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**PROBLEMS WITH SHARING THE PIRATES' BOOTY:
AN ANALYSIS OF TRIPS, THE COPYRIGHT
DIVIDE BETWEEN THE UNITED STATES
AND CHINA & TWO
POTENTIAL SOLUTIONS**

*Manesh Jiten Shah**

I. INTRODUCTION

It is essential for a capitalist society to guarantee that technological innovation remains the work product of its originator so that there is an incentive to research and develop new products. At the same time, however, society must have many sellers in a market and ensure that no one company monopolizes the market for any one highly demanded product. Monopolies subject the supply and demand curves to idiosyncratic conditions creating inefficient and inequitable solutions.¹ Consequently, a balance must be struck between those two goals of giving the creator the exclusive right to his/her creation, and the free market enough producers and suppliers to prohibit monopolies.

Software programming is an emerging specialty within the intellectual property field. While software programming represents a relatively small portion of total international commerce, it has significant impacts on companies world-wide. The United States International Trade Commission estimated that domestic companies lost approximately \$50 billion to software piracy in 1988.² As a result, in 1995, during the World Trade Organizations' Uruguay round of negotiations, the United States government created an accord with other nation-states also concerned about piracy, and the result was the Trade-Related Aspects of Intellectual Property Rights (TRIPS) regime.³ This international covenant intended to establish standards of protections against software pirates, determine rules of enforcement, and set up a dispute settlement mechanism to resolve issues between member

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¹ See generally ADAM SMITH, WEALTH OF NATIONS (1776).

² Advisory Committee for Trade Policy Negotiations, A Report to the President, Congress, and the United States Trade Representative Concerning the Uruguay Round of Negotiations on the General Agreement on Tariffs and Trade 67 (1994).

³ Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round vol.31 (1994), 33 I.L.M. 81 (1994) [hereinafter TRIPS].

States.⁴ This attempt at a comprehensive solution theoretically appealed to both developing and developed nation-states with regards to international business transactions because it created evenhanded resolutions to several problem areas such as maritime services, telecommunications, financial services and intellectual property.⁵ Notwithstanding the attempts to mitigate piracy in the international arena by TRIPS, or in the domestic arena by the United States Federal Government, worldwide financial losses to business software piracy in 2001 – a full six years after TRIPS was established – rose to an estimated \$11 billion.⁶

This Comment attempts to illuminate the effect of software piracy on the United States economy by analyzing, from an international perspective, the current system of preventing, punishing and recovering from such activities. Part II of this comment analyzes how TRIPS operates in an attempt to show current enforcement mechanisms and certain areas of vulnerability. Part III focuses on why developing nation-states are largely the home of software pirates with a case study of present day China compared to the early United States history of “pirating” copyrighted novels. Part IV considers an alternative to the current TRIPS system by incorporating “shrink-wrap licensing” and other alternatives into current enforcement mechanisms. Part V provides a possible resolution of the problem and attempts to synthesize the effects of piracy on segments of the United States’ economy.

II. ANALYZING TRIPS

Louis Henkin flippantly asserted “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”⁷ Applying this to international piracy law, Henkin’s statement suggests nation-states dispose of international law like TRIPS because adhering to any international agreement seems up to the prerogative of individual States under some notion of sovereignty. There are two dominant reasons why nation-states adhere to international covenants. First, “[t]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty

⁴ TRIPS, *supra* note 3, art. 64.

⁵ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

⁶ Note, *Tackling Global Software Piracy Under Trips: Insights from International Relations Theory*, 116 HARV. L. REV. 1139, 1140 (2003); INT’L PLANNING & RESEARCH CORP., SEVENTH ANNUAL BSA GLOBAL SOFTWARE PIRACY STUDY 2 (2002).

⁷ LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

organization, and the wider public."⁸ Essentially the threat of sanctions is not the reason for compliance, but nations are "persuaded to comply by the dynamic created by the treaty regimes."⁹ Economists concur that businesses focused on maintaining repeat customers offer a higher quality product. By analogy, if a nation-state knows several foreign companies want to continue business for many years, then they will enact laws to protect the foreign company's rights because nation-states see the benefit to their domestic economy. A second reason for compliance is that moral, normative and legal reasons all play a role in creating a rule which will be followed because it makes intuitive sense to the actor.¹⁰ Meaning, "[a] transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system."¹¹ As rational agents, governments will act according to the international norms when they are persuaded it is in their best interests and an efficient and equitable solution will flow from their compliance. Regardless of why nation-states are persuaded to comply with international agreements, any international law must make sense to those nation-states individually, otherwise the laws become mere puffery and the lack of domestic enforcement leads to non-compliance with the treaty.¹²

The first indicium that TRIPS is a fair law is to ask if TRIPS can be internalized by nation-states who have agreed to it. Currently, many states view TRIPS as a regime that "despite its contractually obligatory nature. . . [it] is capable of manipulation, distortion, and even abandonment if such actions serve the interests of the states."¹³ Since the nation-states which belong to the treaty agreement have a variety of local economic, legal and social customs,¹⁴ TRIPS jurists ought to take local customs into account,¹⁵ specifically to help nation-states internalize the agreement into their local customs. For example,

⁸ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATOR AGREEMENTS* 3 (1995).

⁹ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2601 (1997).

¹⁰ *Id.*, 2659.

¹¹ *Id.*

¹² See generally 116 *HARV. L. REV.* at 1144.

¹³ *Id.* at 1146.

¹⁴ Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and the Dispute Settlement Together*, 37 *VA. J. INT'L L.* 275, 292 (1997).

¹⁵ Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 *HARV. INT'L L.J.* 357, 411 (1998) (arguing that TRIPS jurists should openly take local circumstances into consideration).

in the United States, a sporadically enforced TRIPS agreement would be insufficient because the domestic economy is dependant on high-technology companies,¹⁶ and only partial enforcement of the TRIPS agreement would violate the Due Process Clause.¹⁷ Random enforcement of any law by the federal or a state government violates the Due Process Clause by applying different laws to two similarly situated people.¹⁸ As a result, the United States Congress enacted Section 182 of the Omnibus Trade Act of 1974, which requires an annual review of the intellectual property laws of trading partners and sanctions those nations whose laws are deemed unfair.¹⁹ This local custom, employed by the United States, is not mandatory for all TRIPS members. However, the United States deemed it necessary in order align the international agreement with its Constitution. Since any nation has the power to decide with whom to trade, this law is not a *de facto* violation of TRIPS. The example further reiterates the argument that any international law will be followed to the extent it can be internalized.²⁰

The second indicium that TRIPS is a fair law is to ensure that it is consistently fair to all nation-states adopting the rule. If the law is perceived as being unfair, then members will see no reason to enforce the treaty as adopted, and the treaty will turn into mere rhetoric. Structural designs such as the centralization of enforcement mechanisms, transparency measures, and the degree of flexibility allotted to individual states all point to the fairness of the TRIPS regime.²¹

The enforcement mechanism for TRIPS lies in a looming threat of reciprocal trade sanctions which seek to sustain cooperation and induce compliance over time.²² This enforcement policy is fair on its face because TRIPS created a Council to hear all disputes and make decisions as a part of its mediation.²³ However, many nation-states rely on domestic legislation to hear a TRIPS claim. So the cost of adjudicating

¹⁶ The U.S. intellectual property trade surplus exceeded \$20 billion in 2000. BUS. SOFTWARE ALLIANCE, FORECASTING A ROBUST FUTURE 3 (1999), at http://www.bsa.org/usa/globalib/econ/us_econ_study99.pdf.

¹⁷ U.S. CONST. amend XIV.

¹⁸ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974).

¹⁹ Trade Act of 1974, Pub. L. No. 93-618, §182, 88 Stat. 1978, 2041 (1975).

²⁰ See *supra* note 8.

²¹ See Ronald B. Mitchell & Patricia M. Keilbach, *Situation Structure and Institutional Design: Reciprocity, Coercion, and Exchange*, 55 INT'L ORG. 891, 196-99 (2001) (arguing what parts need to be in place for any international regime to be considered fair).

²² ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 244-45 (1984); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 57-60 (1990); see 116 HARV. L. REV. at 1150-51.

²³ 116 HARV. L. REV. at 1152.

a dispute becomes a major factor which prohibits parties from seeking remedies before the TRIPS council.²⁴

To maintain a level of transparency in its decision making process, the TRIPS Council issues written questions in advance of its meetings so that nation-states brought in as either offending parties or defenders of a local rule may formulate written responses. The meeting allows follow-up questions as well as replies.²⁵ Any nation-state under review is allowed the chance to present their current TRIPS legislation and any changes executed to comply with TRIPS. After the nation-state's presentation, the Council may ask additional questions.²⁶ The public nature of Council meetings, along with the number of member states which are present, ensures that a nation-state need not worry that a reprehensible adjudication will go unnoticed by other nation-states. This level of transparency is parallel to other international institutions like the General Assembly meetings at the United Nations.

The third indicium of fairness is the degree of flexibility allowed to each nation-state.²⁷ Although the current TRIPS regime is considered flexible because it accounts for local custom explicitly,²⁸ there are at least two potential solutions which would allow a better tailoring of TRIPS to various legal customs. First, nation-states could give private domestic corporations a greater role in the global governance of intellectual property rights protection.²⁹ This would allow those companies to bargain around the TRIPS agreement so that the TRIPS regime becomes the basis of a contract.³⁰ Around this basis, market players may mutually tailor the contract to their benefit.³¹ This would be advantageous to the corporation selling the product because the rules of the game would be known and any unfavorable factual scenario can be considered in advance. Additionally, the consumer would also understand the requirements behind the agreement and perhaps internalize the contract – thereby creating a better chance of

²⁴ *Id.*

²⁵ See TRIPS, *supra* note 3, art. 23(4) (establishing a Council to negotiate a multi-lateral register of geographical indications, in this case, for wine).

²⁶ Council for Trade-Related Aspects of Intellectual Property Rights, 1996 Report of the Council for TRIPS, WTO Doc. IP/C/8, PP4-25 (Nov. 6, 1996), available at <http://www.wto.org>.

²⁷ See *supra* note 19.

²⁸ See e.g. *supra* note 14 (mandating TRIPS jurists to consider local customs).

²⁹ 116 HARV. L.REV. at 1157.

³⁰ 116 HARV. L. REV. at 1157-58; see also J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 60 (1998).

³¹ *Id.*

self-enforcement. Thus, all terms that one party might deem inappropriate can be eliminated by savvy businessmen via rounds of negotiations. Second, non-governmental organizations “can aid states, particularly developing states, in complying with the outcome-based TRIPS provisions”³² by assisting with legislative drafting, promulgating legal norms, and educating the public about the benefits of the TRIPS regime.³³ Two non-governmental organizations, the International Intellectual Property Alliance and the Business Software Alliance, have shown a dedicated interest in China’s and other nation-states’ compliance with the TRIPS regime.³⁴ Both of these non-governmental solutions ought to be written into the TRIPS framework either explicitly, or implicitly, so that the standards are applied consistently and fairly to all nation-states.

The TRIPS agreement is one of the most comprehensive attempts to align nation-states into agreement regarding rights for foreign companies and their work products. TRIPS is flexible because it allows nation-states to create their own laws with regards to domestic problems, and it is consistent because the same procedure for dispute resolution exists regardless of the nation-state in question. These benefits, in addition to a transparent process, make the TRIPS system a fair international law which can be internalized by various nation-states with different priorities.

III. THE GREAT COPYRIGHT DIVIDE OF CHINA AND THE EARLY UNITED STATES

“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.”³⁵ Following copyright laws comes from believing and understanding the reasons for government action. This section highlights the recourse available to any businesses inside a domestic arena, giving special attention to the United States’ manuscript piracy historically versus modern China’s electronic piracy in a comparative case study, and the international solution when consumers violate copyright treaties.

³² 116 HARV. L. REV. at 1159.

³³ *Id.*

³⁴ Serri E. Miller, *The Posse Is Coming to Town. . . Maybe: The Role of United States Non-Governmental Organizations in Software Anti-Piracy Initiatives as China Seeks WTO Accession*, 7 ILSA J. INT’L & COMP. L. 111, 121 (2000); *U.S. Help Is Sought in Fight in Singapore Against Counterfeiters*, WALL ST. J., Mar. 9, 1998, at A11.

³⁵ Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 331 (2003).

Domestically, the United States has seen high profile litigation between university students and the recording industry (whose copyrighted music is often the subject of an illegal taking) who seek billions of dollars in damages.³⁶ Yet this recourse of suing for pecuniary damages has not always been available in the United States. A little over two centuries ago, the United States was notoriously known for its pirating of books.³⁷ The Constitution states "Congress shall have Power. . .to promote the Progress of Science. . .by securing for limited Times to Authors. . .the exclusive Right to their respective Writings."³⁸ The first copyright statute, passed in 1790, limited copyright protection to "a citizen or citizens of these United States, or resident therein."³⁹ Section Five of that Act explicitly discriminated against foreign authors and inventors:

Nothing 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.⁴⁰

This created an unfair advantage to American publishers because their British counterparts could not compete in the open market as American businesses could sell at a cheaper price.⁴¹ "Compared to a legitimate English edition, an American pirated edition cost approximately one-tenth of the total cost."⁴² The tides turned once American literature began to flourish.⁴³ Because copyright laws at the time were made conditional upon reciprocity between two nations, American au-

³⁶ 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.

³⁷ Tomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255, 255 (1997) (arguing that during its formative period, the United States failed to observe foreign intellectual property rights and did not sign any agreements to that end until the end of the nineteenth century).

³⁸ U.S. CONST. art. I, § 8, cl. 8.

³⁹ Act of May 31, 1790, ch. 15, 1 Stat. 124.

⁴⁰ *Id.* § 5.

⁴¹ S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS §2.18, at 25 (2d ed. 1989).

⁴² *Supra* note 32 at 341-42; see also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 44 (2001).

⁴³ *Supra* note 32 at 344.

thors continued to be denied their rights under foreign law just as foreign authors were denied rights in the United States.⁴⁴

Yet 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.”⁴⁵ Historic evidence indicates that the United States changed from pirate to protector because it had a vested interest in ensuring its own citizens were protected.⁴⁶ The shift in policy resulted from internalizing the benefits of international copyright agreements, the exact same justification used for creating transparency in the TRIPS Council.⁴⁷

Scholars credit China for contributing paper, movable type and ink to humanity, but “China has yet to develop comprehensive protection for what is created when one applied inked type to paper.”⁴⁸ In fact “financial losses from [Chinese] piracy have become so severe that some businesses will no longer release software”⁴⁹ in developing nation-states like China.⁵⁰ The situation is not unique to China. In 1997, I visited Bangalore, known as the “Silicon Valley” of India. I walked down a major street and found pirated CDs of Windows ’95 or other Microsoft products on sale by street vendors for Rs. 100 – about \$2.50 at the time.

Among the first treaties signed shortly after China’s reopening to the world after Mao Tse-tung’s death in the late 1970s,⁵¹ was a treaty initiated by the United States about trade relations.⁵² Provi-

⁴⁴ Max Kempelman, *The United States and International Copyright*, 41 AM. J. INT’L L. 413, 413 (1947) (noting Longfellow’s assertion 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 is reported to have received no return on her book *Uncle Tom’s Cabin* even though it sold more than 500,000 copies in Great Britain during its first year alone).

⁴⁵ *Supra* note 32 at 352.

⁴⁶ *Id.*; see DEBORA J. HALBERT, *INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS* 79 (1999).

⁴⁷ *See supra* note 19; *supra* note 23.

⁴⁸ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 1 (1995); *see supra* note 32 at 354.

⁴⁹ Kurt Foss, *Will Software Piracy Fears Keep Adobe Products Out of China?*, PLANET PDF (Feb. 4, 2002) at <http://www.planetpdf.com/mainpage.asp?webpageid=1891>.

⁵⁰ *Id.*

⁵¹ IMMANUEL C.Y. HSU, *THE RISE OF MODERN CHINA* 858 (6th ed. 2000).

⁵² 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.

sions for intellectual property included a caveat: "each Party shall seek, under its laws and with due regard to international practice, to ensure a 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."⁵³ This return to reciprocal copyright status with other nations is reminiscent of the first agreements between the United States and European nations when American authors were being denied copyright protection in the nineteenth century.⁵⁴

China's agreement with the United States came before the Chinese government had a chance to establish internal laws and regulations regarding copyright violations.⁵⁵ This meant that China "assumed an international legal obligation for intellectual property rights protection before it had established a domestic intellectual property protection system."⁵⁶ In 1980, China joined the World Intellectual Property Organization.⁵⁷ In 1995, China became a member of the Paris Convention for the Protection of Industrial Property.⁵⁸ China has even passed two domestic laws regarding trademarks⁵⁹ and patents.⁶⁰

Even with the enactment of all of these agreements and laws, "China afforded authors and inventors very limited protection."⁶¹ In fact some industry experts claim that 99% of all computer software in China was pirated in the late 1990s.⁶² Much of this illegal taking came about because of a misunderstanding of the copyright system.⁶³ Chinese people were under a socialist economic system whereby property did not reside in any person, but in the state and the people as a whole.⁶⁴ After a break in U.S.-Sino relations, "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

⁵³ *Id.* art. VI(3), 31 U.S.T. at 4658.

⁵⁴ *Supra* note 41.

⁵⁵ See generally HONG XUE & CHENGSI ZHENG, SOFTWARE PROTECTION IN CHINA: A COMPLETE GUIDE (1999) [hereinafter Xue & Zheng].

⁵⁶ *Id.* at 5.

⁵⁷ 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.

⁵⁸ *Id.*

⁵⁹ 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).

⁶⁰ Patent Law of the People's Republic of China, translated in THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 65 (1987).

⁶¹ 25 CARDOZO L. REV. at 356.

⁶² Xue & Zheng, *supra* note 51, at 31.

⁶³ 25 CARDOZO L. REV. at 361.

⁶⁴ *Id.* at 362.

the country's economic development, foreign investment and interstate relations."⁶⁵ This inability to internalize the previous agreements with the United States and other nations meant that the Chinese saw the laws as slowing down economic progress.⁶⁶ Moreover, they were afraid that following such policies would lead China down the "path of the former Soviet Union and Eastern Europe – toward economic decay, social unrest, and political instability."⁶⁷ All of this history is analogous to the American tale written above; the Chinese, and by analogy, other developing nation-states simply need time to develop laws, regulations, and local customs which produce the fruits of international cooperation.

Recent developments in Chinese law regarding copyrights point to a progression to towards the current United States system:

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 and the Regulations on the Protection of New Plant Varieties. China amended its Criminal Law by including a section on intellectual property crimes. In April 2000, China became a member of the International Union for the Protection of New Varieties of Plants and subsequently enacted a law to protect trademark holders against [cyber-squatters].⁶⁸

All of these laws, combined with even more efforts aimed at entering the World Trade Organization and receiving "most favored nation" trade status by the United States, show that the Chinese are taking steps to apply the goals found in the TRIPS regime.⁶⁹ Even though laws were passed, the problems of developing nations remain enforcement mechanisms for their laws.⁷⁰ The Chinese authorities have launched "large scale crackdowns" on pirated and counterfeit products.⁷¹ Additionally, "Chinese leaders, through public speeches and position papers, [stress] the importance of intellectual property as an

⁶⁵ *Id.* at 364.

⁶⁶ *Id.*

⁶⁷ HARRY HARDING, BREAKING THE IMPASSE OVER HUMAN RIGHTS, IN LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 165, 172 (Extra F. Vogel ed., 1997).

⁶⁸ 25 CARDOZO L. REV. at 365.

⁶⁹ *Id.* at 366-67 (listing even more statutory changes and international agreements passed by China since 1996).

⁷⁰ See generally 106 Yale L.J. 2659.

⁷¹ *Supra* note 64.

economic strategy."⁷² Most importantly, the Chinese people have become stakeholders in the system⁷³ because their software industry has experienced tremendous growth as the value of the stock market doubled from 1995 to 1997.⁷⁴ These actions and effects seem similar to what happened with the United States when it was pirating Great Britain's novelists.

While China is still not as vigorous about supporting intellectual property rights as the United States, China is becoming a market player and will continue to advocate stricter enforcement because the reciprocity agreement which underlies the international framework makes China internalize the international agreement.

Nation-states internalize international norms, especially those which protect the rights of foreigners, because they have a vested interest in following the norm. Because China has a growing software programming industry, their businesses will begin having a vested interest in the Chinese government applying the TRIPS agreement.

IV. DOWNLOADING MUSIC, PIRATING SOFTWARE, AND SHRINK-WRAP LICENSING

The United States became more aware of copyright laws when its younger generations began illegally procuring music from "peer to peer networks." The President of Time Warner explained that this is a profound historical movement.⁷⁵ Pirating music is not just about individuals stealing a few songs, but it is "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."⁷⁶ The problem remains that companies or artists knowing that the sale of their product will be diminished by the plethora of people illegally obtaining the material, will have no incentive for creating or developing works.⁷⁷

The landmark case involving piracy in the United States happened when Universal Studios brought a lawsuit against Sony for manufacturing a Betamax Videotape Recorder that allowed consumers to tape broadcasts without separately paying for them.⁷⁸ The United

⁷² 25 CARDOZO L. REV. at 368; see OFFICE OF THE USTR, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 57 (2003).

⁷³ *Id.* at 370.

⁷⁴ Xue & Zheng, *supra* note 52, at 9.

⁷⁵ Chuck Phillips, *Time Warner Tunes in New Delivery Channel*, L.A. TIMES, July 25, 2000, at C1 (interviewing Richard Parsons, President, Time Warner).

⁷⁶ *Id.*

⁷⁷ *Id.* (explaining "Artists will have no incentive to create").

⁷⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that taping the broadcasts were not illegal because of the fair use doctrine).

States Supreme Court held that by making the broadcast public “over the air,” that the taping constituted merely a shift in time when the material was viewed.⁷⁹ Therefore, the recorder was “fair use.”⁸⁰ Because of many individuals relying on the “fair use” formula, Congress passed legislation attempting to mitigate any harm to companies or artists by providing copyright and generation status information on any digital recording.⁸¹

If the United States, a proclaimed “champion of literary and artistic property and one of the predominant powers advocating strong intellectual property protection around the world”⁸² cannot enforce the law, how will any other nation, including developing nations, have that capacity? In fact the problems associated with file sharing were summarized by Professor Michael Froomkin:

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, 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 the 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.⁸³

It seems that this Internet culture can become a haven for pirates.⁸⁴ Some download music specifically as a “kind of protest movement against record companies,”⁸⁵ which is justified because “many artists hate [them] because they have control over access to the music market.”⁸⁶ This problem necessitated more legislation, like the Digital Millennium Copyright Act, which strengthened copyright protection in

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Audio Home Recordings Act of 1992, Pub. L. No. 102-563, 106 STAT. 4247.

⁸² 25 CARDOZO L. REV. at 375.

⁸³ A. Michael Froomkin, “The Internet as a Source of Regulatory Arbitrage”, in *Borders in Cyberspace* 129, 129 (Brian Kahin & Charles Nesson eds., 1997).

⁸⁴ 25 Cardozo L. Rev. at 383.

⁸⁵ *Id.*

⁸⁶ *Id.*

the digital medium.⁸⁷ Most importantly, this new law sought to impose liability on ordinary citizens to make noncommercial behavior illegal on the theory that the law will prevent piracy.⁸⁸ This law disallows certain acts which were justified at common law because of the time-shifting exclusion to the "fair use doctrine."⁸⁹ Again, this makes ordinary citizens stakeholders so that the laws become internalized in society.⁹⁰

Although litigation between the recording industry and individuals might enforce the laws in the United States, some claim that the cost and lack of requisite infrastructure bar other nations from doing the same without the help of non-governmental and inter-governmental organizations.⁹¹ As an alternative, some scholars suggest a strategy whereby "shrink-wrap licenses" enforce user agreements on all computer software.⁹² "Shrink-wrap licenses" provide that any owner of a piece of software agrees to the "user agreement" by merely removing the plastic wrapping around the product.⁹³ The user agreements also include provisions about when copying the software is legal, and in what limited instances the copyrighted work can be digitally multiplied.⁹⁴

"Shrink-wrap licenses" are valuable for many reasons. First, they cut down the time required to individually contract with each consumer regarding the rights and responsibilities of owning the product. Second, they provide a favorable and uniform agreement for the developer. This entices software programmers to create more innovative products because programmers know they will receive compensation by all who use their product. Third, they allow developers additional protection for their software during litigation.⁹⁵ This seems like a good

⁸⁷ Digital Millennium Copyright Act, Pub. L. No. 105-204, 112 STAT. 2860 (1998) (making illegal the action of downloading music for private use).

⁸⁸ See generally Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137 (1999).

⁸⁹ Compare note 74 with note 83.

⁹⁰ See generally *supra* note 19.

⁹¹ See generally 116 HARV. L. REV. at 1159.

⁹² See generally Nathan Smith, Comment, *The Shrinkwrap Snafu: Untangling the "Extra Element" in Breach of Contract Claims Based on Shrinkwrap Licenses,* 2003 B.Y.U. L. REV. 1373.

⁹³ See generally Kell Corrigan Mercer, Note, *Shrink-Wrap Licenses: Consumer Shrink-Wrap Licenses and Public Domain Materials: Copyright Preemption and Uniform Commercial Code Validity in ProCD v. Zeidenberg,* 30 CREIGHTON L. REV. 1287 (1997).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1385.

solution for the problems faced by developing nation-states as discussed above.⁹⁶

However, there might be some problems with national contract law depending on the nation-state. In the United States, this law has become quite controversial because “[c]ourts have yet to reach a consensus on whether [shrink-wrap licenses], backed by state contract law, should be preempted by federal copyright law.”⁹⁷ Generally, “shrink-wrap licensing” violates the common law traditions of both the United States and Great Britain because there is no assent or consideration as required for contract formation when the “shrink-wrap” is broken.⁹⁸ Additionally these types of licenses might be adhesion contracts because there is no “meeting of the minds” as consumers and no negotiating terms with producers.⁹⁹ Nevertheless, their simplicity of enforcement might make them ideal in other nations where adhesion contracts are viewed in an acceptable light and the government’s opinion is *caveat emptor*.

Another alternative lies in nations adopting a copyright law with a “fair use doctrine” as in the United States.¹⁰⁰ This exception to copyright law insulates individuals from prosecution for otherwise illegal behavior by claiming that their use of the copyrighted work did not violate the spirit of the law which aimed at protecting the copyright holder. The question then becomes whether the United States’ “fair use doctrine” is truly equitable. The four pronged test of the fair use doctrine asks the tribunal to consider: (1) the commercial nature, character, and purpose of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the copyrighted work that was used; and (4) “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰¹ This alternative mandates an equitable judicial infrastructure as the power of the Copyright Act makes “shrink-wrap licenses” unnecessary, because an alternate enforcement mechanism would exist.¹⁰²

For example, in a world without [“shrink-wrap licenses”], where a party purchases software and later makes unauthorized commercial use of it, copyright law would en-

⁹⁶ See *infra* pt. II.

⁹⁷ 2003 B.Y.U. L. REV. at 1373.

⁹⁸ Gary L. Founds, Note, *Shrinkwrap and Clickwrap Licenses: 2B or Not 2B?*, 52 FED. COMM. L.J. 99, 101-03 (1999).

⁹⁹ Brett L. Tolman, Note, *ProCD, Inc. v. Zeidenberg: The End Does Not Justify the Means in Federal Copyright Analysis*, 1998 B.Y.U. L. REV. 303 (1998) (implying that the extra element of bargain does not exist with shrinkwrap contracts because they of their adhesive quality).

¹⁰⁰ See 17 U.S.C. §301(2000); 112 STAT. 2860, *supra* note 83.

¹⁰¹ 17 U.S.C. §107 (2000).

¹⁰² 2003 B.Y.U. L. REV. at 1415.

sure a fair solution. The accused infringer may assert a digital fair use defense, but a court would likely dismiss the fair use defense due to the commercial nature of the use and its effect on the product's market. Of course, in other situations where a fair use exists, a court will probably find against infringement.¹⁰³

In our case, developing nation-states could work up to such a standard by slowly implementing the laws, rules, and local customs necessary.¹⁰⁴

Although the solution might be inequitable with certain nation-states' legal traditions, "shrink-wrap licensing" is an incredibly efficient solution to the problem of piracy because it does not need a complicated enforcement mechanism or sophisticated consumers to create detailed contracts about when copies of work product can be made.

V. CONCLUSION

Any attempt to show how the corporations, artists, and inventors in the United States lose money as well as the desire to create innovative products or music depends on who the recipients of the free items are. This comment explained how the United States sets an example for other nation-states through TRIPS; non-governmental organizations, privatizing enforcement of copyrights, shrink-wrap licensing, or helping establish "fair use doctrines" of copyright laws in other nations.

Basically, TRIPS may succeed where unilateral coercion has failed. Specifically, unilateral measures first enacted by treaties between China and the United States¹⁰⁵ threaten Chinese sovereignty, or any nation-state in that position. Control over internal affairs is essential for any government.¹⁰⁶ Providing a relatively neutral forum for nation-states to air disputes, and provisions guarding against negative side effects of overzealous enforcement, makes TRIPS a natural compromise, which is subject to evolution as circumstances and consensus permit.¹⁰⁷ This means the United States is a party with a vested interest in the same way as all other nation-states in the TRIPS agreement. Time will reveal innovations in products from other nation-states who

¹⁰³ *Id.*

¹⁰⁴ *See infra* part III.

¹⁰⁵ *Supra* note 49.

¹⁰⁶ Warren Newberry, Note, *Copyright Reform in China: A "TRIPS" Much Shorter and Less Strange Than Imagined*, 35 Conn. L. Rev. 1425, 1461 (2003).

¹⁰⁷ *Id.*; *see also* WTO, Commission Report is Food For Thought on Intellectual Property, (Sept. 17, 2002), at http://www.wto.org/english/newse/news02e/com_report_intel_prop_17sep02_e/htm.

will then become greater stakeholders in the system.¹⁰⁸ One might expect that these nations follow the pattern established by the United States and China. By internalizing the international law, it will become part of the local legal tradition and have a greater likelihood of being accepted and followed.

Alternatively, it is beneficial for developing nations to join in multi-governmental entities, like the World Trade Organization, to enforce international agreements. In the case of China, this “admittance was accompanied by promises from the Chinese government to revise existing intellectual property laws and abide by the provisions of TRIPS.”¹⁰⁹ Making inter-governmental and non-governmental organizations more transparent will aid in member nation-states believing they have a stake in upholding their international agreements.¹¹⁰

Finally, while promoting the United States’ view of the “fair use doctrine”¹¹¹ may seem hegemonic, consider the large benefit to international corporations and consumers which exists by fostering a basic framework of contracts and build from that structure. Ultimately, a protective international copyright agreement will be enforced by other nation-states currently harboring pirates counting their bounty if the United States shares its intellectual, social and local customs with them.

¹⁰⁸ Compare note 41 (discussing United States action once they had writers whose works were being pirated) with note 70 (showing the increase in Chinese legislation once their software production doubled).

¹⁰⁹ Andrew Evans, Note, *Taming the Counterfeit Dragon: The WTO, TRIPS, and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT’L & COMP. L. 587, 616 (2003).

¹¹⁰ *Supra* note 19.

¹¹¹ *Supra* note 99.