

Article

East-West Intellectual Property Enforcement Partnerships: Dream and Reality

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ABSTRACT

Intellectual property rights (IPRs) are essential to functioning economies. Nearly all nations adopt treaties and enact statutes supporting IPRs. Moderate uniformity is found in legislative branches, but actions from executive and judicial branches vary among cultures, traditions and nations. Piracy and counterfeiting, both online and in physical markets, are prevalent within and between States, necessitating new and enhanced enforcement partnerships. Most research on the subject focuses on Eastern production and physical market counterfeiting rather than Western consumption and internet piracy. This article addresses IP enforcement problems among Eastern and Western nations. A survey is taken of Western consumers in a Thai physical market, and an inquiry into infringing websites is made. Game theory helps analyze the IP protection environment. A more realistic approach to international IPR enforcement is advocated, one including ex officio action and a new online copyright dispute resolution system resembling UDRP.

Keywords: *Intellectual Property Rights, International Law, Piracy and Counterfeiting, Internet*

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I. INTRODUCTION

Legally and with only rare exceptions,¹ states are bound by both international and domestic law to recognize and enforce intellectual property rights (IPRs). IPRs are individual rights similar to those of fixed property ownership, which are considered essential to economic development and competitiveness.² Despite its value and importance, the existence of such intangible property is not without its opposition.³ Although the existence of IPRs is not threatened, cultural and social divisions have interrupted universal acceptance and harmonized enforcement of IPRs across nations.⁴ Some progress has been made in recent years, but theories of collective ownership still dominate the developing Eastern conversation.⁵ Western internet activists similarly claim that information should be free.⁶

Worldwide, there is growing disrespect for IPRs as shown by increasing bad-faith infringement.⁷ With no clear solution to these problems in sight, new direction is needed to secure the future of IPRs, copyright and trademark most notably. If the processes of strengthening institutions and international partnerships on IP are to continue, then ongoing research must be conducted with the aim of pinpointing problems which impede development. Theories and opinions proffered by experts consistently suggest that IP protection and enforcement systems need significant revision

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 66, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. WTO has 159 members as of Mar. 2, 2013. Members and Observers, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 12, 2013). Least developed countries (LDCs) are granted a 10-year grace period between application and implementation.

2. Intellectual property protection is included in the first (Institutions) and twelfth (Innovation) pillars on the World Economic Forum Global Competitiveness Report (2013-2014). THE GLOBAL COMPETITIVENESS REPORT 2013-2014 (Klaus Schwab ed., 2013), available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

3. N. Stephen Kinsella, *Against Intellectual Property*, LUDWIG VON MISES INSTITUTE (2008), available at <http://mises.org/books/against.pdf>.

4. Wei Shi, *The Paradox of Confucian Determinism: Tracking the Root Causes of Intellectual Property Rights Problems in China*, 7 J. MARSHALL REV. INTELL. PROP. L. 454 (2008). Collectivist cultures such as China are more reluctant than individualist cultures of the West on acceptance of IP.

5. *Id.* at 462.

6. *The Hacker Ethic*, ZYPHRO (May 7, 2005), http://gradha.sdf-eu.org/textos/hacker_ethic.en.html. People use this credo to rationalize internet copyright and trademark infringement, frequently citing Article 19 of the Universal Declaration of Human Rights (1948) - "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration of Human Rights].

7. "Over the last decade, the counterfeiting and piracy phenomenon has risen to very dangerous dimensions and has become one of the most devastating problems facing world business." *Enforcement of Intellectual Property Rights*, EUROPEAN COMMISSION (Jan. 30, 2014), http://ec.europa.eu/internal_market/iprenforcement/index_en.htm.

in order to handle new threats posed by globalization and high speed internet.⁸ With the objective of supporting calls for improved international IP protection and enforcement, this article provides some insight into piracy and counterfeiting, failures to eradicate or sufficiently control commercial-scale infringement, and surrounding factors which hinder broader successes.

A. *Provenance of the Research*

Qualitative and quantitative research was undertaken with the intent of uncovering information about IP protection and enforcement, with special emphasis on the similarities and differences between Eastern and Western nations. English-language literature most frequently posited argument against the developing-Eastern style of IPR protection. However, a review of IPR treaties, statutes and cases suggested that the majority of the Eastern world, despite its relaxed enforcement attitude when compared to the United States and Western Europe, has effectively implemented provisions of international agreements into domestic legislation.⁹ Most literature suggested that piracy and counterfeiting were Eastern problems, whereas infringement was far less tolerable in Western nations. However again, there were contradictions found in cases and statistics.¹⁰ Some studies showed that certain types of infringement in the Western world and among Western consumers were greater in sum than those in the East.¹¹

Most industry and government research focuses on tangible goods,

8. "The Global Congress on Combating Counterfeiting and Piracy represents a unique, international public-private sector partnership that is united in its efforts to identify solutions to the growing menace of the illegal trade in counterfeit and pirated goods, and facilitate their implementation." Press Release, WIPO, Seventh Global Congress on Combating Counterfeiting and Piracy Opens in Istanbul (Apr. 24, 2013), *available at* http://www.wipo.int/pressroom/en/articles/2013/article_0010.html.

9. "As many critics have noted, the problem isn't that China doesn't have intellectual property laws: it's that China doesn't enforce them." Gillian Kassner, *China's IP Reform: State Interests Align with Intellectual Property Protection*, JOLT DIGEST (Apr. 24, 2012), <http://jolt.law.harvard.edu/digest/patent/chinas-ip-reform-state-interests-align-with-intellectual-property-protection-again>.

10. "[T]here is a serious lack of reliable statistics on counterfeiting and piracy." Charles Clift, *A Review of Statistical Information on Counterfeiting and Piracy*, WIPO 24 (Sept. 2, 2011), http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_7/wipo_ace_7_5.pdf.

11. *Shadow Market: 2011BSA Software Piracy Study* (May, 2012), BUSINESS SOFTWARE ALLIANCE, http://globalstudy.bsa.org/2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf. Software piracy rates were higher in Eastern nations like China, Indonesia, Thailand, Korea, Malaysia, but the monetary value of pirated software was highest in the United States. France, Germany, the UK, Canada, and Australia were in the top 20 economies by commercial value of pirated software. *See also Online Piracy in Numbers: Facts and Statistics*, GO-GULF.COM (Nov. 1, 2011), <http://www.go-gulf.com/blog/online-piracy/>. 67% of digital piracy sites are hosted in North America and Western Europe.

primarily of Chinese origin.¹² True, China manufactures the most infringing goods, and the Eastern developing world is stocked full of them, but those economies are dependent upon exports, especially to the United States and Western Europe,¹³ which are target markets for counterfeiters and pirates. Furthermore, it was found that Western consumers frequently purchase counterfeit and pirate items in Eastern physical markets.

Discussion of internet infringement has expanded in recent years, but such research is still less abundant than information about tangible goods. The bulk of literature found regarding internet piracy are generally related to non-commercial aspects of downloading and uploading among users, and rarely included information about specific internet companies involved in the process. Given inconsistencies, conflicting opinions and apparent lack of certain information, further research is needed to assess infringement in Eastern and Western regions and among citizens of those regions to get a better picture of protection and enforcement strategies.

B. *Research Design*

Lex scripta is reviewed and analyzed in the first section. Piracy and counterfeiting are then examined. Associations are made between commercial infringement, organized crime, and economic losses. Infringing internet sites, found primarily based in the West are considered threats to IPRs comparable to or greater than Eastern physical markets. Insufficient legal and political will is found in Western nations to curb the massive commercial infringement of media online, resembling the apparent lack of political will to regulate physical markets in developing Eastern nations.

Secondary sources indicated a need for more empirical evidence supporting claims.¹⁴ To satisfy this demand, a two-part study was conducted to assess infringement online and in physical markets. A survey was used to

12. An internet search leads to hundreds of pages on China's part in the counterfeit trades. For example, Bob Orr, *Counterfeit Goods from China a Continuing Problem that Costs Billions a Year*, CBS NEWS (May 11, 2012), http://www.cbsnews.com/8301-18563_162-57433030/counterfeit-goods-from-china-a-continuing-problem-that-costs-billions-a-year/.

13. China's domestic consumption is roughly 35% of GDP; around 55% of GDP is domestic consumption in Thailand; less than 60% of Indonesia's GDP is domestic consumption; less than 20% of Brunei's GDP is domestic consumption. In the United States, this number is over 70%, and considering the monetary value, that number is very high. In countries like the U.K. (64%) and France (58%), the volume of internal trade is larger per capita than in China and the rest of the Eastern developing world. *Household Final Consumption Expenditure, etc. (% of GDP)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NE.CON.PETC.ZS> (last visited Sept. 12, 2013).

14. "There is a great need for an evidence-based understanding of the economic impact of counterfeiting and piracy." Paris Outcomes Statement from the Sixth Global Cong. on Combatting Counterfeiting and Piracy (Feb. 2-3, 2011), available at http://www.ccapcongress.net/archives/Paris/files/ParisOutcomesStatement_6thGlobalCongress.pdf.

gather opinions on piracy and counterfeiting from Western consumers in Thai physical markets. The survey generated international and cross-cultural data. Online research was also conducted to determine organizational characteristics of internet companies dealing in infringing media content. Information was collected to discover national affiliation, approximate valuation, site traffic and so-called legal policies of target websites. Evidence pointed toward Western nations being primarily responsible for internet infringement.

Following presentation and analysis of primary data, this article takes a brief look at the history of Eastern and Western traditions and systems, including foundations of intellectual property law. Longstanding ideological, cultural and philosophical conflicts between East and West are considered as having led to present difficulties. Discussion is offered about ostensible systemic faults supporting a double standard whereby Western nations propagate pro-IPR rhetoric that often enough translates into a shaming of Eastern nations,¹⁵ while infringement in those same Western nations is comparable to or greater than that in the developing Eastern world. Game theory is used to examine decision making processes of Americans and Chinese, which represent predominant Eastern and Western approaches. Coercive enforcement methods and harsh punishments for IP infringement are considered inherently ineffective and inefficient. As for online infringement, the research found rights without remedies, which is unacceptable by legal positivist standards.

Handshake and smile politics (that is, exclusively legislative and diplomatic pacts) are considered false-reality, not representative of the deeper problems involved in ongoing, massive IP infringement. Micro-economies of illicit goods are entrenched in social and political structures, broad in geographic range and involve diverse participants. In order to approach the problem realistically, a new attitude is promoted. Conclusions support *ex officio* enforcement in physical markets and focus on commercial, organizational infringers rather than private individuals in the online context. Revisions to statutory language and court logic are suggested with the intent of making IP protection simpler and more effective. *Lex ferenda* proposals also include commencement of a UDRP-style arbitral system for online copyright dispute resolution.

15. "The US has put Thailand on its [Special 301] PWL every year since 2007. The list carries no threat of sanctions but is aimed at shaming governments into fighting piracy and updating copyright laws." *Software Pirates in the Crosshairs*, BANGKOK POST (Jan. 19, 2013), <http://www.bangkokpost.com/lite/topstories/331575/favicon.ico>.

1. *Operational Definition*

“Eastern” and “Western” are ubiquitous terms in international research, yet meanings of the words are not concrete. Traditional definitions of “Westerner” referred to people of European descent but in research it is synonymous with Americans, while through the ages “Easterners” have been more consistently perceived to be of Chinese, Korean, or Japanese origin.¹⁶ “Easterner” and “Asian” are frequently used interchangeably¹⁷ despite the lack of attention such nomenclature pays to vast ethnographic diversity on the Asian continent as a whole. Semantic arguments concerning demographics are not without merit, but pragmatic usage of language in research suggests that “Westerners” can be presumed American¹⁸ or European¹⁹ whereas “Easterners” are associated primarily with the Chinese.²⁰ Considering trends in research and political conditions,²¹ primarily for the purposes of simplification, portions of this article will position China as representative of the “East” and the United States as representative of the “West”. Notwithstanding this operational definition, the broader scope of “Eastern” and “Western” nations, people, and cultures is fully recognized.

16. “Researchers use the terms East and West very roughly. West tends to mean American-raised people and others from independence-oriented European countries or Australia. East means East Asians — mainly Japanese, Koreans, and Chinese in research so far — as well as much of the rest of the world.” Carey Goldberg, *Differences Between East and West Discovered in People’s Brain Activity*, THE TECH, Mar. 4, 2008, at 13.

17. Richard Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently...and Why* (2003).

18. “[Kaipingeng said] that American and Chinese, Westerners and Easterners, thought in completely different ways about the world, and had completely different thinking processes.” Richard Nisbett, *Culture and Cognition*, INTERCULTURES MAGAZINE, Dec. 19, 2011, available at <http://www.international.gc.ca/cfsi-icse/cil-cai/magazine/v03n04/1-1-eng.asp>.

19. Anne Harding, *Easterners, Westerners See Emotion Differently*, ARMENIAN MEDICAL NETWORK (Aug. 31, 2009), <http://www.health.am/ab/more/see-emotion-differently/>. A study of 13 Europeans, 12 Chinese, and 1 Japanese participants claiming results applicable to “Easterners and Westerners.”

20. Elif Aslan Bulut, *The Construction of Intelligence in Terms of Cultural Differences between East and West*, THE FOUNTAIN MAGAZINE, Jan.-Feb., 2008, <http://www.fountainmagazine.com/Issue/detail/The-Construction-of-Intelligence-in-Terms-of-Cultural-Differences-between-East-and-West>. 91.5% of the PRC population and sizeable proportions of other East Asian nations are made up of persons from the Han ethnicity, likely to be the ethnicity most frequently associated with Chinese people. See World Factbook: China, CIA (Jan. 7, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#People>.

21. China exercises political influence throughout the Eastern developing region. See Chin-Hao Huang, *China’s Soft Power in East Asia: A Quest for Status and Influence?* NATIONAL BUREAU OF ASIAN RESEARCH (Jan., 2013), <http://www.nbr.org/publications/element.aspx?id=640#UiReHNLGmSo>. China provides a counterweight to American hegemony over IPR politics. See Dexin Tian & Chin-Chung Chao, *Intellectual Property Rights (IPR) Disputes in Cyberspace: U.S. Hegemony and Chinese Resistance*, 5 J. POLITICS & L. 1 (2012).

II. LEX SCRIPTA

IP-related laws and regulations date back to ancient times,²² although the original rights were primitive by modern standards and primarily designed to increase state revenue. In the late-19th century, three treaties were created which still make up the foundation of our IPR system. Virtually every country has been moved to apply internationally-accepted standards of IP protection since the Paris Convention,²³ Berne Convention,²⁴ and Madrid Agreement.²⁵ The WTO TRIPS Agreement²⁶ enhanced the obligatory nature of recognition and enforcement of IPRs, and strengthened IP's permanent place in international trade.

A. *International Law*

Since the late 19th century, a long list of IP treaties has been created to give life to an international system.²⁷ Today, IPRs are considered human rights.²⁸ IP has been normalized into the structure of international trade law, although its protection and enforcement has not acquired the strength of international custom. Thus, states which are not parties to treaties are under

22. The first patent grant most frequently cited by authors was in Florence in 1421, a right which later became law in Venice in 1474. *See, e.g.,* Robert Cook-Deegan & Christopher Heaney, *Patents in Genomics and Human Genetics*, 11 ANNU. REV. GENOMICS HUM. GENET. 383 (2010). First grants of copyright in Europe came around the same time, in Venice in 1469. Joanna Kostylo, *Commentary on Johannes of Speyer's Venetian Monopoly*, PRIMARY SOURCES OF COPYRIGHT (1450-1900) (2008), http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_i_1469. Euro-centric historians may be reluctant to accept historical records of other ethnicities, and as such, the first grants of copyright may be mistakenly placed in the 1400s in Venice. Chinese historians date regulations barring unauthorized reproduction of classics back to the Han Dynasty (B.C. 206– A.D. 220). Other publication regulations were found in the Tang code of A.D. 835. WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 13 (1995).

23. The number of total contracting parties is 174. Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 828 U.N.T.S. 303 [hereinafter Paris Convention].

24. The number of total contracting parties is 166. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

25. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, amended 1900, 1911, 1925, 1934, 1957, 1967, and 1979, 1972 U.N.T.S. 390. The total number of contracting parties is 56.

26. TRIPS Agreement, *supra* note 1.

27. *See* WIPO-Administered Treaties, WIPO, <http://www.wipo.int/treaties/en/> (last visited Sept. 12, 2013).

28. UNESCO, *Approaching Intellectual Property as a Human Right*, Copyright Bulletin, July-Sept., 2001. The Article 27 of Universal Declaration of Human Rights (1948) states that "everyone has the right to the protection and material interests resulting from any scientific, literary, or artistic production of which he is the author." This at least impliedly includes copyright, trademark, and patent rights. Universal Declaration of Human Rights, *supra* note 6, at art. 27.

no obligation to comply with treaty provisions without consent.²⁹ Instead, only state parties to a treaty, which in the case of the TRIPS Agreement includes nearly all nations, are required to perform treaty provisions in good faith.³⁰

Consistent with the law of treaties, TRIPS does not derogate from original IP treaties, which are still in force. TRIPS enhanced and supplemented prior multilateral arrangements. WTO members are obligated to comply with Articles 1 through to 21 of the Berne Convention except for Article 6*bis*.³¹ Likewise, TRIPS articles pertaining to trademarks, geographical indications, and undisclosed information cite the Paris Convention as a guide.³² These treaties are based upon principles of international recognition and enforcement of IP, national treatment, and most-favored nation treatment.³³

Part III of TRIPS pertains to enforcement of IPRs, placing upon members obligations not contemplated in Berne or Paris. Article 61 of TRIPS³⁴ requires members to criminalize commercial trademark counterfeiting and copyright piracy. Prior treaties required states to ensure the possibility of seizure of infringing goods³⁵ without mention of imprisonment for offenders. As the larger international criminal law enforcement system developed, copyright and trademark offenders who were once considered harmless within the scope of criminal enterprise came to be included in assessments and actions related to organized and serious crimes.³⁶ International criminal threat assessments now routinely include

29. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34-38, 1155 U.N.T.S. 331.

30. *Id.* at art. 26.

31. TRIPS Agreement, *supra* note 1, at art. 9.1. Article 6 *bis* of the Berne Convention pertains to moral rights.

32. TRIPS Agreement, *supra* note 1, at arts. 15.2, 16.2, 16.3, 22.2(b), and 39.1. Paris Convention art. 6 *bis* related to well-known marks, and art. 10 *bis* to unfair competition.

33. TRIPS Agreement, *supra* note 1, at arts. 1-4.

34. "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale." *Id.* at art. 61. For the purposes of this article, "counterfeiting" and "piracy" shall refer to the context provided in article 61 of TRIPS, where "counterfeiting" pertains to trademarks and "piracy" pertains to copyright.

35. Paris Convention, *supra* note 23, at arts. 9-10. Berne Convention, *supra* note 24, at arts. 13, 16.

36. United Nations Convention against Transnational Organized Crime, Dec. 15, 2000, 2225 U.N.T.S. 209. Article 2(b) defines "serious crime" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". Not all nations have adopted penalties for counterfeiting and piracy consisting of four or more years imprisonment, but for those such as the U.S. which have, any group of three or more persons involved in

trade in counterfeit and pirated goods along with more egregious violations like narcotics, firearms, and human trafficking.³⁷

Customary international law limits the extent to which a state may be compelled to apply a certain treaty provision, or to apply it in such a manner that is consistent with a particular interpretation of the language.³⁸ While implementation of a treaty is compulsory after consenting to it, independent nations have room to implement treaties in a way that best suits their individual needs and those of their citizens. States are typically viewed as structures which further interests of individuals.³⁹ Hence, wealthier states or those with larger populations of wealthier individuals promote more IPR protection and enforcement than do less-developed States.

Treaties provide the minimum standards of protection and enforcement which occur at the domestic level. Domestic control over execution of laws is a fundamental part of sovereignty mentioned in both the Paris and Berne Conventions.⁴⁰ Differences in legal systems and traditions have made complete harmonization of enforcement efforts across national boundaries extremely troublesome.

B. *Domestic Law*

Generally, it is a reliable assumption that a nation has enacted basic IP legislation which reflects minimum requirements as stated in the Berne Convention, Paris Convention and WTO TRIPS Agreement. Exceptions like Myanmar⁴¹ are rare and cover only the least-developed-countries. Both

counterfeiting or piracy is considered an “organized criminal group” under art. 2(a).

37. U.N. Office on Drugs and Crime, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, U.N. Sales No. E.10.IV.6 (2010) [hereinafter THE GLOBALIZATION OF CRIME].

38. Sovereign equality, non-use of force or threat thereof, pacific settlement of disputes, and universal respect for basic human rights are some of the few principles that make up *jus cogens* peremptory norms. U. N. Charter, ch. I.

39. “The UN, by strongly and unflinchingly promoting human rights, has introduced a new ethos in the international community. It has gradually brought about a sort of Copernican revolution: while previously the whole international system hinged on State sovereignty, at present individuals make up the linchpin of that community. To be sure, States still play a crucial role in international dealings. However, now they are no longer looked upon as perfect and self-centered entities. They are now viewed as structures primarily geared to the furtherance of interests and concerns of individuals.” ANTONIO CASSESE, INTERNATIONAL LAW 333 (2d ed. 2005).

40. Paris Convention, *supra* note 23, at art. 9(3), “Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.” Berne Convention, *supra* note 24, at art. 5(3), “Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.”

41. Myanmar has no law in operation on patents and industrial designs. “The Myanmar Patent and Design Act was issued in 1995 but never came into effect. The law was subsequently repealed. The 1946 Patents and Designs (Emergencies Provisions) Act (Emergencies Act) remains on

criminal and civil remedies for bad-faith infringement are technically available in virtually every nation worldwide, but each jurisdiction decides which cases receive attention and funding. A result of this application of sovereign equality⁴² is inconsistency.

The world's policies on IP protection and enforcement are similar but not congruent. WTO case DS362⁴³ is thus far the most notable international case involving implementation of treaty provisions in domestic law. China was obligated to amend its Copyright Act such that it would be consistent with TRIPS. Considering China's continuing reputation as the world's largest IP infringing nation, the effects of changes to statutory language are arguably minimal. Absent a *bona fide* international government or extraterritorial dispute resolution system, each secular nation continues to operate and control its own executive, legislative and judicial branches. Due to factors such as budget and civil rights, no single nation has effectively eradicated or hampered IP infringement such that rights owners are silent on issues of abuse.

The United States, for example, holds individuals civilly and criminally liable for uploading or downloading in any capacity, whether commercial or private.⁴⁴ Even with some of the harshest penalties in the world, Americans are still some of the world's biggest internet pirates.⁴⁵ In Canada, like many other countries, uploading and downloading of copyright protected content online has been protected under personal use exceptions in the underlying copyright law.⁴⁶ Fair use exclusions offer immunity to the demand side of

Myanmar's statute books, although it is essentially defunct as its main purpose was to apply Indian Patents and Designs Act of 1911." Patent & Design, PINTAS IP GROUP (2014), <http://www.pintas-ip.com/p/patent-design-myanmar>.

42. U.N. Charter, art. 2(1).

43. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

44. No Electronic Theft (NET) Act Pub. L. No. 105-147, § 2(b)(a), 111 Stat. 2678 (1997); Prioritizing Resources and Organization for Intellectual Property Act Pub. L. No. 110-403, 122 Stat. 4256, § 208 (2008). File-sharing services were considered indirectly liable in *A&M Records v. Napster*, 284 F.3d 1091 (2002) and *MGM v. Grokster*, 545 U.S. 913 (2005). Cases which held individuals directly liable include *BMG v. Gonzalez*, 430 F.3d 888 (2005); *Sony BMG v. Tenenbaum*, 660 F.3d 487 (2011); *Capitol Records v. Thomas-Rasset*, 692 F.3d 899 (2012).

45. Between 46% and 70% of respondents in a survey admitted to buying, copying, or downloading pirated media content. Market value of pirated content in the United States exceeds that in most other nations due to pricing. Joe Karaganis, *Americans Won't Welcome Online-Piracy Crackdown*, BLOOMBERG Jan. 19, 2012, available at <http://www.bloomberg.com/news/2012-01-19/americans-won-t-welcome-online-piracy-crackdown-joe-karaganis.html>.

46. "[D]ownloading a song for personal use does not amount to infringement." *BMG Canada Inc. v. John Doe*, 2005 FCA 193, [2005] 4 F.C.R. 81. The Court held that ISPs could not be held liable for illegal downloading over their networks in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427. Bill C-60 (2005) attempted to amend the copyright to make uploading illegal, but the bill was defeated. See *Bill L C-60: An Act to Amend the Copyright Act*, PARLIAMENT OF CANADA (Sept. 20, 2005), http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C60&Parl=38&Ses=1.

the transactions,⁴⁷ compounding internet infringement problems in an American-dominated system⁴⁸ where users are considered direct infringers while organizations and websites are considered indirect and vicarious infringers.⁴⁹ In Europe, that American standard has been noticed in courts more than once,⁵⁰ but privacy laws in the EU have generally granted users *de facto* immunity from legal action to an extent similar to fair use exceptions elsewhere.⁵¹

III. PIRACY AND COUNTERFEITING

In the first approximately 45 years after cases involving brand counterfeits emerged, this segment of the black market economy gained between five to seven percent of world trade according to popular estimates.⁵² Including digitally pirated products, estimated values of counterfeit and pirated goods in 2008 topped US\$650 – \$775 billion annually, forecasted to rise to US\$1.77 – \$1.89 + trillion by 2015.⁵³ Between 2000 and 2007, the estimated volume of counterfeit and pirated physical

See also CBC, *Downloading music* (May 1, 2006), http://www.cbc.ca/news2/background/internet/downloading_music.html (last visited Sept. 12, 2013). Late 2012 amendments to the Copyright Act designed to implement WIPO Internet Treaties have not yet led to court cases suggesting dramatic shifts in approach to online infringement.

47. See Thailand Copyright Act of B.E. 2537, section 32(2) (1994); Malaysia Copyright Act of 1987, section 41(1)(d) does not preclude protection of “private and domestic use” of infringing copies; Hong Kong Copyright Ordinance 528 of 1997 grants exemption to “private and domestic use” throughout the statute. Copyright Ordinance, (1990) Cap. 528 (H.K.), sections 38, 47, 48, 52, 70, 79, 80, 118, 120, 136, 202, 203, 207, 209, 211, 229 & 263.

48. Tian & Chao, *supra* note 21.

49. A & M Records v. Napster, 114 F. Supp. 2d 896 (C. D. Cal. 2000). BMG v. Gonzalez, 430 F.3d 888 (7th Cir. 2005).

50. This is shown in findings of contributory liability in the Dutch Buma/Kazaa case (District Court of Amsterdam, LJN-nummer: AD6395, Zaaknr: KG 01/2264) and Pirate Bay case (District Court of The Hague, LJN: BN1445, 365643/KG ZA 10-573). See Ot van Daalen, *Dutch Court Addresses Peer-to-Peer Issue*, IRIS (2002), <http://merlin.obs.coe.int/iris/2002/1/article26.en.html>, and Esther Janssen, *Summary Judgment in Pirate Bay Case Confirmed*, IRIS (2010), <http://merlin.obs.coe.int/iris/2010/8/article37.en.html>.

51. Council Directive 95/46/1995 O.J. (L 281) 31 (EC) has stalled and complicated retrieval of IP address data from ISPs. Swiss company Logistep was enjoined from conducting piracy surveillance in an Italian case involving Germany’s Peppermint Jam Records due to privacy issues relating to processing IP addresses. Amedeo Arena, *Monitoring the Activity of P2P Users Runs Foul of Privacy Legislation*, IRIS (2008), <http://merlin.obs.coe.int/iris/2008/7/article26.en.html>. After years of reversals and conflicts in opinions, Courts in Austria and Switzerland have decided to deny rights of disclosure of personal data such as IP addresses in cases of suspected online infringement. Giancarlo F. Frosio, *Urban Guerrilla & Piracy Surveillance: Accidental Casualties in Fighting Piracy in P2P Networks in Europe*, 37 RUTGERS COM. & TECH. L.J. 1 (2011).

52. *The Economic Impact of Counterfeiting*, OECD 23 (1998), <http://www.oecd.org/sti/ind/2090589.pdf>; Martin Eisend & Pakize Schuchert-Güler, *Explaining Counterfeit Purchases: A Review and Preview*, 12 ACADEMY OF MKT. SCI. REV. 1 (2006).

53. *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy*, FRONTIER ECONOMICS & BASCAP (Feb., 2011), <http://www.iccwbo.org/Data/Documents/Bascap/Global-Impacts-Study-Full-Report/>.

products more than doubled worldwide and the market share of counterfeit/pirated products increased by about 10 percent.⁵⁴

A. *Economic Impacts*

In markets where infringement is ubiquitous, vendor profit margins are increased by eliminating licensing fees, and consumers enjoy price reductions despite reduced quality.⁵⁵ However, when inferior substitutes replace normal goods, market distortion follows. Whether or not legal remedies are available to rights owners who claim abuse, unauthorized reproduction and distribution of protected works poses severe macroeconomic threats, especially to developing markets. While it is true that a trillion dollar annual industry does provide local jobs and income, increased trade in counterfeit and pirated products reduces bargaining power among legitimate suppliers and ultimately creates an anticompetitive environment. Expansive penetration of markets by infringing goods reduces brand equity and increases artificial barriers to entry for new competitors who cannot afford to compete with lower-priced copies of internationally-known brands.⁵⁶

“We can’t compete with free. That’s an economic paradigm that doesn’t work,” said 20th Century Fox Films Co-Chairman James Gianopulos.⁵⁷ This canon applies to all existing and potential competitors in a market. For major companies, the “losses” due to piracy and counterfeiting are largely theoretical,⁵⁸ but the “network effects” actually reinforce their monopoly power over markets as creative upstart companies are forced out. While strong IPRs can act as a barrier to entry,⁵⁹ most commentators accept that

54. *Magnitude of Counterfeiting and Piracy of Tangible Products: An Update*, OECD (Nov., 2009), <http://www.oecd.org/dataoecd/57/27/44088872.pdf>.

55. *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (Apr., 2010), <http://www.gao.gov/assets/310/303057.pdf>.

56. MEDIA PIRACY IN EMERGING ECONOMIES 52 (Joe Karaganis ed., 2011). “Piracy acts as a barrier to entry for competition, especially ‘free’ open-source alternatives that have no upfront licensing costs...all the major companies could adopt stronger online authentication measures, making it more difficult to use and maintain pirated software...but strong versions of these options go unexercised for a variety of reasons, including fear of alienating paying customers, fragmenting the installed-code base, and diminishing the other positive network effects of widespread use.”

57. Michael D. Smith & Rahul Telang, *Competing with Free*, 33 MIS QUARTERLY 321 (2009).

58. RIAA quotes annual losses of 12.5 billion USD directly from the American music industry, plus an additional 70,000 job losses and 2 billion USD in lost wages to American workers. *Who Music Theft Hurts*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online (last visited Sept. 12, 2013). This depressing picture fails to mention that globally, digital music revenues have increased from 4.3 billion to 5.6 billion USD between 2008 and 2012. *Digital Music Report*, IFPI (2013), <http://www.ifpi.org/content/library/DMR2013.pdf>.

59. Fordham Law School, *An Analysis of the Economic/Legal Literature on the Effects of IP Rights as a Barrier to Entry*, WIPO (Apr. 15, 2011), http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_sym_ge_11/wipo_ip_sym_ge_11_www_168817

IPR enforcement leads to more innovative media for consumers.⁶⁰

1. *Small Local Gains Risk Large Global Losses*

ITC considered foreign IPR infringement as a “nontariff measure.”⁶¹ Foreign IP infringement has been considered expropriation by business persons, investors, proprietors⁶² and the American Senate.⁶³ G20 nations were said to have lost some 2.5 million jobs to piracy and counterfeiting,⁶⁴ many of which were in entertainment industries,⁶⁵ and much of which is online since the expansion of broadband. In 1996, when the internet became commercially viable for the general population, online piracy was modest compared to more recent levels.⁶⁶

Worldwide film industry losses to piracy in 2005 were estimated to have exceeded 18 billion USD, about a third of which was suffered by American studios. 20 percent of those transactions came from within the U.S. while countries like China, Thailand and Russia are considered more serious problems with piracy rates of over 80 percent. In 2005, less than 40 percent of quoted film piracy occurred online. However since then internet piracy has grown as a competitor for physical products, as evidenced in reductions

.pdf.

60. Daniel Castro, *Better Enforcement of Online Copyright Would Help, Not Harm, Consumers*, ITIF (Oct., 2010), <http://www.itif.org/files/2010-copyright-coica.pdf>.

61. “As tariffs are reduced and eliminated as a result of global trade liberalization, nontariff measures have become increasingly more visible as significant impediments to U.S. industry and trade. Among these nontariff measures (NTMs), foreign intellectual property right (IPR) infringement is responsible for billions of dollars in lost revenues for U.S. industries dependent on intellectual property.” Amanda Horan et al., *Foreign Infringement of Intellectual Property Rights: Implications for Selected U.S. Industries* (Office of Industries Working PaperID-14, 2005).

62. James J. Anton & Dennis A. Yao, *Expropriation and Inventions: Appropriable Rents in the Absence of Property Rights*, 84 AM. ECON. REV. 190 (1994).

63. Protecting Intellectual Property Against Theft and Expropriation Act, S. 2237, 108 Cong. (2004).

64. *The Impacts of Counterfeiting on Governments and Consumer*, FRONTIER ECONOMICS & BASCAP (May, 2009), <http://www.icc.se/policy/statements/2009/BASCAP.pdf>.

65. Between 2003 and 2010, global top 50 debut album sales fell 77%. Between 2004 and 2010, the total value of the global recorded music industry fell by 31%. *Digital Music Report*, IFPI (2011), <http://www.ifpi.org/content/library/DMR2011.pdf>.

66. In 1996, 12.5% of music sales and 33% of total music units offered to markets worldwide were pirated. By 2005, music and movie piracy rates in selected ASEAN nations were as high as 100%. Luigi Proserpio et al., *Entertainment Pirates: Determinants of Piracy in the Software, Music and Movie Industries*, 8 INT’L J. OF ARTS MGMT. 33, 41, 43 (2005). Music and film piracy rates in Vietnam were found to be 100%, a number which was obviously rounded-up. Music piracy rates in China were 91%, 63% in Indonesia, 61% in Malaysia, 43% in Thailand, and 32% in Philippines. Movie piracy rates were 90% in China, 90% in Indonesia, 80% in Malaysia, 74% in Philippines, and 63% in Thailand. Software piracy rates in Vietnam were 96%, higher than China (92%), Indonesia (88%), Thailand (79%), Malaysia (69%), and Philippines (66%). The study discovered negative correlations between all three forms of piracy and (a) individualism, (b) enforcement, (c) GDP per capita, and (d) average years of education.

of CD and DVD seizures in the EU.⁶⁷ Trends suggest that threats of internet copyright infringement dwarf those in physical markets. As broadband services are available to more consumers worldwide, copyright faces near extinction, costing global markets untold trillions of dollars.

Whether patent, trademark or copyright, economies rely on intellectual property as a source of economic security and advancement. If market order presupposes legal order,⁶⁸ then we can assume that the threats of volatility and crises can be reduced with enforcement of IPRs, whereas continuing non-enforcement or partial enforcement undoubtedly adds uncertainty and macroeconomic instability to the world.

B. *Criminal Associations*

Commercial counterfeiting and piracy are crimes throughout the Eastern and Western world.⁶⁹ Every business is an organization requiring a supply chain to continue operating. Involvement of organized criminal groups in sustained criminal business activity is implicit. Hence, since natural and legal persons involved in commercial infringement are also involved in crime, piracy and counterfeiting are related to organized crime.

Threats are said to extend beyond mere violation of IP laws. “With rare exceptions,” said John Malcolm, senior vice-president and director of worldwide anti-piracy operations for the MPAA, “the people procuring, producing, and distributing this pirated material are affiliated with large and dangerous international criminal syndicates...[which] have no qualms whatsoever about resorting to violence or bribery to conduct operations.”⁷⁰

South America’s Barakat network reportedly raised funds for Hezbollah by selling pirated goods. South Asia’s D-Company reportedly pirated Bollywood and Hollywood films.⁷¹ Japanese, Italian, Chinese, and Nigerian

67. Press Release, European Commission, Customs: Commission publishes 2005 Customs seizures of counterfeit goods, IP/06/1541 (Oct. 11, 2006), *available at* http://europa.eu/rapid/press-release_IP-06-1541_en.htm.

68. RODERICK LONG & TIBOR MACHAN, ANARCHISM/MINARCHISM: IS A GOVERNMENT PART OF A FREE COUNTRY? 140 (2008).

69. *See, e.g.*, Malaysia Copyright Act of 1987, § 41; Brunei Emergency (Copyright) Order, § 205(5) (1999); Thailand Copyright Act of B.E. 2537, § 69 (1994); Laos Intellectual Property Laws, § 134 (2008); Cambodia Law Concerning Marks, Trade Names and Acts of Unfair Competition (NS/RKM/0202/006), § 64 (2002); Law of the Republic of Indonesia No. 15 Regarding Marks, §§ 90-94 (2001); Intellectual Property Code of the Philippines (Republic Act No. 8293), §§ 170, 217 (1997); Vietnam Penal Code (No. 15/1999/QH10), art. 131(2) (1999); Singapore Trademarks Act (Chapter 332), § 46 (1999); Myanmar Penal Code (India Act XLV), §§ 478-489 (1860); Chung Hua Jên Min Kung Han Kuo Jud Zwo Ch’üan Fa [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 47 (China) [hereinafter Copyright Law of PRC]; 18 U.S.C. § 2319 (2012).

70. Karaganis, *supra* note 56, at 38.

71. GREGORY TREVERTON ET AL., FILM PIRACY, ORGANIZED CRIME AND TERRORISM 91 (2009).

organized crime groups often have cells or partners in foreign territory where they can exploit markets for counterfeit goods.⁷² Although these illicit incomes may only reach between 0.02 and 0.1 percent of total criminal proceeds, the nominal monetary values are significant at between 38 million and 100million USD annually in countries such as Germany and the US, respectively.⁷³ These funds must then be laundered when they are large enough to give rise to suspicion.

“Counterfeiting has become the preferred method of financing for terrorist organizations,” said an EC customs expert.⁷⁴ Extremist and terrorist groups including al-Qaeda were reported to have earned money directly through sales of counterfeit consumer goods or indirectly from organizations which sell counterfeit goods.⁷⁵ Afghani terrorist groups have survived in part due to “hold-ups, credit copying and even counterfeiting designer clothes.”⁷⁶ Notwithstanding cases and theory available on the subject, relationships between counterfeiting and acts of terrorism have been considered “inconclusive.”⁷⁷ Links between piracy, counterfeiting and international organized crime, however, are indisputable.

1. *Computer Crime*

Potential for criminal activity is very high in instances involving piracy and counterfeiting of digital content including software. Microsoft sponsored a study⁷⁸ which found 25 percent of websites offering counterfeit product

72. *Annual Report and Resource Material Series No. 59*, UNAFEI (2000), http://www.unafei.or.jp/english/pdf/RS_No59/No59_00All.pdf.

73. THE GLOBALIZATION OF CRIME, *supra* note 37.

74. Luz Baguioro, *Terrorists 'selling pirated goods to get money'*, ECAP III. (Sept. 17, 2011), <http://www.docstoc.com/docs/95110225/Terrorists-selling-pirated-goods-to-get-money-by-Luz-Baguioro>.

75. *Intellectual Property Crimes: Are Proceeds from Counterfeited Goods Funding Terrorism?*; *Hearing before the H. Comm. on Int'l Relations*, 108th Cong. (2003), (Statement of Ronald K. Noble, Secretary General, Interpol).

76. Union des Fabricants, *Counterfeiting & Organized Crime Report* (2d ed.), INTERPOL (2004), <http://counterfeiting.unicri.it/docs/Union%20des%20Fabricants.Counterfeiting%20and%20Organised%20Crime%20Report.2nd%20edition2004.pdf>.

77. Zachary A. Pollinger, *Counterfeit Goods and Their Potential Financing of International Terrorism*, MICH. J. BUS. 85 (2008).

78. John Gantz et al., *The Risks of Obtaining and Using Pirated Software*, IDC (2006), <http://download.microsoft.com/download/7/6/9/769E42E0-68C4-4826-838B-0F801DB2EFC2/IDC%20White%20Paper%20on%20Risks%20of%20Pirated%20Software.pdf>. 11% of key generators and crack tools downloaded from websites and 59% of those downloaded from peer-to-peer networks contained either malicious or potentially unwanted software. A range of malware was found, including software that was designed to open connections on a user's system and allow third parties the ability to download and execute programs on the infected system; keystroke loggers for financial crime; redirecting traffic to fraudulent PayPal websites; Trojan droppers; adware; bots that take over a machine to relay spam, store illegal files, or give third parties access to private data. Organizational costs of recovery on a single workstation were found to reach US\$1,000 or more.

keys, pirated software, key generators, or crack tools attempted to install either malicious or potentially unwanted software. Using pirated software increases likelihood of experiencing data loss and computer failure.⁷⁹ Downloading pirated content of all kinds has been shown as potentially hazardous to computers and private information contained in them.⁸⁰ Risks of system invasion reflect the high association between digital infringement and criminal behavior.

C. *Eastern Physical Markets v. Western Internet Community*

While there has been a lot of hype about Chinese counterfeiters and infringement of tangible goods, Western businesses and consumers have shown similarly strong support for infringement in the online context. In fact, with the exception of goods representing threats to public health and safety,⁸¹ online media piracy represents a greater threat than physical market piracy.⁸² In 2008, 16 percent of all European internet users reported having regularly used file-sharing services for retrieval of free pirated music.⁸³ Infringing traffic in the U.S. contributed between 17 and 18 percent of total internet use in recent years.⁸⁴ These rates were slightly lower than global

79. *Addressing Global Software Piracy*, MICROSOFT, <http://www.microsoft.com/en-us/news/presskits/antipiracy/docs/piracy10.pdf> (last visited Sept. 12, 2013). Companies that used pirated software were 73% more likely to experience a loss of data and 43% more likely to have computer failures lasting 24 hours or longer.

80. *Submission to the DBCDE Convergence Review Emerging Issues Paper and Detailed Discussion Papers*, AFACT (Nov. 3, 2011), [http://www.screenassociation.com.au/uploads/submissions/AFACT_AHEDA_NACO_submission_to_the_DBCDE_Convergence_Review_emerging_issues_and_detailed_discussions_paper_3.11.11%20\(1\).pdf](http://www.screenassociation.com.au/uploads/submissions/AFACT_AHEDA_NACO_submission_to_the_DBCDE_Convergence_Review_emerging_issues_and_detailed_discussions_paper_3.11.11%20(1).pdf).

81. This class of goods includes cosmetics, health and hygiene products, auto parts, foodstuffs or any other product that is potentially dangerous to consumers. Clothes, accessories, apparel, luggage, wallets, media, footwear, and to a lesser extent, toys, computers and accessories are not considered as part of this class of goods. In 2012 in the U.S., potentially harmful goods accounted for 10% or less of total seizures, whereas over 65% of seized goods were clothing or accessories. U.S. Customs and Border Patrol, *Intellectual Property Rights: Fiscal Year 2012 Seizure Statistics*, DEP'T. HOMELAND SECURITY (2012), http://www.cbp.gov/linkhandler/cgov/newsroom/publications/trade/fy_2012_final_stats.ctt/fy_2012_final_stats.pdf.

82. *Review of Intellectual Property and Growth: Supporting Document CC*, UKIPO, <http://www.ipo.gov.uk/ipreview-doc-cc.pdf> (last visited Sept. 12, 2013). Estimates of UK piracy confirm that internet infringement is more common than physical media violation. A study found 1.2 billion music files were downloaded as opposed to 10 million CDs sold. 98 million TV & film streams/download were found in comparison to 61 million physical units sold. The estimated value of digital content, using substitution rates as low as 10%, exceeded the value of physical units. While a fake shoe or pair of sunglasses has virtually no potential to create harm beyond the economic loss estimates, the internet forum opens doors to cause potential catastrophe in finance, security, and privacy.

83. *Key Statistics*, IFPI (2009), <http://www.ifpi.org/content/library/DMR2009-key-statistics.pdf>.

84. *Technical Report: An Estimate of Infringing Use of the Internet*, ENVISIONAL (Jan., 2011), http://documents.envisional.com/docsEnvisional-Internet_Usage-Jan2011.pdf. 17.53% of U.S. internet

averages,⁸⁵ but lower rates in the U.S. and Western European regions still amount to greater total volume and monetary value due to pricing and market turnover.⁸⁶

While existing statutes have kept the West free of “notorious” physical markets, copyright laws have so far been ineffective in keeping notorious internet markets from operating within wealthier Western nations.⁸⁷ Ironically, several nations that participated in negotiations leading to the controversial Anti-Counterfeiting Trade Agreement (ACTA)⁸⁸ are considered critical threats to copyright.

IV. PHYSICAL MARKET SURVEY

A survey was administered to 196 foreign participants found in markets in Bangkok and Chiang Mai, Thailand at or near where large amounts of counterfeit and pirated goods were sold. The questionnaire was designed to gather information about perceptions of piracy and counterfeiting in Thailand and in the ASEAN region.⁸⁹ SPSS was used to analyze descriptive statistics, measures of central tendency, ANOVA, and Pearson product-moment correlations.

traffic was found to have been infringing, which is less than the 23.76% global average, but in terms of site visits and downloads, this number is very high.

85. *Id.* Worldwide, 23.76% of internet traffic was estimated to infringe copyright.

86. Broadband internet penetration is related to higher volume of online infringement. U.S. and EU markets are the most wired in the world. Globally, average internet penetration rates in 2012 were just over 34%. In Europe, that number was over 63% and in the North America it was over 78%. *Internet Usage Statistics*, INTERNET WORLD STATS (2012), <http://www.internetworldstats.com/stats.htm>. China, with 40% penetration, has around half of Asian internet users, which represents about the same number of internet users in Europe. Korea has the highest broadband penetration rate in the world (97.5%), but the rest of the top 15 nations are western European, Canada or the U.S. Broadband makes multiple downloads of files in excess of 200mb feasible. Daniel Tencer, *Countries with the Highest Broadband Internet Penetration Rate*, HUFFINGTON POST CANADA (Jan. 21, 2013), http://www.huffingtonpost.ca/2012/08/02/broadband-internet-penetration-oecd_n_1730332.html.

87. *Out-of-Cycle Review of Notorious Markets*, U.S. TRADE REPRESENTATIVE (Dec. 13, 2012), <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. Zero notorious physical markets were located in North America and EU. Cyberlockers Rapidgator.net and Putlocker were linked to the U.K. The Pirate Bay was based in Sweden. IsoHunt, Kat.ph, and torrentz.eu were reportedly based in Canada.

88. Anti-Counterfeiting Trade Agreement (2011), available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf. Participants included the U.S., Canada, EU, and Mexico – all of which have major domestic copyright infringement problems. 22 EU members signed ACTA, but did not ratify it. Protests followed signing the treaty. The European Union then voted against adoption of ACTA in 2012. *ACTA: Controversial Anti-piracy Agreement Rejected by EU*, BBC (July 4, 2012), <http://www.bbc.co.uk/news/technology-18704192>.

89. See the Appendix.

A. *Results*

The survey questionnaire was a reliable instrument.⁹⁰

1. *Sample Demographics*

Ages ranged from 18 to 77. Mean age was 32.6, median 28, mode 23, standard deviation 12.71, and skewness 1.27. Of 189 participants reporting gender, 95 were male and 94 were female. 132 participants reported English was their first language and 63 reported speaking English as a second or foreign language. 195 participants responded to the question of origin. 53 were from Europe, 52 came from the UK and Ireland, 32 were from the USA, 32 were from Australia and New Zealand, and 9 were from other regions.

Nearly all respondents either did not report religion or reported a sect of Christianity.⁹¹ Most participants completed at least some college.⁹² A range of employment types were reported.⁹³

2. *Opinions about Piracy and Counterfeiting*

Participants generally found piracy and counterfeiting problematic, as shown by negatively skewed distributions of data. The problem was perceived slightly greater within Thailand than in the ASEAN region. Appeal to tourists was found slightly lower than level of purchases, which may suggest that tourists who do make purchases often purchase multiple items. Appeal to tourists and levels of purchases remained above the midpoint despite the low perceived quality of the goods. Prior studies found that consumers will buy the fake when symbolic value of the fake exceeds the loss from the differential in quality and price.⁹⁴ In this case, we can assume that probability of police action against consumers is roughly zero and that the ratio of difference in quality to difference in price is well-below one.⁹⁵

171 respondents thought price was the main motivating factor leading to purchases of counterfeit or pirated goods. 10 people held no opinion about

90. Cronbach's alpha was greater than 0.70, indicating reliability ($\alpha = .705$).

91. Not reporting (117), "Christian" (26), "Catholic" (17), "Protestant" (16). Other religious affiliations included "atheism", "Gnosticism", "Agnosticism", "Buddhism" (2), and "Jedi" (1).

92. Bachelor's degree or equivalent (93), high school (47), master (18), certificate (16), doctor (4).

93. Business (46), services (27), education (24), engineering and technology (17), health care (16), government (4). 44 respondents reported being a retiree, student, or unemployed.

94. Pierre-Jean Benghozi & Walter Santagata, *Market Piracy in the Design-based Industry: Economics and Policy Regulation*, 3 *ECONOMIE APPLIQUEE* 121 (2001).

95. It represents the difference in quality between the fake and genuine good. It represents the difference in price between the fake and genuine good.

motivation. 10 thought convenience was the main reason. 4 thought supporting lower class people, and 1 thought destabilizing markets were main motivating factors.

Participants rejected the purported high public threat level of piracy and counterfeiting organizations, but some threat was recognized. Losses to companies were perceived as being greater than economic threat levels. These two opinions suggest lack of will among the general public to support enhanced IP protection efforts.

Table 1 Distribution, Central Tendency, and Dispersion of Survey Responses

	N	Mean	Median	Mode	Std. Deviation	Skewness
1.Problem TH	196	3.13	4.00	4.00	1.61	-0.83
2.Problem ASEAN	196	3.04	4.00	4.00	1.65	-0.81
3.Appeal to Tourists	196	3.46	4.00	4.00	1.25	-1.16
4.Level of Purchases	196	3.62	4.00	4.00	1.27	-1.53
5.Public Threat Level	196	2.67	3.00	3.00	1.38	-0.46
6.Losses to Companies	196	3.36	4.00	4.00	1.37	-0.83
7.Economic Threat Level	196	3.02	3.00	3.00	1.25	-0.41
8.Level of Quality	196	2.27	2.00	3.00	1.14	-0.19

Source: Author

3. *Differences between Groups*

No significant difference in opinions on questions 1-8 were found between gender, nationality, occupation, and education groups.⁹⁶

Statistically significant differences between age groups were found using a one-way ANOVA test, relating to the question of whether or not piracy and counterfeiting are a problem in Thailand.⁹⁷ Younger participants considered piracy and counterfeiting in Thailand a greater problem than older participants.⁹⁸ This may have been attributable to changes in education

96. Normal Q-Q plots were assessed to determine that there was no violation of assumption of normality. A Levene's test showed homoscedasticity among the data ($p > .05$). A one-way ANOVA showed no difference between groups ($p > .05$).

97. ($F(3,191) = 3.745, p = .012$).

98. A Tukey post-hoc test revealed differences between age groups. Mean & SD in the 18-24

between generations leading to greater awareness of IP issues among younger participants.⁹⁹ Differences between age groups may have also reflected the higher rates of consumption of infringing media and goods among young people.¹⁰⁰ No statistically significant difference was found between those groups on the questions of problems in ASEAN or Thailand.

Participants whose first language was English perceived a greater piracy and counterfeiting problem in ASEAN than did participants whose first language was other than English.¹⁰¹ Native English speakers estimated levels of purchases among foreign tourists as higher than non-native English speakers.¹⁰² Native English speakers also perceived piracy and counterfeiting as representing greater losses to companies than non-native English speakers.¹⁰³ Differences between language groups could have been related to higher media exposure that infringement receives in English-speaking nations, or it could have been related to the higher infringement rates of English-language media, which native English speakers naturally consume more than non-native English speakers. Participants who did not report religion estimated higher levels of purchases among foreign tourists than those in the Catholic group.¹⁰⁴

4. Correlations

The problems of piracy and counterfeiting in Thailand and ASEAN were shown to have very strong, positive correlations.¹⁰⁵ Public threat levels

group: (3.62 ± 1.16) . 45+ age group: (2.57 ± 1.83) .

99. However, exposure to anti-piracy messages do not relate to lower propensity to consume pirated goods, so education is not likely a solution to the problem. Steven Brown, *Attitudes Toward Music Piracy: The Impact of Positive Anti-piracy Messages and Contribution of Personality*, in PROCEEDINGS OF THE 12TH INTERNATIONAL CONFERENCE ON MUSIC PERCEPTION AND COGNITION AND THE 8TH TRIENNIAL CONFERENCE OF THE EUROPEAN SOCIETY FOR THE COGNITIVE SCIENCES OF MUSIC 153, 153 (E. Cambouropoulos et al. eds., 2012).

100. College students and young adults more frequently buy, share and use pirated software. Trevor Moores & Vatcharaporn Esichaikul, *Socialization and Software Piracy: A Study*, J. OF COMP. INFO. SYS. 1, 1 (2011 Spring). Younger people download more infringing media. Mike Masnick, *Dear RIAA: Pirates Buy More. Full Stop. Deal With It* (Nov. 27, 2012), <http://www.techdirt.com/articles/20121126/00590921141/dear-riaa-pirates-buy-more-full-stop-deal-with-it.shtml>. Young people more often consume counterfeit goods. *Fake goods tempting young people* BBC (Aug. 9, 2004), <http://news.bbc.co.uk/2/hi/technology/3541758.stm> (last visited Sept. 12, 2013). “Only 17% of the over-50s own pirated goods compared to 44% of those between 18 and 29 revealed the research.”

101. Question two ANOVA: $(F(1,193) = 5.042, p = .026)$. English mean: (3.21 ± 1.61) . Not English mean: (2.65 ± 1.67) .

102. Question four ANOVA: $(F(1,193) = 5.438, p = .021)$. English mean: (3.77 ± 1.16) . Not English mean: (3.32 ± 1.42) .

103. Question six ANOVA: $(F(1,193) = 5.113, p = .025)$. English mean: (3.50 ± 1.30) . Not English mean: (3.03 ± 1.47) .

104. Question four ANOVA: $(F(6,188) = 2.745, p = .014)$. A Tukey post hoc test showed difference between religious groups. Non-reporting mean: (3.74 ± 1.15) . Catholic mean: (2.65 ± 1.80) .

105. $(r = .745, n = 196, p < .0005)$. This confirms Special 301 and IIPA conclusions about the

and economic threat levels were moderately, positively correlated.¹⁰⁶ A moderate, positive correlation was also found between economic threat level and estimated losses to companies.¹⁰⁷

V. INTERNET SURVEY

Exploratory research was conducted to discover information regarding online file storage, sharing, video hosting, and other popular websites where users can download media without registration or fee. Searches were conducted on Google using keyword strings like “watch movies free online” and “download Skyfall” among queries for other titles and artists (for example, Lincoln, Homeland, Red Hot Chili Peppers). Some Google searches resulted in direct links to download or streaming sites and others led to directory sites which provided active links to thousands of television and film titles.

Sites were tested for infringing activity by downloading multiple large samples and viewing streaming media files. Those sites which provided free, open access to copyright protected content were considered infringing sites.¹⁰⁸ Expansive directories which specialize in procuring links to external host pages were also considered infringing sites. The sample consisted of 26 websites.

Each website was visited and its homepage inspected for a link stating “copyright” or “DMCA” or “intellectual property” or any similar word or phrase that would lead to a policy on copyright.¹⁰⁹ In cases where no such link was found, but a “terms of use” or “terms of service” or similarly worded link appeared, those terms were read for mention of valid copyright law or policy relating thereto.

Searches were also conducted to determine physical locations of infringing sites, IP addresses, estimated valuations, and estimated daily site

ASEAN region, that piracy and counterfeiting in physical markets like those in Thailand are problematic. A tour of physical markets in Thailand, where ubiquitous commercial infringement is largely tolerated, shows the accuracy and reliability research on the topic. Considering that external reports were independently verified in this study, the likelihood of erroneous findings in other reports about the region is low.

106. ($r = .448$, $n = 196$, $p < .0005$).

107. ($r = .430$, $n = 196$, $p < .0005$).

108. Criteria for defining piracy and piracy sites were modeled on Mark Monitor. *Traffic Report: Online Piracy and Counterfeiting*, MARK MONITOR (Jan., 2011), https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf.

109. The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) was the only statute or law mentioned specifically by name on any website visited. Inclusion of the keyword “DMCA” in search criteria was due to prevalence of this term on websites under study. Explicit references to the American Act on websites suggested legal actions were more probable under that Act than under other national statutes, while lack of reference to other Acts by name suggested probability of action in other regional jurisdictions was low.

traffic. These data were retrieved primarily through webindetail.com. Further information about the physical location of the site registrant was retrieved through godaddy.com, whois.net, and website.informer.com, and gositevalue.com.

A. *Results*

Four of the 26 sites specialized in .mp3 and other music format downloads. Two of those hosted files for direct download.¹¹⁰ The other two provided downloads through the site, but claimed not to host.¹¹¹ Three directory sites were included.¹¹² Eighteen sites were of the cyber-locker variety. Any number of television programs and films were available via these lockers.¹¹³

Multiple sites were ranked in the top 1,000 on the World Wide Web. More than half of the sample is valued at greater than one million US dollars. In the months of investigation, nearly every site in the sample increased its estimated value and daily views. Several sites changed registrant information and relocated to different countries. Two of the directory sites changed domain names, one of those sites changed its name twice.

Name changes, incomplete and contradictory registration information, and site offerings gave rise to reasonable suspicion that royalties are not paid per view, download, or use. The brazen mentality of these tech-professionals is shown by inclusion of copyright laws and policies on blatantly infringing websites. Copyright laws are clearly not a primary consideration among the professionals in charge of the sampled websites.

110. emp3world.com&mp3skull.com.

111. mp3bear.com&beemp3.com.

112. movie2k.to offers links to external sites and streaming capability. watchseries.eu changed its name to btvguide.com at which time it started carrying links to pay-per-download content on Hulu and iTunes alongside free download or streaming content via sites like putlocker.com and gorillavid.in. letmewatchthis.ch, AKA lchannel.ch, AKA vodly.to AKA primewire.ag changed its name three times during the course of the study. Linking to a file was considered contributory infringement in Norway's napster.no case. Thomas Rieber-Mohn, *The Norwegian Supreme Court Decides the napster.no Case*, IRIS (Mar. 29, 2005), <http://merlin.obs.coe.int/iris/2005/3/article29.en.html>.

113. Mp3, rar, zip, doc, pdf, avi, flv, mp4, and mkv files were available at mediafire.com.

Table 2 Sample Information¹¹⁴

	Site	Location	Copyright Policy on Homepage?	Estimated Value	Daily Views
1	vidbux.com	USA, UK, NL, PA	yes	USD 1,046,934	332,383
2	vidxden.com	USA, UK, PA, RO	yes	USD 2,413,591	764,987
3	nosvideo.com	UK, USA, FR	yes	USD 258,188	59,949
4	novamov.com	SC, NL	in terms of use	USD 3,082,320	2,853,720
5	videoweed.es	NL	in terms of use	USD 907,003	288,370
6	divxstage.eu	DE, AU, SC	in terms of use	USD 277,786	245,706
7	movshare.net	RU, BS, SC, NL	in terms of use	USD 857,000	389,924
8	gorillavid.in	MD, SC, NL	yes	USD 2,730,415	868,101
9	daclips.in	MD, SC	yes	USD 201,475	46,704
10	sharerepo.com	DO, NL, CA	yes	USD 233,417	54,514
11	uploadc.com	DE, USA	yes	USD 573,143	181,111
12	viooz.eu	NL	no	USD 31,718	3,393
13	filebox.com	USA, NL, CH	yes	USD 848,246	269,689
14	putlocker.com	UK, PA, NL	yes	USD 27,432,000	5,074,359
15	sockshare.com	UK, PA	yes	USD 7,674,169	2,407,550
16	clicktoview.org	USA, FR	yes	USD 272,539	63,651
17	vimeo.com	USA	yes	USD 54,524,880	17,252,821
18	mediafire.com	USA	yes	USD 68,473,080	63,401,256
19	emp3world.com	USA, AU	yes	USD 202,320	140,262
20	mp3skull.com	USA, PA	no	USD 10,708,067	3,352,603
21	mp3bear.com	USA	yes	USD 384,498	88,048
22	beemp3.com	USA, PA	yes	USD 7,402,943	2,315,715
23	movie2k.to	RU, DE	no	USD 9,137,000	3,761,000
24	watchseries.eu	RO	yes	USD 11,311,216	3,548,569
25	vodly.to	NL, CR, USA	in "legal stuff"	USD 1,237,921	393,582
			Sum 1-25:	USD 210,983,948	108,157,967
			Average 1-25:	USD 8,790,998	4,326,319
26	youtube.com	USA	yes	USD 3,860,556,500	1,211,012,000

Source: Author

Youtube was set aside from other sites due to its enormous size, valuation, and level of daily activity. Youtube provides primarily streaming video, much of which is not copyright protected, or falls under fair use

114. Information is retrieved from webindetail.com, GoDaddy, Whois, website.informer, gositevalue.com, and directly from the sample population. All tables in the document are the original creations of the author, using references stated in their composition. Estimated values were retrieved using services such as websiteinformer, webindetail, and gositevalue.com. Values are estimated as of September 2013.

definitions due to short duration. However, extraordinarily large numbers of infringing media were found on Youtube, to the extent that it was utterly unlikely that the company was unaware of its presence, which confirmed the *Viacom* complaint¹¹⁵ despite the outcome of that case in the American district court.¹¹⁶ In combination with external sites like keepvid.com and applications, Youtube videos can be downloaded, converted and stored for reproduction or other use. Although cyber-lockers hosted more complete films, albums, television programs and music tracks, the volume of traffic Youtube receives on average qualified it as the largest infringer.¹¹⁷

VI. DISCUSSION

Prevalence of piracy and counterfeiting in all forms is high and rising as evidenced by the primary and secondary data presented in this study. These trades persist because of their profitability and because the products are popular. Total eradication of commercial infringement is clearly not a realistic goal. Likewise, criticizing infringement abroad while failing to simultaneously address it at home, such as in the Special 301 reports, is both misleading and the source of international friction. A more scientific approach to application of law is central to shedding undesirable bias and achieving broader success.

Traditionally, when a criminal problem is persistent, proponents of the coercive state power frequently turn to theories of the deterrent effects of increased penalties. However, considering the colossal magnitude of online piracy attributable to Americans alone, whose anti-infringement laws are the world's harshest, it is unlikely that tougher copyright laws will significantly reduce internet piracy.¹¹⁸ In the Eastern world, absent broader economic opportunities, it is unlikely that large reductions will be seen in

115. *Viacom Int'l et al. v. YouTube et al.*, 676 F.3d 19 (2d Cir. 2012). The Circuit Court reversed the decision of the District, holding "a reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website." Thus, Youtube did not qualify for safe harbor protection under 17 U.S.C. § 512 (DMCA). In many cases, a full length film or television show is split into multiple parts of roughly 8-10 minutes each, which can be watched in succession. Hundreds of full-length music albums were found on Youtube, where video is most often a static picture of the album cover.

116. *Viacom Int'l v. YouTube*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013). Youtube did not have actual knowledge of specific infringement, and Youtube did not have the "right and ability to control" content.

117. "The destruction of music through YouTube is enormous," said pianist Krystian Zimerman. Jee van Vasagar, *World Renowned Pianist Storms off Stage in Protest after Fan Films Concert on Phone*, THE TELEGRAPH (June 5, 2013), <http://news.nationalpost.com/2013/06/05/world-renowned-pianist-storms-off-stage-in-protest-after-fan-films-concert-on-phone/>.

118. *Tougher Laws Won't Stop Internet Piracy: Study*, CBC NEWS (Mar. 17, 2011), <http://www.cbc.ca/news/technology/story/2011/03/16/tech-online-piracy.html>.

counterfeiting of hard goods. In both cases, we see a trend that infringement is not considered immoral, and thus motivating compliance with laws is virtually impossible.¹¹⁹

Worldwide, we have enormous economic and social inequality which does not lend to sympathy for corporations claiming IPRs.¹²⁰ Domestic and international problems reflect economic disparity.¹²¹ On the consumer end, generally speaking, people who obtain infringing copies of media or merchandise cannot afford genuine products. Likewise, people who engage in manufacture, distribution and sales of infringing tangible goods generally have few or no other employment opportunities. Like some other criminal trades, piracy and counterfeiting persist due in a large part to underlying economic deficiencies. Some commentators argue that unless these related conditions are changed, it is unlikely that we will witness a significant change in prevalence of piracy and counterfeiting.¹²² However, if market order presupposes legal order,¹²³ then we can argue for improved economic conditions via stronger IPR protection and enforcement.

An exception to the general rule that commercial piracy and counterfeiting are elements of economic survival was found in the course of this research. Internet companies such as Youtube, Mediafire, Megaupload, and The Pirate Bay are not founded and operated by people who have no alternative means of securing their livelihoods. While users of these services most often cannot afford to purchase everything they download, entrepreneurs in the digital piracy industry are tech-savvy geeks, fully capable of performing other licit services in the mainstream business world. Bad faith is thus implied on the part of site owners and operators who

119. Tom Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N. Y. U. J. INT'L L. & POLITICS 219 (1997). Perceptions of morality influence behavior. If something is not considered immoral, the corresponding law may be considered invalid, and punishment may be ineffective in motivating compliance.

120. Poverty rates in East and South Asia are among the highest in the world. In 2008, roughly one-third of East Asians lived below \$2/day (PPP). In South Asia, that number was over 70%, the highest in the world. In Western Europe and North America, this type of poverty does not exist., *Poverty*, WORLD BANK (2013), <http://data.worldbank.org/topic/poverty>.

121. Thailand has the highest per capita GDP among the Eastern developing nations. However, this number is only \$10,000 (PPP), nearly \$40,000 below that in the United States. *World Factbook: GDP Per Capita*, CIA (2013), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>. In the United States, the individual threshold for poverty is above \$10,000 (not PPP). 28% of Americans experienced at least 2 consecutive months of poverty between 2009 and 2010. Carmen DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States*, U.S. CENSUS BUREAU (Sept., 2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

122. Catherine Saez, *At WIPO, A Complex Fight Against Counterfeiting, Piracy*, INTELLECTUAL PROPERTY WATCH (Dec. 21, 2012), <http://www.ip-watch.org/2012/12/21/at-wipo-a-complex-fight-against-counterfeiting-piracy/>. WIPO initiatives take into consideration multiple aspects of socio-economic conditions, which are considered contributory causes of piracy and counterfeiting.

123. LONG & MACHAN, *supra* note 68, at 140.

obviously have more knowledge of infringement via their services than courts have yet determined. In the case of Youtube, a somewhat villainous, unscrupulous managerial staff simply manipulates legal loopholes to maintain near-monopoly power.

Legal defenses may also lie beneath the opaque surface of developing national strategies. Many clothes, bags, sunglasses, accessories, footwear and small electronics found in physical markets are not copies of patterns or models manufactured by the legitimate trademark owner. The only link between those goods and a genuine item is a trademark. Furthermore, fake tangible goods frequently contain very discernible flaws that alert consumers to their obvious shanzhai¹²⁴ origins, and as such many of these items could be considered parody.¹²⁵ Voiceovers in media content are frequently so outrageous that it could also be considered parody in many cases.¹²⁶ In court, fair use defenses are generally rejected and parody has yet to be formally acknowledged in international territory, but these arguments and other issues like antitrust¹²⁷ and censorship¹²⁸ need to be explored if one is to understand how and why illegal trades have been allowed to operate and proliferate in plain sight.

While IPRs are recognized worldwide, the West is the rhetorical seat and theoretical origin of contemporary intellectual property laws¹²⁹— laws which have been only partially successful in the West. Despite its own failures to protect and enforce its own people's IPRs, Western nations want

124. 山寨 “shanzhai” literally means “mountain fortified camp” and refers to counterfeit goods. The extent to which the public may be deceived depends on the public itself. If experts can spot a fake, then so can members of the public so long as they think about the possibility of the fake being present in shops. Informed, intelligent consumers are probably misled far less often than other types of consumers, so opinions of what the “public” as a whole may think vary across sources.

125. The dissent in *White v. Samsung*, 971 F.2d 1395, 1407 (1992) argued, “[g]enerally, a parody does not constitute an infringement on the original work if it takes no more than is necessary to ‘conjure up’ the original.” Low-quality knock-offs and those not imitating patterns or models of originals do just that – conjure up the image of the original. When new patterns, models and products are sold under somebody else's trademark, the result is not a slave copy of the original. In fact, as the dissent in *White v. Samsung*, 989 F.2d 1512, 1517 (1993) remarked, “like all parody, it created something new.”

126. 17 U.S.C. § 107 (1992) considers parody within fair use guidelines.

127. Antitrust issues plague industries most affected by piracy. See *United States v. American Society of Composers, Authors, and Publishers*, 607 F.Supp.2d 562 (S.D.N.Y. 2009); *United States v. Microsoft*, 253 F.3d 34 (App. D.C. 2001); *Campos v. Ticketmaster*, 140 F.3d 1166 (8th cir. 1998); *Starr v. Sony BMG*, 592 F.3d 314 (2d cir. 2010).

128. WTO Dispute DS362 required amendment of the prior Chinese copyright law article 4, requiring protection to be granted to foreign works. However, each state may censor works as it sees fit. In the analysis of these issues, it is important to consider the informal nature of many Eastern developing country actions, and also the likelihood that various foreign music and movies could be formally banned based upon their content if the issue were pressed. American entertainment is filled with gratuitous violence, sexual content, explicit language, drug use, promotion of criminal behavior. These are sufficient reasons to censor.

129. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2813 (2006).

Eastern and other developing nations to protect and enforce IPRs of foreign citizens, and no will not be taken for an answer, as if it is even possible to achieve a zero-tolerance goal at this stage. Such an outlook across the Pacific or overland appears reminiscent of the ubiquitous bad father's famous advice: "do as I say, not as I do."

A. *Culture and Legal Tradition*

Historical institutions relating to culture, religion, social and legal orders influence present-day enforcement. Demographic and geographic distance equates to differences in formal institutions. At a base level, epistemological variation between East and West may stem from the absence of Confucianism in the West and absence of a dogmatic, monotheistic Church in the East. Whereas traditional Western law and order emanated from paternal systems whereby the State used coercive methods to establish and maintain control over the population, Eastern tradition was influenced by Confucian idealism which gravitated around the idea that moral behavior must be voluntary.¹³⁰ These traditions may share similar deontological makeups but stark contrasts in consequences have long existed between jurisdictions.

Early Western law emphasized normative ethics through formal procedures, usually involving clergy or State official, and harsh punishments for violations of explicit rules.¹³¹ With exceptions in a few criminal cases where the Chinese system was "overwhelmingly penal in emphasis,"¹³² Chinese law relied more upon informal means of resolving disputes wherein moral behavior was expected to be motivated by responsibilities to and of family, and codes among members of local hierarchies. Magistrates from the Qin (221-206 B.C.) through Qing (A.D. 1644-1911) dynasties handled very few cases formally, and in some instances they were penalized for handling too many cases.¹³³

While each contemporary system infuses certain principles and practices of other historical systems, certain aspects remain more static. Eastern systems such as China continue to utilize various informal measures,

130. "The Master said: Guide them with policies and align them with punishments and the people will evade them and have no shame. Guide them with virtue (de) and align them with li and the people will have a sense of shame and fulfill their roles." Confucius, *ANALECTS*, Bk. 2, Ch. 3, available at [http://www.indiana.edu/~p374/Analects_of_Confucius_\(Eno-2012\).pdf](http://www.indiana.edu/~p374/Analects_of_Confucius_(Eno-2012).pdf) (last visited Mar. 3, 2013).

131. In the Catholic world, Inquisitions were the method of the middle ages. Joseph Blotzer, *Inquisition*, THE CATHOLIC ENCYCLOPEDIA (1910), <http://www.newadvent.org/cathen/08026a.htm>. In England a similarly barbaric process was utilized, the "trial by ordeal". Bernard Knight, *History of the Medieval English Coroner System: Trial by Ordeal, Injuries & Outlaws* (1999), <http://www.britannia.com/history/articles/coroner5.html>.

132. ALFORD, *supra* note 22, at 10.

133. *Id.* at 12.

whereas transparency and procedural law dominate Western systems, leaving few options for informal remedies. The greater formality of Western systems when compared to Eastern ones is shown in higher rates of imprisonment in the U.S. when compared to China¹³⁴ and higher number of inhabitants per judge in East Asia when compared to North America and Western Europe.¹³⁵ These imbalances imply lower justice expenditures per capita in the East, offering opportunities for local pirates and counterfeiters to set up shop.

1. *History of Conflicting Philosophies*

Scholars are deeply concerned about asymmetry in IP norm-setting and rhetorical seat. WTO, WIPO, and the United Nations are all headquartered in the West, giving the impression of potential bias. Classical colonialism is a thing of the past, but the present wealth of nations is directly related to historical exploitation and seizure of resources. Some authors argue that the global IP system is little more than a tool for “neo-colonialism” – an informal empire built under pressures to conform to the status quo among Western nations.¹³⁶ Western hegemony over the IP system persists despite the fact that since China’s entry into the WTO, three of the top national IP offices in terms of patent applications¹³⁷ and trademark applications¹³⁸ have been Eastern, with China taking the lead in overall IP growth.

2. *Sino-Centric Traditions*

Traditional Chinese law contained few counterparts to various legal concepts inherent to Western institutions. Until the 20th century, there was nothing in Chinese statutes comparable to the Western concept of IP.¹³⁹ Academics claim Chinese people believe the past represents something close

134. The U.S. has the highest imprisonment rates in the world, at 716 per 100,000 population. China has only 121 prisoners per 100,000 population. Roy Walmsley, *World Prison Population List*, INTERNATIONAL CENTRE FOR PRISON STUDIES (2013), http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf.

135. For years 1998-2000, Eastern Asia had about 37 people per judge or magistrate, whereas in North America that number was about 14, and in Western Europe it was around 5. Mark Shaw et al., *Determining Trends in Global Crime and Justice*, 3 FORUM ON CRIME AND SOCIETY 57 (2003).

136. Andreas Rahmatian, *Neo-Colonial Aspects of Global Intellectual Property Protection*, 12 J. WORLD INTELLECTUAL PROP. 40 (2009).

137. Top five offices in terms of patent applications between 2001 and 2011 were (1) U.S., (2) Japan, (3) China, (4) Korea, (5) European Patent Office. Top five offices in terms of trademark applications between 2001 and 2011 were (1) Europe, (2) China, (3) U.S., (4) Korea, (5) Japan. WIPO Statistics Database, <http://www.wipo.int/ipstats/en/statistics/patents/> (last visited Mar. 8, 2013).

138. WIPO, *Intellectual Property Indicators* 78 (2010), http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2010.pdf.

139. ALFORD, *supra* note 22, at 18.

to the Western concept of truth.¹⁴⁰ Although an illusory characteristic, the perceived inherent moral superiority of the past is perhaps most noticeable when widespread attempts to change the social order are underway. During the disastrous Cultural Revolution, the “iron rice bowl”¹⁴¹ equal-rewards-for-all-labors mentality was certainly a change, and many would say an immoral one. When the first copyright laws were enacted in the PRC in 1986¹⁴² and 1990,¹⁴³ as should have been expected, the people clung to their pre-legislation counterfeit ways.

In 1984, the U.S. International Trade Commission (ITC) estimated that 60% of the world’s counterfeit products came from Taiwan, which *Newsweek* called the “counterfeiting capital of the world” in 1982, and which the *New York Times* said was “to counterfeiting what Miami is to drug trafficking.”¹⁴⁴ Between 1998 and 2003, more than half of counterfeit merchandise seized in the U.S. came from mainland China, Hong Kong, and Taiwan.¹⁴⁵ Taiwan’s role thereafter decreased radically,¹⁴⁶ but the numbers show that IP-infringing history and tradition are alive and well throughout China.

Down in Southeast Asia, the culture of the past is scarred due to colonial

140. *Id.* at 26.

141. *Id.* at 67. “Proponents of a patent law protective of ownership interests placed primary emphasis on its likely salutary economic effects, arguing that China needed to smash the ‘iron rice bowl’ (*tie fan-wan*) mentality of the Cultural Revolution that rewarded all equally, irrespective of the quality of their work, and that was now seen as having stifled initiative and held back the nation.”

142. *Chung Hua Jên Min Kung Han Kuo Minfa T’ungtsê* [General Principles of the Civil Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), § 3, art. 94 (China).

143. Copyright Law of PRC, *supra* note 69. This was the first sui generis copyright statute.

144. ALFORD, *supra* note 22, at 98. (cited *Newsweek*, *Taiwan’s Brazen Pirates* (Nov. 15, 1982)). “...to counterfeiting what Miami is to drug trafficking” (cited Steven Lohr. “Crackdown on Counterfeiting.” *New York Times*, May 7, 1984, p. 12) sounds a bit like the pot calling the kettle black, but also sheds some light on how Americans move on these issues. The separability of legal and trade issues is of crucial importance to the American and larger Western international strategy. If issues could not be compartmentalized, trade and foreign relations could become excessively inefficient, leading to breakdowns and elevated disputes. Still, it gives the impression of imperialism and unfair dealings if one side pushes an issue, like IP, while rejecting external criticism of its own issues, like drug trafficking or more recently the occupation or invasion of foreign nations.

145. *Pirates of the 21st century: The curse of the black market: Hearing before the Subcomm. on Oversight of Gov’t Mgnt, the Federal Workforce and the Dist. of Columbia of the S. Comm. on Gov’t Affairs*, 108th Cong. 7 (2004) (Statement of Francis White, Unit Chief of Commercial Fraud, Immigration and Customs Enforcement, U.S. Department of Homeland Security), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg94482/html/CHRG-108shrg94482.htm>.

146. Among 2012 fiscal year seizures by U.S. authorities, 72% came from China and 12% came from Hong Kong. Seizures of goods from Taiwan made up less than 1% of the total. U.S. Customs and Border Patrol, *supra* note 81. Likewise, over 70% of goods seized in the EU in 2011 came from China, and over 12% from Hong Kong, but less than 1% from Taiwan. EUROPEAN COMMISSION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE BORDER – 2011 (2012), available at http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2012_ipr_statistics_en.pdf.

occupation. Indigenous peoples may harbor considerable animosity for violations of customary international law perpetrated by colonial powers, or for war crimes committed during the brutal liberation period. Where no legal remedies are available for these historical atrocities, states may seek retribution using passive-aggressive methods such as turning a blind eye to infringement of Western-owned IP, which could be politically marketed as economic justice. True, developing countries voluntarily consent to treaties, and enact legislation to implement those treaties, and thus there is no legitimate defense by American standards for failures to enforce IP laws in Thailand, Indonesia, Brunei, Vietnam and the Philippines.¹⁴⁷ However, some reasons for such tolerance of infringement are implicit and extend beyond institutional faults like corruption, lack of judicial independence, and lack of rule of law.¹⁴⁸ Eastern cultural preferences for indirectness¹⁴⁹ and collectivism¹⁵⁰ seem to imply there is more to the story than what is officially admitted.

The IP concept does not seem to make sense to large portions of the Sino-region population, whose present-day attitudes are influenced more by local and national traditions than by new international accords and legislation supportive of high-tech innovation, multimedia conglomerates, or mega-corporations.¹⁵¹ Likewise, core components of Sino philosophy are somewhat inconclusive by Western standards. East Asian social and cultural systems leave many Americans feeling as if some direction or resolve is lacking.¹⁵² The present situation, rooted in history, can be frustrating and uncomfortable to all sides.

147. ASEAN members are frequently cited as major violators of IP laws. The 2012 report Priority Watch List included Thailand, Indonesia, and of course China. The 2012 Watch List included Brunei, Philippines, and Vietnam. *Special 301 Report*, U.S. TRADE REPRESENTATIVE (2012), http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf.

148. ALFORD, *supra* note 22 at 109-10.

149. Yuxin Jia, *Indirectness: The General Preference of the Chinese in Their English Writing*, 13 INTERCULTURAL COMMUNICATION STUD. 1 (2004). Generally, Westerners prefer to be more direct than Easterners.

150. Geert Hofstede, *National Culture Dimensions*, THE HOFSTEDE CENTRE, <http://geert-hofstede.com/national-culture.html> (last visited Sept. 11, 2013). Eastern cultures generally score higher on collectivism when compared to Western cultures.

151. "Unlike Western values which advocate individual rights, Confucian ethics emphasizes the virtue of austerity, hard work, teamwork and submission to authority, all of which have contributed to the economic development in the Eastern nations...Chinese society has traditionally viewed private rights as individualization, which is considered immoral." Shi, *supra* note 4, at 455.

152. "Western philosophers still tend to think that philosophy, in a sense that they can take with professional interest, does not exist in non-Western traditions." Ben-Ami Scharfstein, *The Western Blindness to Non-Western Philosophies*, paper presented at Twentieth World Congress of Philosophy, (Aug. 10-15, 1998), Boston, MA, available at <http://www.bu.edu/wcp/Papers/Comp/CompScha.htm>.

B. *Game Theory and Algebraic Logic*

Larger-order historical and systemic differences between Sino-centric and Euro-centric models are clearly associated with manifestations of variance in the area of IP enforcement. More recent political conflicts can be understood simply as furtherance of longstanding grudges. Mainland Chinese are undoubtedly disenfranchised by the Western systems that brought about annexation of Hong Kong, Kowloon, and Macau – the resulting effects being a difficult unification of the PRC, necessitating the “one nation, two systems” model.¹⁵³ Under a Communist regime, the PRC finds itself naturally at odds with the West, but this is not a new rivalry.¹⁵⁴ Sino-Asians resent attempts to apply foreign law today as they did hundreds of years ago. Today, the Chinese have more recognized global power and some equal standing in the international community to work with, thereby changing the game.

The 2007-09 WTO dispute between the United States and China on the

153. Macau and Hong Kong became Special Administrative Regions (SAR) following repatriation to the PRC. “One Country, Two Systems” has resulted in some political and social struggle, especially between Beijing and Hong Kong. Sisi Tang & Tan Lyn, *Hong Kong Students Boycott Class to Protest China ‘Propaganda’*, REUTERS (Sept. 11, 2012), available at <http://www.reuters.com/article/2012/09/11/us-hongkong-students-idUSBRE88A0FY20120911>. See also *One Country, Two Systems*, CHINA FACTS & FIGURES, <http://www.china.org.cn/english/features/china/203730.htm> (last visited Sept. 12, 2013).

154. Following the Opium War, extraterritoriality took effect following the Treaty of Nanking (1842). A second war was fought between 1858 and 1960, which led to the Treaty of Tientsin and Convention of Peking, which increased a colonial-style presence of Europeans in China, *The Opium War and Foreign Encroachment*, ASIA FOR EDUCATORS (2009), http://afe.easia.columbia.edu/special/china_1750_opium.htm#treaty. The U.S. Chinese Exclusion Act (1882) sent a very explicit “no reciprocity” message to Chinese who desired to live and establish trade relations in the U.S. See *Chinese Exclusion Act* (1882), OUR DOCUMENTS: 100 MILESTONE DOCUMENTS, <http://www.ourdocuments.gov/doc.php?flash=true&doc=47> (last visited Sept. 12, 2013). *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) followed shortly thereafter, easing some tensions and granting some equality to Chinese residents in the U.S., but more than another hundred years before the House passed H.Res.683 – Expressing the regret of the House of Representatives for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act. See H. R. Res. 683 112th Cong. (2012). Callousness toward Easterners was again witnessed during the WWII period of Japanese internment and deprivation of property. *Korematsu v. U.S.* 323 U.S. 214, 225 (1944) (Justice Roberts, dissenting) said “indisputable facts exhibit a clear violation of Constitutional rights.” Failure to establish equal rights for East Asians through WWII is evidenced by lack of German or Italian internment camps. Perhaps the biggest blemish on America’s record in the East is the Vietnam conflict. Former Senator, Secretary of State Lt. John Kerry once spoke to the Senate about war crimes committed in Vietnam by Americans. “not isolated incidents but crimes committed on a day-to-day basis with the full awareness of officers at all levels of command...[American soldiers] raped, cut off ears, cut off heads, taped wires from portable telephones to human genitals and turned up the power, cut off limbs, bl[ew] up bodies, randomly shot at civilians, razed villages in fashion reminiscent of Genghis Khan, shot cattle and dogs for fun, poisoned food stocks, and generally ravaged the countryside of South Vietnam.” Complete Testimony of Lt. John Kerry to Senate Foreign Relations Committee, see *Legislative Proposals Relating to the War in Southeast Asia: Hearing before the S. Comm. on Foreign Affairs*, 92th Cong. (1971) (Statement of Lt. John Kerry), available at <https://bulk.resource.org/gao.gov/93-148/00005F57.pdf>.

matter of protection and enforcement of intellectual property rights showed some favor toward the Chinese by denying American complaints about criminal thresholds.¹⁵⁵ China's more tolerant nature reflects its commitment to the historical view that coercive methods are inherently ineffective. The Chinese model is, as previously stated, also designed to relieve police, courts and prisons from the financial burdens of enforcement against small-time crooks. Of course, one would be remiss if one did not accept that corruption and mafia activity are involved in major commercial counterfeiting and piracy enterprises. However, there is apparently a method to this Eastern tolerance that drives Westerners up the wall.

1. *Physical Market Piracy and Counterfeiting*

By applying game theory, a better understanding of the situation can be gained. There are two players in a simplified game: the United States (US) representing the West, and China (CN) representing the East. Each player has two options: they can be *tolerant* or *intolerant* of counterfeiting. The impacts of their decisions to be *tolerant* or *intolerant* are positive (+x) or negative (-x) on four separate factors, (a) domestic strategy, (b) international strategy, (c) internal consistency and transparency, and (d) historical and cultural legitimacy.

Domestic strategy includes benefits or costs toward achieving domestic economic, social and cultural goals. *International strategy* refers to reputation and appearance among nations, and factors of foreign policy. *Internal consistency and transparency* is the extent to which a particular action creates consistency or inconsistency between theory and practice, or between branches of government. *Historical and cultural legitimacy* relates to honoring the past, continuance of tradition, or application of sacred principles.

Our first game is scored with equal weighting (± 1) on each of the four factors. A *tolerant* U.S. receives a negative score (-1) for each factor for a total outcome of (-4). An *intolerant* U.S. receives a positive score (+1) for each factor for a total outcome of (+4). The U.S. will thus choose to be *intolerant*. China's *domestic strategy* and *historical culture* are satisfied by allowing infringement, so an *intolerant* China receives a negative score (-1) for each of those two factors and a *tolerant* China receives a positive score (+1) for each of those two factors. Like the U.S., China's *international strategy* and *internal consistency* are harmed by tolerance of infringement, so a *tolerant* China receives a negative score (-1) for each of those factors and an *intolerant* China receives a positive score (+1) for each of those two

155. Panel Report, *supra* note 43.

factors. The result is a zero for China in either case. Without weighting of factors, chance alone may dictate China's decision to be intolerant or tolerant, which may well reflect some Westerners' criticisms that China's system is arbitrary.¹⁵⁶

Figure 1 Unweighted Physical Market Game

		CN	
		Tolerant	Intolerant
US	Tolerant	-4,0	-4,0
	Intolerant	+4,0	+4,0

A weighted game probably gives a more realistic impression of motivating factors in China. Instead of equal scoring for each of the four factors, two receive double scoring (± 2) and two receive normal weight (± 1). China and the U.S. both receive double weighting on *domestic strategy* and single weighting on *international strategy*, but the younger U.S. receives its second double score on *internal consistency and transparency* whereas millennia-old China receives its second double score on *historical and cultural legitimacy*. Effects of each action are still of the same valence as in the first game, but the outcome is different because of the weight. U.S. totals are ± 6 and China totals are ± 2 . The maximum total benefit ($+8$) is found when the U.S. is intolerant and China is tolerant, which is the apparent current paradigm.

Figure 2 Weighted Physical Market Game

		CN	
		Tolerant	Intolerant
US	Tolerant	-6,+2	-6,-2
	Intolerant	-6,+2	-6,-2

156. "China's legal and regulatory system is complex and contradictory and generally lacks consistent enforcement. Foreign investors rank inconsistent and arbitrary regulatory enforcement and lack of transparency among the major problems they face in China's market." *2011 Investment Climate Statement – China*, U.S. DEPARTMENT OF STATE (2011), <http://www.state.gov/e/eb/rls/othr/ics/2011/157258.htm>.

2. Online Piracy

As data from the website survey suggested, the western strategy for online copyright infringement is remarkably different from the apparent approach to physical market trademark and copyright infringement. Game theory can again be used to understand aspects of this phenomenon. China and the United States are again the players, and their options are again *tolerant* and *intolerant*, but two motivating factors have changed in this game. *Domestic strategy* and *international strategy* stay, but instead of *consistency/transparency* and *cultural/traditional legitimacy*, the new factors are *IT advancement*, and *political support for internet freedoms*. It is assumed that tolerance of internet infringement leads to internal inconsistencies and loss of face externally, while intolerance creates internal consistency and preserves the national image externally. Likewise, it is assumed that tolerance of online piracy supports IT advancement and internet freedoms, while intolerance does not support either.

Figure 3 Unweighted Online Game

		CN	
		Tolerant	Intolerant
US	Tolerant	0,0	0,0
	Intolerant	0,0	0,0

In an unweighted game, no benefit or cost for tolerance or intolerance is found between the players. Any policy would be either somewhat random or devised subject to multiple other factors not considered. In such a scenario, any enforcement would likely be sporadic and unpredictable, subject to private interests and non-transparent political factors. Criminal enforcement has trended much in this way, but civil cases in the United States have been consistent enough to suggest the unweighted game is not an accurate view. Instead, a weighting of factors gives a more realistic view.

Both players were given single weighting for *internal consistency* and double weighting for *IT advancement*. Political systems influenced differences in weighting for the other two factors. Whereas the United States – and the majority of the western world – has a tradition of democracy whereby the public opinion has significant influence on public policies relating to speech and communication, China – and significant parts of the eastern world – rely on more authoritarian censorship of press and speech,

including the internet.¹⁵⁷ Thus, *political support for internet freedoms* was given double weight on the American side, while China received double weighting for *international strategy* considering its apparent desire to be considered acceptable in the global political and media sphere,¹⁵⁸ and because long term interests are served by remaining silent on Western infringing sites. The result is an ambiguous China and tolerant US, which reflects current conditions.

Figure 4: Weighted Online Game

		CN	
		Tolerant	Intolerant
US	Tolerant	2,0	2,0
	Intolerant	-2,0	-2,0

3. *Money Is the Bottom Line*

If we draw a comparison between civil and criminal suits, wherein the state is plaintiff in criminal proceedings similar to a private plaintiff in civil proceedings, then we can further understand possible motivating factors for tolerance of infringement in either jurisdiction. Private plaintiffs to infringement suits will only pursue litigation when probability of net gain is higher than probability of net loss in the legal action. Plaintiffs will settle or not pursue claims when a net cost is foreseen. Mathematically, we can phrase the conditions where suit will be pursued as:

$$a_1 + b_1 p_1 - l_1 > a_1$$

Variable a_1 represents profits obtained by the plaintiff while infringing activity continues, b_1 is the award available to the plaintiff in a suit, p_1 is the probability of victory for the plaintiff, and l_1 is the plaintiff's legal fees. In most cases of commercial infringement, $l_1 > b_1$, resulting in a monetary

157. Communist and fascist regimes are well-known for speech-suppression, which is also seen in otherwise democratic nations like Thailand and South Korea. See Sang-Hun Choe, *Korea Policing the Net. Twist? It's South Korea*, NEW YORK TIMES (Aug. 12, 2012), <http://www.nytimes.com/2012/08/13/world/asia/critics-see-south-korea-internet-curbs-as-censorship.html> (last visited Sept. 12, 2013). See also *Thailand: Internet Trial a Major Setback for Free Speech*, HUMAN RIGHTS WATCH (May 30, 2012), <http://www.hrw.org/news/2012/05/30/thailand-internet-trial-major-setback-free-speech>.

158. This analysis does not imply that China demonstrates desire to be like western powers, but rather that it appears to dislike negative attention. Ergo, China's desire to save face exceeds its apparent desire to implement policies supportive of expansive internet freedoms.

loss accompanying a legal victory. If the State is the plaintiff in a criminal suit, l_1 includes police and corrections expenditures, and although p_1 may near 1.0, b_1 is likely low. For the State-plaintiff case, a_1 could be zero or it may include potential tax revenues and other fees collected from infringing businesses, which could be reduced after suits which remove such businesses from communities. In cases where corruption is involved, losses of such proceeds would also factor into the equation.

On the infringer side, a similar equation can explain conditions under which infringement will continue.

$$a_2 - b_1 p_1 - l_2 > x$$

On the infringer side, a similar equation can explain conditions under which infringement will continue.

In this situation, if the infringer can continue generating revenues above a certain level x , which may be the break-even point, then infringement will continue even if the probability of plaintiff victory in a lawsuit, p_1 , is absolute. In such a case, defendants' legal fees, l_2 , and potential award to plaintiffs, b_1 , are subtracted from profit obtained through infringement, a_2 .¹⁵⁹ On the defendants' side in a criminal suit, if corrupt payments are involved, then they can be factored into other costs and may significantly reduce probability of legal action, thus creating a greater margin between profits from infringement and costs, keeping net income above x .

C. Strategy Development and Deployment

Either side of the games could seize an advantage over the opposition by providing more adequate protection of rights in its weak area. If one player were to more reliably protect rights in both the physical and online contexts, this advantage would undoubtedly translate to political and economic leverage. Nations which protect IPRs are more competitive than nations that are more tolerant of infringement. A comparative advantage in IP protection is likely to draw more foreign direct investment, ensuring more consistent economic growth and stability.¹⁶⁰

Where statutes expressly permit, law enforcement officials in developing Eastern nations could take *ex officio* action to at the very least seize inventories from street vendors in physical markets saturated with infringing goods. A business consistently deprived of its inventory cannot

159. Douglass Fox and Roy Weinstein, *Arbitration and Intellectual Property Disputes*, paper presented at American Bar Association 14th Annual Spring Conference (Apr. 19, 2012), available at http://www.micronomics.com/articles/Arbitration_and_Intellectual_Property_Disputes.pdf.

160. Schwab, *supra* note 2.

survive. In other nations where statutes do not explicitly authorize *ex officio* enforcement, some legislative initiative may be needed to provide further options for police.

Western nations could provide internet regulations sufficient to impede the flow of infringing files from user to user over broadband networks. Considering the EU privacy directive's effects on investigations of internet users,¹⁶¹ issues of improper joinder which ended RIAA mass litigation and soon expected to end BitTorrent suits,¹⁶² and the otherwise slow and inefficient nature of DMCA-style one-at-a-time takedowns, it is unlikely that the current American model of holding users as primary infringers will ever be a solution to the internet problem. Even with a refocused approach toward commercial infringers first, jurisdiction could prove the nail in the coffin for State prosecutions as a means of radically controlling the world online.

Private individuals and organizations have the most to gain or lose in protecting IPRs, so the public sector should accommodate interests to serve justice. Where budget constraints prevent police action, community-level policy development could allow private corporations or interest groups to fund and oversee expansive seizure and enforcement operations. On the internet front, a new arbitral institution modeled after the UDRP system has been proposed,¹⁶³ and seems to be the only realistic option available for scalable enforcement online.¹⁶⁴ Theoretical antidotes for the maladies of the international IP system are abundant, but they need to be brought out of the imagination and into the real world.

VII. CONCLUSION

State parties to treaties undertake to perform treaty obligations, bearing in mind the principle of *pacta sunt servanda*.¹⁶⁵ However, there is evidence that various parties to IP treaties have not yet honored their agreements fully. Rights without remedies are neither acceptable nor appropriate, so some changes are essential to improving conditions. Recent years have witnessed much quibbling between East and West on matters related to IP infringement and protection. Somehow, at some point a popular illusion developed and was propagating claiming that either the Western approach is better than the Eastern one, or *vice versa* when in fact neither provides an adequate model

161. Council Directive 95/46/1995 O.J. (L 281) 31 (EC).

162. Sean Karunaratne, Note, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283 (2012).

163. Mark Lemley & Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

164. Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VANDERBILT J. ENT. & TECH. L. 695 (2011).

165. Vienna Convention on the Law of Treaties, *supra* note 29, at art. 26.

for the other. Both players produce and consume infringing goods. Whether Eastern or Western physical or online markets, the infringement is serious, commercial, and habitual. But where history has failed, the future should represent opportunity.

IP experts disagree on the merits of suits against individual and noncommercial infringers,¹⁶⁶ but opinions are more or less uniform on the matter of liability for commercial infringement.¹⁶⁷ Thus, our first step in taking a realistic approach is to limit suits to those against commercial infringers only. Here the American approach to online piracy is found to be problematic because internet users are considered direct infringers whereas commercial entities such as cyberlockers and file-sharing network organizations are at worst indirectly liable. This is the crux of our problem since indirect infringement cannot occur without direct infringement,¹⁶⁸ meaning websites cannot be held liable without first holding users liable. This is the fantasy of the current Western model in a nutshell: courts admit it is probably impossible to enforce rights against all direct infringers,¹⁶⁹ meaning that any enforcement will appear random and inherently unfair.¹⁷⁰ In order to maximize efficiency and implement an effective internet copyright regime in the West, new legislation is needed which considers websites and internet businesses direct infringers.

In the Eastern world, internet regulation can be as simple as blocking foreign infringing sites under national firewall programs. Physical market infringement in the Eastern developing world is the more pressing issue. Consistent with the WTO decision on IP protection in China, minor legislative changes should be implemented throughout the regions developing nations to further protect foreign IP in theory.¹⁷¹ In practice, *ex officio* enforcement in physical markets is of crucial importance. In most cases, where court and corrections costs exceed potential fines, thus making action unappealing in impoverished and underfunded districts, consistent seizure of inventory is an effective remedy. Multiple instances of inventory loss will force businesses to close while simultaneously supporting local artists, producers and computer programmers.

166. Karunaratne, *supra* note 162.

167. Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VANDERBILT J. ENT. & TECH. L. 881 (2011).

168. Religious Technology Center v. Netcom, 907 F.Supp. 1361 (N.D.Cal. 1995).

169. MGM v. Grokster, 545 U.S. 913, 930 (2005) "[I]t may be impossible to enforce rights in the protected work effectively against all direct infringers."

170. Although it has not yet been affirmed in Courts, arbitrary enforcement brings about questions of equal protection under the law. U.S. CONST. amend. XIV, § 1.

171. Moral rights need to be expanded in developing nations to include rights to object to distortion, mutilation, or modification (*droit de respect*), and rights to correct or retract a work (*droit de repentir*).

Statutes and regulations should also authorize *ex officio* action against commercial infringers.

As the region continues to develop through PRC growth and the launch of the ASEAN Economic Community,¹⁷² Taiwan and Singapore can provide models of constrained success in physical markets. Lacking a process similar to the UDRP system, trans-global cooperation may speed up the internet control process, using perhaps parts of the Chinese internet regulation. Unfortunately, the illusion that it is immoral to fully apply rule of law principles to IP protection has deep ties in the West.¹⁷³ In reality, political obstacles are likely to stall, complicate, and ultimately prevent enforcement of copyright online, thus making a private arbitral body very attractive. Commencement of dispute resolution under such a system would first require a multilateral agreement, or at least considerable political work through WIPO and ICANN, which is probably one of the main reasons for its absence today.

In summary, IPR enforcement partnerships already exist, although in reality these are more oriented toward legislative than executive and judicial branches. To consider the global system as being harmonized at this stage is something of a fantasy, or a dream, or an illusion. Enforcement and adjudication options are a nightmare for many rights holders whose keys to revenue streams are kept just out of reach. In a time of fading American hegemony alongside China's rise as a global superpower, and toward the future of increase competition in a diverse geopolitical environment, we must hold dear the importance of cooperation and pursuit of unity between hemispheres and people. Having agreed upon theoretical aspects of IPRs, the practical aspects can be settled, but only through hard work, diligence, and plenty of patience. New infrastructure is probably needed internationally, and new approaches need to be developed domestically. In the end, innovation and creativity in the legal field itself will likely be the path along which individuals and states can reduce, prevent, and react to crimes and abuses perpetrated by persistent, trendy intellectual property thieves.

Stealing a book may have at one time been an elegant offense, but stealing whole libraries is truly graceless.

172. AEC scheduled to start December 31, 2015. *AEC 2015 Remains on Track and Top Priority*, ASEAN (Sept. 12, 2012), <http://www.asean.org/news/asean-secretariat-news/item/aec-2015-remains-on-track-and-top-priority>.

173. Opponents of ACTA argued on human rights grounds. Robert Ellis, *Conflicts at the Intersection of ACTA & Human Rights: How the Anti-Counterfeiting Trade Agreement Violates the Right to Take Part in Cultural Life*, Am. Uni. INTELLECTUAL PROPERTY BRIEF, Spring 2011, at 65. The American Civil Liberties Union similarly argued against the Stop Online Piracy Act (H.R. 3261). Michael Macleod-Ball, *Urge Congress to Stop SOPA!*, ACLU (Dec. 14, 2011), <https://www.aclu.org/blog/free-speech/urge-congress-stop-sopa>.

APPENDIX

Age: _____ Nationality: _____ Sex: Male/Female
Occupation/Job: _____ Highest Education Completed: _____
Religion: _____ First Language: _____

Please answer the following questions/items with a number 0-5 where:

0 = No opinion 1 = lowest 2 = low 3 = medium
4 = high 5 = highest

1. How much of a problem are piracy/counterfeiting of goods in this country? _____
2. How much of a problem are piracy/counterfeiting of goods in ASEAN? _____
3. What level of appeal do knock-off goods have to foreign tourists? _____
4. Estimate the level of purchases of knock-off goods by foreign tourists. _____
5. Estimate the threat level that knock-off goods organizations pose to the public. _____
6. Estimate the level of losses to companies that shanzhai/knock-offs create. _____
7. To what level do non-genuine goods threaten jobs and economies? _____
8. What is the quality level of knock-off goods? _____

Please circle one answer or write in the blank:

9. Why do consumers purchase pirated/counterfeited/knock-off goods?
 - a. Lower Price
 - b. Anti-corporate beliefs
 - c. Support lower class people
 - d. Destabilize markets
 - e. Convenience
 - f. No opinion
 - g. _____

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東西方執行智慧財產權 的夥伴關係：夢想與現實

Adam R. Tanielian

摘 要

智慧財產權（IPRs）對經濟運作至關重要。幾乎所有國家均簽署條約與制定法規以支持智慧財產權。一定程度的一致性在立法部門可被發現，但行政與司法部門的行動則因文化、傳統與國家而有所不同。在網路與實體市場中的盜版與仿冒遍及國內外，使得新的強化執行夥伴關係成為必須。絕大部分對此議題的研究聚焦在東方產品與實體市場的仿冒而非西方消費與網路盜版。本文處理智慧財產權在東西方國家的執行問題。一個關於西方消費者的研究在一個泰國實體市場中進行，本文並調查了有關盜版的相關網站。賽局理論幫助分析智財權保護的環境。一個更現實的國際智財權執行途徑被提倡，此中包含了當然的行動與一個和統一網域名稱爭端解決政策相似的新網路著作權爭端解決機制。

關鍵詞：智慧財產權、國際法、盜版與仿冒、網路