). *See also* Hu, *supra* note 8, at 111 ("[A]ctive involvement by U.S. companies and lawyers, for example through special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media, will expedite the training process."). One commentator argued that "U.S. Companies must take a proactive stance and not be content to rely on government for help." Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 190 (1998).

296 *China: First IPR Protection Personnel Center Opens in Beijing*, CHINA BUS. INFO. NETWORK, Apr. 17, 1998, *available at* 1998 WL 7561463.

297 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 7 (noting that "[t]he Chinese government has become enthusiastic about information-based economic development because it has become aware that the value of the global information industry is more than US$1,000 billion, and that this will be the 'first industry' in the next century").

298 *Id.*

299 XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, *supra* note 251, at xl.

300 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 7.

development.[301]

Second, the Chinese, in particular their leaders, have begun to notice the benefits of protecting intellectual property rights. In April 1997, the Chinese government provided assistance to set up special intellectual property affairs departments, create intellectual property protection networks, and build a self-protection system in enterprises and institutes to which intellectual property rights are particularly important.[302] These enterprises and institutes included major oil and chemical corporations, computer companies, and prestigious universities and scientific research institutes.[303] The Ministry of Information Industry also was determined "to create 30 large software companies with an annual revenue of RMB10 billion, and ten larger companies with an annual revenue of RMB 30 billion."[304] Unlike what they did in the past, the Chinese no longer consider intellectual property rights exploitative devices that help protect the West's dominant position. Rather, they have begun to see how these tools can help promote national growth.

Third, and most important of all, many Chinese have become stakeholders or potential stakeholders. Intellectual property therefore matters to them. Since the mid-1990s, China's software industry has experienced a tremendous growth.[305] By 1997, the value of the software market had doubled from RMB 6.8 billion in 1995 to RMB 12.6 billion.[306] The Chinese government also has been active in developing the local software industry, establishing software bases in Liaoning, Hunan, Shandong, and Sichuan Provinces and in Beijing, Shanghai and Zhuhai districts.[307]

While the software industry was growing, the Internet population

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301 Tenth Five-Year Plan (2001-2005).

302 *See China: New Measure Will Be Taken to Protect IPR*, CHINA BUS. INFO. NETWORK, Apr. 4, 1997, *available at* 1997 WL 9842657. *See also China Introduces Anti-Piracy Technology*, CHINA BUS. INFO. NETWORK, Mar. 15, 1999, *available at* 1999 WL 5618404 (reporting the efforts of the China Software Association to introduce new anti-piracy technology to local software producers).

303 *China: New Measure Will Be Taken to Protect IPR*, *supra* note 302.

304 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 9.

305 For discussions of the blossoming software industry in China and the leaders' eagerness to develop science and technology parks, see generally *China: Guangzhou to Establish "Silicon Valley,"* CHINA BUS. INFO. NETWORK, Dec. 4, 1998, *available at* 1998 WL 22707603 (reporting the municipal government's intention to develop an international science and technology park); *China: Sales of Software Stay Strong Despite Fakes*, ASIAINFO DAILY CHINA NEWS, June 20, 2000, *available at* Lexis, News Library, ASINFO File ("Despite the damage done by piracy, China's software industry is still moving ahead with sales in 1999 hitting 17.6 billion RMB yuan (US$ 2.13 billion), an increase of 27.5 percent over 1998."); *China: Software Industry Booms in China*, CHINA BUS. INFO. NETWORK, Oct. 30, 1997, *available at* 1997 WL 12878806 (reporting a 50% annual growth rate in the software industry over the past several years).

306 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 8 (citing *PC World China*, Mar. 9, 1998, at 15).

307 *Id.* at 9.

exploded. In October 1997, there were only 299,000 computers connected to the Internet, and 620,000 Internet users. Today, based on the July 2003 survey by the China Internet Network Information Center ("CNNIC"), there are 25.72 million computers connected to the Internet, and 68 million Internet users.[308] Although the growth in the Chinese Internet user community recently slowed down,[309] China already has surpassed all the major developed countries except the United States and now boasts the second largest Internet population in the world, ahead of Japan, Germany, and the United Kingdom.[310]

Moreover, the Chinese have begun to perceive themselves as passive stakeholders. In other words, they now understand the danger of inadequate intellectual property protection and how the lack thereof could impair the well-being of the country while slowing down its development.[311] They also realized the damage the lack of intellectual property protection could inflict upon the country's international reputation. Because intellectual property protection remains a key issue in the WTO accession negotiation, the Chinese understand that the stakes for the lack of intellectual property protection extend beyond the intellectual property arena, covering almost every other area that implicates international trade, including agriculture, banking, electronics, insurance, professional services, securities, telecommunications, and textiles.

On November 10, 2001, member states of the WTO approved

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[308] CNNIC, 12TH STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA § 4 (2003) [hereinafter CNNIC, 12TH STATISTICAL SURVEY REPORT], *available at* http://www.cnnic.net.cn/develst/2003-7e/12th_Statistical_report.doc.

[309] The number of Internet users rose from 33.7 million in January 2002 to 59.1 million in January 2003. *See* Semiannual Survey Report on the Development of China's Internet, *available at* http://www.cnnic.net.cn/develst/rep200201-e.shtml (Jan. 2002); Semiannual Survey Report on the Development of China's Internet, *available at* http://www.cnnic.net.cn/develst/2003-1e/index.shtml (Jan. 2003). By contrast, in the first six months of 2003, the number Internet users increased only from 59.1 million to 68 million. *See* CNNIC, 12TH STATISTICAL SURVEY REPORT, *supra* note 308.

[310] *Nielsen//Netratings Announces China Has World's Second Largest Internet Population—56 Mln*, CHINA IT & TELECOM REPORT, Apr. 26, 2002, *available at* LEXIS, News Library, ALLNWS File.

[311] *See* Yu, *From Pirates to Partners*, *supra* note 8, at 189-90; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 61.

> For example, adulterated drugs and counterfeit products will lead to illness, extended injuries, and unnecessary deaths. Emerging entrepreneurs, authors, and creative artists will be unable to capture the benefits of their inventions, innovations, and creative endeavors. To make up for the potential infringement of their fellow citizens and organizations, businesses and educational centers will have to pay more for the needed foreign technologies and materials. Consumers who receive worse products despite paying the same price will be reluctant to consume in the open market. Foreign entities will be wary of investing in China because of widespread intellectual property piracy. And worst of all, "the best and brightest from [China will] feel compelled to leave their home country for the more remunerative systems in developed nations."

Yu, *From Pirates to Partners*, *supra* note 8, at 194-95 (footnotes omitted).

China's accession to the international trading body.[312] After fifteen years of exhaustive negotiations, China finally became a member of the WTO on December 11, 2001.[313] Although the accession process was complicated and involved many different factors, it would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights. Indeed, some commentators considered the WTO membership a major impetus for China's recent improvements in intellectual property protection. As two leading commentators in Chinese intellectual property law explained:

> In general, China's entry to the WTO significantly influenced the speed and scope of the development of the Chinese IP law system. It is interesting to note that IP rights reforms kept pace with Chinese WTO negotiations. When the negotiations encountered obstacles, the IP rights reform slowed down; when the negotiations reached agreements to promote the accession process, the IP rights reform accelerated noticeably. Since China has become a member of the WTO, Chinese IP law reform has also peaked.[314]

When commentators analyze the effects of China's entry into the WTO, they usually fall into one of two camps—the optimists or the pessimists[315] (or perhaps a hybrid between the two, who considers China's entry a "double-edged sword").[316] The optimists believe China's WTO membership will lead to stronger intellectual property protection in the country. As they argued, China's accession to the WTO will lead to better economic conditions in the country. As a result, consumers no longer will be attracted to low-priced counterfeits and, instead, will seek higher-priced genuine and luxury goods.[317] Using Taiwan as an example, these observers predicted that "[p]irates and counterfeiters will . . . gradually move into legitimate businesses[,] and the focus of counterfeiting and piracy will shift away from China to lesser developing countries, such as Vietnam."[318]

By contrast, the pessimists believe that the piracy and counterfeiting problem will worsen in the first few years after China's

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312 Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47.

313 China became the 143rd member of the WTO on December 11, 2001.

314 XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, *supra* note 251, at xxxix.

315 *See* Peter K. Yu, *The Ramifications of China's Entry into the WTO: Will the Global Community Benefit?*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/commentary/20011204_yu.html (Dec. 4, 2001) [hereinafter Yu, *Ramifications of China's Entry into the WTO*] (discussing the optimistic and pessimistic views of China's entry into the WTO).

316 *See, e.g.*, GREG MASTEL, THE RISE OF THE CHINESE ECONOMY: THE MIDDLE KINGDOM EMERGES 176 (1997) (cautioning that China's accession to the WTO is "a double-edged sword").

317 DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 254 (2002).

318 *Id.*

entry into the WTO. As access to the Chinese markets increases, the increase of foreign investment and trade will enhance the economic conditions that give rise to the piracy and counterfeiting problem in the first place.[319] Reduced restrictions on export privileges also will allow pirates and counterfeiters to trade more aggressively with markets having "a strong appetite for low-priced counterfeit goods," such as Southeast Asia and Eastern Europe.[320]

Moreover, as the current legal reforms in China focus primarily on improving the compliance of existing laws with the WTO regime, China's recent accession to the WTO might create a disincentive for the country to carry out further immediate reforms, especially in areas where noncompliance is questionable, difficult to assess, or hard to prove before the WTO Dispute Settlement Body.[321] In fact, its "increased stature as a WTO member will increase its bargaining position and its leverage against any future pressure to improve its piracy problem."[322]

Since China reopened in the late 1970s, protection of computer software has improved considerably. Although software piracy has yet to be eradicated and significant barriers still remain, this story seems to be developing in a promising direction. If the later chapters of the story unfold the same way as the earlier ones, perhaps this story might have an ending as happy as the first.

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319 *Id.*

320 *Id.*

321 Professor Chow discussed the difficulties of proving China's noncompliance of the enforcement obligations under the TRIPs Agreement:

> Part III of TRIPS creates specific enforcement obligations and raising the counterfeiting and piracy issue after China's admission into the WTO will most likely take place in the context of arguing that China's enforcement efforts fail to satisfy TRIPS enforcement obligations. The burden of proof and persuasion will be upon the complaining party. Meeting these burdens will require the complaining party to gather evidence of China's failure to meet its obligations—a task that could take years given the complexity of the enforcement environment in China today—and would also require the party to prove its case before the WTO's Dispute Settlement Body. Not only will this be a long process requiring several years, but there is no guarantee that the party raising the dispute would succeed given that it now has all of the burdens of proof and going forward.

Id. at 253-54.

322 *Id.* at 254. As Professor Chow queried: "[I]f China can enter the world's foremost commercial law regime and be recognized as a member of the world trading community despite having the world's most serious piracy problem, what incentive is there to improve the problem and to commit the considerable resources that this would require?" *Id.*

III. MUSIC PIRACY IN TWENTY-FIRST-CENTURY CYBERSPACE

Unlike old-fashioned smugglers, the haven pirates never had to physically touch their booty. Data had no substance.

— Bruce Sterling[323]

This is a very profound moment historically. This isn't just about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: The country will end up in a sort of cultural Dark Ages.

— Richard Parsons[324]

Even data pirates may have their good side; some may rob from the rich and give to the poor, which may not seem so undesirable from the perspective of the poor. Others may rob from monopolists and give to consumers, which may seem desirable from the perspective of consumers. At the very least, the threat of data pirates may force policymakers to batter down the hatches and run a tighter ship, which might be desirable to anyone on board. And in some cases, data pirates may even force some politicians to walk the plank, which might be desirable to nearly everybody.

— Dan L. Burk[325]

The final story returns to the United States, although it also happens in a territory called the cyberspace,[326] in which U.S. laws apply in many instances.[327] Unlike the first story, however, the United States

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323 BRUCE STERLING, ISLANDS IN THE NET 37 (1988), *quoted in* Dan L. Burk, *The Market for Piracy*, *in* BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 205, 205 (Brian Kahin & Charles Nesson eds., 1997) [hereinafter BORDERS IN CYBERSPACE].

324 Chuck Philips, *Time Warner Tunes in New Delivery Channel*, L.A. TIMES, July 25, 2000, at C1 (interviewing Richard Parsons, President, Time Warner).

325 Burk, *supra* note 323, at 205.

326 Science-fiction writer William Gibson introduced the term "cyberspace" in the mid-1980s. *See* WILLIAM GIBSON, NEUROMANCER 51 (1984).

327 Commentators have emphasized *ad nauseum* how the Internet and new communications technologies have transformed the global economy and the international political system. However, "information dos not flow in a vacuum, but in political space that is already occupied." ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 217 (3d ed. 2001). As Professor Lawrence Lessig pointed out repeatedly, code is law and the Internet is regulable. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999) [hereinafter LESSIG, CODE]. For articles advocating the self-governance of cyberspace, see David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); David G. Post, *Anarchy, State, and the Internet: An Essay on Law-making in Cyberspace*, 1995 J. ONLINE L. art. 3, *at* http://www.wm.edu/law/publications/jol/articles/post.shtml; I. Trotter

is no longer the notorious pirate in this story. Rather, it has become the champion of literary and artistic property and one of the predominant powers advocating strong intellectual property protection around the world.[328]

Since the invention of Guttenberg's printing press, one can reproduce copyrighted works at will, although the cost, quality, and speed of reproduction may vary significantly. While piracy occurred at times when copyists freely rode on the efforts of other creative artists,[329] intellectual property law protected most authors and publishers, while others were able to recuperate their investment by relying on the market headstart their investment had created.[330] However, things changed as digital technology was developed. This revolutionary technology greatly reduces the cost and speed of reproduction while substantially increasing the quality of the reproduced work.[331] As a result, digitally

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Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413 (1997); Edward J. Valauskas, *Lex Networkia: Understanding the Internet Community*, FIRST MONDAY, *at* http://www.firstmonday.dk/issues/issue4/valauskas/index.html (Oct. 7, 1996). *But see* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (disputing the need to distinguish cyberspace and real-space transactions and advocating the need to ground cyberspace transactions in real-space laws).

328 *See* Donald E. deKieffer, *U.S. Trade Policy Regarding Intellectual Property Matters*, *in* INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 97 (George R. Stewart et al. eds., 1994); Yu, *From Pirates to Partners*, *supra* note 8, at 132 (noting that the United States recently has been very aggressive in pushing for a universal intellectual property regime that offers information and high-technology goods uniform protection throughout the world).

329 Professor Stewart Sterk described the free riding problem in the copyright context:

> If the author of a creative work cannot prevent copying, any potential copyist has an incentive to reproduce the creative work so long as the market price for the work is greater than the marginal cost of reproduction. As a result, the market price for copies of the work would approach the marginal cost of reproduction. If copies were indistinguishable in quality from the original, the market price for the original, too, would approach the marginal cost of reproduction. At that price, however, the author would realize no financial return on his investment in creating the work. In this world, only authors unconcerned with financial return would produce creative works.

Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204 (1996) (footnotes omitted). *See also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (discussing the economic rationale justifying copyright protection). See generally Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J.L. & ECON. 147 (1975), for an excellent discussion of the free riding problem.

330 *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 299-308 (1970) (arguing that the rewards created by a market headstart may provide encourage incentives for authors to create).

331 *See* Hardy, *The Proper Legal Regime for "Cyberspace," supra* note 327, at 1005 (noting that "[p]hotocopying machines at one time threatened to turn every individual into a mass publisher, but cyberspace seems actually to have achieved that distinction in a way that photocopying never really did"); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264 (2002) (noting that "digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the Internet individuals may distribute those digital works around the world at the speed of light"); Eugene Volokh, *Cheap Speech and*

reproduced products compete directly with the original productions.[332]

Consider, for example, sound recordings. Traditionally, sound recordings are made using analog technology,[333] which traced the original sound through mechanical pickups by running a stylus through the grooves on the storage medium and by converting the stylus's movements back into electrical signals.[334] As a result of the mechanical nature of this process, imperfections in the original work, such as cracks, pops, and fuzz, significantly diminish the sound quality of the copy.[335] Even though home taping is available, many consumers prefer factory originals.

Indeed, "home copying of sound recordings was not a common occurrence" before Philips introduced the audio cassette format in 1963.[336] Sound recordings were not even protected until many years later, when Congress enacted the Sound Recording Amendment of 1971[337] to protect the recording industry against substantial losses caused by bootleg recordings.[338] Although the Sound Recording Amendment was subsequently incorporated into the 1976 Copyright Act,[339] it remained unclear as to whether home taping constituted fair use.[340]

What It Will Do, 104 YALE L.J. 1805, 1808-33 (1995) (arguing that the Internet has greatly reduced the production and reproduction costs of information).

332 *See* COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (2000) [hereinafter DIGITAL DILEMMA] (discussing the threat to the copyright regime created by digital technology). *See also* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/.

333 *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 103-29 (2002) (discussing the shift from analog to digital technology).

334 *See* Andrew S. Muroff, Comment, *Some Rights Reserved: Music Copyright in Digital Age*, 1997 DET. C.L. REV. 1241, 1269-70.

335 *Id.* at 1270.

336 Joel L. Mckuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 318 (1994).

337 17 U.S.C. §§ 1(f), 5(n), 19, 20, 26, 101(e), *repealed by* 1976 Copyright Act, 90 Stat. 2541. *See also* H.R. REP. NO. 487, 92d Cong. 5 (1971) ("[S]ound recordings are clearly within the scope of the 'writings of an author' capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue.").

338 *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 3.19[C], at 137 (3d ed. 1999); Mckuin, *supra* note 336, at 319 ("By the early 1970s, it was calculated that 60% of records and tapes in New York were illegally pirated copies. Indeed, in 1971, a bootleg recording of Jimi Hendrix made it to the top half of the LP charts."). *See also* 17 U.S.C. §§ 102(a)(7), 106, 114 (2000).

339 17 U.S.C. §§ 101-803.

340 *See* NIMMER & NIMMER, *supra* note 61, § 8B.01[A] ("The issue of home taping is not new to the copyright sphere. The claims of songwriters, music publishers, record companies (and even performers) that such activity constitutes infringement have long met denials from user groups and electronics manufacturers, the issue never having been definitely resolved." (footnotes omitted)); Mckuin, *supra* note 336, at 319 ("Beyond the 1976 Act's general fair use provision,

In 1984, Universal Studios attempted to resolve the home taping question by bringing a lawsuit against Sony, the manufacturer of the Betamax videotape recorder, alleging contributory copyright infringement regarding illegal home taping of off-the-air broadcasts.[341] In a narrow five-to-four decision, the United States Supreme Court held that off-the-air home taping for time-shifting purposes constituted fair use.[342] As the court reasoned, such home taping did not harm the plaintiffs, because the use for those tapes was private and non-commercial and because the plaintiffs did not prove sufficiently the future or potential harm from time-shifting.[343]

Shortly after *Sony*, digital audio reproduction technology emerged. This new technology allows consumers to reproduce unlimited copies of prerecorded music in near-perfect quality.[344] By translating the original sound recording into a series of 1's and 0's and reconverting these 1's and 0's back into sound during playback, digital technology eliminates the imperfections inherent in analog reproduction.[345] By virtue of this new technology, consumers can now create a chain of perfect digital copies of sound recordings through trading with friends, neighbors, or even swap clubs.[346]

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nothing in its text or legislative history suggested that home taping was considered a noninfringing activity."). *See also* H.R. REP. NO. 1476, 94th Cong. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5669, 5679 (stating that the Copyright Act "is not intended to give taping any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use"). For a detailed discussion of whether home taping violates the reproduction right, see generally NIMMER & NIMMER, *supra* note 61, § 8B.01[D].

341 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).

342 *See id.*

343 *See id.*

344 *See* NIMMER & NIMMER, *supra* note 61, § 8B.01[A] ("Unlike traditional (analog) recordings, digital recordings produce perfect fidelity no matter how many times they are copied.").

345 *See* Muroff, *supra* note 334, at 1270. One commentator explained the digital recording mechanism as follows:

> The important difference between analog and digital recording is that the duplication of a digital signal is far more precise than the duplication of its analog equivalent. The digital stream of ones and zeros can be duplicated before it is converted to analog. Once the stream of ones and zeros is duplicated, it can be recorded multiple times without a decrease in the quality of the end recording. For example, the digital pattern "1101" can be copied by a digital audio tape recorder fifty times and the final copy will still look like "1101" because of the precision of the digital electronics. By contrast, less precise analog recording devices must record a stream of information that constantly fluctuates by variable amounts, so a signal representing "5" may be recorded as "4.9998." Each time the copy is copied, the analog signal will fluctuate more, leading to progressively diminishing sound quality.

Jonathan Franklin, *Pay to Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 95 (1993).

346 *See id.* at 329-30. *See also* NIMMER & NIMMER, *supra* note 61, § 8B.01[A] ("One original—if taped by its buyer who in turn passed copies to three friends who in turn each made four copies for their own friends, and so on—could therefore supplant thousands of factory sales.").

Concerned about this new technology, a group of songwriters and music publishers filed a class-action lawsuit against Sony, the manufacturer of the digital audio recording device, alleging contributory copyright infringement.[347] While the litigation was underway, the parties settled.[348] On the one hand, the songwriters and music publishers were concerned that history might repeat itself and that Sony might win again.[349] On the other hand, Sony and other electronics manufacturers wanted to free their marketing plans from possible injunctions or future liabilities.[350]

Eventually, this settlement agreement became the Audio Home Recordings Act of 1992 ("AHRA").[351] AHRA prohibits legal actions for copyright infringement based on the manufacture, importation, or distribution of a digital audio equipment or media for private, non-commercial recording.[352] This prohibition not only protects the electronics industry from costly copyright infringement litigation, but also reserves to consumers the right to use digital audio recording equipment or media for non-commercial, analog or digital home audio taping.[353]

To compensate the recording industry, AHRA requires that digital audio recording machines be equipped with a Serial Copy Management System ("SCMS"), which provides copyright and generation status information and prevents the recording devices from producing a chain of perfect digital copies through "serial copying."[354] The AHRA also requires manufacturers and importers of digital hardware and blank digital media to pay compensatory royalties to those music creators and copyright holders who will be injured by the new digital audio recording technology.[355] Nonetheless, the SCMS allows for first-generation reproduction used in home audio taping, thus accommodating the interests of individual consumers to perform private, non-commercial home taping.[356]

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347 Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991). *See also* Gary S. Lutzker, *Dat's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 164-74 (1992) (discussing *Cahn*).

348 *See* NIMMER & NIMMER, *supra* note 61, § 8B.01[B]; Lutzker, *supra* note 347, at 146.

349 NIMMER & NIMMER, *supra* note 61, § 8B.01[B] (noting that the copyright holders "had the incentive to settle for less than full control over the uses to which [digital audio tape] machines could be put, lest history repeat itself and Sony triumph again").

350 *Id.*

351 Pub. L. No. 102-563, 106 Stat. 4247 (codified in scattered sections of 17 U.S.C.).

352 *See* 17 U.S.C. § 1008 (2000).

353 *See* NIMMER & NIMMER, *supra* note 61, § 8B.01[C]; LEAFFER, *supra* note 338, § 8.30[B], at 370-72.

354 *Serial copying* is defined as "duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording" without the authorization from the copyright holder. 17 U.S.C. § 1001(11).

355 *See id.* § 1003.

356 *See id.* § 1002(a). *Serial copying* is defined as "the duplication in a digital format of a

In sum, AHRA protects both the copyright holders and the electronics industry. While preventing serial copying and compensating copyright holders for less harmful duplication, AHRA allows electronics manufacturers, importers, and distributors to "focus on selling a product that meets consumer demands."[357] Thus, it is not surprising that Professor Marshall Leaffer suggested that AHRA "may well become a model for future compromises between copyright owners and manufacturers of further reprographic technologies."[358]

Meanwhile, consumers learned that compact discs might soon replace digital audio tapes as the state-of-the-art technology.[359] They therefore were reluctant to invest in digital audio equipment. As a result, the AHRA successfully protected the recording industry against the digital threat, and the recording industry continued to blossom. In the mid-1990s, however, the recording industry faced a new challenge, this time from the Internet.

The Internet is a decentralized, global network of computers that share information with each other via common interface protocols.[360] Due to its "rudderless, decentralized, and transnational" nature, regulation of the medium is inherently difficult.[361] As Professor Michael Froomkin explained:

> Three technologies underlie the Internet's resistance to control. First, the Internet is a *packet switching network*, which makes it difficult for anyone, even a government, to block or monitor information flows originating from large numbers of users. Second, users have access to powerful military-grade cryptography that can,

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copyrighted musical recording" without the authorization of the copyright holder. *See id.* § 1001(11).

357 LEAFFER, *supra* note 338, § 8.30[B], at 372.

358 *Id. See also* NIMMER & NIMMER, *supra* note 61, § 8B.01[D][3] ("Legislation providing for a compulsory license would appear to be the most acceptable solution. . . . The [AHRA] . . . simultaneously allows technological development to progress and home users to take advantage of the benefits of digital technology, while it safeguards the interests of copyright owners by imposing royalty requirements for the benefit of those whose works are affected.").

359 Mckuin, *supra* note 336, at 321 (noting that consumers "had recently been told that the compact disc . . . would be state of the art well into the future").

360 For interesting discussion of the origins of the Internet, see generally TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB (2000); KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET (1998); JOHN NAUGHTON, A BRIEF HISTORY OF THE FUTURE: FROM RADIO DAYS TO INTERNET YEARS IN A LIFETIME (2000); Barry M. Leiner et al., *A Brief History of the Internet*, *at* http://www.isoc.org/internet/history/brief.shtml (Aug. 4, 2000).

361 Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 448 (2000). *See also* PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 100 (2001) (noting that "officials normally find it far more difficult to silence critical voices on the new media compared with their ability to regulate and control the TV airwaves"); A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, *in* BORDERS IN CYBERSPACE, *supra* note 323, at 129 (discussing the difficulties of censorship on the Internet); Johnson & Post, *supra* note 327, at 1373-74 (describing how efforts to control the flow of electronic information across physical borders will likely fail).

> if used properly, make messages unreadable to anyone but the intended recipient. Third, and resulting from the first two, users of the Internet have access to powerful anonymizing tools. Together, these three technologies mean that anonymous communication is within reach of anyone with access to a personal computer and a link to the Internet unless a government practices very strict access control, devotes vast resources to monitoring, or can persuade its population (whether by liability rules or criminal law) to avoid using these tools.[362]

To make things more complicated, activities on the Internet often involve parties in different countries, and the resulting disputes often contain difficult jurisdictional and conflict-of-laws issues.[363] As Professor Jane Ginsburg noted during the early development of the Internet, which was then referred to as the Global Information Infrastructure ("GII"):

> A key feature of the GII is its ability to render works of authorship pervasively and simultaneously accessible throughout the world. The principle of territoriality becomes problematic if it means that posting a work on the GII calls into play the laws of every country in which the work may be received when . . . these laws may differ

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362 Froomkin, *supra* note 362, at 129-30 (footnote omitted). *But see* LESSIG, CODE, *supra* note 327 (arguing that the Internet is regulable through codes).

363 For discussions of choice-of-law issues in intellectual property litigation, see generally EUGEN ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS (1978); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1 (1999); Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575 (2000); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000); Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought*, 49 AM. J. COMP. L. 429, 436 (2001); Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 DUKE J. COMP. & INT'L L. 69 (1998) [hereinafter Geller, *From Patchwork to Network*]; Paul Edward Geller, *Mastering Conflicts of Laws in International Intellectual Property Litigation*, IPL NEWSL. (ABA), Summer 2000, at 7; Paul Edward Geller, *International Intellectual Property, Conflicts of Laws, and Internet Remedies*, 22 EUR. INTELL. PROP. REV. 125 (2000); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001); Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153 (1997); Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587 (1997); David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383 (2000); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace: The Role of Intermediaries*, *in* BORDERS IN CYBERSPACE, *supra* note 323, at 164; Peter K. Yu, *Conflict of Laws Issues in International Copyright Cases*, *at* http://www.gigalaw.com/articles/2001/yu-2001-04.html (Apr. 2001). *See also* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) (developing a new foundation for choice-of-law scholarship in light of globalization and technological change); Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941 (2002) (responding to Professor Guzman); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957 (2002) (same).

> substantively. Should the rights in a work be determined by a multiplicity of inconsistent legal regimes when the work is simultaneously communicated to scores of countries? Simply taking into account one country's law, the complexity of placing works in a digital network is already daunting: should the task be further burdened by an obligation to assess the impact of the laws of every country where the work might be received? Put more bluntly, for works on the GII, there will be no physical territoriality; no way to stop works at the border, because there will be no borders. Without physical territoriality, can legal territoriality persist?[364]

Even more problematic, the Internet allows individuals to become authors and publishers, and many of those pioneer Internet users subscribed to an arguably anti-copyright,[365] anti-establishment culture.[366] As Stephen Levy noted, these pioneers—often called hackers—believe "[a]ccess to computers . . . should be unlimited and total . . . [and a]ll information should be free."[367] To this group, a free exchange of information is needed to allow for greater overall creativity. After all, who can fix a machine if he or she does not have access to the program code or other needed information?

In general, hackers "believe that essential lessons can be learned about the systems—about the world—from taking things apart, seeing how they work, and using this knowledge to create new and even more interesting things. They resent any person, physical barrier, or law that tries to keep them from doing this."[368] For example, when a hacker noticed in a Chinese restaurant that some Chinese people ordered fantastic-looking dishes that were not available on the English menu, he would go back to the restaurant armed with a Chinese dictionary, trying to "hack" the Chinese menu:

> [O]ne night [Bill Gosper] found a tiny little cellar place run by a small family. It was fairly dull food, but he noticed some Chinese people eating fantastic-looking dishes. So he figured he'd take [Peter] Sampson back there.
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> They went back loaded with Chinese dictionaries, and demanded a Chinese menu. The chef, a Mr. Wong, reluctantly complied, and Gosper, Samson, and the others pored over the menu as if it were an

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364 Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318, 319-20 (1995).

365 "As every reality hacker knows: 'Information wants to be free' and 'plagiarism saves time.'" *See* HALBERT, *supra* note 177, at 104 (quoting Gareth Branwyn, *Street Noise*, *in* MONDO 2000, at 30 (1992)).

366 *See generally* PEKKA HIMANEN, THE HACKER ETHIC AND THE SPIRIT OF THE INFORMATION AGE (2001); STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION (1984).

367 LEVY, *supra* note 366, at 40.

368 *Id.* *See also id.* at 217-18 (discussing how a hacker took some Atari chips home to test them out and considered his action "a neat hack from the proprietary oppressors").

> instruction set for a new machine. Samson [who learned a fair amount of Chinese characters] supplied the translations, which were positively revelatory. What was called "Beef with Tomato" on the English menu had a literal meaning of Barbarian Eggplant Cowpork. "Wonton" had a Chinese equivalent of Cloud Gulp. There were unbelievable things to discover in this system! So after deciding the most interesting things to order ("Hibiscus Wing? Better order that, find out what that's about"), they called over Mr. Wong, and he jabbered frantically in Chinese disapproval of their selections. It turned out he was reluctant to serve them the food Chinese-style, thinking that Americans couldn't take it. Mr. Wong had mistaken them for typically timid Americans—but these were explorers! They had been inside the machine, and lived to tell the tale (they would tell it in assembly language). Mr. Wong gave in. Out came the best Chinese meal that any of the hackers had eaten to date.[369]

Because hackers believe strongly in the free flow of information, they mistrust authority and find bureaucracies flawed. To many hackers, "[b]ureaucrats hide behind arbitrary rules (as opposed to the logical algorithms by which machines and computer programs operate): they invoke those rules to consolidate power, and perceive the constructive impulse of hackers as a threat."[370] In *A Declaration of the Independence of Cyberspace*, John Perry Barlow captured this sentiment:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.[371]

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369 *Id.* at 80-81.

370 *Id.* at 41.

371 John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1995), *available at* http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration. In the very beginning, the Internet was used exclusively by government and military agencies, educational and research institutions, government contractors, scientists, and technological specialists. *See* Peter K. Yu, *The Neverending ccTLD Story*, *in* ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS 1 (Erica Schlesinger Wass ed., 2003). As the medium became more commercial and global by nature, the cyberspace was transformed into a different place, with a different look and feel. Consider, for example, the following nostalgic account by Mike Godwin:

> I believe virtual communities promise to restore to Americans at the end of the twentieth century what many of us feel was lost in the decades at the beginning of the century—a stable sense of community, of place. Ask those who've been members of such a virtual community, and they'll tell you that what happens there is more than an

Despite their anti-establishment sentiment, hackers are different from thieves or computer criminals. Indeed, they have their own sense of fairness and follow their own codes of conduct. For example, hackers would use "blue boxes"—hardware devices to make illegal phone calls—"only for connecting to the computer—a practice which in the hacker mind justifies lawbreaking—and not for personal gain in trivial matters like calling distant relatives."[372]

Because of this unique Internet culture and the lack of regulation in the new technological medium, the Internet soon became a haven for music pirates, who downloaded music directly from pirated Web sites, rather than purchasing it from retail outlets.[373] In a way, many have considered MP3s "a kind of protest movement against record companies, which many artists hate because they control access to the music market."[374] As one commentator put it, "The MP3 movement is a rational revolt of passionate fans."[375] It offers opportunity for emerging

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exchange of electronic impulses in the wires. It's not just virtual barn raising. . . . It's also the comfort from others that a man like Phil Catalfo of the WELL can experience when he's up late at night caring for a child suffering from leukemia, and he logs on to the WELL and pours out his anguish and fears. People really do care for each other and fall in love over the Net, just as they do in geographic communities. And that "virtual" correctedness is a real sign of hope in a nation that's increasingly anxious about the fragmentation of public life and the polarization of interest groups and the alienation of urban existence.

MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 15 (1998). By the mid-1990s, cyberspace has become a very different place. As Professor Lessig wrote:

Newbies are the silent majority of today's Net. However much we romanticize the old days when the Net was a place for conversation and exchange, this is not its function for most of its users now. Certainly, the world is into "chat," but even ignoring the large portion of that space devoted to sex, chat is not the stuff the WELL was made of. Most people do not understand what chat or a MOO really is—maybe they have heard talk about them, but they do not understand what they are about. They do not understand what life in the community of the WELL, or a MOO, is really like.

In its feel, cyberspace has changed. How it looks, what you can do there, how you are connected there—all this has changed.

LESSIG, CODE, *supra* note 327, at 64 (footnotes omitted). *See also* LEVY, *supra* note 366, at 284 (noting that the third generation of hackers "dreamed not only of the ultimate hack, but of fame, and big royalty checks").

372 LEVY, *supra* note 366, at 250.

373 Muroff, *supra* note 334, at 1273 (noting that "populated with 'music downloading outposts' which allow users to download . . . for free either musical samples or full cuts of their favorite artists").

374 *The Big Five Hit the Web*, ECONOMIST, May 8, 1999, at 63.

375 As Professor Vaidhyanathan explained:

Compact discs cost too much. Cutting-edge fans want the newest, coolest music as fast as possible. So they share music and tips about music where they find each other—over the net. The free music strategy is, for lack of a better term, the Grateful Dead business model: Give away free music to build a loyal following, establish a brand name, and charge handsomely for the total entertainment package. . . . Free music has always been essential to the discursive communities that fuel the creative process. These days, some small music labels such as Emusic.com and Chuck D's Rapstation.com are experimenting with "value-added" and "gate-keeper" business models, with modest taxation on consumers and artists (and thus modest profit

artists, whom the established music industry ignores due to limited production, manufacturing scarcity, and narrow distribution channels.[376]

In the very beginning, music distribution over the Internet was very limited, because sound recordings demanded a lot of storage space,[377] and it took a long time (and probably many attempts) to download a complete recording.[378] However, as new compression technologies became available, the files became smaller, the rate of successful transfer higher, and the downloading time drastically reduced. Today, one can transmit digitized music across the world in a matter of seconds, and hundreds of thousands of users can access music instantaneously.[379]

The predominant compression technology is MP3, a standard, non-proprietary algorithm that compresses sound recordings to about one-twelfth of its original size while maintaining virtually identical sound quality.[380] With the development of this new technology, users could now store a minute's worth of CD-quality digital audio in a megabyte of memory in their computer hard drives.[381] Coupled with the latest broadband technology, MP3 enabled users to download an hour of music to their personal computers in just a few minutes.[382]

Already concerned about the illicit distribution of copyrighted music over the Internet, the recording industry became particularly concerned when Diamond Multimedia introduced the Rio portable music player.[383] Although pirated recordings had been freely available

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potential). They depend on open systems, like the Internet itself, to foster creativity and "buzz" about their products and services.

VAIDHYANATHAN, *supra* note 38, at 179-80.

376 *Id.* at 180.

377 For example, a typical digitally recorded song takes up about 40 megabytes of space. *See* Alixandra E. Smith, *Harvard Crimson, available at* LEXIS library, ALLNWS file.

378 *See* Mark Grossman, *Music to Whose Ears?*, MIAMI DAILY BUS. REV., Apr. 2, 1999, at B1 ("If MP3 technology didn't exist, few people would have the patience to wait hours to download recordings, and the music industry probably wouldn't face the dilemma now before it.").

379 Muroff, *supra* note 334, at 1273.

380 *See* Michael S. Mensik & Jeffrey C. Groulx, *From the Lightweight 'Rio' Flows Heavyweight Battle*, NAT'L L.J., Dec. 14, 1998, at B5. *See also* RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1074 (9th Cir. 1999) (noting that "MP3's popularity is due in large part to the fact that it is a standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary (and copyright-secure) competitor algorithms").

381 Philip Manchester, *The Fight for Protection*, FIN. TIMES (London), Apr. 7, 1999, at 4.

382 *See Diamond Multimedia*, 180 F.3d at 1074.

383 Judge O'Scannlain described in detail the function of the Rio portable music player:

> The Rio is a small device (roughly the size of an audio cassette) with headphones that allows a user to download MP3 audio files from a computer and to listen to them elsewhere.... Generally, the Rio can store approximately one hour of music, or sixteen hours of spoken material (e.g., downloaded newscasts or books on tape). With the addition of flash memory cards, the Rio can store an additional half-hour or hour of music. The Rio's sole output is an analog audio signal sent to the user via headphones. The Rio cannot make duplicates of any digital audio file it stores, nor can it transfer or upload such a file to a computer, to another device, or to the Internet. However, a flash

on the Internet in the past, consumers still preferred to purchase CDs because they did not have computer access all the time. However, with the release of this portable player, people could listen to MP3 recordings anywhere, and they might no longer be interested in buying physical CDs.

To protect itself, the recording industry brought suit to enjoin the manufacture and distribution of the Rio player in *RIAA v. Diamond Multimedia Systems, Inc.*[384] The industry alleged that Diamond Multimedia violated the AHRA by manufacturing and distributing a product that failed to meet the requirements for digital audio recording devices as specified in the statute.[385] In addition, the industry sought payment of royalties Diamond Multimedia owed under the AHRA.[386] As the recording industry claimed, online distribution of pirated recordings would discourage the purchase of legitimate recordings, and losses due to digital piracy would soon surpass figures caused by other more traditional forms of piracy.[387]

In its defense, Diamond Multimedia argued that the Rio did not fall within the scope of the AHRA and that computers were exempted from the statute.[388] The manufacturer also pointed out that the player could

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memory card to which a digital audio file has been downloaded can be removed from one Rio and played back in another.

Id. at 1073-75.

384 180 F.3d 1072 (9th Cir. 1999).

385 *Id.* at 1075. AHRA defined a "digital audio recording device" as

> any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.

17 U.S.C. § 1001(3) (2000). The Rio player failed to meet the requirement of the AHRA because the device did not employ a Serial Copyright Management System that sends, receives, and acts upon information about the generation and copyright status of the files the device played. *See id.* § 1002(a) (prohibiting the importation, manufacture, and distribution of any digital audio recording device that does not conform to the Serial Copyright Management System or a system that has similar functional characteristics).

386 *Diamond Multimedia*, 180 F.3d at 1075. *See also* 17 U.S.C. § 1003 (requiring manufacturers, distributors, and importers of digital hardware and blank digital software to pay compensatory royalties to music creators and copyright holders).

387 *Id. But see* Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 506 (1998) (arguing that persons who are willing to purchase the item for free often will not purchase the same item even if it is no longer freely available); *id.* at 509-10 (noting that the current price of recordings, which takes into consideration home taping and piracy and the harms such activities cause, offsets in part the losses incurred by the industry from such copying). *See also* ALFORD, *supra* note 8, at 129 n.13 (cautioning that loss figures supplied by the copyright industries and the U.S. government should not be taken at face value); Yu, *From Pirates to Partners*, *supra* note 8, at 175-76 (arguing that the copyright industries tend to overstate the extent of the piracy problem in China).

388 AHRA specifically provides that the term "digital musical recording" does not include "a material object . . . in which one or more computer programs are fixed." 17 U.S.C. § 1001(5)(B).

be used for other beneficial noninfringing uses.[389] As the United States Court of Appeals for the Ninth Circuit acknowledged, "[i]ndependent and wholly Internet record labels routinely sell and provide free samples of their artists' work online, while many unsigned artists distribute their own material from their websites."[390] Likewise, the Rio player allows users to access free-of-charge samples that are available for marketing purposes and teasers that seek to entice listeners to purchase recordings that are available through mail orders or for direct download.[391]

The trial court denied the recording industry's request for a preliminary injunction, holding that the industry failed to show a strong likelihood of success on the merits[392] and that the balance of hardships did not tip in the industry's favor.[393] Upon appeal, the Ninth Circuit found that the Rio player did not fall within the definition of digital audio recording devices as defined by the AHRA. As the appellate court explained: "Unlike digital audio tape machines, for example, whose primary purpose is to make digital audio copied recordings, the primary purpose of a computer is to run various programs and to record the data necessary to run those programs and perform various tasks."[394] Thus, computers do not qualify as digital audio recording devices, and Diamond Multimedia do not need to comply with the SCMS requirement.[395] In fact, as the Court observed in *dicta*, the AHRA "seems designed to allow files to be 'laundered' by passage through a computer."[396]

While *Diamond Multimedia* provided a victory for the hardware industry (and arguably consumers), it opened the floodgate for future litigation by noting that the AHRA did not cover computers.[397] After all, if computer equipment qualified as a digital audio recording device

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389 *Diamond Multimedia*, 180 F.3d at 1074.

390 *Id.*

391 *Id.*

392 RIAA v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 632 (C.D. Cal. 1998) (stating that "[a]lthough Plaintiffs have established a probability that the Rio is a 'digital audio recording device,' Plaintiffs have not established a probability of success in establishing that the Rio, if assessed by the Secretary of Commerce, would fail to satisfy Section 1002(a)(3)").

393 As the court maintained:

> Defendant has offered credible evidence that an injunction would substantially impact its projected revenues from the sale of the Rio. Regardless of the accuracy of Defendant's estimate ($ 200 million over the next two years), the Court is convinced that Defendant would at a minimum suffer multi-million dollar losses. Moreover, because the Rio is capable of recording legitimate digital music, an injunction would deprive the public of a device with significant beneficial uses.

Id. at 629 (citation omitted).

394 *Diamond Multimedia*, 180 F.3d at 1078.

395 *Id.*

396 *Id.*

397 *See, e.g.*, TeeVee Toons v. MP3.com, Inc., 134 F. Supp. 2d 546 (S.D.N.Y. 2001); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

as defined in the AHRA, the SCMS requirement and royalty payments would be the only remedies available to copyright holders.

In January 2000, MP3.com launched its My.MP3.com service, which allowed subscribers to play music over the Internet as long as they owned, borrowed, or purchased the CDs containing the requested recordings.[398] To facilitate this service, MP3.com purchased tens of thousands of popular CDs and copied them onto their computer servers.[399] Although MP3.com purchased licenses to perform the music, it did not own any licenses to reproduce the recordings.[400] As a result, major record companies and their artists brought suits against MP3.com, alleging copyright infringement.[401]

In its defense, MP3.com claimed that its service constituted fair use,[402] contending that the service provided a transformative "space shift" by allowing subscribers to enjoy the sound recordings they owned without carrying physical CDs around.[403] MP3.com also argued that the My.MP3.com service benefited, rather than harmed, the plaintiffs by enhancing sales, since the service required subscribers to demonstrate that they owned, borrowed, or purchased the CDs containing the requested recordings.[404] In addition, the defendant noted that its service did not compete directly with the plaintiffs in the digital downloading market and, instead, "provide[d] a useful service to consumers that, in its absence, will be served by 'pirates.'"[405]

At trial, the court rejected all of the defendant's arguments. Analyzing them under the four criteria specified under the fair use provision of the 1976 Copyright Act,[406] the court openly rejected the

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398 *UMG Recordings*, 92 F. Supp. 2d at 350.

399 *Id.*

400 Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 346-47 (2002).

401 *See TeeVee Toons*, 134 F. Supp. 2d 546; *UMG Recordings*, 92 F. Supp. 2d 349.

402 *See* 17 U.S.C. § 107. *See also* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating for the first time the concepts that evolved into the fair use doctrine). For comprehensive discussions of fair use, see generally WILLIAM PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

403 *UMG Recordings*, 92 F. Supp. 2d at 351. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding "time shifting" fair use).

404 *UMG Recordings*, 92 F. Supp. 2d at 352.

405 *Id.*

406 Although the Copyright Act does not explicitly define fair use, it lists four criteria that are to be applied to determine whether a particular use is "fair":

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of a copyrighted work.

defendant's "space shifting" argument, maintaining that such a service was neither transformative nor productive.[407] As the court explained, the defendant's argument was "simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation."[408] The court also found that the second and third factors weighed against fair use because the recordings the defendant copied were "close[] to the core of intended copyright protection"[409] and that the defendant had copied and replayed "the entirety of the copyrighted works."[410]

Finally, the court rejected the defendant's market enhancement argument by noting that "[a]ny allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."[411] The court also maintained that a copyright "is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders' property interests."[412] MP3.com lost the lawsuits and was acquired shortly afterwards by Vivendi Universal, which incorporated MP3.com into its subscription service[413] and has since sold the service to Roxio,[414] a manufacturer of CD- and DVD-copying software.

In another well-known lawsuit, the recording industry sued Napster for contributory and vicarious copyright infringement.[415] Napster

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17 U.S.C. § 107.

407 *UMG Recordings*, 92 F. Supp. 2d at 351. *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . .") (citation and footnote omitted).

408 *UMG Recordings*, 92 F. Supp. 2d at 351. *See also* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) (rejecting the fair use defense by the operator of a service that retransmitted copyrighted radio broadcasts over telephone lines); L.A. News Serv. v. Reuters Television Int'l Ltd., 149 F.3d 987 (9th Cir. 1998) (rejecting the fair use defense by television news agencies that copied copyrighted news footage and retransmitted it to news organizations).

409 *UMG Recordings*, 92 F. Supp. 2d at 351 (citing *Campbell*, 510 U.S. at 586).

410 *Id.* at 352.

411 *Id.*

412 *Id.*

413 *See* Litman, *War Stories*, *supra* note 400, at 347. *See also* Justin Oppelaar, *Vivendi U Uploads MP3 for $ 370 Mil.*, DAILY VARIETY, May 21, 2001, at 1; Brad King, *MP3.com Goes Major Labels League*, *available at* http://www.wired.com/news/print/0,1294,45377,00.html (July 20, 2001); Brad King, *MP3.com Goes Universal*, Wired News, *at* http://www.wired.com/news/print/0,1294,43972,00.html (May 21, 2001).

414 *Roxio Acquires PressPlay for $40 Million*, N.Y. TIMES, May 20, 2003, at C6.

415 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000). For discussions of *Napster* see generally Symposium, *Beyond* Napster—*The Future of the Digital Commons*, 15 TRANSNAT'L LAW. 257 (2002); Symposium, *Beyond* Napster*: Debating the Future of Copyright on the Internet*, 50 AM. U. L. REV. 355 (2000); Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473 (2002); Ku, *supra* note 331; Symposium, Napster*: Innocent Innovation or Egregious Infringement?*, 9 VILL. SPORTS & ENT. L.F. 1 (2002); David G. Post, *His Napster's Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35 (2001); Damien A.

counterargued that the users' "file sharing" constituted fair use. The Napster case, however, was more complicated than the MP3.com cases because Napster did not reproduce copyrighted works itself. Rather, Napster facilitated unauthorized copying, downloading, transmission, and distribution of the copyrighted works by others.[416]

Napster was started as a project by a college student, Shawn Fanning, who was frustrated by the difficulty in finding MP3 files on traditional Internet servers.[417] To alleviate this difficulty, Napster allowed users to search for music on the hard drives of other users and share music files with them while they were on the network.[418] As a result of this peer-to-peer network, Napster successfully transformed faraway computers into a large file-sharing network—or some would say piracy network.

At trial, the district court concluded that the recording companies had established a prima facie case of direct copyright infringement by Napster users. As the court explained, "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music."[419] The court then moved on to address the four fair use factors specified in the Copyright Act. The court noted that the first factor weighed against fair use, because Napster's users were neither using the copyrighted works in a transformative way nor did they attempt to use the songs for parody or for research.[420] Rather, users were merely copying and listening to the music.[421] Likewise, the second and third factors weighed against fair use, because music is creative in nature and because users downloaded entire songs.[422] Finally, although the court concluded that the use was not "paradigmatic commercial activity," the "vast scale" of file sharing facilitated by Napster could not be considered private use or personal use "in the traditional sense."[423] As the court explained, that "Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use."[424] Even though the activity was not for profit, it was certainly economic in nature.

To boost its case, the recording companies presented evidence of a

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Riehl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761 (2001); Alfred C. Yen, *A Preliminary Economic Analysis of* Napster*: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. DAYTON L. REV. 247 (2001).

416 114 F. Supp. 2d at 911.

417 *See id.* at 901-02.

418 *See id.* 905-07.

419 *Id.* at 911.

420 *Id.* at 913-14.

421 *Id.*

422 *Id.* at 913.

423 *Id.* at 912.

424 *Id.*

decline in CD sales at highly wired college campuses that subsequently banned Napster use.[425] According to the study, sales near these college campuses dropped by twelve to thirteen percent from 1997 to 2000, although CD sales nationwide had risen by eighteen percent.[426] The study inferred that the decline in sales resulted from MP3 downloads replacing CD purchases. The recording industry also argued that the availability of free downloading reduced the market for competing commercial downloading, and that this downloading deprived copyright holders of royalties for downloading even if it enhanced CD sales.[427] Based on this evidence, the court found that the effect of the use upon the value of the work and potential markets for the work weighed against fair use. According to the court, Napster harmed the market for copyrighted music by reducing CD sales among college students and by raising barriers to entry in the market for digital downloads.[428]

The district court ordered Napster to shut down. On appeal, the Ninth Circuit was more sympathetic to Napster and found that Napster was capable of commercially significant noninfringing uses.[429] Nonetheless, it concluded that "sufficient knowledge exist[ed] to impose contributory liability when linked to demonstrated infringing use of the Napster system."[430] As the Ninth Circuit reasoned, "[t]he record supports the district court's finding that Napster has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material."[431]

The Ninth Circuit remanded the case to the lower court, which subsequently ordered Napster to police its system and to block access to infringing material after it was notified of that material's location.[432] Unable to do so, Napster shut down its service in July 2001 and has since filed for bankruptcy protection.[433] In November 2002, Roxio purchased Napster's name and intellectual property assets.[434] A few months later, Roxio acquired PressPlay, the online music service, from Vivendi Universal and Sony Music.[435] In October 2003, Roxio finally

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425 *Id.* at 909-10.

426 Ku, *supra* note 331, at 289 (citing MICHAEL FINE, SOUNDSCAN STUDY ON NAPSTER USE AND LOSS OF SALES 5 (2000)).

427 114 F. Supp. 2d at 915.

428 *Id.* at 913.

429 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001).

430 *Id.* at 1021.

431 *Id.* at 1022.

432 A&M Records, Inc. v. Napster, Inc., 2001 U.S. Dist. LEXIS 2186 (N.D. Cal. Mar. 5, 2001).

433 *See* Matt Richtel, *Napster Says It Is Likely to Be Liquidated*, N.Y. TIMES, Sept. 4, 2002, at C2.

434 *Roxio Buys Napster Assets*, N.Y. TIMES, Nov. 28, 2002, at C10.

435 *Roxio Acquires PressPlay for $40 Million*, *supra* note 414.

relaunched Napster as a subscription-based service, featuring music from the major music labels.[436]

Although the recording industry, to a great extent, has succeeded in beating the pirates by taking them to court and suing them into bankruptcy, the technologies have become increasingly challenging to the industry. Since the MP3 and Napster litigation, a whole host of engines and services—such as Gnutella, Madster (formerly Aimster), KaZaA, AudioGalaxy, Morpheus/MusicCity, Grokster, iMesh, Filetopia, BearShare, and LimeWire—has emerged, and these "successors" can be used for the very same purposes as Napster.

From the industry's perspective, these engines are even more problematic. Unlike MP3.com and Napster, many of these engines and services do not have a centralized server.[437] Rather, they allow users to transfer files among various locations. Some of them, like Freenet, also allow users to remain anonymous.[438] Thus, enforcement has become a major problem, and the outcome of these battles becomes even harder to predict. The industry forced Napster to shut down its server, but there is little the industry could do to deal with Gnutella and its uncountable successors.

Moreover, as is demonstrated by the KaZaA litigation, jurisdictional issues might create barriers to the industry's litigation effort.[439] In fact, because not every country is as protective of the copyright industries as the United States, foreign countries might have different laws. Even when foreign courts apply identical laws, they might come to different conclusions.[440] Unless the recording industry is willing to go after all the users (which will likely result in an enforcement fiasco and publicity disaster), piracy will become rampant.

In light of this difficulty, the music industry looked for a fallback position and adopted self-help measures, including copyright protection

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436 Benny Evangelista, *Napster Back from the Dead*, SAN. FRAN. CHRON., Oct. 10, 2003, at B1; Jon Healey, *Napster Returns—Not Free but Legal*, L.A. TIMES, Oct. 10, 2003, at 5.

437 *See* Riehl, *supra* note 415, at 1773-79 (describing the architecture of gnutella-based engines).

438 *See id.* at 1779-87 (describing Freenet).

439 As the *Washington Post* reported: "Kazaa is a multinational creation. The three young men who developed the software hail from Estonia. They were commissioned to do the work by a company in the Netherlands. That company has since sold the software to another based in the Pacific island nation of Vanuatu, whose executives work in Australia." Ariana Eunjung Cha, *File Swapper Eluding Pursuers; Unlike Napster, Kazaa's Global Nature Defies Legal Attacks*, WASH. POST, Dec. 21, 2002, at A1. *But see In Web Disputes, U.S. Law Rules the World*, TORONTO STAR, Feb. 24, 2003, at D1 (noting that U.S. laws were applied in most Internet disputes).

440 *See* Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT'L L.J. 218, 232-41 (2003). *See also* Patti Waldmeir, *Material Published on the Internet and Thus Accessible Anywhere in the World Is Increasingly Being Challenged Under the Laws of Individual Nation States*, FIN. TIMES (London), Dec. 16, 2002, at 19 (noting the increasing willingness of national courts to assert jurisdiction over activities conducted on the Internet).

technologies, to protect itself against widespread piracy on the Internet.[441] Among such protection technologies are encryption,[442] digital watermarking,[443] and the use of trusted systems.[444] Notwithstanding these self-help measures, the entertainment industries remain vulnerable.[445] Although copy-protection technologies allow copyright holders to lock up their creative works, these technologies lose their protective function when they are decrypted. Even worse, once the technology is decrypted, the copyrighted work becomes available not only to those "techies" who successfully broke the code, but also to unsophisticated computer users around the world, through online downloads and through peer-to-peer file sharing.

To prevent the public from doing so, copyright holders must constantly upgrade their encryption technology. Such upgrading would, in turn, attract even more attention from hackers, who are just too eager to crack the latest encryption technology available. Eventually, the repeated encryption and decryption will create a vicious cycle in which the entertainment industry and the hacker community are engaged in an endless copy-protection arms race.[446] Instead of devoting resources to

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441 *See* Jessica Litman, *Electronic Commerce and Free Speech*, *in* THE COMMODIFICATION OF INFORMATION 23, 35 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

442 *See* DIGITAL DILEMMA, *supra* note 332, at 156:

> Cryptography is a crucial enabling technology for IP management. The goal of encryption is to scramble objects so that they are not understandable or usable until they are unscrambled. The technical terms for scrambling and unscrambling are "encrypting" and "decrypting." Encryption facilitates IP management by protecting content against disclosure or modification both during transmission and while it is stored. If content is encrypted effectively, copying the files is nearly useless because there is no access to the content without the decryption key. Software available off the shelf provides encryption that is for all practical purposes unbreakable, although much of the encrypting software in use today is somewhat less robust.

Id.

443 "While [digital watermarking] does not prevent the content from being copied and redistributed, this technique can at least make evident who owns the material and possibly aid in tracking the source of the redistribution." *Id.* at 83.

444 *See id.* at 167-71. *See also* Jonathan Weinberg, *Hardware-Based ID, Rights Management, and Trusted Systems*, 52 STAN. L. REV. 1251 (2000) (discussing hardware-based identifiers and trusted systems).

445 Although the industry might remain vulnerable, copy-protection technology does not necessarily need to be perfectly robust:

> Most people are not technically knowledgeable enough to defeat even moderately sophisticated systems and, in any case, are law-abiding citizens rather than determined adversaries. TPSs [Technical protection services] with what might be called "curb-high deterrence"—systems that can be circumvented by a knowledgeable person—are sufficient in many instances. They can deter the average user from engaging in illegal behavior and may deter those who may be ignorant about some aspects of the law by causing them to think carefully about the appropriateness of their copying. Simply put, TPSs can help to keep honest people honest.

DIGITAL DILEMMA, *supra* note 332, at 218.

446 As Professor Ku explained:

> [C]opy protection for digital content necessitates an expensive technological arms race . . . Given the difficulty of protecting digital works from copying, copyright

develop artists and improve products, the industries would invest their resources in developing encryption technology and in preventing consumers from accessing copyrighted works. This strategy would hurt artists, the recording industry, and consumers.

In fact, because the encryption technologies the industry used were easy to crack, some record companies switched to low-technology or unconventional protective measures. For example, when Epic Records distributed review copies of Tori Amos, Pearl Jam, and AudioSlave albums in 2002, the label sent them inside portable CD players that had been glued shut.[447] Likewise, before Madonna released her new single, *American Life*, the label started circulating a spoofed version of the song on the Internet, featuring the singer saying "What the f___ do you think you're doing?"[448] Unfortunately for the label, that strategy backfired when a hacker took over the singer's Web site, Madonna.com, posting real, downloadable MP3s of every song on the album. Angry fans also responded by remixing Madonna's tirade with other songs.[449] Some Web sites even held contests for these remixes.

To protect its technological self-help measures, the industry successfully lobbied Congress for the Digital Millennium Copyright Act ("DMCA"),[450] which was enacted in 1998 to strengthen copyright

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> holders will be forced constantly to spend significant resources developing technology just to keep the cat in the bag. These costs will in turn be passed on to the public, not to provide the public with access to new works, but for the sole purpose of limiting access. Given that hackers appear to be as adept, if not more so, at picking the locks of copyright protection as those trying to lock up digital works, the costs associated with a copy protection arms race would be unending.

Ku, *supra* note 331, at 319-20 (footnote omitted). *See also* Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 251 (discussing the "wasteful 'arms race' of technological-protection schemes, with each side increasing its spending to outperform the other's technology"); Peter K. Yu, *How the Motion Picture and Recording Industries Are Losing the Copyright War by Fighting Misdirected Battles*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/commentary/20020815_yu.html (Aug. 15, 2002) [hereinafter Yu, *How the Motion Picture and Recording Industries Are Losing*].

447 Lev Grossman, *It's All Free!*, TIME, May 5, 2003, at 60.

448 *Id.*

449 *See* Nik Bonopartis, *Firms Say the Swap Must Stop*, POUGHKEEPSIE J., July 16, 2003, at 1A.

450 Digital Millennium Copyright Act, Pub. L. No. 105-204, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). Professor Jessica Litman criticized the DMCA as follows:

> The DMCA is long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain. Most importantly, it seeks for the first time to impose liability on ordinary citizens for violation of provisions that they have no reason to suspect are part of the law, and to make noncommercial and noninfringing behavior illegal on the theory that that will help to prevent piracy.

JESSICA LITMAN, DIGITAL COPYRIGHT 145 (2001). For comprehensive discussions of the DMCA, see generally Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137 (1999) [hereinafter Ginsburg, *Copyright Legislation*]; Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL'Y 61 (2000); Glynn S. Lunney, Jr., *The Death of*

protection in the digital medium. The DMCA includes a provision prohibiting the circumvention of encryption technology copyright holders use to protect their creative works and the dissemination of information concerning how to defeat copy-protection technologies.[451] In addition, the DMCA provides a "safe harbor" for Internet service providers to remove any hosted content that allegedly infringes upon the work of a copyright holder.[452] The statute also protects the integrity of copyright management systems[453] and revised the performance right regime in light of the changes in the digital environment.[454]

Since the enactment of the DMCA, commentators have widely criticized the statute for stifling creativity.[455] On the one hand, the DMCA creates a chilling effect by requiring Internet service providers to remove content even if the reproduction of such materials is permissible under existing copyright law.[456] On the other hand, the anti-circumvention provision of the statute prevents people from

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Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act, 87 VA. L. REV. 813 (2001); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002); David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855 (2001); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279 (2001).

451 17 U.S.C. § 1201.

452 *Id.* § 512.

453 *Id.* § 1202. As Professor Ginsburg summarized:

> Section 1202 prohibits: (a) knowingly providing false copyright management information, with the intent to facilitate or conceal infringement. The provision also prohibits (b) knowingly or intentionally altering or removing copyright management information, knowing (or having reasonable grounds to know) that the alteration or removal will facilitate or conceal infringement. Subsection (c) defines copyright management information. It includes: the name of the author; the name of the copyright owner; and the "terms and conditions for use of the work."

Ginsburg, *Copyright Legislation*, *supra* note 450, at 157. *See id.* at 157-60 (discussing the provision on copyright management information). *See also* Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996) (examining the impact of copyright management mechanisms on the traditional notions of freedom of thought and expression).

454 *See* Ginsburg, *Copyright Legislation*, *supra* note 450, at 166-70 (discussing the DMCA amendments to the 1995 Digital Performance Right in Sound Recordings Act).

455 Shortly after the United States Copyright Office released its report on the effects of the DMCA, U.S. COPYRIGHT OFFICE, STUDY REQUIRED BY SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (2001), *available at* http://www.loc.gov/copyright/reports/studies/dmca/dmca_study.html, more than 50 intellectual property law scholars expressed disappointment over the report and urged Congress to conduct its own study. *See IP Law Professors Urge Congress to Do Its Own DMCA Study*, WASH. INTERNET DAILY, Oct. 16, 2001, at 200. The study is required by section 104 of the DMCA.

456 *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 187-90 (2001) [hereinafter LESSIG, THE FUTURE OF IDEAS]; LITMAN, *supra* note 450, at 145.

engaging in actions that traditionally have been considered fair use.[457]

A case in point is Professor Edward Felten of Princeton University, who successfully decrypted copy-protection technologies designed by the Secure Digital Music Initiative ("SDMI").[458] In September 2000, the SDMI issued a public challenge and offered $10,000 to those who successfully broke their proposed copy-protection technologies.[459] Professor Felten claimed that he and his research team successfully broke the proposed technologies. When he planned to present his findings at a scientific conference, the recording industry asked him to withdraw the paper, citing potential violation of the DMCA.[460] In response, Professor Felten filed a lawsuit seeking a declaratory judgment,[461] which was subsequently dismissed.[462] Although the industry eventually backed down and Professor Felten was able to present his research, the incident demonstrated the statute's potential chilling effect.

Recently, the constitutionality of the DMCA was called into question in *Universal City Studios, Inc. v. Corley*.[463] The controversy arose when the motion picture industry used CSS to control access to, and prevent the copying of, motion pictures recorded on DVDs.[464] In September 1999, Jon Johansen, a Norwegian teenager, and two others created DeCSS, a program capable of "ripping" DVDs, which then allowed users to play the data on noncompliant computers as well as to copy the recordings.[465] The DeCSS code was posted on the Web site of the defendant's magazine, *2600: The Hacker Quarterly*,[466] and the defendant subsequently provided hyperlinks to other sites posting the

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457 *See* LESSIG, FUTURE OF IDEAS, *supra* note 456, at 187-90; LITMAN, *supra* note 450, at 145.

458 SDMI is an association of electronic companies that were involved in designing copy-protection technologies that protect copyrighted works against unauthorized access.

459 SDMI described its public challenge in a press release.

> So here's the invitation: Attack the proposed technologies. Crack them.
>
> By successfully breaking the SDMI protected content, you will play a role in determining what technology SDMI will adopt. And there is something more in it for you, too. If you can remove the watermark or defeat the other technology on our proposed copyright protection system, you may earn up to $10,000.

SDMI, *An Open Letter to the Digital Community*, *available at* http://www.sdmi.org/pr/OL_Sept_6_2000.htm (Sept. 6, 2000).

460 David P. Hamilton, *Digital-Copyright Law Faces New Fight*, WALL ST. J., June 7, 2001, at B10.

461 Felten v. RIAA, No. CV-01-2669 (D.N.J. June 26, 2001).

462 Dave Wilson, *Professor's Suit Against RIAA Dismissed*, L.A. TIMES, Nov. 29, 2001, at C3.

463 273 F.3d 429 (2d Cir. 2001).

464 CSS is "an encryption based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs." Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

465 *See id.* at 311.

466 The Web site of the defendant's magazine is available at http://www.2600.com.

DeCSS code.[467]

In response to the defendant's action, eight major movie studios brought suit to enjoin *2600* from posting the DeCSS program and related hyperlinks,[468] citing the anticircumvention provision of the DMCA, which prohibits offering to the public or trafficking in any technology designed to circumvent a technological measure that controls access to a work.[469] In its defense, the defendant argued that the posting of DeCSS code was speech protected by the First Amendment.[470]

Although the trial court agreed that computer code was expressive,[471] it concluded that the DMCA is a content-neutral regulation that only incidentally affects expression[472] and upheld the statute because it furthers a substantial governmental interest—"the protection of copyrighted works stored on digital media from the vastly expanded risk of piracy in this electronic age."[473] As the Court reasoned:

> Once a decryption program like DeCSS is written, it quickly can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiffs' copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear.[474]

On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment. As Judge Jon Newman, a well-respected judge in the copyright area, explained, the court was torn between "two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication."[475] Nonetheless, the Second Circuit was convinced that Congress, rather than the court, should resolve this dilemma. As Judge Newman concluded, the court's "task is to determine whether the legislative solution adopted by Congress, as applied to the Appellants by the District Court's injunction, is consistent with the limitations of the First Amendment, and [the court was]

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467 *Reimerdes*, 111 F. Supp. 2d at 312.

468 *Id.* at 303.

469 17 U.S.C. § 1201(a)(2) (2000).

470 *Reimerdes*, 111 F. Supp. 2d at 304.

471 *See id.* at 326 ("It cannot seriously be argued that any form of computer code may be regulated without reference to First Amendment doctrine. The path from idea to human language to source code to object code is a continuum.").

472 *Id.* at 329.

473 *Id.* at 330.

474 *Id.* at 331.

475 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 457-58 (2d Cir. 2001).

satisfied that it is."[476]

While the *Corley* litigation was on appeal, Russian cryptographer Dmitry Sklyarov was arrested in the United States in July 2001, after giving a presentation to a computer hacker convention on the software that removed security protection from Adobe e-books.[477] He became the first person to be charged with violating the DMCA and was eventually released after strong protests in the United States and after he promised to testify for the U.S. government against his former employer.[478] A trial ensued, accusing his Moscow-based employer, ElcomSoft, of illegally selling software that permitted users to circumvent security features in an electronic book. In December 2002, a federal jury acquitted ElcomSoft of all charges.[479]

Since the passage of the DMCA, the copyright industries have been heavily lobbying Congress for further protection. For example, in late July, U.S. Representative Howard Berman introduced the Peer to Peer Piracy Prevention Act,[480] which, if enacted, would allow movie studios and record companies to hack into personal computers and peer-to-peer file-sharing networks if the rights holders suspect that infringing materials were being circulated without authorization. Meanwhile, the industry also has been actively pursuing litigation against potential infringers, such as Grokster, MusicCity, and KaZaA.[481]

In April 2003, the recording industry discovered newfound subpoena power under the DMCA when it won *RIAA v. Verizon*

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476 *Id.* at 458.

477 Jennifer Lee, *U.S. Arrests Russian Cryptographer as Copyright Violator*, N.Y. TIMES, July 18, 2001, at C8 (reporting Sklyarov's arrest). *See also* Complaint, U.S. v. Sklyarov (N.D. Cal. July 7, 2001) (No. 5 01 257), *available at* http://www.eff.org/IP/DMCA/US_v_Sklyarov/20010707_complaint.html; Symposium, *Implications of Enforcing the Digital Millennium Copyright Act: A Case Study, Focusing on* United States v. Sklyarov, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 805 (2002).

478 David Frith, *A Promotion a Day Keeps Apple A-weigh*, CANBERRA TIMES, Jan. 7, 2002, at A12 (reporting that Sklyarov was released in a deal that "saw him admit the facts of the case but not any illegal activity").

479 Matt Richtel, *Russian Company Cleared of Illegal Software Sales*, N.Y. TIMES, Dec. 18, 2002, at C4.

480 Peer to Peer Piracy Prevention Act, H.R. 5211, 107th Cong. (2002). *See also* Rep. Howard L. Berman, *The Truth About the Peer to Peer Piracy Prevention Act: Why Copyright Owner Self-help Must Be Part of the P2P Piracy Solution*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/commentary/20021001_berman.html (Oct. 1, 2002) (explaining the need for the legislation); Julie Hilden, *Going After Individuals for Copyright Violations: The New Bill That Would Grant Copyright Owners a "License to Hack" Peer-To-Peer Networks*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/hilden/20020820.html (Aug. 20, 2002) (criticizing the legislation). Most recently, Rep. Berman suggested that he might not reintroduce his controversial bill, in part due to the lack of support from the copyright industries. *See* Jon Healey, *Rep. Berman May Not Revive Internet Piracy Bill*, L.A. TIMES, Feb. 21, 2003, at 3.

481 *See, e.g.*, Matt Richtel, *A New Suit Against Online Music Sites*, N.Y. TIMES, Oct. 4, 2001, at C4; John Davidson, *Battle for the Internet Bazaar*, AUSTL. FIN. REV., Mar. 25, 2003, at 35.

Internet Services,[482] in which the court required the Internet service provider to hand over names of individuals whom the industry accused of illegally trading music.[483] Using this newfound subpoena power, major record companies filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute, seeking billions of dollars in damages.[484] Despite the companies' high-profile efforts, they eventually settled with the students for meager amounts.[485] Ironically, one student was able to raise his entire $12,000 fine in less than six weeks over the Internet, while another was working his way to complete a similar feat.[486]

Most recently, the recording industry launched a mass litigation campaign against file swappers who make large number of songs available on peer-to-peer file-sharing networks.[487] By mid-July, the industry had already sent out close to 1000 federal subpoenas, with roughly 75 new subpoenas approved every day.[488] On September 8, 2003, the RIAA followed up its earlier efforts by filing 261 lawsuits against individuals who illegally downloaded and distributed on average more than 1000 copyrighted music files via peer-to-peer file-sharing networks, such as KaZaA, Grokster, iMesh, and Gnutella.[489] As of this writing, the RIAA has settled some of these lawsuits, while continuing to litigate the others.[490]

The industry's recent efforts were controversial, and the consuming public increasingly see copyright as antithetical to their interests, jeopardizing the public domain,[491] the unprotected territory in

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482 258 F. Supp. 2d 6 (D.D.C. 2003).

483 *Id.*

484 *See* Ahrens, *4 Students Sued over Music Sites*, *supra* note 2; Jon Healey, *Students Hit with Song Piracy Lawsuits*, *supra* note 2.

485 Jon Healey & P.J. Huffstutter, *4 Pay Steep Price for Free Music*, L.A. TIMES, May 2, 2003, at 1 (reporting that students will pay the recording industry damages in the range of $12,000 to $17,500).

486 *See* Jefferson Graham, *Fined Student Gets Donations to Tune of $12K*, USA TODAY, June 25, 2003, at 4D.

487 *See* Jefferson Graham, *Swap Songs? You May Be on Record Industry's Hit List*, USA TODAY, July 22, 2003, at 1D.

488 *See* Benny Evangelista, *Firm Sleuths out Illegal File Sharers*, SAN. FRAN. CHRON., July 21, 2003, at E1.

489 *See* Harmon, *The Price of Music*, *supra* note 6.

490 *See, e.g.*, Frank Ahrens, *Music Industry Will Talk Before Suing*, WASH. POST, Oct. 1, 2003, at E1; Mike Snider, *Record Industry Fires Warning Shot*, USA TODAY, Oct. 1, 2003, at 2B.

491 *See generally* David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). Recent literature has emphasized the importance of the public domain and the danger of its disappearance. *See, e.g.*, LESSIG, CODE, *supra* note 327, at 66 (lamenting how the media and software industries are stifling innovation in the New Economy); LITMAN, *supra* note 450 (showing how the increased domination of interest groups in the lawmaking processes has made copyright law anti-public and incomprehensible); VAIDHYANATHAN, *supra* note 38 (describing how the increasing corporate control over the use of software, digital music, images, films, books and academic materials has

which raw materials reside. Consider, for example, the immediate reaction to the United States Supreme Court's ruling in *Eldred v. Ashcroft*.[492] In *Eldred*, the Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act,[493] which extends copyright protection in the United States for twenty years, bringing the copyright term to the life of the author plus seventy years.[494] Shortly after the Court handed down its decision, strong, bitter reactions emerged from supporters of the public domain movement. While many believed the Court had sold them out to private corporations, like Disney, the more radical ones advocated civil disobedience as a counteracting strategy.[495]

In recent years, the public awareness of intellectual property issues has increased tremendously, thanks to the MP3, Napster, *Eldred*, and KaZaA litigation. In the past, copyright law was considered a complicated issue that was of primary interest and concern to intellectual property lawyers, legal scholars, and technological developers. Today, however, the public see it as something that affects their daily lives. With increasingly user-friendly technologies, individuals have become authors and publishers and have taken on roles that traditionally required commercial equipment.

As political support grows, legislative proposals that place a heavier emphasis on the public domain have surfaced.[496] To maintain

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steered copyright law away from its original design to promote creativity and cultural vibrancy); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) [hereinafter Benkler, *Free as the Air to Common Use*] (advocating the use of Justice Brandeis's conception that information should be "free as the air to common use" as a conceptual baseline to limit property rights in information products).

492 537 U.S. 186 (2003). *See also* Peter K. Yu, *Mickey Mouse, Peter Pan, and the Tall Tale of Copyright Harmonization*, IP L. & BUS., Apr. 2003, at 24; Marci Hamilton, *Now That the Supreme Court Has Declined to Limit Copyright Duration, Those Who Want to Shorten the Term Need to Look at Other Options, Including Constitutional Amendment*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/hamilton/20030213.html (Feb. 13, 2003); Peter K. Yu, *Four Remaining Questions About Copyright Law After* Eldred, *at* http://www.gigalaw.com/articles/2003/yu-2003-02.html (Feb. 2003).

493 Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304 (2000)).

494 17 U.S.C. § 304.

495 *See* Lord Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), *reprinted in* EXTENDING MICKEY'S LIFE: *ELDRED V. ASHCROFT* AND THE COPYRIGHT TERM EXTENSION DEBATE (Peter K. Yu ed., 2003) (cautioning that an ill-advised copyright law eventually would be "repealed by piratical booksellers"). *But see* Siva Vaidhyanathan, *After the Copyright Smackdown: What Next?*, Salon.com, *at* http://www.salon.com/tech/feature/2003/01/17/copyright/print.html (Jan. 17, 2003) (discouraging acts of civil disobedience by noting that "[w]hile disobedience might be more fun, the power of civil discourse remains" in the post-*Eldred* era).

496 For example, Congressman Richard Boucher recently introduced the Digital Media Consumers' Rights Act in an effort to restore historical balance in copyright law and to ensure proper labeling of copy-protected CDs. Digital Media Consumers' Rights Act, H.R. 107, 108th Cong. (2003), *available at* http://www.house.gov/boucher/docs/dmcra108th.pdf. Senator Sam Brownback circulated among consumer groups and within the Senate a draft bill requiring

the historical balance in the copyright system, commentators have called for more attention to access issues and users' rights while proposing safeguards to limit copyright protection.[497] Likewise, consumer advocates and civil libertarians have alarmed the general public about the problems created by the growing use of encryption technologies to protect copyright.[498] In addition, organizations such as

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copyright holders to file suits before obtaining the identities of alleged infringers from Internet service providers. *See* Farhad Manjoo, *Can Anyone Stop the Music Cops?*, Salon.com, *at* http://www.salon.com/tech/feature/2003/06/17/brownback_bill/index_np.html (June 17, 2003). Most recently, Reps. Zoe Lofgren and John Doolittle introduced the Public Domain Enhancement Act, which, if enacted, would require copyright holders to pay a $1 fee to maintain their copyrights fifty years after the original publication of their works. Brian Krebs, *Bill Seeks to Loosen Copyright Law's Grip*, NEWSBYTES, June 25, 2003.

[497] *See, e.g.*, LESSIG, THE FUTURE OF IDEAS, *supra* note 456, at 251 (proposing a regime whereby a published work will be protected for a term of five years once registered, that the registration can be renewed fifteen times, and that the work will fall into the public domain if the registration is not renewed); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 241 (1991) (noting that "[p]reserving the integrity of copyright law—including its law of users' rights—is critical to our free society"); Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 18 (2003) (noting the need to adapt "pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright owners without depriving individuals of the customary real space access to information provided by bound books and periodicals"); Benkler, *Free as the Air to Common Use*, *supra* note 491 (advocating the use of Justice Brandeis's concept that information should be "free as the air to common use" to limit property rights in information products); Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1003-04 (1996) (calling for the recognition of the right to read anonymously); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 277 (1996) (arguing that users must be allowed "to do the same things they are able to do in a non-digitized environment"); Hamilton, *TRIPS Agreement*, *supra* note 238, at 631 (emphasizing the need to construct a "free use zone" that will "mak[e] explicit what is already accepted practice in a hard copy universe—that copyright owners do not have rights to prohibit individuals from browsing and borrowing their works"); Reichman & Samuelson, *supra* note 175, at 113-24 (discussing the adverse impact of *sui generis* database protection on scientific research and education); Reichman & Uhlir, *supra* note 14, at 796-821 (discussing the adverse impact of database protection laws on scientific, technical, and educational users of factual data and information); Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403, 405 (noting the need to "maintain[] some approximation of our current cheap and simple access to copyrighted works for research, scholarship and pleasure"); Lawrence Lessig, *Protecting Mickey Mouse at Art's Expense*, N.Y. TIMES, Jan. 18, 2003, at A17 (proposing a scheme whereby copyright holders will have to pay a tax 50 years after a work is published and that the work will fall into the public domain if the copyright holder fails to pay the tax for three years in a row).

[498] *See* Yu, *How the Motion Picture and Recording Industries Are Losing*, *supra* note 446; Kevin Hunt, *Record Industry Opens Attack on Consumer Rights*, HARTFORD COURANT, May 23, 2002, at 21. After all, an encrypted CD may not function the same way as a conventional CD. Previously available functions, including those to which consumers may have a legal right under the fair use provision, may no longer exist. Even worse, an encrypted CD might not be playable on car stereos, some PCs, and old CD players, forcing consumers to buy new ones they do not otherwise need or cannot afford. *See Celine Dion and the Copycats*, FIN. TIMES (London), July 19, 2002, at 11. Thus, it is not surprising that the recording industry has encountered a highly negative response—including a class-action lawsuit by two California consumers—when Sony released Celine Dion's latest album as an encrypted CD. Jon Healey & Jeff Leeds, *Record Labels*

the Digital Media Association and the Digital Future Coalition have grown considerably, while organizations and legal clinics that publicly defend users' rights have emerged.[499]

Today, piracy remains rampant on the Internet. Global CD sales fell in 2001 for the first time since the introduction of the CD format in the early 1980s.[500] Billions of music files are now downloaded per month, while global CD sales have dropped by nine per cent in 2002.[501] If piracy were to continue at this level, it would not be surprising to find the United States regaining its century-old title as the most notorious pirate in the world. After all, the United States is the world leader in developing cutting-edge reproduction technologies, and it possesses the largest Internet population in the world.[502]

IV. MORAL OF THE STORIES

This Article brings together piracy stories in eighteenth- and nineteenth-century America, twentieth-century China, and twenty-first century cyberspace. Each of these stories takes place at a different era in a different geographical region under different politico-socio-economic conditions. The story involves different cultural traditions, levels of economic development, political systems, historical practices, reprographic technologies, and copyright sectors.

When commentators analyze these stories, they tend to overemphasize a particular factor or a combination of these factors. However, when one steps back and looks at the comparative picture, these explanations become inadequate. For example, extensive copyright piracy occurs in both the East and the West even though Eastern and Western cultures diverge significantly. Likewise, the piracy problem occurs in the United States at different eras, even though the country today is very different from what it was two centuries ago.

So far, commentators have not provided a "grand unified theory"

Grapple with CD Protection, L.A. TIMES, Nov. 29, 2002, § 3, at 1 (reporting that "[t]wo California consumers already have filed a class-action lawsuit against the five major record companies, alleging that copy-protected CDs are defective products that shouldn't be allowed on the market"). As some consumer advocates noted, the record companies need to label the CD carefully to avoid confusion and to allow consumers to choose away from these encrypted CDs.

499 *See* Rick Boucher, *The Future of Intellectual Property in the Information Age*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 95, 100 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2002) [hereinafter COPY FIGHTS].

500 *See* Menell, *supra* note 333, at 119.

501 Renee Graham, *Life in the Pop*, BOSTON GLOBE, Sept. 9, 2003, at E4.

502 *But see* Mark Landler, *For Music Industry, U.S. Is Only the Tip of a Piracy Iceberg*, N.Y. TIMES, Sept. 26, 2003, at A1 (noting that "the recording industry's problems with the illegal online distribution of music in the United States pale beside the rampant piracy that goes on overseas").

of copyright piracy. Instead, they offered very careful analyses of each story, discussing in detail the different aspects of the problem—political, social, economic, cultural, and historical. While their analyses are insightful and significant, policymakers and the general public have a very difficult time understanding the crux of the piracy problem. To help us do so, this Article seeks to provide a broad systemic framework that takes into account the various forces that contribute to the creation and enlargement of the copyright divide.

A. *The Copyright Divide*

Copyright law has always been about stakeholders.[503] In the late nineteenth century, Anthony Trollope blamed American book piracy on "the book-selling leviathans."[504] A century later, Professor Jessica Litman told us that "[t]he only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves."[505] Since then, commentators have discussed at length the gaps between the "copyright-rich" and "copyright-poor"[506] and between the haves and have-nots in the copyright system.[507]

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503 As my former colleague Justin Hughes wrote:

> [I]deas about property have played a central role in shaping the American legal order. For every Pilgrim who came to the New World in search of religious freedom, there was at least one colonist who came on the promise of a royal land grant or one slave compelled to come as someone else's property.

Justin Hughes, THE PHILOSOPHY OF INTELLECTUAL PROPERTY, 77 GEO. L.J. 287, 288 (1988). *See also* James V. Delong, *Defending Intellectual Property*, *in* COPY FIGHTS, *supra* note 499, at 17, 25:

> We are a long way from the Jeffersonian ideal of a nation of yeoman farmers, tilling fields that we own. But it remains difficult to refute the idea that a stable political system needs people with a stake in ensuring that its politics do not run off the rails, and that one of the best safeguards is to be sure that people own property and thus have something to lose. Certainly, at the local level, widespread property ownership in the form of homes seems to provide substantial stability and involvement in government.

504 TROLLOPE, *supra* note 85, at 308.

505 Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53 (1994). *See also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) [hereinafter Litman, *Copyright, Compromise*].

506 VAIDHYANATHAN, *supra* note 38, at 105.

507 Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 19 (1996) [hereinafter Litman, *Revising Copyright Law*] (noting that current copyright rules "make some parties 'haves' and others 'have-nots'"); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 162 (2001) (noting that "[a] blanket legitimization of automated rights management systems, clickwrap licensing regimes, or other similar means to assert absolute property rights over a work in cyberspace will . . . ultimately recreate patterns of resource allocation that institutionalize the status of the information "haves" and the information "have nots"); Edward Samuels, *Can Our Current Conception of Copyright Law Survive the Internet Age?*, 46 N.Y.L. SCH. L. REV. 221, 223 (2002) ("Copyright . . . represents the attempt by the haves (the companies that own all the copyrights) to

These commentaries are very helpful in helping us understand the three piracy stories. Today, a *copyright divide* exists between those who have stakes in the existing copyright regime and those who do not. On one side of the divide are the stakeholders, who are eager to protect what they have under the existing regime. This group of players not only considers piracy annoying, but sees it as theft. On the other side of the divide are the nonstakeholders. These nonstakeholders neither understand nor believe in the copyright system.

Using this construct, the extensive copyright piracy that takes place in the above three stories can be viewed as a battle between the stakeholders and nonstakeholders over the change and retention of the status quo. Unless the nonstakeholders understand why copyright needs to be protected and until they become stakeholders or potential stakeholders, they will not be eager to abide by copyright laws or to consent to stronger copyright protection.

To be certain, the stakeholders can always lobby for stronger copyright protection, including heavier penalties for copyright violations. However, their actions incur heavy political and economic costs on the enforcement authorities and would ultimately become ineffective when the authorities lose interest in enforcing those penalties.[508] Even worse, this lack of enforcement might instill in the public a lack of confidence in and respect for the legal system.[509]

As with all stakeholder-nonstakeholder problems, it is not easy to deal with the copyright divide. After all, the stakeholders would be eager to protect what they have, while the nonstakeholders would be eager to enlarge their share and become stakeholders. Fortunately, not

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keep the goodies away from the have-nots (the consuming public)."). *See also NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association) (expressing concern that requiring "some form of payment for every use of a protected work . . . will take us a very long way towards becoming a nation of information haves and information have-nots"), *available at* http://www.dfc.org//dfc1/Archives/n2/librarie.html; INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 84 (1995) [hereinafter NII WHITE PAPER] (noting the divide between information "haves" and "have nots" and rejecting "the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of "universal access"); Tatiana Boncompagni, *Copyright Haves, Have-Nots Take Fight To Hill*, RECORDER, Aug. 18, 2000, at 3.

508 DIGITAL DILEMMA, *supra* note 332, at 312 (discussing how copyright holders can shift the cost to the public by adopting weak protection technology).

509 *See id.* at 212-13 (noting that "[w]hen popular attitudes and practices are out of synch with laws, the enforcement of laws becomes more difficult, which may instill in people a lack of confidence in and respect for the legal system."). *See also* Bartow, *supra* note 497, at 17 (arguing that "if the government wants its citizens to respect copyrights, the copyright laws as they are promulgated and enforced, must be more consistent, comprehensible and respectful of individuals' needs and experiences").

everybody steals or uses other illegal means to enlarge his or her share. Most people do so only when they do not understand the law or when they do not believe in the system—for example, when they perceive the system as grossly unfair.[510]

This is exactly what happens with the DMCA today.[511] Drafted by copyright lobbyists, the law is long, wordy, complex, cumbersome, counterintuitive, and internally inconsistent.[512] The statute contains many pages and is full of exceptions and exceptions to exceptions. As a result of this complicated and convoluted structure, it would take a sophisticated copyright lawyer or a veteran intellectual property scholar a considerable amount of time to digest and master the law.[513] One could only imagine the amount of time the general public needs to spend to grasp the basic understanding of this statute, not to mention the fact that many of them have very limited understanding of such basic copyright concepts as the idea-expression dichotomy,[514] the first-sale doctrine,[515] and the fair use privilege.[516]

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510 *See* Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 238-39 (1997) [hereinafter Litman, *Copyright Noncompliance*]. *See also* Hamilton, *TRIPS Agreement*, *supra* note 238, at 616 ("Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective."); Faison, *supra* note 179 ("We take copyright violations very seriously, but when it comes to copying a disk, most Chinese people don't see what's wrong." (quoting Xu Guoji, senior official in Shanghai's Industrial and Commercial Administration)).

511 Digital Millennium Copyright Act, Pub. L. No. 105-204 (1998). *See also* discussion *supra* Part III.

512 *See* Litman, *Electronic Commerce and Free Speech*, *supra* note 441, at 33.

513 *See* Bartow, *supra* note 497, at 25 (contending that "not even someone with a firm knowledge of the copyright law can confidently expect to reliably identify the metes and bounds of copyright compliant behavior across disparate factual situations because copyright laws are neither clear nor applied consistently or predictably").

514 The idea-expression dichotomy "is the term of art used in copyright law to indicate the elements in a copyrighted work which the grant of the copyright monopoly does not take from the public." Abrams, *supra* note 61, at 563. It "'strike[s] a definitional balance . . . by permitting free communication of facts while still protecting an author's expression.'" Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985). For discussions of the idea-expression dichotomy, see generally Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990); Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989). *See also* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("[I]t is convenient to define such a use by saying that others may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.'"); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("[T]here is a point in this series of abstractions where [creative works] are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended."); Landes & Posner, *supra* note 329, at 347-49 (discussing the economic rationale for the idea-expression dichotomy).

515 *See* 17 U.S.C. § 109(a) (2000).

516 *See* sources cited *supra* note 402.

Consider, for example, section 1201(d) of the DMCA,[517] which provides a "shopping right" for libraries and other nonprofit educational institutions.[518] The statute allows the institutions to circumvent "solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under [the DMCA]."[519] Nevertheless, the statute would only apply to situations in which "an identical copy of that work is not reasonably available in another form."[520] Imagine how often a library will have to decide whether or not to acquire a work that exists only in access-protected form and whose author or publisher is unwilling to make available sufficient information for potential customers to make the purchasing decision!

Today, the general public has many misconceptions of copyright law. For example, some maintain that downloading a copyrighted song for purposes of evaluation for up to 24 hours would not constitute copyright infringement.[521] Some have the wrong impression that posting copyrighted materials for downloading on a foreign Web site is legally permissible because U.S. copyright laws do not apply to countries abroad.[522] Some mistakenly assume that anything posted on the Web or on a Usenet news group are in the public domain by virtue of its presence there.[523] And some wrongfully believe that software is available for copying without liability if the copyright owner has ceased actively distributing it for more than a number of years.[524] In fact, there are many other copyright-related myths and urban legends circulating on the Internet.

By the same token, many copyright holders fail to understand the limits of copyright and insist on rights that they did not get under the copyright statute. For example, many major publishers place on the cover page a legend noting that "[n]o part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission."[525] Likewise, many scholars include in the draft of their papers such admonitions as "Unauthorized reproduction prohibited" or "No part of this paper may be reproduced or cited without the permission of the author."[526]

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517 17 U.S.C. § 1201(d).
518 *See* Ginsburg, *Copyright Legislation for the "Digital Millenium," supra* note 450, at 139.
519 17 U.S.C. § 1201(d)(1).
520 *Id.* § 1201(d)(2).
521 DIGITAL DILEMMA, *supra* note 332, at 124.
522 *Id.*
523 *Id.*
524 *Id.* at 125.
525 *Id.* at 128.
526 Bartow, *supra* note 497, at 48.

In many less developed countries, the lack of understanding of copyright law remains a major barrier to successful intellectual property law reforms. A case in point is China. In the 1980s and the early 1990s, the Chinese people had very limited awareness of intellectual property rights and did not understand the benefits of such protection or the harm resulting from the lack of such protection.[527] Even worse, like the general populace, judges and law enforcement officers in China neither understood intellectual property rights nor saw the urgency of protecting such rights.[528] Coupled with the lack of rule of law[529] and an acute shortage of competent judges and sophisticated lawyers,[530] the lack of awareness and understanding of intellectual property rights has created a major barrier to effective intellectual property law reforms in China.

Even if the nonstakeholders are aware of and understand copyright, a copyright divide can exist if the nonstakeholders do not believe in the system. As Professor David Post wrote powerfully in the Napster context:

> Only when Napster users believe that it is in *their* interest to grant recognition to the "foreign" copyrights held by Lieber and Stoller will they do so. Only when there is a constituency for reciprocal copyright recognition Over There, among cyberspace's new Hawthornes, Melvilles, and Emersons, will we see it. There may be things we can do to speed that process up; taking our cue from Dickens, a policy of nonrecognition of *cyberspace* copyrights here in realspace, for example, under which we might deny copyright protection Over Here for software and systems developed Over There, might be an interesting place to start.[531]

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527 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 221-25 (discussing the need to educate the Chinese populace about intellectual property rights); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 71 (same).

528 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 213-21 (discussing the need to educate Chinese judges and government officials about intellectual property rights); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 71 (same). *See also* Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHT IN SCIENCE AND TECHNOLOGY 68, 85 (1993) [hereinafter *Why a Uniform Intellectual Property System Makes Sense*] ("For a national intellectual property system to work, there must first be a judicial system that works, a precondition that is often missing.").

529 For discussions of the development of the rule of law in China, see, for example, RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS (1997); CHINA'S LEGAL REFORMS (Stanley Lubman ed., 1996); DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman B. Potter ed., 1994); RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW (1994); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); MURRAY SCOTT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS (1999).

530 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 214 (discussing the shortage of competent judges and experienced lawyers).

531 David G. Post, *His Napster Voice*, *in* COPY FIGHTS, *supra* note 499, at 107, 121.

Countries differ in levels of wealth, economic structures, technological capabilities, political systems, and cultural traditions. They need different copyright systems to promote the creation and dissemination of intellectual works in their own countries.[532] Unless and until a country considers copyright protection in its national interest, it unlikely would strengthen copyright protection in the country.

In retrospect, this is exactly what happened in the United States shortly after the Second World War,[533] in China in the late 1990s,[534] and in many less developed and transition countries today. In all these examples, one can find a strong correlation between increasing intellectual property protection and a growing realization of self-interests in the intellectual property area. Because of this realization, the United States underwent a complete change after the Second World War, while China accelerated its intellectual property law reforms shortly before it joined the WTO.

B. *The Contributing Factors*

When commentators analyze copyright piracy, they tend to focus on individual factors. For example, commentators have examined cultural tradition, the level of economic development, political system, historical practice, the type of reprographic technology, and the type of copyright sector. This Section argues that none of these factors *alone* accounts for the extensive piracy problem, although some of these factors at times are more influential and determinative than others. Rather, all the different factors contribute to the creation and enlargement of the copyright divide, and they should be considered as contributing factors.

Until we can develop a *comprehensive* approach that targets the various factors, as compared to a piecemeal policy that focuses on one or two exaggerated factors, we might not be able to stem the piracy problem.

1. Cultural Tradition

Copyright has an intertwining relationship with cultural policy,[535]

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532 *See* discussion *supra* Part IV.A.2.

533 *See* discussion *supra* Part I.

534 *See* discussion *supra* Part II.

535 *See, e.g.*, Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 187, 187 (1997) (exploring the importance of the cultural exception and arguing that each country "has a right—even a duty—to protect and develop its own culture" despite the need

and culture has always been a powerful argument to account for the cause of extensive copyright piracy. For example, commentators discussed at length the classic Greek and Roman beliefs that works were created through "inspiration by the muses."[536] They also examined the Confucian underpinnings of Chinese society,[537] the familial and community values embodied in Islam laws,[538] and the hacker culture that paves the way to widespread MP3 piracy.[539] To many commentators, culture is the primary cause of extensive copyright piracy in less developed countries and in cyberspace today.

However, if examined carefully, this cultural tradition argument is as unconvincing as the argument that extensive MP3 piracy occurs in Western societies because of the communitarian underpinnings in Judeo-Christian teachings. Communitarian philosophies were (and are) not unique to the Greek and Roman republics, China, the Middle East, or hackers. They are found in civilizations around the world.

Undeniably, cultural tradition might create barriers for copyright laws to emerge or develop. A culture-based analysis also might provide insight into a community of which the public has limited understanding. However, a different, or even pro-copying, culture does not necessarily result in extensive copyright piracy. Consider China, for example. As Professor William Alford pointed out in his seminal work, *To Steal a Book Is an Elegant Offense*, the Confucian culture militated against copyright protection in so far as it did not allow intellectual property protection to take root.[540] Yet, this non-Western culture had not prevented intellectual property protection from functioning in the Chinese society once it was introduced—in this case by the United States.[541] Indeed, there is strong compatibility between copyright and

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to protect intellectual property); J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625 (1996) [hereinafter Reichman, *Duration of Copyright*] (noting the close ties between copyright and cultural policy); Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 634 (2002) [hereinafter Yu, *Toward a Nonzero-sum Approach*].

536 WALTER BAPPERT, WEGE ZUM URHEBERRECHT 26-39 (1962) (positing that the classic Greeks and Romans, with pagan theories of inspiration by the muses, could not conceive of rights based on individual authorship), *quoted in* Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do with It?*, 47 J. COPYRIGHT SOC'Y U.S.A. 209, 213 n.19 (2000).

537 *See* sources cited *supra* note 8.

538 *See* Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT'L & COMP. L. 307, 345 (1996). *See also* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 66 (Lise Buranen & Alice M. Roy eds., 1999) (discussing how some teachers attribute plagiarism by Middle Eastern students to the emphasis of community and family values in Middle Eastern cultures).

539 *See* sources cited *supra* note 8.

540 *See* ALFORD, *supra* note 8.

541 *See* YU, *supra* note 8, at 4-7 (discussing the importation of intellectual property rights into

Confucianism,[542] just as there is between Western human rights and Confucianism.[543]

Likewise, although many early members of the Internet community subscribed to the hacker culture and the motto "Information wants to be free,"[544] there is no evidence that these members would necessarily steal or undertake other illegal acts to free up information. As Jessica Litman pointed out insightfully:

> People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the stuff the copyright law says.... People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact says, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads.[545]

China by Western countries); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 178 (1994) (noting that "[o]utsiders can play a constructive role by insisting that the [intellectual property] issues be addressed within a larger and principled framework.").

542 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 224-25 (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 76-77 (same). *Compare* XIANFA art. 20 (1982) (amended Mar. 29, 1993) ("The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions."), *and id.* art. 47 ("The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."), *with* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

543 In the past decade, substantial research has been devoted to explore the common grounds between human rights and the Chinese culture, in particular Confucianism. *See, e.g.*, DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael C. Davis ed., 1995).

544 Stewart Brand was often credited for coining the phrase. Hamilton, *TRIPS Agreement*, *supra* note 238, at 625; David Stipp & Stewart Brand, *The Electric Kool-Aid Management Consultant*, FORTUNE, Oct. 16, 1995, at 160 (characterizing the phrase "Information wants to be free" as the "cyberhacker rallying cry").

545 Litman, *Copyright Noncompliance*, *supra* note 510, at 238–39. *See* Hamilton, *TRIPS Agreement*, *supra* note 238, at 616 ("Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective."). *See also* Bartow, *supra* note 497 (advocating the adaptation of pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright holders without depriving individuals of the customary real space access to

So far, copyright law "doesn't stick in their heads" because it is long, complex, cumbersome, and counterintuitive.[546] Consider the following excerpt from the RIAA's Web site on what consumers can and cannot do with their music:

> First, for your personal use, you can make analog copies of music. For instance, you can make analog cassette tape recordings of music from another analog cassette, or from a CD, or from the radio, or basically from any source. Essentially, all copying onto analog media is generally allowed.
>
> Second, again for your personal use, you can make some digital copies of music, depending on the type of digital recorder used. For example, digitally copying music is generally allowed with minidisc recorders, DAT recorders, digital cassette tape recorders, and some (but not all) compact disc recorders (or CD-R recorders). As a general rule for CD-Rs, if the CD-R recorder is a stand-alone machine designed to copy primarily audio, rather than data or video, then the copying is allowed. If the CD-R recorder is a computer component, or a computer peripheral device designed to be a multipurpose recorder (in other words, if it will record data and video, as well as audio), then copying is not allowed.[547]

Since the turn of the twentieth century, copyright law has been drafted primarily by copyright lawyers who negotiate on behalf of their clients. As a result, the statute consists of bargains stakeholders made in private meetings during an arduous negotiating process.[548] Compared to a commandment that says "Thou Shalt Not Steal" or "Thou Shalt Not Kill," the current law would be very difficult and time-consuming even for sophisticated copyright lawyers and veteran intellectual property scholars to understand, not to mention the average users.[549] This

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information provided by bound books and periodicals); Faison, *supra* note 179 ("We take copyright violations very seriously, but when it comes to copying a disk, most Chinese people don't see what's wrong.") (quoting Xu Guoji, senior official in Shanghai's Industrial and Commercial Administration); Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991) (examining the difference between the prevailing public myth of copyright and existing copyright statute and case law).

546 LITMAN, *supra* note 450, at 73. Ironically, the Clinton Administration claimed the passage of the DMCA as the success of its Framework for Global Electronic Commerce, which called for the creation of "predictable, minimalist, consistent, and simple" rules. *See* WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), *available at* http://www.iitf.nist.gov/eleccomm/ecomm.htm. *See also* Samuelson, *supra* note 450, at 524.

547 DIGITAL DILEMMA, *supra* note 332, at 47.

548 *See, e.g.*, *id.* at 47 (noting that "[m]uch of the complexity of this law is pertinent only to the specific industry-to-industry dealings it addresses and is irrelevant to the general public"); Litman, *Copyright, Compromise*, *supra* note 505; Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) [hereinafter Litman, *Copyright Legislation*].

549 As Jessica Litman pointed out:

> If ordinary people are to see copyrights as equivalent to tangible property, and accord copyright rules the respect they give to other property rules, then we would need, at a minimum, to teach them the rules that govern intellectual property when we teach them the rules that govern other personal property, which is to say in elementary school.

situation may change, however, if the law becomes shorter, intuitive, and more commonsensical.[550] Once Internet users begin to understand copyright law, stronger copyright protection will follow, and the piracy problem will be significantly reduced.

2. Level of Economic Development

Countries differ in terms of levels of wealth, economic structures, technological capabilities, political systems, and cultural traditions.[551] Different countries have different needs and aspirations,[552] and policymakers face different political pressures[553] and make different

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> The problem, though, is that our current copyright statute could not be taught in elementary school, because elementary school students couldn't understand it. Indeed, their teachers couldn't understand it. Copyright lawyers don't understand it. If we are going to teach the copyright law to schoolchildren, then we need the law to be sensible, intuitive, and short enough that schoolchildren can hold its essential provisions in their heads. What we have now is not even close.

LITMAN, *supra* note 450, at 72. *But see* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (footnote omitted):

> "Thou shalt not steal." has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

Id. at 183.

550 *See* DIGITAL DILEMMA, *supra* note 332, at 125 (noting the need for the law to be "set forth in a clear and straightforward manner that the general public can readily comprehend").

551 MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 191 (1998); Yu, *From Pirates to Partners*, *supra* note 8, at 239; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 84.

552 RYAN, *supra* note 551, at 201. *See also* Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 333 (1993) ("Fundamental differences in concepts of ownership and legal regimes provide at least some explanation as to why it has been so difficult to draft a multilateral intellectual property agreement. A favorable agreement for one country could be unfavorable for another country.").

553 *See* Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, *in* INTELLECTUAL PROPERTY AND ETHICS 195, 207 (Lionel Bently & Spyros M. Maniatis eds., 1998) (noting that "no Chinese leader could be seen bowing to pressure from the United States [on the intellectual property front] without being in danger of undermining his own position, a difficulty which goes some way towards explaining much of the brinkmanship which has characterised the negotiations between China and the United States on the issue"); RYAN, *supra* note 551, at 144 (arguing that intellectual property protection, which involves a fundamental debate about economic development strategy, may threaten the established relationships of businesses and the government); SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 215 (1998) (arguing that intellectual property protection may put the ruling elites in less developed countries in a very difficult, if not precarious, position). *See also* RYAN, *supra* note 551, at 75 (describing why the South Korean government was very sensitive to the political threat posed by college students who were seriously concerned about increased textbook prices that result from efforts to curtail piracy); SELL, *supra*, at 192 (describing how Thai Prime Minister Prem Tinsulanond's

value judgments as to what would best promote creations and inventions in their own countries.[554] In light of these differences and the need to have a global intellectual property regime,[555] the TRIPs Agreement includes transitional provisions that delay implementation of the Agreement for five years in less developed and transitional countries[556] and for eleven years in least developed countries.[557] To help create "a sound and viable technological base" in these countries, the Agreement also requires developed countries to provide incentives for their businesses and institutions to promote and encourage technology transfer to least developed countries.[558]

Although these transitional provisions seem to suggest that less developed countries have not developed to an economic level that makes intellectual property protection a cost-effective and sound governmental policy, they do not do so. Instead, they suggest that less developed countries have not developed to an economic level that makes implementation and enforcement of the TRIPs Agreement a cost-effective and sound governmental policy.[559] The debate about the TRIPs Agreement is not about whether a country should have intellectual property protection, but whether a country should have a particular intellectual property system.

So far, the presumptions that stronger intellectual property protection will benefit less developed countries[560] and that a

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administration was ousted in a no-confidence vote after it attempted to strengthen the country's copyright law).

554 *See* Yu, *Toward a Nonzero-sum Approach*, *supra* note 535, at 569.

555 *See* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831 (arguing that the Paris Convention incurs significant costs to less developed countries); J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11, 25 (1997) [hereinafter Reichman, *From Free Riders to Fair Followers*] ("[A]dherence to the TRIPS Agreement requires [less developed] countries to reconcile their own economic development goals with its international intellectual property norms.").

556 TRIPs Agreement, *supra* note 172, arts. 65(1)-(3).

557 *Id.* art. 66(1), 33 I.L.M. at 1222.

558 *Id.* art. 66(2), 33 I.L.M. at 1222.

559 *See* RYAN, *supra* note 551, at 75 (arguing that some governments have not developed to an economic level that makes Western intellectual property protection a cost-effective and sound government policy); Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 68, 97 (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS] (discussing why a uniform intellectual property regime that requires strict equality in the duration of patents would ignore the different elasticities, discount rates, and research and development productivities in different countries); *Conferences: Intellectual Property Lawyers Lament Supreme Court Federalism*, PAT. TRADEMARK & COPYRIGHT L. DAILY (BNA), at D3 (Nov. 22, 1999) (reporting that a Ukrainian government minister told Judge Randall Rader that honoring U.S. intellectual property rights on products used in Ukraine would cost half of the country's gross national product).

560 SELL, *supra* note 553, at 221 (arguing that, "[w]hile the North claims that stronger intellectual property protection will benefit developing countries, this relationship has yet to be demonstrated in either economic theory or empirical proof"); Frischtak, *supra* note 559, at 90

universalized intellectual property regime would maximize global welfare are questionable.[561] Equally doubtful is the assumption that the current intellectual property system strikes the proper balance "between incentives to future production, the free flow of information and the preservation of the public domain in the interest of potential future creators."[562] As Professor Jerome Reichman noted, "policymakers concerned to promote investment in important new technologies often overstate the supposed benefits of specific intellectual property regimes while ignoring the negative economic functions of these regimes in relation to the complementary operations of competition law generally."[563]

Indeed, as we learn from the recent debate on copyright term extension,[564] many Americans disagree on the proper balance between

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(noting that "[t]here is little in economic theory to support convergence of [intellectual property rights] systems on a cross-country basis, particularly if convergence means an increase in the level of protection in developing and industrializing countries"). *But see* Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE 75 (1990) (asserting that the level of economic development is closely correlated to the existing level of intellectual property protection).

561 *See* Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT'L L. & POL. 109, 126 (1997); Frischtak, *supra* note 559, at 103-05 (urging countries to develop their intellectual property rights regime according to their own needs). *See also* Robert O. Keohane, *The Demand for International Regimes*, *in* INTERNATIONAL REGIMES 141, 152 (Stephen D. Krasner ed., 1983) (arguing that an international regime may not yield overall welfare benefits and that actors outside the regime may suffer).

562 BOYLE, *supra* note 11, at 124. *See* Reichman, *From Free Riders to Fair Followers*, *supra* note 555, at 24 (arguing that policymakers in many developed countries take the existing levels of innovative strength for granted and mistakenly promote protectionism). *See also* F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (W.W. Bartley III ed., 1988) ("While property is initially a product of custom, and jurisdiction and legislation have merely developed it in the course of millennia, there is then no reason to suppose that the particular forms it has assumed in the contemporary world are final.").

563 J.H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75, 81 (1993).

564 For discussions of copyright term extension, see generally ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION AND THE MAKING OF COPYRIGHT POLICY (1998); EXTENDING MICKEY'S LIFE: *ELDRED V. ASHCROFT* AND THE COPYRIGHT TERM EXTENSION DEBATE (Peter K. Yu ed., forthcoming 2003); Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM.-VLA J.L. & ARTS 17 (2002); Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989 (2000); Ginsburg, *Copyright Legislation for the "Digital Millennium,"* *supra* note 450, at 170-75; Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); Peter A. 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 (1996); Dennis S. Karjala, *The Term of Copyright*, *in* GROWING PAINS: ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY (Laura N. Gasaway ed., 1997); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 70-74 (2001); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT

intellectual property protection and the access to information "needed to spur further innovation and ensure the citizenry's full participation in our democratic polity."[565] The European Union and the United States, the two leading advocates of strong international intellectual property protection, also disagree on a large variety of copyright issues, such as database protection,[566] the protection of moral rights,[567] fair use,[568] the first sale doctrine,[569] the work-made-for-hire arrangement,[570] and protection against private copying in the digital environment.[571]

Although commentators sometimes attribute extensive copyright piracy to the level of economic development, in particular the pirate countries' limited financial resources, technological backwardness, undeveloped legal system, and minimal stakes in a healthy global

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SOC'Y U.S.A. 19 (2002); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996); L. Ray Patterson, Eldred v. Reno*: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223 (2001); Reichman, *Duration of Copyright*, *supra* note 535; Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 CARDOZO ARTS & ENT. L.J. 651 (2000); Symposium, Eldred v. Ashcroft*: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 1 (2002); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315 (2000).

565 William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 22 (1994) [hereinafter Alford, *How Theory Does—and Does Not—Matter*]. *See also* XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, *supra* note 193, at 33-38 (discussing the different models of computer software protection); Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33 (1987) (arguing that policymakers and the judiciary should not automatically apply the existing copyright paradigm to computer software); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents & Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 84 (arguing against the need for copyright in digital media).

566 For discussions of the expediency and constitutionality of U.S. database protection legislation, see generally sources cited *supra* note 14.

567 For discussions of the tension between U.S. copyright and moral rights in Europe, see generally sources cited *supra* note 13.

568 *See generally* sources cited *supra* note 15.

569 *See* Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000) (discussing the disagreement over the exhaustion issue during the negotiation of the TRIPs Agreement).

570 J.H. Reichman, *Duration of Copyright*, *supra* note 535, at 631 (noting that "[a] more substantial discrepancy between American copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work-made-for-hire doctrine in general and on the principle of corporate authorship in particular"). *See id.* at 631-33 (discussing the United States' distinctive reliance on the work-made-for-hire doctrine and corporate authorship).

571 Joseph S. Papovich, *NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended?—A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 259 (1997) (noting that "[b]lank tape levies have been a matter of dispute for several years between the United States and some European countries"). *See also* Lutzker, *supra* note 347, at 182-83 (discussing how foreign countries protect against unauthorized private copying). *Compare* Audio Home Recording Act of 1992, 17 U.S.C. §§ 1000-1009, *with* Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter EU Information Society Directive].

intellectual property system, their attribution is unjustified. Economic development explains a lot about our need for diversity and sensitivity in developing the international intellectual property system,[572] but very little about the cause of extensive copyright piracy.

In fact, however poor and backward they are, less developed countries have strong incentives to develop a strong, robust, and dynamic copyright regime. Such a regime will promote modernization and economic development,[573] attract foreign investment,[574] and create new jobs.[575] It also will facilitate transfer of knowledge and

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572 *See* ASSAFA ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES 47 (1996) (arguing that less developed countries may be able to modernize if "they manage to grasp the internal dynamic that operates in each of them and devise appropriate economic and technological polices, without neglecting social and political aspects"); *id.* at 98-142 (outlining a proposal for an intellectual property system in non-industrial countries); LESTER C. THUROW, BUILDING WEALTH: THE NEW RULES FOR THE INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY 128 (1999) (arguing that countries with different levels of economic development desire, need, and should have different intellectual property systems); Chiappetta, *supra* note 569 (arguing that countries must "agree to disagree" during their negotiation of a multilateral intellectual property regime); Correa, *supra* note 561, at 129 ("Differentiation . . . looks desirable in that it permits countries in the Latin tradition to retain a system that responds to their own cultural perceptions of creation and protects the moral and economic rights of all interested parties."); Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, *in* INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 89 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (examining whether intellectual property protection is of net benefit to less developed countries); Oddi, *supra* note 555, at 866-74 (outlining a proposal for a patent system in less developed countries); Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473 (1999) (explaining how to restructure the patent administration in ways that can maximize the contribution of inventors to economic growth and sustained development); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 528, at 68 ("The first characteristic of the uniform system being proposed is that the specific intellectual property systems of individual countries need not be *identical*."); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, *in* INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 156 (George R. Stewart et al. eds., 1994) ("[A] truly successful IP system must be culturally-specific and responsive to the different economic and social realities of each country."); *id.* at 171 ("[I]t cannot be taken for granted that a Western IP system will be either beneficial to or successful in other countries with different cultures.").

573 *See* Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 528, at 83 ("Strong intellectual property safeguards seem likely to speed rather than retard progress toward world-class achievement."); Yu, *From Pirates to Partners*, *supra* note 8, at 174 (noting the importance of intellectual property rights to a country's strategy of economic development); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 62 (arguing that China overlooked the importance of intellectual property rights to its economic development).

574 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 192; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 62.

575 *See* Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, *in* PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 269, at 7, 9; Yu, *From Pirates to Partners*, *supra* note 8, at 192 (noting that effective intellectual property protection can create jobs); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 63 (same). *See also* PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY 4 (1998) (estimating that a 60% decrease in piracy would translate into more

technology,[576] promote indigenous authorship and creation,[577] and generate considerable tax revenues for the country.[578]

3. Political System

Copyright protection goes hand in hand with the freedom a government gives its citizenry to express opinion. Societies that have no respect for individual rights are unlikely to tolerate private expressions or expressive activities.[579] Thus, authoritarian societies have very limited need for an effective copyright system, as they do not need to provide incentives for people to create expressions. Indeed, commentators have noted "an intimate link" between a country's respect for individual rights and its respect for a copyright system that values and promotes an individual's creative achievement.[580] As Professor Marci Hamilton pointed out, one must accept, at least, some version of individualism, reward, and commodification to believe in intellectual property rights.[581]

Consider, for example, China, which has been widely criticized for its lack of intellectual property protection and its authoritarian rule. Since its establishment in 1949, China has exercised very strict control over the dissemination of information and the distribution of media products,[582] which it considered instruments of political indoctrination

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than 79,000 jobs).

576 Although technology transfer is always mentioned alongside patent protection, technology can be transferred via books, videos, and computer software. See Yu, *From Pirates to Partners*, *supra* note 8, at 192; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 63.

577 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 192-93; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 63.

578 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 193; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 63-64.

579 *See* Alford, *How Theory Does—and Does Not—Matter*, *supra* note 565, at 17-18. *See also* Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT'L & COMP. L. 1, 7 (1997) [hereinafter Zhang, *Intellectual Property Law in China*] (attributing the delay of implementing copyright law to "China's concern about the control of publications"). As Dean Garten explained:

> If foreign governments do not seek to protect basic human rights, they are more likely to ignore or circumvent other basic laws of great commercial relevance, such as those that protect intellectual property rights, combat corruption, and mandate the disclosure of critical financial information. If the arrogance of governments that oppress their people transfers easily to other areas.

Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., May/June 1997, at 67, 75.

580 Hamilton, *TRIPS Agreement*, *supra* note 238, at 618. *See also* Ringer, *Two Hundred Years of American Copyright Law*, *supra* note 36, at 118 ("[W]e know, empirically, that strong copyright systems are characteristic of relatively free societies.").

581 *See* Hamilton, *TRIPS Agreement*, *supra* note 238, at 617 ("Individualism, as captured in the Western intellectual property system, is the *sine qua non* for a society to recognize and honor personal liberty.").

582 *See* YUEZHI ZHAO, MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY

and mass mobilization.[583] Today, the media business and the publishing industry remain the most heavily regulated businesses in the country.[584] One can find severe restrictions on imported films,[585] books and audiovisual products,[586] and the Internet.[587] Due to these restrictions, many media products are unavailable despite heavy demand,[588] and consumers have to settle for black market products or pirated goods,[589] which are often inferior to, and are sometimes indistinguishable from, genuine products.[590]

LINE AND THE BOTTOM LINE 19 (1998) [hereinafter ZHAO, MEDIA, MARKET, AND DEMOCRACY] (noting that the Chinese Communist Party "exercised strict control over its publications from the very beginning"); Shaozhi Su, *Chinese Communist Ideology and Media Control*, *in* CHINA'S MEDIA, MEDIA'S CHINA 75, 77 (1994) (noting that the Chinese Communist Party "pays utmost attention to ideology"). *But see generally* DANIEL C. LYNCH, AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND "THOUGHT WORK" IN REFORMED CHINA (1999) (describing how a combination of property rights reforms, administrative fragmentation, and technological advance has caused the Chinese authorities to lose some of its control over propagandistic communication).

583 ZHAO, MEDIA, MARKET, AND DEMOCRACY, *supra* note 582, at 2; Su, *supra* note 582, at 77 (noting that media not only has the ability to create an atmosphere conducive to political development, but also can help mobilize the masses and foster political struggle).

584 Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, *in* PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 127, 127 (Mary L. Riley ed., 1997) [hereinafter Lee, *Censorship and Approval Process*]; Mary L. Riley, *The Regulation of the Media in China*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 355 (Mark A. Cohen et al. eds., 1999) [hereinafter Riley, *Regulation of the Media*] ("Media and all media products, are heavily regulated in China.").

585 *See generally* Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291-96 (1999) (discussing the importation and censorship of non-Chinese films in China).

586 *See* Lee, *Censorship and Approval Process*, *supra* note 584, at 148; Riley, *Regulation of the Media*, *supra* note 584, at 377.

587 *See* Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate Between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 (1999); Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, *at* http://www.gigalaw.com/articles/ 2001/yu-2001-03-p1.html (Mar. 2001) [hereinafter Yu, *Barriers to Foreign Investment*] (discussing content regulations in the Chinese Internet Industry).

588 *See* Robert B. Frost, Jr., Comment, *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 132 (1995) ("[W]hen China stalled the import of the film, 'True Lies,' because of the looming trade war, a cinema in Shenzhen had already begun showing a pirated copy." (footnote omitted)); Erik Eckholm, *Spider-Man Springs into China with More Than Comics*, N.Y. TIMES, Aug. 31, 2000, at E2 (reporting that pirated video compact discs of *X-Men* were available in China even though the film itself was not approved for commercial screening). *See also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 55 (2001) [hereinafter 2001 NTE REPORT] ("Pirates find ways to get VCDs and DVDs of blockbuster films into the Chinese market almost immediately after the films are released theatrically in the United States.").

589 *See* Butterton, *supra* note 8, at 1105-06 (noting that the film import quota has "been a fertile ground for pirate practices"); Derek Dessler, Comment, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181, 232 (1995) ("Commentators argue that . . . market access barriers facilitate intellectual property piracy and impede enforcement."); Frost, *supra* note 588, at 132 ("The United States claims that this limitation produces a vacuum effect which creates a large demand for pirated films.").

590 *See* 2001 NTE REPORT, *supra* note 588, at 55 (noting that "consumers are often unaware

As time passes, the Chinese market becomes saturated with infringing substitutes, and foreign manufacturers and distributors have a difficult time entering the market, even if restrictions are finally removed, or relaxed.[591] Under this theory, one therefore would expect government censorship to promote piracy. As one commentator acknowledged:

> It is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of "The Lion King"—the factory managers would be sharing a cell with other dissidents in a heartbeat.[592]

While government censorship in general encourages piracy, the converse is not necessarily true. Piracy can flourish equally in a free society, in which regulation is limited and citizens are free to commit piracy acts. The textbook example of a free society with a significant piracy problem is the Internet. The Internet is "rudderless, decentralized, and transnational," and its architecture and structural resistance has made government regulation difficult.[593] It is therefore understandable why the entertainment industry is very concerned about piracy on the Internet.

Moreover, we should not ignore the effectiveness of authoritative governments in controlling social problems, including copyright piracy. In the early 1990s, the Chinese authorities—to the dismay of human rights advocates—enlisted the help of some of their toughest law enforcers to clean up pirate factories.[594] To create a deterrent effect and to demonstrate to the West their eagerness in eradicating piracy, the

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that they are purchasing [intellectual property right]-infringing goods"); Alford, *Making the World Safe for What?*, *supra* note 8, at 137 (noting that the piracy problem in Shanghai "has reached such proportions that officials in Shanghai have found it necessary to take to the airwaves to inform citizens of where they can shop without fear of purchasing fakes").

591 As one commentator explained:

> If the Chinese more fully relaxed or lifted barriers to market participation by foreign [intellectual property rights] owners, those foreign owners could sell their own goods in China and thereby displace, at least to some extent, pirate products that now have Chinese markets to themselves. Moreover, absent such barriers, some U.S. producers could both sell their "authentic" products in the Chinese market, and also monitor, if not police, infringement themselves on an in-country basis. Such market access adjustments would have application in a number of areas.

Butterton, *supra* note 8, at 1105.

592 James Shinn, *The China Crunch; Three Crises Loom in the Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1. *But see* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 4-5 (2000) ("[T]here are real political and social costs associated with any serious crackdown on a problem as massive as counterfeiting. Overcoming local protectionism will require the expenditure of considerable political capital and divert limited resources from China's myriad other pressing problems.").

593 *See* Netanel, *Cyberspace 2.0*, *supra* note 361, at 448.

594 *See* Alford, *Making the World Safe for What?*, *supra* note 8, at 143.

Chinese authorities also imposed the death penalty and life imprisonment on infringers in severe cases.[595]

Indeed, commentators have expressed concerns over the deterioration of intellectual property protection after China's accession to the WTO.[596] In the post-WTO environment, China can no longer use traditional barriers and measures to protect its economy—for example, restrictions on export privileges will be greatly reduced. As a result, pirates and counterfeiters might trade more aggressively with markets that have "a strong appetite for low-priced counterfeit goods," such as Southeast Asia and Eastern Europe.[597] Thus, although the country has fewer restrictions and barriers as a result of its entry to the WTO, intellectual property protection in China might not necessarily improve.

4. Historical Practice

Unlike the first three factors, historical practice was rarely used to account for the cause of extensive copyright piracy. Rather, it has been applied retroactively to explain why a country failed to protect intellectual property in the past or why a country should be entitled to lower intellectual property protection in the future. For example, developed countries, in particular the United States, have used historical practice to explain why its past as a pirating nation should be ignored.[598] Likewise, less developed countries have used the same factor to explain why it is unreasonable to expect drastic and immediate changes in their attitudes toward intellectual property rights or to expect a sudden emergence of institutions that are needed to support and nurture those attitudes.[599] In particular, these countries have used the historical

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595 *See* ALFORD, *supra* note 8, at 91 (stating that China had imposed death penalty on at least four individuals, life sentences on no fewer than five others, and imprisonment on some 500 people for trademark violations); Korski, *China Sentences Three to Life*, *supra* note 10.

596 For discussions of China's entry into the WTO, see generally GORDON G. CHANG, THE COMING COLLAPSE OF CHINA (2001); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY (2002); SUPACHAI PANITCHPAKDI & MARK CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE (2002); Yu, *Ramifications of China's Entry into the WTO*, *supra* note 315; Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 Colum. J. Asian L. (forthcoming 2004).

597 CHOW, *supra* note 317, at 254; YU, *supra* note 8, at 31.

598 Even though the United States' historical indifference to foreign intellectual property rights does not necessarily justify China's abuse of intellectual property rights, "an appreciation of [the] nation's own 'sins' would temper the moralism that infuses governmental and industry rhetoric about Chinese infringement and inflames passions in both nations about the other's intentions and integrity." Alford, *Making the World Safe for What?*, *supra* note 8, at 147.

599 Alford, *How Theory Does—and Does Not—Matter*, *supra* note 565, at 21. *See* Carole Ganz Brown & Francis W. Rushing, *Intellectual Property Rights in 1990s*, *in* INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS 1, 14 (Francis W. Rushing & Carole Ganz Brown eds., 1990) ("[I]ncreased protection is not to be expected tomorrow, and the movement will be evolutionary

practice argument to justify the need for extension of the transitional period. As they argue, these transitional periods are important to less developed countries, because they will enable them to attain the economic level needed to make copyright protection a cost-effective and sound governmental policy.[600]

While it is true that civilization progresses and economy advances, copyright problems do not diminish with the passage of time. Indeed, historical practice is of very limited relevance, as new copyright problems emerge as society progresses and as new technologies are developed.[601] Consider the United States, for example. In their defense of the country's past as a pirating nation, commentators often point to the differences between the United States today and what it was two centuries ago. According to these commentators, one should not hold the country's past against it, because times have changed and the country's past is irrelevant. As they explain, the country's unfortunate past as a pirating nation was more a reflection of the *zeitgeist* of that era, rather than a historical proof that piracy is a natural—and legitimate—course of development for a less developed country.[602] After all, it would be unfair and unappealing to argue that the United States should stop complaining about slavery and human trafficking today because of its prior acceptance of such an inhumane practice.

When the United States was a less developed country, countries did not offer copyright protection to foreign authors and did not regard piracy of foreign works as unfair or immoral.[603] Indeed, "[s]ome countries . . . openly countenanced piracy as contributing to their educational and social needs and as reducing the prices of books for their citizens."[604] Nevertheless, it is still disturbing to find that the United States did not offer reciprocal protection to foreign authors when

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rather than revolutionary. Strategies to advance protection should take long-range approaches, say, a five to ten year time frame."); Brauchli & Kahn, *supra* note 180, at 1 ("[Building a copyright system is] like building a house. . . . You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time.") (quoting Li Changxu, head of China United Intellectual Property Investigation Center). *See also* TRIPs Agreement, *supra* note 172, arts. 65-66, 33 I.L.M. at 1222 (providing a five-year transitional period for developing countries and an 11-year transitional period for the least developed countries).

600 Consider for example Professor's Endeshaw's historical argument: "Historically, each of the advanced countries today was determined to industrialize first before either 'opening up' to forces and interests that they might previously have dreaded and before calling for a stronger international IP system." ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES, *supra* note 572, at 120.

601 *See* LITMAN, *supra* note 450, at 35-69; Litman, *Copyright Legislation*, *supra* note 548.

602 *But see* ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES, *supra* note 572, at 120 (noting that "[h]istorically, each of the advanced countries today was determined to industrialize first before either 'opening up' to forces and interests that they might previously have dreaded and before calling for a stronger international IP system").

603 *See* sources cited *supra* note 69.

604 SAMUELS, *supra* note 69, at 231.

others began to do so in the mid-nineteenth century. It is also troubling to find that the United States did not participate in the international intellectual property regime until after the Second World War.

Even for those who find the historical practice argument convincing, this argument has been significantly weakened by recent developments concerning MP3 piracy in the United States.[605] As far as MP3 piracy is concerned, the United States is not that much different from a less developed country or from the country itself two centuries ago.

Like MP3, software piracy is extensive in the United States. A recent study by the Business Software Alliance indicated that the U.S. software industry had lost $1.96 billion in United States alone in 2002, an amount slightly lower than the total retail software revenue lost in China during the same period.[606] The study also noted that pirated products constituted close to a quarter of all computer software in use in the United States.[607] While one understandably might be skeptical of figures supplied by a self-interested industry, few people would deny that there is a serious piracy problem on the Internet. Copyright piracy not only occurred in the past. It is a significant problem today.

5. Type of Reprographic Technology

The copyright regime always lags behind the development of new technology, be it radio, talking machines, television, cable television, satellite communications, or the Internet.[608] Thus, commentators sometimes attribute the piracy problem to the emergence of new technology and call for the development of new paradigms, responses, and regulatory measures to address the new technological development. Recent enactments include the DMCA, the EU Database Directive,[609] the EU Information Society Directive,[610] and the 1996 WIPO Internet

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605 *Compare* discussion *supra* Part I, *with* discussion *supra* Part III.

606 INTERNATIONAL PLANNING & RESEARCH CORPORATION, EIGHTH ANNUAL BSA GLOBAL SOFTWARE PIRACY STUDY: TRENDS IN SOFTWARE PIRACY 1994-2002, at 9-10 (2003) [hereinafter BSA GLOBAL SOFTWARE PIRACY STUDY], *available at* http://global.bsa.org/globalstudy/2003_GSPS.pdf. *See also $22 Million of Alleged Counterfeit Microsoft Software Seized in Pennsylvania; State Troopers, Following Leads About Stolen Laptops, Uncover Huge Worldwide Counterfeiting Operation*, PR NEWSWIRE, June 12, 2000, *available at* LEXIS, News Library, ALLNWS File (reporting on the investigation and discovery of a significant counterfeit distribution operation in Harrisburg, Pennsylvania).

607 BSA GLOBAL SOFTWARE PIRACY STUDY, *supra* note 606, at 7 (stating that 23% of all software in use in the United States are pirated).

608 *See* LITMAN, *supra* note 450, at 35-69; Litman, *Copyright Legislation*, *supra* note 548.

609 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20.

610 EU Information Society Directive, *supra* note 571.

Treaties.[611]

As the U.S. copyright history informs us, copyright law always catches up with the development of technology, especially if high stakes are involved.[612] As Professor Jessica Litman pointed out:

> [T]he contours of [the dispute about intellectual property rights in the digital environment] don't look very different from the shape of very similar disputes that arose in the 1980s, when the gods invented personal computers; or the 1970s, when they invented videocassette recorders; or the 1960s, when they invented cable television; or the 1920s, when they invented commercial broadcasting and talkies.[613]

Most of the time, the entrepreneurial developers of the new media would start "outside" the copyright regime, as they "concentrate on getting market share first, and worry about profits—and the rules for making them—later."[614] Thus, copyright law can stifle innovation, rather than be influenced by new technology.[615]

A case in point is digital audio reproduction technology, which provides consumers with an innovative technology that reproduces sound recordings with virtually perfect fidelity. In light of the threat posed by the repeated home reproduction of sound recordings, the music industry successfully lobbied Congress to enact the Audio Home Recordings Act of 1992.[616] As a result of this statute and the consumers' uncertainty over the evolvement of audio reprographic technology, copyright law successfully prevented a revolutionary change by digital audio recording equipment and technology.

In fact, if one looks back a few centuries ago, the first modern copyright law was developed as a reaction to the emergence of a new reprographic technology, the printing press.[617] Since the enactment of the first copyright statute in the United States in 1790, which protected books, pamphlets, maps, and charts,[618] copyright has been extended to different technologies, including radio, talking machines, television, cable television, satellite communications, and finally the Internet. While technology might explain the speed at which the piracy problem grows, it says very little about the cause of extensive copyright piracy.

People sometimes assume that piracy will naturally occur

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611 WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996).

612 *See* LITMAN, *supra* note 450, at 35-69; Litman, *Copyright Legislation*, *supra* note 548.

613 Litman, *Revising Copyright Law*, *supra* note 507, at 22.

614 *Id.* at 30.

615 *Id.* at 29-30 ("A variety of new media flourished and became remunerative when people invested in producing and distributing them first, and sorted out how they were going to protect their intellectual property rights only after they had found their markets.").

616 *See* discussion *supra* Part III.

617 *See, e.g.*, GOLDSTEIN, *supra* note 13, at 39-40.

618 *See* discussion *supra* Part I (discussing the 1790 Act).

whenever new technologies emerge. This assumption is wrong. Piracy is the unauthorized reproduction and distribution for commercial purposes of a copyrighted work *as prohibited under copyright law*. It depends on the interpretation of the copyright statute. Although copyright law has recently been expanded to cover new technological media, there is no guarantee that the new technological media will necessarily fall within the scope of copyright protection. Until it does so, the reproduced version of the copyrighted work might not constitute an actionable copy, and the reproduction of a copyrighted work in the new medium might not be actionable.

In fact, there are strong historical precedents supporting this argument. A case in point is *White-Smith Publishing Co. v. Apollo Co.*[619] In *White-Smith Publishing*, the United States Supreme Court was asked to determine whether a player piano roll was a "copy" of the music composition it represented within the scope of the copyright statute. As the Court reasoned:

> Various definitions [of the word "copy"] have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be "a written or printed record of it in intelligible notation." It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which other can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.[620]

The Court therefore held that player piano rolls did not constitute "copies within the meaning of the copyright act" and therefore did not qualify for copyright protection.[621] Indeed, Congress had to "correct"

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619 209 U.S. 1 (1908).

620 *Id.* at 17.

621 The Court nonetheless was concerned about the free-riding problem the decision might create:

> It may be true that the use of these perforated rolls, in the absence of statutory

the *White-Smith Publishing* Court's interpretation by creating a special statutory provision subjecting "mechanical" reproductions of musical works to a compulsory license.[622]

Similarly, the Court rejected the extension of the public performance right to cable system operators. When television was first developed, people relied on television antennae to pick up over-the-air signals. If the antennae were not strong enough, viewers would receive no or very poor reception.[623] In the 1960s, Community Antennae Television ("CATV") emerged by passing signals on through wires to individual homes and began the era of cable television. Copyright holders asserted that cable system operations were unauthorized public performance of creative works. In a pair of cases, *Fortnightly Corp. v. United Artists Television, Inc.*[624] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[625] the Court ruled otherwise. The Court held that cable system operators did not engage in the public performance of the transmitted works. As the Court reasoned, a CATV system is similar to a "reception service" and "falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set."[626] The Court therefore did not find copyright infringement.

Copyright holders constantly claim that new technologies will destroy their market. In a widely-cited quote, Jack Valenti, the longtime motion picture industry lobbyist, stated that the videocassette recorder "is to the American film producer and the American public as the Boston Strangler is to the woman alone."[627] By now, it is quite clear

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protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government.

Id. at 18.

622 *See* Act of March 4, 1909, § 1(e), Ch. 320, 1(e), 35 Stat. 1075 (1909).

623 *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 423 (2002).

624 392 U.S. 390 (1968).

625 415 U.S. 394 (1974).

626 *Fortnightly Corp.*, 392 U.S. at 399. As the Court explained:

It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Id. at 399-400.

627 Adam Liptak, *Is Litigation the Best Way to Tame New Technology?*, N.Y. TIMES, Sept. 2,

that Valenti was wrong; videocassettes have transformed the motion picture industry, bringing to it new revenue and business opportunities. In fact, commentators have noted other precedents:

> In 17th century England, the emergence of lending libraries was seen as the death knell of book stores; in the 20th century, photocopying was seen as the end of the publishing business, and videotape the end of the movie business. Yet in each case, the new development produced a new market far larger than the impact it had on the existing market. Lending libraries gave inexpensive access to books that were too expensive to purchase, thereby helping to make literacy widespread and vastly increasing the sale of books. Similarly, the ability to photocopy makes the printed material in a library more valuable to consumers, while videotapes have significantly increased viewing of movies. But the original market in each case was also transformed, in some cases bringing a new cast of players and a new power structure.[628]

6. Type of Copyright Sector

Commentators sometimes differentiate the piracy problem based on the copyright sectors in which the industries are involved. For example, some pointed out that extensive copyright piracy on the Internet occurs primarily to sound recordings and audio-visual works, rather than books.[629] After all, many consumers are not interested in reading books on the Internet due to a lack of user-friendly equipment and technology. However, this argument ignores the varying living standards around the world and the demand created by consumers. Textbook piracy remains a key problem in Africa, Asia, and South America.

Even in the developed world, piracy in the print media remains a significant problem.[630] A recent example concerns the latest novel in

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2000, at B9.

628 DIGITAL DILEMMA, *supra* note 332, at 78-79 (citations omitted).

629 As a recent study by the National Research Council explained:

> The problem . . . has hit music first for a variety of reasons. First, files containing high-fidelity music can be made small enough that both storage and downloading are reasonable tasks. . . . Second, access to digitized music is abundant, and demand for it is growing rapidly. . . . [Third,] music is popular with a demographic group (students in particular, young people generally), many of whom have easy access to the required technology, the sophistication to use it, and an apparently less than rigorous respect for the protections of copyright law. . . . Fourth, music can be enjoyed with the existing technology: Good speakers are easily attached to a computer, producing near-CD quality sound, and a variety of portable players (e.g., the Rio from Diamond Multimedia) are available that hold 30 minutes to an hour of music.

DIGITAL DILEMMA, *supra* note 332, at 77-78.

630 *See, e.g.*, Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir.

the Harry Potter series, which became number one on the Amazon.com bestseller list even before the book appeared on the market. Shortly after the book was released, pirated versions of *Harry Potter and the Order of the Phoenix* appeared on the Internet.[631] Although people generally consider electronic books difficult to read, they have particular appeal for experienced file swappers, as the book files are smaller in size and therefore faster to download than most music or movie files.

In fact, "[b]ooks and movies have begun to feel the effects. Electronic books are appearing, with several Web sites selling full-length books in digital form, while others offer reloadable book-sized portable display hardware."[632] As Professor Peter Menell pointed out:

> [U]ltimately the publishing industry may be the most vulnerable content industry to unauthorized reproduction and distribution because the content (text) will always be directly perceptible (and hence subject to copying, even if through scanning or re-typing). Furthermore, libraries have become interested in distributing eBooks through their websites. . . . Whereas music and audiovisual content can be encrypted in such a way that the user cannot see the content without authorization, the essence of books (the text) will always be available to the extent that the books are sold in hard copy form. Therefore, would-be copyists will be in a position to scan such content into digital form within hours of a book's release.[633]

Likewise, although movies were thus far relatively immune from widespread piracy because of their large size and the long downloading time, the increase of bandwidth and the emergence of more advanced compression technologies will soon make movie downloading as commonplace as music downloading.[634] Nonetheless, because of

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1996); American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

631 *See* Amy Harmon, *Harry Potter and the Internet Pirates*, N.Y. TIMES, July 14, 2003, at C1; Michael Pollitt, *Like Music, Books Have Now Fallen Prey to Internet Pirates Who Go to*, INDEPENDENT (London), July 30, 2003, at 11.

632 DIGITAL DILEMMA, *supra* note 332, at 94.

633 Menell, *supra* note 333, at 129-30.

634 *See* DIGITAL DILEMMA, *supra* note 332, at 95. As the study described:

> Movies in digital form are currently saved from widespread illegal copying because of their large size, but this barrier is likely to be overcome before too long. A number of sites have begun already to sell full-length movies in digital form, but at upwards of 200 megabytes for a (compressed) movie, and 5 megabytes for even a trailer, the space requirements and download times are still quite substantial. Others are exploring the possibility of Internet distribution of movies. Digital movie piracy has also appeared; in 1999 pirated copies of "The Blair Witch Project," "The Matrix," and "American Pie" were all available online. These copies are relatively low-quality, still sizable to download and store, and not easy to find (they are generally traded in low-profile news groups and chat rooms). But the struggle over digital movies has clearly arrived and will grow worse as storage capacity and transmission speeds increase.

differences between the film industry and the sound recording industry, the movie industry might be less vulnerable to unauthorized distribution.[635] In fact, "digital technology may significantly improve the film industry's delivery and revenue models" by reducing the costs borne by consumers in renting and purchasing movies.[636]

In sum, although we might be able to infer the extent and seriousness of the copyright piracy problem by looking at the copyright sector, we will not be able to account for the cause of the piracy problem. As the costs of creation vary with the types of work created, the scale of the piracy problem might differ with respect to the type of industries involved.[637] It would take less than a million dollars to record a major-label album,[638] but millions or even hundreds of millions of dollars to make a motion picture.[639]

Id. (footnote omitted).

635 Menell, *supra* note 333, at 123. As Professor Menell explained:

> Thus far, the time to download feature films as well as the generally poor quality of the first wave of online copies distributed has not significantly affected the market for film products. Relatively few consumers have the bandwidth, storage capacity, expertise, and patience to acquire film content in this way. In fact, online availability of poor quality versions may help to promote consumer interest. Furthermore, even as bandwidth and memory storage expand, the fact that consumers do not tend to view films repeatedly in the way that they listen to music suggests that archiving will not play the same role in film as it does in music.
>
> Most importantly, the film industry can still control the important first waves of distribution without significant leakage in unauthorized channels. They continue to hold tight controls over theatrical release, pay-per-view, and premium channel distribution. Such versioning strategies will continue to work into the digital future. Moreover, the video market is already built upon an encrypted format, which will hinder, although not entirely defeat, unauthorized distribution of films. Furthermore, competitive pricing of DVDs and the potential for directors' cuts (with previously unreleased scenes), behind-the-scenes footage, game and merchandising tie-ins, and other added features will keep many consumers within the legitimate market for content. As bandwidth and memory capacity expand and new devices, such as DVD burners, become more widely diffused, the film industry will experience somewhat greater competition for the video market as well as marginal effects on what they can charge for theatrical release, but the multi-faceted nature of its business model will be able to adapt reasonably effectively.

Id. at 123-25.

636 *Id.* at 125.

637 *See* Breyer, *supra* note 330, at 351 ("One must know facts about a particular industry before one can accurately weigh the various costs and benefits associated with copyright protection."); Ku, *supra* note 331, at 305 ("[T]he costs associated with creation vary depending upon the kind of work, [and] copyright may play a different role with respect to music than it does with motion pictures or other works.").

638 "By one estimate, the typical major-label artist spends $100,000 to $200,000 on studios, musicians, and other production costs to record an album." Ku, *supra* note 331, at 306 (citing Jon Healey, *Breaking Down the Cost of Compact Discs* ¶ 13, *at* http://www0.mercurycenter.com/svtech/news/indepth/docs/cd09032000.htm (Sept. 2, 2000).

639 "According to the MPAA, the average major studio film in 1999 cost $52 million to produce." *Id.* (citing Jack Valenti, *Copyright & Creativity—The Jewel in America's Trade Crown: A Call to the Congress to Protect and Preserve the Fastest Growing Economic Asset of the United States* ¶ 2, *available at* http://www.mpaa.org/jack/2001/01_01_22b.htm (Jan. 22,

C. *Bridging the Copyright Divide*

To help bridge the copyright divide, this Section outlines four areas on which policymakers—be they government leaders, intergovernmental agencies, or industry executives—can focus their remedial efforts.

1. Educating Nonstakeholders

Policymakers must educate the nonstakeholders about the copyright system. They need to make the nonstakeholders understand what copyright is, how it is protected, and why they need to protect such property. Policymakers also need to show the nonstakeholders the benefits of copyright protection—how such protection can help them and how the lack thereof can hurt them.

One might still remember the controversial "just say yes" to licensing campaign outlined in the Information Infrastructure Task Force White Paper released by the Clinton administration.[640] As the White Paper explained:

> Certain core concepts should be introduced at the elementary school level—at least during initial instructions on computers or the Internet, but perhaps even before such instruction. For example, the concepts of property and ownership are easily explained to children because they can relate to the underlying notions of property—what is "mine" versus what is "not mine," just as they do for a jacket, a ball, or a pencil.[641]

Although commentators severely criticized this campaign,[642] the

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2001)). Indeed, blockbuster movies might cost hundred of millions of dollars. For example, *Pearl Harbor* costs $135 million while the production costs of the *Lord of the Rings trilogy* total $270 million. Ian Johns, *Does My Budget Look Big in This?*, TIMES (London), May 28, 2001.

640 *See* NII WHITE PAPER, *supra* note 507, at 208.

641 *Id.* at 205. Some commentators doubted about the appropriateness of this extensive campaign. As they explained:

> One concern is that a federal government requirement for copyright education in schools would raise the issues of whether federal funds should be allocated for such a purpose and whether the federal government should encourage specific content to be included in curricula (which is traditionally determined at the local level). Having the federal government pay for the campaign would raise concerns, because it would likely be seen as a subsidy of the information industries. Why should taxpayers grant such a subsidy? Other government-funded public education campaigns are motivated by issues of public health and safety, which are clearly not at issue here.

DIGITAL DILEMMA, *supra* note 332, at 306-308.

642 *See, e.g.*, Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 299 (1996) (noting that the copyright awareness section in the White Paper "is an excellent example of a good idea gone wrong"); Litman, *Copyright Noncompliance*, *supra* note 510 (criticizing the

White Paper underscored the need and importance of education in the intellectual property arena. This need was recently reemphasized by a study conducted by the National Research Council.[643] As the study stated: "A better understanding of the basic principles of copyright law would lead to greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy."[644]

In recent years, the copyright industries have been very active in educating the consuming public. For example, the Business Software Alliance "has an ongoing campaign that includes spot radio announcements, aimed primarily at software users in institutional environments (in both the public and private sector)."[645] The recording industry set up the "Byte Me" Web site to stem the distribution of illegal copies of popular music in MP3 format.[646] In addition, "[e]ntertainment groups have sent thousands of letters to colleges and corporations, alerting them to infringements," and celebrities like the Dixie Chicks and Missy Elliott appear on MTV and BET to relay artists' concerns.[647] The FACE Initiative of the Copyright Society of the U.S.A. also brings together copyright holders, copyright lawyers, and their representatives to educate primary and secondary school students across the country about copyrights.[648] Even Madonna chastised her fans for downloading an illegal copy of her single.[649]

As the National Research Council stated in its recent study:

> [T]o be effective, a program of copyright education must clearly communicate that the law is, in its intent and spirit, attempting a fundamentally fair and equitable balancing of interests. The program should emphasize the core goal of IP law, namely, the improvement

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White Paper).

643 DIGITAL DILEMMA, *supra* note 332.

644 *Id.* at 17.

645 *Id.* at 308 n.3.

646 *Id.*

647 *Entertainment Industry Widens War*, USA TODAY, Feb. 13, 2003, at 9D.

648 FACE stands for "Friends of Active Copyright Education." The Web site of the FA©E Initiative is available at http://www.face-copyright.org/. Professor David Lange believe it is "fundamentally wrong to insist that children internalize the proprietary and moral values of the copyright system." David Lange, *The Public Domain: Reimagining The Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 471 (2003). As Professor Lange explained:

> It is wrong to challenge school children with responsibility for copyright. Wrong for copyright to intrude into private lives. Wrong to measure creativity by the standards of copyright. Wrong to lay impediments (moral, intellectual, legal) before exercises of the imagination, whether great or small. Wrong, in short, to rob us of this vital aspect of our citizenship: the right to think as we please and to speak as we think.
>
> We must learn to reimagine the public domain. We must learn to ask questions from within the province of that new status, a status like citizenship, measured by creativity and the imagination, and invoked by an exercise of either.

Id. at 482-83.

649 Grossman, *It's All Free!*, *supra* note 447.

> of society through the advancement of knowledge; should describe the difficult balance between control and dissemination; and should make clear that, in the long term, all intellectual property becomes a part of the shared intellectual heritage, available to everyone. Such a program would describe both the rights granted exclusively to creators and the limits on those rights. The program should include an introduction to fair use and other limitations on copyright law, and their role in accomplishing the larger purpose of the law.[650]

It is important not to oversimplify the copyright message, for an oversimplified message "will obscure the genuine and legitimate debate about how far copyright law extends."[651] The educational program also must acknowledge the existing difference between "the law as it appears on the books and the law as it is actually carried out."[652] To some extent, copyright law is similar to the laws concerning speed limits and jaywalking. The law that appears on the books is very different from the law that is actually carried out.

"Respect for copyrights is not an inherent or natural part of the cultural infrastructure," but something that is acquired through a learning process.[653] Education therefore is very important. By creating social and peer pressure, education also will help persuade others away from conducting infringing activities.[654] Indeed, education is essential in less developed countries, especially those in lack of a copyright tradition, a sophisticated legal system, and respect for the rule of law. Unfortunately, neither the governments of industrialized countries nor multinational corporations were interested in funding and organizing these awareness and educational campaigns in those countries.[655] Their lack of efforts may be attributable to two reasons.[656] First, the political system tends to reward short-term results, rather than long-term results. Thus, policymakers, including CEOs of major corporations, are reluctant to focus on long-term policies such as providing education at

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650 DIGITAL DILEMMA, *supra* note 332, at 216.

651 *Id.* at 309.

652 *Id.* at 305.

653 Bartow, *supra* note 497, at 23. *See also* Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum in se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 11 (2000) (suggesting that copyright law might not have a normative role). As Professor Halpern elaborated:

> Individual determinations of moral and ethical conduct require a moral and ethical context. The problem for intellectual property law in general, and the law of copyright in particular, is the lack of such an underlying clear context. The nature of American copyright law makes it difficult, if not impossible to find or to construct an unambiguous moral compass.

Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L.J. 569, 572 (2001).

654 DIGITAL DILEMMA, *supra* note 332, at 305.

655 *See* sources cited *supra* note 295.

656 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 223.

the grassroots level. Second, education is a public good. Most governments and companies tend to free ride on each other's efforts without incurring any substantial investment.

2. Creating Stakeholders

Policymakers need to help the nonstakeholders develop a stake in the system and understand how they can protect their products and receive royalties. For example, they need to help the nonstakeholders develop their own industry, such as a software industry or a recording industry. By doing so, they will be able to transform the nonstakeholders into stakeholders or potential stakeholders.

So far, companies in less developed countries are reluctant to protect intellectual property rights of their foreign joint venture partners, because they have a limited understanding of intellectual property and are suspicious of the intentions behind what their foreign partners are attempting to do. Once they learn more about intellectual property and understand their stakes within the copyright system, they will change their perception and position.

A case in point is a U.S.-China joint venture, whose Chinese partner was unwilling to allocate a portion of the joint venture profits to the foreign partner for design fees.[657] The reaction of the Chinese partner was natural and understandable; it understood neither intellectual property protection nor the foreign partner's intentions. However, once the foreign partner explained to the Chinese manufacturer that it could charge separately for its design work and helped the manufacturer determine the cost of its own design processes, the Chinese partner became receptive to the idea of allocating profits for intellectual property. It even actively lobbied the local regulators for the right to design fees.

So far, the entertainment industry has had a difficult time explaining why the general public has a stake in the copyright system. True, the industry has repeatedly extolled the benefits of strong copyright protection and how such protection can induce artists to create music, movies, and other projects that entertain the general public. However, the industry's rhetoric was lost on most consumers. Fortunately, the industry has begun to adopt other strategies to attract consumers. For example, some software manufacturers offer post-sale benefits that are not available to purchasers of counterfeit goods, such as warranty service, replacement part guarantees, free upgrades, and

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657 *See* John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 409, 420 (Mark A. Cohen et al. eds., 1999).

contests or giveaways.[658] Some music publishers also include special photos, files, and interviews on their Web sites that are made only accessible to purchasers of legitimate CDs.

A good illustration of this strategy is the change of Warner Brothers' changing attitudes toward Harry Potter fan sites. A while ago, Warner Brothers threatened to sue a 15-year old English schoolgirl over her Web site and domain name, www.harrypotterguide.co.uk. The studio eventually backed down, after she organized a boycott of Potter merchandise in protest through another Web site, potterwar.org.uk.[659] Even today, one can visit the Potter War Web site to see the remnant of this infamous war. Since the Potter War, Warner Brothers has changed its position toward fan sites. Instead of threatening legal action to take over or shut down these Web sites, it has created a Webmaster Community page in its official Web site, thus allowing webmasters to enroll their unofficial web sites and to download official banners, shields, and seals.[660] It has even attempted to entice younger fans by offering to link a selected number of unofficial Web sites to its official Web page.[661]

Copyright holders sometimes assume that no one will voluntarily choose to pay for copyrighted content if given the opportunity to free ride on the content. Thus, "most consumers . . . will infringe copyrights at every opportunity unless they are dissuaded from doing so by the fear of punishment."[662] Although it is understandable why copyright holders adopt this position, their perception is far from the reality. Indeed, anybody who has tried to download music from pirated Web sites knows how time-consuming and frustrating it could be to locate what one wants in those Web sites.[663] Just think about the typos you have to

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658 As one commentator recounted:

> One joint venture publishing company which publishes popular comics chose to compete directly against their pirates. Beyond wrapping the magazine in hard-to-reproduce plastic, the company has continuously upgraded the quality of the comic's graphics and paper relative to pirate editions, and included inexpensive, educational prizes with each issue. These gambits have worked. Despite being significantly more expensive than the pirated version, this popular comic book has seen increasing subscriptions and readership, and the company is planning to expand its operations.

Donaldson & Weiner, *supra* note 657, at 432. *See also* Doris Estelle Long, *China's IP Reforms Show Little Success*, IP WORLDWIDE, Nov.-Dec. 1998, at 6 (arguing that post-sale benefits would create incentives for the Chinese to buy legitimate products).

659 The protest Web site is available at http://www.potterwar.org.uk/. *See also* The Bringers: Fighting for the Rights of Fans Online, *The Potterwar Campaign*, at http://web.ukonline.co.uk/bringers/temp/c-potter.html (n.d.).

660 *See* James Norman, *Copyright Issues Become Kids' Stuff*, AGE (Melbourne), May 7, 2002, at 3.

661 *See id.*

662 Bartow, *supra* note 497, at 62.

663 As a recent study by the National Research Council described:

> The [noncommercial] service is terrible and the experience can be extraordinarily frustrating. Search engines can assist in finding songs by title, performer, and so on,

make to find music you like, the "Host not responding" messages, and the slow connection speeds between the host and your computer!

In April 2003, Apple Computer unveiled a new online music service, the iTunes Music Store, offering low-priced music downloads from the five major record companies.[664] Customers seem to be happy about the service, and initial sales appear encouraging.[665] As one customer praised the service, "It's solved all my problems. It's so fast, and there's no guilt, no recriminations."[666] Notwithstanding the service's early popularity, it remains interesting to see how the service will develop. Unless record companies are willing to provide content, the Apple service eventually might end up with the same fate as other subscription-based services like Rhapsody and PressPlay, which has now become part of the new Napster service.

3. Strengthening Laws and Enforcement Mechanisms

It is important for policymakers to help develop intellectual property laws and strengthen enforcement mechanisms. Commentators have discussed at length the importance of intellectual property laws and enforcement mechanisms. In fact, two of the main goals of the TRIPs Agreement are to transform the international trading system from a coercion-based environment to a rule-based system[667] and to institute

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but you have to know how to look: Can't find what you're looking for when you type in "Neil Young"? Try "Niel Young." In any collection, quality control is a problem; when the data are entered by thousands of individual amateurs, the problem is worse.

When the links are found, the next question is, How long are you willing to keep trying, when receiving responses such as "Host not responding," "Could not login to FTP server; too many users—please try again later," and "Unable to find the directory or file; check the name and try again"? The computers containing the files are often personal machines that are both unreliable and overloaded.

Even once connected, the speedy download times cited earlier are ideals that assume that both the computer on the other end and its connection to the Internet are up to the task. The real-world experience is often not so good: Creating a Web site with a few music files is easy; providing good service on a site with hundreds or thousands of songs is not: The hardware and software requirements are considerably more complex.

DIGITAL DILEMMA, *supra* note 332, at 80-81.

664 Laurie J. Flynn, *Apple Offers Music Downloads with Unique Pricing*, N.Y. TIMES, Apr. 29, 2003, at C2 (reporting that Apple Computer plans to offer individual songs for $0.99 each and most albums for $9.99 each).

665 Amy Harmon, *In Fight over Online Music, Industry Now Offers a Carrot*, N.Y. TIMES, June 8, 2003, § 1, at 1 (reporting that "[i]n just over a month, the [Apple Music] service has sold more than 3 million tracks, far exceeding the record industry's expectations").

666 *Id.*

667 As Professors Dreyfuss and Lowenfeld described:

[One of the major breakthroughs in the Uruguay Round] was agreement on a strict and binding system of dispute settlement and enforcement. Under the earlier GATT dispute settlement mechanisms, parties to disputes could frustrate the system both at the beginning and at the end. In contrast, the new Understanding on Dispute

a mechanism through which countries can resolve international trade disputes before seeking retaliation.[668]

Today, most countries have intellectual property laws that comply with international standards. However, very few of these countries provide strong enforcement of intellectual property laws. Thus, policymakers need to work with their counterparts in these countries to strengthen intellectual property laws and develop effective enforcement mechanisms. While the U.S. government has used coercive tactics in the past to induce—and perhaps compel—foreign countries to change their laws in the American image, past experience suggests that such changes will not be complete and sustainable until these countries

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> Settlement, to which all members of the World Trade Organization (WTO) are required to belong, precludes objection by a potential defendant to initiation of a case beyond a short delay, and precludes veto of a decision made by a panel, or, if that decision is appealed, by the Appellate Body. There is also a complex system of enforcement, complete with fairly short deadlines and provision for retaliation, in case a member state does not comply with a decision.

Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 276-77 (1997). *See also* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 76-78 (1987) (discussing how an adjudicative system would better promote compliance with GATT rules than would a negotiation/consensus system). Professor John Jackson argued that the rule-based system is particularly important for the governance of international economic affairs:

> Economic affairs tend (at least in peace time) to affect more citizens directly than may political and military affairs. Particularly as the world becomes more economically interdependent, more and more private citizens find their jobs, their businesses, and their quality of life affected if not controlled by forces from outside their country's boundaries. Thus they are more affected by the economic policy pursued by their own country on their behalf. In addition, the relationships become increasingly complex—to the point of being incomprehensible to even the brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their needs and their perceived complaints. The result of this is increasing citizen participation, and more parliamentary or congressional participation in the processes of international economic policy, thus restricting the degree of power and discretion which the executive possess.
>
> This makes international negotiations and bargaining increasingly difficult. However, if citizens are going to make their demands heard and influential, a "power-oriented" negotiation process (often requiring secrecy, and executive discretion so as to be able to formulate and implement the necessary compromises) becomes more difficult, if not impossible. Consequently, the only appropriate way to turn seems to be toward a rule-oriented system, whereby the various citizens, parliaments, executives and international organizations will all have their inputs, arriving tortuously to a rule—which, however when established will enable business and other decentralized decision makers to rely upon the stability and predictability of governmental activity in relation to the rule.

JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 111 (2d ed. 1997).

668 *But see* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 364 (1993) ("[I]f the major GATT countries are not ready to change their behavior, these stronger demands will only produce more visible and dramatic legal failures. And if that were to happen, the credibility of GATT legal obligations would almost certainly plunge.").

consider themselves stakeholders or potential stakeholders in the international intellectual property system.[669]

Moreover, digital rights management tools could be employed to help promote enforcement of intellectual property laws. When the Internet was first developed, commentators discussed how the new environment allowed for the creation of a "celestial jukebox,"[670] which Professor Paul Goldstein defined as "a technology-packed satellite orbiting thousands of miles above Earth, awaiting subscriber's order—like a nickel in the old jukebox, and the punch of a button—to connect him to any number of selections from a vast storehouse via a home or officer receiver." Although this jukebox never materialized in the form commentators envisioned and the Internet has made enforcement difficult at times, new communications technologies provide effective ways for copyright holders to monitor uses, track users, enforce rights, and collect royalties.

4. Developing Legitimate Alternatives

Policymakers, in particular those in the copyright industries, should help develop legitimate alternatives for the local people where products are needed, yet unaffordable. As Gene Hoffman, the CEO of Emusic, Inc. said: "We think the best way to stop piracy is to make music so cheap it isn't worth copying."[671] Indeed, it would be hard to imagine why a foreign national who earns fifty dollars a month would spend half of his or her monthly salary to buy a single book.[672] It is also disturbing to find that American software is more expensive abroad—and often in less developed countries—than it is in the United States.[673]

Fortunately, many companies already understand this problem and have used bargain pricing to fight piracy.[674] For example, to make their

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669 *See* SELL, *supra* note 553, at 13 (noting the sharp distinction between overt coercion and persuasion in the American foreign intellectual property and antitrust policies); Yu, *From Pirates to Partners*, *supra* note 8, at 207-11; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 71-72.

670 GOLDSTEIN, *supra* note 13, at 199.

671 DIGITAL DILEMMA, *supra* note 332, at 80.

672 *See* Alford, *How Theory Does—and Does Not—Matter*, *supra* note 565, at 13 (emphasizing how unlikely a Chinese person "earning fifty dollars a month would be to fork out more than a month's salary to buy even such an outstanding work as Melville Nimmer and Paul Geller's treatise on worldwide copyright"). *See also* RYAN, *supra* note 551, at 80 ("Chinese officials defended the book piracy by claiming that people are too poor to pay for Western books, 'yet we must obtain this knowledge that we can develop our economy.'").

673 HO, *supra* note 233 ¶ 2.6 (noting that legitimate copies of software are 20% more expensive in Hong Kong than they are in the United States).

674 *See* RYAN, *supra* note 551, at 81. *See also* Donaldson & Weiner, *supra* note 657, at 433 (asserting that one approach to stop piracy is to offer the affected people a legitimate way to earn a living).

products affordable, some movie studios have released audiovisual products dubbed in the local language or with added foreign-language subtitles.[675] On the one hand, these bargain products provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the original products in the local language or including subtitles, the studios successfully make the discounted products unappealing to consumers in the English-speaking world. This strategy therefore successfully prevents the bargain products from entering the country as parallel imports.[676]

In theory, if policymakers focus on these four areas, they can bridge the copyright divide. In reality, however, it is not easy to transform the nonstakeholders into stakeholders or potential stakeholders. Even if policymakers were able to devise a comprehensive strategy, the process might be further complicated by the existence of the diverse interests of the various stakeholders. As commentators noted:

> The debate over intellectual property includes almost everyone, from authors and publishers, to consumers (e.g., the reading, listening, and viewing public), to libraries and educational institutions, to governmental and standards bodies. Each of the stakeholders has a variety of concerns . . . that are at times aligned with those of other stakeholders, and at other times opposed. An individual stakeholder may also play multiple roles with various concerns. At different times, a single individual may be an author, reader, consumer, teacher, or shareholder in publishing or entertainment companies; a member of an editorial board; or an officer of a scholarly society that relies on publishing for revenue. The dominant concern will depend on the part played at the moment.[677]

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675 Don Goves, *Warner Bros., MGM Dips into China Vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Bros. and MGM have entered a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin).

676 For discussion of gray-market goods, see generally Margreth Barrett, *The United States' Doctrine of Exhaustion: Parallel Imports of Patented Goods*, 27 N. KY. L. REV. 911 (2000); Carl Baudenbacher, *Trademark Law and Parallel Imports in a Globalized World—Recent Developments in Europe with Special Regard to the Legal Situation in the United States*, 22 FORDHAM INT'L L.J. 645 (1999); Shubha Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373 (1994); Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. INTELL. PROP. L. 1 (1999); Shubha Ghosh, *Pills, Patents, and Power: State Creation of Gray Markets as a Limit on Patent Rights*, 53 FLA. L. REV. 789 (2001); Seth Lipner, *Trademarked Goods and Their Gray Market Equivalents: Should Product Differences Result in the Barring of Unauthorized Goods from the U.S. Markets?*, 18 HOFSTRA L. REV. 1029 (1990).

677 DIGITAL DILEMMA, *supra* note 332, at 51. As the study elaborated:

> [Stakeholders include] the computer owner (i.e., music consumer), computer manufacturers (of both hardware and software), music publishers, and performers. Consumers have expectations about the ability to share and the ongoing use of content, publishers are concerned about the overall market, and performers are concerned about

In today's political reality, the United States likely will run into a chicken-and-egg problem. As the U.S. copyright history has taught us, the copyright industries always actively lobby for legislation that helps protect their economic interests. Because they are eager to maximize profits for their shareholders, it is unlikely that they will lobby for a regime that protects the nonstakeholders. However, as Professor Jessica Litman pointed out, unless the nonstakeholders have power to lobby for legislation that suits their needs, they will have a very difficult time getting the legislation they want.[678] In the end, the nonstakeholders will not become stakeholders or potential stakeholders, and they will have no incentives whatsoever to support stronger copyright protection. Unless U.S. policymakers are able to change the way copyright laws are made and ensure that the lawmaking process consider the interests of the nonstakeholders just as they would consider the interests of the stakeholders, the United States likely will face a vicious cycle.

Ironically, this chicken-and-egg problem will be absent from, or largely reduced in, a command economy, notwithstanding our general aversion toward authoritarian rule and the general belief that copyright piracy flourishes in authoritarian societies.[679] In a command economy, the government can decide the type of economic policy it desires, the type of resources it wants to allocate, or even whether the government wants to use copyright piracy as a competitive strategy. Indeed, many industry executives were amazed by the efficiency the Chinese authorities showed when they closed down pirate factories. How happy the recording industry would be if copyright owners could close down MP3.com, Napster, and KaZaA without long and arduous legal battles! Notwithstanding these differences, command economy exists more in name than in practice today. Even China, one of the very few remaining Communist countries in the world, has recently joined the WTO and is making the transition from a command economy to a market economy.[680]

V. THE LIMITS OF COERCION

The above "action plan" suggests four different areas on which policymakers should focus their remedial efforts. So far, none of them

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their audience and royalties. Getting significant content protection machinery in place and widely distributed would require a concerted and coordinated effort, yet each of the players has its own goals and aims that may not necessarily align.

Id. at 88 (citation omitted).

678 *See generally* LITMAN, *supra* note 450.

679 *See* discussion Part IV.A.3.

680 *See generally* sources cited *supra* note 596.

touches on the international harmonization process and the coercive efforts made by copyright holders.

As the world becomes increasingly globalized, harmonization is badly needed to provide stability, certainty, and efficiency. In the past decade, the international community, in particular the European Union and the United States, has devoted substantial efforts to harmonizing its intellectual property laws.[681] Unfortunately for many countries, especially those in the less developed world, harmonization efforts have led to the development of one-size-fits-all templates that ignore local needs and variations.[682]

Even worse, policymakers who are driving the harmonization process at times have lost sight of the public interest and other important social goals. By ignoring the needs of less developed countries, they enlarged the gap between developed and less developed countries[683] and created tension and conflict within the international community.[684] The harmonization process also took away possibilities for legal experimentation and innovation by fostering uniformity and reducing interjurisdictional competition.[685]

When developing countries signed on to the WTO Agreements a decade ago, they were divided and unclear as to what they wanted. Some of the issues involved in the Agreements, such as intellectual property rights, were relatively new, and arguably of low priority, to these countries. These days, however, less developed countries have become more vigilant, organized, and sophisticated. Led by such heavyweights as Brazil, China, and India, these countries have a better sense of what they want.[686] They now understand the importance of the WTO bargains and are willing to take a more aggressive collective stance.

The leading example of international harmonization effort in the intellectual property field is the TRIPs Agreement. As commentators pointed out, the TRIPs Agreement was designed not only to correct the international balance of trade or to lower customs trade barriers, but to "remake international copyright law in the image of Western copyright

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681 *See* TRIPs Agreement, *supra* note 172.

682 *See* Peter K. Yu, *World Trade, Intellectual Property, and the Global Elites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1 (2002).

683 *See* Peter K. Yu, *Dis-networking Rules in the Networked World*, STS NEXUS, Spring 2003, at 6 (Supp.).

684 *See* Peter K. Yu, *How the International Intellectual Property System, Meant to Create Global Harmony, Has Created Conflict Instead*, FindLaw's Writ: Legal Commentary, *at* http://writ.news.findlaw.com/commentary/20021114_yu.html (Nov. 14, 2002).

685 John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 707-09 (2002).

686 *See* Sue Kirchhoff & James Cox, *WTO Talks Break Down, Threatening Future Pact*, USA TODAY, Sept. 15, 2003, at 1B; Chris Kraul, *Split Derails WTO Talks*, L.A. TIMES, Sept. 15, 2003, at 1.

law."[687] Thus, many have considered the TRIPs Agreement "coercive" and "imperialistic."[688]

People sometimes assume coercion is needed to induce compliance. After all, pirates are business people who are motivated by profits and who monitor the market for business opportunities.[689] In mathematical terms, "the total cost of the crime includes the cost of producing and distributing the fakes and the cost of paying penalties, weighed against the embarrassment of being caught, the probability of being convicted, and the severity or inconvenience of any non-monetary penalties that are likely to be imposed."[690] Thus, coercion is needed to dissuade pirates from unauthorized copying.

However, coercion is of limited use, as it neither transforms social norms nor engenders respect for copyrights.[691] As Confucius, the Chinese philosopher, explained in the *Analects* millennia ago: "Govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord."[692] Consider, for example, the file-swapping community:

When 30 million people exchange music files over the Internet,

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687 Hamilton, *TRIPS Agreement*, *supra* note 238, at 614. *See also* Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, *in* VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 305, 316 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that TRIPs "universalize[s] the U.S. system of intellectual property rights").

688 *See* Yu, *Toward a Nonzero-sum Approach*, *supra* note 535, at 580.

689 Lagerqvist & Riley, *supra* note 575, at 17. *See also* Bartow, *supra* note 497, at 62 (noting that "[l]arge-scale content owners seem to hold the view that most consumers . . . will infringe copyrights at every opportunity unless they are dissuaded from doing so by the fear of punishment"); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1591 (2000):

> Insofar as the bad man obeys the law, he does so for instrumental reasons. Thus the bad man treats law as "external" in the sense of being outside of his own values. Economic models of law typically accept the "bad man" approach and add an element to it: rationality. A bad man who is rational decides whether or not to obey the law by calculating his own benefits and costs, including the risk of punishment. The rational bad man breaks the law whenever the gain to him exceeds the risk of punishment. Law and economics scholars typically make the rational bad man into the decisionmaker in their models. For the bad man, law is a constraint and not a guide.

690 *Id.*

691 *See* Bartow, *supra* note 497, at 61-63. *See also* DIGITAL DILEMMA, *supra* note 332, at 59-60 (noting that legal solutions "should take account of psychology and sociology; they must ultimately be viewed as fair and pragmatic by the majority of citizens").

692 THE ANALECTS OF CONFUCIUS, bk. II, ¶ 3 (Arthur Waley trans., Vintage 1989) (footnote omitted). *See also* ALBERT EINSTEIN, THE EXPANDED QUOTABLE EINSTEIN 206 (Alice Calaprice ed., 2000), *quoted in* Bartow, *supra* note 497, at 56 n.138 ("A man's ethical behavior should be based effectually on sympathy, education, and social ties and needs; no religious basis is necessary. Man would indeed be in a poor way if he had to be restrained by fear of punishment and hope of reward after death."); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 8, at 32-34 (discussing the Chinese concept of *li* and *fa*).

> federal judges can rule that the file trading infringes copyrights and they can enjoin online services and technologies that facilitate the file trading. What these jurists cannot accomplish, however, is to make those 30 million people "obey" the copyright laws, at least not as a matter of collective conscience. Even more problematically, neither Congress nor the courts can seem to articulate in a meaningful way what it means for an individual consumer to respect copyrights. There is a growing disjuncture between the Copyright Act, copyright case law and the ways individuals (in their consumptive capacities) have traditionally used, and would prefer to continue to use, copyrighted content.[693]

Even worse, "[h]eavy-handed rhetoric and enforcement practices bred less respect for the law, not more, and left people feeling justified in flouting the law."[694]

Nevertheless, coercion is sometimes needed for two reasons. First, coercion might be needed to alleviate the influence of those individual factors that militate against intellectual property law reforms. Consider, for example, the coercive U.S. foreign intellectual property policy in the late 1980s and early 1990s. This coercive policy provided the needed foreign pushes to strengthen intellectual property protection in China. For example, the 1992 MOU and 1995 Agreement were instrumental in establishing a new intellectual property regime in China and the institutional infrastructure needed to protect and enforce rights created under that regime.[695] The trade threats and coercive tactics also increased the awareness of intellectual property rights among the Chinese people, in particular government officials.[696] In addition, the U.S. tactics put intellectual property at the forefront of the U.S.-China bilateral trade agenda, thus attracting the interests of Chinese leaders in implementing legal reforms in the area[697] while providing the reformist leaders with the needed push that helped reduce resistance from their conservative counterparts.[698]

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693 Bartow, *supra* note 497, at 15-16.

694 DIGITAL DILEMMA, *supra* note 332, at 310.

695 *See* YU, *supra* note 8, at 15.

696 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 213.

697 *See* Yu, *Privacy, Prejudice, and Perspectives*, *supra* note 8, at 24-28 (discussing the skepticism of the Chinese people about intellectual property rights).

698 *See* Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, *in* THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE 299, 300 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) ("[Economic integration would] help the reformers tilt the internal Chinese debate in directions that would minimize, if not avoid, future economic conflicts. It would encourage and perhaps accelerate the inevitable transformation of China's political regime." (internal quotations omitted)); David E. Sanger, *Playing the Trade Card*, N.Y. TIMES, Feb. 17, 1997, at 1 (reporting that the Clinton administration considers the WTO as a tool to foster political change in China). *See also* MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION 41 (1999) ("[A]n international institution such as the WTO can help

Second, coercion is needed to prevent the development of, or even dismantle, an entrenched pirate industry. Once entrenched, that pirate industry will lobby the local government actively against stronger copyright protection even if such protection would be in the country's interest.[699] For example, in 1987, Thai Prime Minister Prem Tinsulanond's administration was ousted in a no-confidence vote after it attempted to strengthen the country's copyright laws, which arguably would destroy a burgeoning pirate industry.[700] After all, it is logical for stakeholders to protect themselves against disenfranchisement.

Notwithstanding these benefits, coercive efforts will be of limited use once the reform barriers are removed or the pirate industry substantially undermined. In the case of China, most of the things that could be accomplished through a coercive bilateral policy have already been achieved. A continuation of such a policy would only be ineffective and futile.[701]

In retrospect, it is not surprising that the U.S.-China policy in the early 1990s had led to a now-famous "cycle of futility":

> The United States begins by threatening China with trade sanctions. In response, China retaliates with countersanctions of a similar amount. After several months of bickering and posturing, both countries come to an eleventh-hour compromise by signing a new

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bolster China's reform leadership against powerful hard-liners. International institutions can tie the hands of leaders in ways that the ineffectual bilateral relationship is not able to do so."); Yu, *From Pirates to Partners*, *supra* note 8, at 196 (arguing that greater economic integration will result in stronger intellectual property protection). *But see* James Mann, *Our China Illusions*, AM. PROSPECT, June 5, 2000, at 22 ("'[H]elping the reformers' is a poor basis for American policy. It is too risky. It plays into (and, indeed, accentuates) China's internal political tensions.").

699 Kitch, *supra* note 541, at 178. As Professor Kitch explained:

> [A] country that has not fully participated in the international system creates incentives among its own citizens to engage in activities that depend upon their ability to ignore patent rights. If patent protection is weak or non-existent, industries will develop that rely for their existence on their ability to ignore the international patent system. Once these industries have developed, they have an interest in resisting any change in the rules. Although it may be in the overall, long run interest of the country to participate in both form and substance in the international patent system, the adversely affected industries will have incentives to expend their political capital to keep that from happening. Thus even if full participation is as a theoretical matter the optimum strategy in the long run, once a country departs from that strategy it may find that internal political forces block a return to the optimum. Outsiders can play a constructive role by insisting that the issues be addressed within a larger and principled framework.

Id.

700 SELL, *supra* note 553, at 192.

701 *See* Yu, *From Pirates to Partners*, *supra* note 8, at 140-51, 153-54 (discussing the cycle of futility). *See also* Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make It Drink*, 37 VA. J. INT'L L. 223, 242 (1996) (noting the emergence of a cycle); Editorial, *Surprise! A Deal with China*, WALL ST. J., June 18, 1996, at A22 ("One of the Clinton Administration's specialties is threatening a trade war and then striking a deal at the 11th hour.").

> intellectual property agreement. While intellectual property protection improves during the first few months immediately after the signing of the agreement, the piracy problem revives once international attention is diverted and the foreign push dissipates. Within a short period of time, American businesses again complain to the U.S. government, and the cycle repeats itself.[702]

As a result of these repeated episodes, the United States gradually lost its credibility, fostered resentment among the Chinese people, and made the Chinese government more reluctant to adopt Western intellectual property law.

Even worse, the U.S.-China policy jeopardized the United States' longstanding interests in other areas, such as international trade and human rights.[703] The United States also wasted its hard-earned political capital that could have been used to deal with other difficult cross-border issues, such as terrorism, nuclear nonproliferation, illegal arms sales, environmental degradation, drug trafficking, refugees, illegal immigration, bribery and corruption.

To some extent, the recording industry is making the same mistake today as the Clinton administration in the mid-1990s. The industry fails to understand the limits of coercion. To be fair, legal action is needed to protect the industry against egregious offenders who will not feel guilty about what they have done even if they know what they are doing was illegal. However, an overuse of heavy-handed tactics and aggressive lawsuits will eventually backfire on the industry.

Instead of bringing file swappers into the fold, the industry has antagonized consumers by fighting battles everywhere—against legal scholars, college researchers, universities, students, cryptographers, technology developers, civil libertarians, hackers and ultimately consumers.[704] What began as a war on piracy has now become a war against the whole world![705]

Like the U.S. government a decade ago, the RIAA's tactics have alienated its major supporters. Although the recording industry was able to solicit support from the computer and consumer electronics industries in their support of the DMCA, these industries soon expressed regret and disappointment over the development and interpretation of the statute.[706] Even Congress, which is known for

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[702] Yu, *Toward a Nonzero-sum Approach*, *supra* note 535, at 624 n.461. *See* Yu, *From Pirates to Partners*, *supra* note 8, at 154 for a discussion of this cycle.

[703] *See* Yu, *From Pirates to Partners*, *supra* note 8, at 174 (arguing that the coercive U.S.-China intellectual property policy "backfires and jeopardizes the United States' longstanding interests in promoting human rights and civil liberties in China").

[704] Yu, *The Escalating Copyright Wars*, *supra* note 1.

[705] *Cf.* ERIC HOBSBAWM, ON THE EDGE OF THE NEW CENTURY 49 (2000) (cautioning that it is "a dangerous gamble" and "a mistake" for a single power, however great and powerful it is, to control world politics).

[706] *DRM Foes Turn Aside Hollywood Peace Gestures*, WASH. INTERNET DAILY, Aug. 5, 2002.

being protective of the entertainment industry, is losing patience. Most recently, Senator Norm Coleman called for congressional hearings to investigate the recording industry's enforcement tactics and to examine whether the RIAA had abused the subpoena power granted under the DMCA in its pursuit of individual pirates.[707] Senator Coleman's action was understandable, given the wide implications of RIAA's lawsuits on privacy and civil liberties,[708] two areas that are of great interest and importance to the American public (and their legislators!).

More problematically, the RIAA's tactics would backfire on the constituents the trade group was charged to protect—record companies, musicians, artists, songwriters, and retailers. Although the industry intended to coerce egregious offenders into submission, the industry's action eventually would drive pirates underground.[709] Today, there already exist a large variety of technologies that enable users to cover their identity. For example, Freenet allows file swappers to encrypt their download requests by passing requests from one computer to another in a way that makes it very difficult for copyright holders to determine when and how a file was obtained.[710] File swappers therefore will remain anonymous, as no one knows what files are on a given computer.

To some extent, the RIAA's approach is similar to the futile cat-and-mouse chase between the Chinese authorities and online dissidents in China. No doubt, the Chinese authorities have created a significant deterrent by cracking down repeatedly on cyber cafés, handing out heavy jail sentences to online dissidents, and implementing new and restrictive laws and regulations.[711] However, the heavy-handed tactics used by the Chinese authorities have heightened the cautiousness and sophistication of Chinese netizens. These tactics also have led to the proliferation of anti-monitoring technologies and an increased reliance of Chinese users on proxy servers, offshore Web sites, and encrypted peer-to-peer file sharing systems to avoid detection.

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707 Amy Harmon, *In Court, Verizon Challenges Music Industry's Subpoenas*, N.Y. TIMES, Sept. 17, 2003, at C2 (reporting that Senator Coleman had scheduled a congressional hearing to privacy issues as well as the broader effect of technology on copyright enforcement). As Senator Coleman noted: "If you're taking someone else's property, that's wrong, that's stealing. But in this country we don't cut off people's hands when they steal. One question I have is whether the penalty here fits the crime." Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, Aug. 1, 2003, at C1.

708 *See* Sonia K. Katyal, *A War on CD Piracy, a War on Our Rights*, L.A. TIMES, June 27, 2003, at 17.

709 *See* Saul Hansell, *Crackdown on Copyright Abuse May Send Music Traders into Software Underground*, N.Y. TIMES, Sept. 15, 2003, at C1.

710 *See* Riehl, *supra* note 415, at 1779-87 (describing Freenet).

711 *See generally* Nina Hachigian, *China's Cyber-Strategy*, FOREIGN AFF., Mar./Apr. 2001, at 118; Qiu, *supra* note 587, Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, COMPUTER & INTERNET LAW., Jan. 2001, at 12; Yu, *Barriers to Foreign Investment*, *supra* note 587.

If the RIAA are to avoid the difficulty confronting the Chinese authorities, it will be important for the recording industry to reassess its enforcement strategy and think hard about its long-term goal. If the industry fails to do so, in the very near future the RIAA not only will have to deal with KaZaA, Grokster, iMesh, and Gnutella, but also proxy servers, offshore Web sites, and encrypted peer-to-peer file-sharing systems, as well as angry legislators and the computer and consumer electronics industries.

CONCLUSION

Today, a copyright divide exists between the stakeholders and nonstakeholders in the copyright system. While copyright holders are eager to protect what they have, many users neither understand copyright law nor believe in the copyright system. As a result, copyright piracy is rampant, and illegal file sharing has become the norm, rather the exception—especially among teenagers and college students. As this Article contends, extensive copyright piracy can be seen as a battle between the stakeholders and nonstakeholders over the change and retention of the status quo. Unless the nonstakeholders understand why copyright needs to be protected and until they become the stakeholders or potential stakeholders, they will not be eager to abide by copyright laws or consent to stronger copyright protection.

The problem today is not new, as extensive copyright piracy has taken place in eighteenth- and nineteenth-century America and in China a decade ago. Although commentators rarely analyze the three piracy stories together, this Article brings them together for the first time using a cross-cultural, cross-systemic, cross-temporal, and cross-sectoral approach. This Article argues that there are striking similarities among the three stories and that these similarities will provide insight into the war on piracy, intellectual property law reforms, and international harmonization efforts.

From time to time, commentators have emphasized various individual factors to distinguish one piracy story from another. This Article argues that none of these factors *alone* accounts for the problem, although some of these factors at times are more influential and determinative than others. Rather, all the different factors contribute to the creation and enlargement of the copyright divide, and they should be considered as contributing factors. Until policymakers can develop a comprehensive approach that targets the various factors, as compared to a piecemeal policy that focuses on one or two exaggerated factors, the extensive piracy problem will remain.

First, the stakeholders must educate the nonstakeholders about the

copyright system. They need to make the nonstakeholders understand what the copyright system protects and how the system can benefit the nonstakeholders in the long run. Second, the stakeholders need to help the nonstakeholders develop a stake in the system and understand how the nonstakeholders can get their products protected and receive royalties. By doing so, the stakeholders can transform the nonstakeholders into stakeholders or potential stakeholders. Third, it is important for the stakeholders to help strengthen intellectual property laws and develop enforcement mechanisms. Finally, if products are needed, yet unaffordable by the majority users, the stakeholders should develop legitimate alternatives.

Two centuries ago, the United States was one of the biggest pirating nations in the world. By not granting copyright protection to foreign authors, the United States successfully rode freely on the creative efforts of others, in particular the British and the French. Today, however, the United States has become the champion of literary and artistic property and one of the predominant powers advocating strong intellectual property protection around the world. If the stories of twentieth-century China and twenty-first-century cyberspace play out like the story of eighteenth- and nineteenth-century America, we will be looking at a very happy ending in which piracy will be greatly reduced and creative works will enjoy their well-deserved copyright protection. While the good news is that both story plots seem to be developing in that direction, the bad news is that it will still take quite a while for the ending to be written. Hopefully, the understanding of the copyright divide will help accelerate this plot-writing process.