



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

2003

Four Common Misconceptions About Copyright Piracy

Peter K. Yu

peter_yu@msn.com

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>

 Part of the [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 Loy. L.A. Int'l & Comp. L. Rev. 127 (2003).

Available at: <https://scholarship.law.tamu.edu/facscholar/506>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

Four Common Misconceptions About Copyright Piracy

PETER K. YU*

I. INTRODUCTION

Copyright piracy is one of the most difficult, yet important, transnational problems in the twenty-first century. In 2002 alone, the United States lost more than \$10 billion in copyright piracy abroad.¹ Given the intertwining relationship between the copyright industries and the U.S. economy,² these figures reveal the unlikely truth of the piracy problem. In fact, the International Federation of the Phonographic Industry (IFPI) pointed out recently that music piracy threatened 600,000 jobs in the European music industry.³ If piracy continues at the current level, it would

* Copyright © 2003 Peter K. Yu. All Rights Reserved. Assistant Professor of Law & Director, Intellectual Property & Communications Law Program, Michigan State University-DCL College of Law; Adjunct Professor of Telecommunication, Information Studies and Media & Faculty Associate, James H. and Mary B. Quello Center for Telecommunication Management & Law, College of Communication Arts & Sciences, Michigan State University; Research Associate, Programme in Comparative Media Law & Policy, Centre for Socio-Legal Studies, University of Oxford. This Article is adapted from Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331 (2003). The Author would like to thank Larry Helfer for inviting him to participate in the International Law Weekend—West Conference at Loyola Law School in Los Angeles.

1. International Intellectual Property Alliance, USTR 2003 “Special 301” Decisions on Intellectual Property, at http://www.iipa.com/pdf/2003_June_USTR_LossUpd.pdf (June 24, 2003).

2. STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT 3-5 (2002) (providing statistics that demonstrate the significance of U.S. copyright industries on U.S. jobs and revenue growth).

3. Simon Beavis, *Record Firms Threaten Big Employers with Action to Combat Piracy*, INDEP., Jan. 21, 2003, at 19 (quoting Jay Berman, Chairman and CEO of International Federation of the Phonographic Industry).

not be surprising to find a similar number of American jobs jeopardized, if not more.

Although legal literature has discussed copyright piracy extensively, commentators rarely offer a “grand unified theory” on this global problem. Rather, they give nuanced analyses, discussing the many aspects of the problem—political, social, economic, cultural, and historical. For example, when commentators talk about piracy in China, they discuss the Confucian culture,⁴ the Communist regime,⁵ the paranoia and xenophobia of the Chinese leaders,⁶ the country’s censorship policies,⁷ its lack of rule of law,⁸

4. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 57 (1995) [hereinafter ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE*] (discussing the tension between Confucianism and intellectual property protection in China); Patrick H. Hu, “Mickey Mouse” in China: *Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT’L L.J. 81, 104 (1996) (stating that “many [Chinese] consider copying or imitation ‘acceptable’ and a ‘time-honored learning process’”); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1, 16-21 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing Confucianism and cultural practices in China).

5. See ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE*, *supra* note 4, at 64 (discussing how the Cultural Revolution and the various class struggles have made the Chinese “unwilling to acknowledge their personal role in [creative and] inventive activity”); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 37-38 (1998) (describing how “owning property is tantamount to a sin” in a socialist society); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 21-22 (discussing the Socialist economic system in China).

6. See ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE*, *supra* note 4, at 68 (stating that “[o]pponents of a patent system also expressed concern about the Western ‘literary-industrial complex,’ which some believed might . . . stifle the development of [Chinese] indigenous science and so leave the nation dependent on the outside world economically, scientifically and militarily.”); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 22-28 (discussing the self-strengthening worldview, skepticism of Western institutions, and the xenophobic and nationalist sentiments in China).

7. See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 28-32 (discussing China’s censorship and information control policy). For discussions of the regulation of media and audiovisual products in China, see generally Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, in *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA* 127 (Mary L. Riley ed., 1997); Mary L. Riley, *The Regulation of the Media in China*, in *CHINESE INTELLECTUAL PROPERTY: LAW AND PRACTICE* 355 (Mark A. Cohen et al. eds., 1999).

8. For discussions of the development of the rule of law in China, see generally RONALD C. BROWN, *UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS* (1997); *CHINA’S LEGAL REFORMS* (Stanley Lubman ed., 1996); *DOMESTIC LAW REFORMS IN POST-MAO CHINA* (Pitman B. Potter ed., 1994); RONALD C. KEITH, *CHINA’S STRUGGLE FOR THE RULE OF LAW* (1994); *THE LIMITS OF THE RULE OF LAW IN CHINA* (Karen G. Turner et al. eds., 2000); MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* (1999); Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities, and Strategy*, 39 AM. J. COMP. L. 293 (1991).

and its ineffective judicial system.⁹ Similarly, when commentators talk about piracy on the Internet, they discuss the hacker culture,¹⁰ in particular the hackers' motto, "Information wants to be free,"¹¹ as compared to the copyright industries' motto, "Information wants to be paid." These commentators also note the lower cost and increasing speed of reproduction¹² and the Internet's structural resistance to government regulation.¹³

Even for the few who take a historical interest in pre-industrial America, those scholars talk about the need of the young republic to have access to books and literature without paying exorbitant royalties to foreign—primarily British and French—authors and publishers. They also explain how the United States's status as a less developed country would not make copyright protection of foreign authors cost-effective. Some even

9. See Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 16 (1996) (stating that "China's ineffective legal system remains the major impediment to protection of intellectual property rights"); see also BROWN, *supra* note 8, at 97-99 (discussing China's ineffective judicial system).

10. See generally PEKKA HIMANEN, *THE HACKER ETHIC AND THE SPIRIT OF THE INFORMATION AGE* (2001) (discussing the hacker ethic and culture); STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984) (discussing the hacker philosophy of sharing and openness and examining the evolution of the hacker culture from the 1950s to 1980s).

11. Steward Brand was often credited for coining the phrase. David Stipp, *The Electric Kool-Aid Management Consultant*, *FORTUNE*, Oct. 16, 1995, at 160, 166 (characterizing Stewart Brand's phrase "information wants to be free" as the "cyberhacker rallying cry").

12. See I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1005 (1994) ("Photocopy machines at one time threatened to turn every individual into a mass publisher, but cyberspace seems to have achieved that distinction in a way that photocopying never really did."); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264 (2002) (noting that "digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the Internet individuals may distribute those digital works around the world at the speed of light."); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1808-33 (1995) (arguing that the production and reproduction costs of information have been greatly reduced by the Internet).

13. See PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 100* (2001) (noting that "officials normally find it far more difficult to silence critical voices on the new media compared with their ability to regulate and control the TV airwaves"); Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 448 (2000) (noting that the "rudderless, decentralized, and transnational" nature of the Internet architecture has made regulation of the Internet inherently difficult); A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in *BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE* 129, 140-47 (Brian Kahin & Charles Nesson eds., 1997) (discussing the difficulties of censorship on the Internet); David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1373-74 (1996) (describing how efforts to control the flow of electronic information across physical borders will likely fail).

defend the country's lack of protection by noting a similar lack of protection abroad at that time. They note that during the late eighteenth and early nineteenth centuries, "international copyright protection was the exception rather than the rule."¹⁴

These nuanced discussions, however, are missing in the current public debate, which tends to oversimplify the complicated picture to capture the readers' emotion and to generate support for proposed legislative and executive actions. The debate often exaggerates a particular aspect of the piracy problem or offers an abbreviated, easy-to-understand, yet misleading version of the story. Such oversimplification is dangerous, for it creates misconceptions that confuse the public as to the cause and extent of the problem and misleads policymakers into finding solutions that fail to attack the crux of the piracy problem.

In light of this shortcoming, Part II of this Article challenges four common misconceptions about copyright piracy: (1) copyright piracy is merely a cultural problem, (2) copyright piracy is primarily a development issue, (3) copyright piracy is a past phenomenon for technologically-advanced countries, and (4) copyright piracy is a necessary byproduct of authoritarian rule. Part III attempts to reconfigure the misguided public debate on copyright piracy by underscoring the need to focus on the *copyright divide*—the gap between those who have stakes in the copyright regime and those who do not. Part IV concludes by warning that the United States might not be able to eradicate the piracy problem, unless its policymakers are willing to change the lawmaking process by taking into account the interests of both the stakeholders and nonstakeholders.

14. Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968) [hereinafter Ringer, *The Role of the United States in International Copyright*]; see also EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 231 (2000) (noting that "the copyright law of many other countries at that time was not any more protective of the rights of foreign authors" than the First U.S. Copyright Act); Henry G. Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 43 (1953) ("Until a century ago, the general rule, with a few standout exceptions, was that domestic works were eligible for protection and foreign works were not." (citation omitted)); Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 12 (1986) (noting that piracy activities "had been a long-established feature of European social and cultural life").

II. THE FOUR COMMON MISCONCEPTIONS

A. *Misconception #1: Copyright Piracy Is Merely a Cultural Problem*

When commentators examine the piracy problem in “foreign” communities—including the Internet¹⁵—they often talk about the cultural differences that differentiate the community from a traditional Western society. For example, they discuss the classic Greek and Roman beliefs that works were created through “inspiration by the muses,”¹⁶ the Confucian underpinnings of Chinese society,¹⁷ the familial and community values embodied in Islamic laws,¹⁸ and the hacker culture that believes “Information wants to be free.”¹⁹ Based on these analyses, copyright piracy is sometimes characterized as a cultural problem.

While such characterization undoubtedly highlights our differences, it is a mistake to assume that culture is the *only*, or even *primary*, cause of the piracy problem in these communities. After all, communitarian philosophies are not unique to the Greeks, Romans, Chinese, Muslims, and hackers. These philosophies are found in civilizations around the world. It is just as misleading to argue that extensive copyright piracy occurs in

15. As Professor Post commented about the Napster situation:

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

David G. Post, *His Napster Voice*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 107, 121 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2002).

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

17. See ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE*, *supra* note 4, at 57; Hu, *supra* note 4, at 104; Yu, *Piracy, Prejudice, and Perspective*, *supra* note 4, at 16-21.

18. See Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”?* A *Lockean, Confucian, and Islamic Comparison*, 2 *ILSA J. INT’L & COMP. L.* 307, 357 (1996); *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 66 (Lise Buranen & Alice M. Roy eds., 1999) (discussing how some teachers attribute plagiarism by Middle Eastern students to the emphasis of community and family values in Middle Eastern cultures).

19. See HIMANEN, *supra* note 10; LEVY, *supra* note 10.

non-Western communities by virtue of their cultural roots as to argue that extensive MP3 piracy occurs in Western societies because of the communitarian underpinnings in Judeo-Christian teachings.

Cultural barriers may make it difficult for copyright laws to emerge or to develop. A culture-based analysis may therefore provide insight into a community where the public has limited understanding of these different cultures. A different or even copying culture, however, does not necessarily result in extensive copyright piracy. For example, Professor William Alford pointed out that China's Confucian culture militated against copyright protection in that it did not allow intellectual property protection to take root.²⁰ Yet, this non-Western culture did not prevent the adoption of laws aimed at protecting intellectual property rights in Chinese society.²¹ Indeed, there is strong compatibility between copyright and Confucianism,²² just as there is between Western human rights principles and Confucianism.²³

Although many early members of the Internet community subscribe to the hacker culture and the motto, "Information wants to be free," there is no evidence that these members would steal or undertake other illegal acts to free up information. As Professor Jessica Litman pointed out:

20. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE, *supra* note 4, at 57.

21. See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 4-15 (discussing the imposition of intellectual property rights on China by Western countries).

22. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 223-25 (2000) [hereinafter Yu, *From Pirates to Partners*] (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 76-77. Compare XIANFA art. 20 (1982) ("The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions."), and *id.* art. 47 ("The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."), with U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

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

People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the stuff the copyright law says. . . . People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact says, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads.²⁴

So far, copyright law “doesn't stick in their heads” because it is long, wordy, complex, cumbersome, counterintuitive, and internally inconsistent.²⁵ The law today is drafted by copyright lawyers, who primarily represent stakeholders, negotiated through a series of private meetings.²⁶ Compared to the commandment that says “Thou shalt not steal” or “Thou shalt not kill,” current copyright law is very difficult and time-consuming to understand, even for sophisticated copyright lawyers and veteran intellectual property scholars.²⁷ The situation may change, however, if the law

24. Jessica Litman, *Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 238-39 (1997) [hereinafter Litman, *Copyright Noncompliance*]; see also Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996) (“Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective.”); Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 (“We take copyright violations very seriously, but when it comes to copying a disk . . . most Chinese people don't see what's wrong.” (quoting Xu Guoqi, a senior official in Shanghai's Industrial and Commercial Administration)).

25. JESSICA LITMAN, DIGITAL COPYRIGHT 73 (2001) [hereinafter LITMAN, DIGITAL COPYRIGHT]. Ironically, the Clinton Administration claimed the passage of the Digital Millennium Copyright Act as the success of its Framework for Global Electronic Commerce, which called for the creation of “predictable, minimalist, consistent, and simple” rules. WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 3 (1997), available at <http://www.iitf.nist.gov/elecomm/ecom.htm>; see also Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 524 (1999) (supporting the notion that copyright legislation is unnecessarily complex).

26. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 880-82 (1987); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 299-305 (1989).

27. Jessica Litman pointed out:

If ordinary people are to see copyrights as equivalent to tangible property, and accord copyright rules the respect they give to other property rules, then we would need, at a minimum, to teach them the rules that govern intellectual property when we teach them the rules that govern other personal property, which is to say in elementary school. The problem, though, is that our current copyright statute could not be taught in elementary school, because elementary

becomes shorter, intuitive, and easier to follow. Once the public begins to understand and comply with copyright law, stronger copyright protection will follow and the piracy problem will be significantly reduced.

*B. Misconception #2: Copyright Piracy Is
Primarily a Development Issue*

Politicians and commentators often link the piracy problem to the development debate. Southern politicians successfully earn sympathy from the public by linking piracy to their economic plight, their citizenry's lack of basic necessities (such as clean drinking water, food, shelter, electricity, schools, and basic health care), and the remaining impact of their unfortunate colonial past. Northern politicians strongly oppose such attempts to use piracy as a bargaining chip to enhance development agendas. Nevertheless, to correctly understand the piracy problem, it is important to distill these emotional and powerful arguments from the existing copyright piracy debate.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) includes transitional provisions that delay implementation of the Agreement in transitional and less developed countries.²⁸ The TRIPs Agreement also requires developed countries to provide incentives for businesses and institutions to promote and encourage technology transfer to least developed countries in an effort to create "a sound and viable technological base" in the beneficiary countries.²⁹

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

LITMAN, DIGITAL COPYRIGHT, *supra* note 25, at 72. *But see* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991):

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

28. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 65(1)-(3), 66(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1197, 1222 (1994).

29. *Id.* art. 66(1).

However, the TRIPs Agreement is *silent* on the cost-effectiveness of intellectual property protection in less developed countries.

The public debate tends to assume that the TRIPs Agreement reflects universal intellectual property standards. This assumption is troubling, if not completely wrong. It ignores the fact that the Agreement may favor developed countries at the expense of less developed countries.³⁰ Countries differ in terms of their levels of wealth, economic structures, technological capabilities, political systems, and cultural traditions. They have different needs and aspirations and require different intellectual property systems. Had the level of intellectual property protection been adjusted to reflect the countries' needs, interests, and conditions, those transitional provisions in the TRIPs Agreement might not be needed.³¹

30. Commentators discuss extensively the coercive nature of the TRIPs Agreement. See, e.g., Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 112 (1995) (examining the implications of the TRIPs Agreement "as a form of passive coercion"); Hamilton, *supra* note 24, at 614 ("Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPS attempts to remake international copyright law in the image of Western copyright law."); Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 305, 315-16 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that the TRIPs Agreement "universalize[s] the U.S. system of intellectual property rights"). Some even consider the Agreement "imperialistic." Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, in INTELLECTUAL PROPERTY AND ETHICS 195, 207 (Lionel Bently & Spyros M. Maniatis eds., 1998) (discussing the United States's insistence that China adopt international copyright norms); Hamilton, *supra* note 24, at 614, 617 (contending that the TRIPs Agreement could become "one of the most effective vehicles of Western imperialism in history" and equating the TRIPs Agreement with "freedom imperialism"); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 813 (1989) ("Imposition of foreign legal standards on unwilling states in the name of 'harmonization' remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism." (citing 1 STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975)); SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 184 (1996) (noting that "[w]hat is universalism to the West is imperialism to the rest."); Susan Strange, *Cave! hic dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES 340 (Stephen D. Krasner ed., 1983) (arguing that the American policy is a form of "nonterritorial imperialism").

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

The presumptions that stronger intellectual property protection will benefit less developed countries and that a universalized intellectual property regime would maximize global welfare are questionable.³² Equally doubtful is the assumption that the current intellectual property system strikes the proper balance “between incentives to future production, the free flow of information and the preservation of the public domain in the interest of potential future creators.”³³ As Professor Jerome Reichman noted, “policymakers concerned to promote investment in important new technologies often overstate the supposed benefits of specific intellectual property regimes while ignoring the negative economic functions of these regimes in relation to the complementary operations of competition law generally.”³⁴

Moreover, as we learn from the recent debate on copyright term extension,³⁵ many Americans disagree on the proper balance between intellectual property protection and the access to information “needed to spur further innovation and ensure the citizenry’s full participation in our democratic polity.”³⁶ The European Union and the United States, the leading advocates of strong international intellectual property protection, also disagree on a large variety of copyright issues, such as database protection, the protection of moral rights, fair use, the first sale doctrine, the

32. See Yu, *From Pirates to Partners*, *supra* note 22, at 234.

33. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 124 (1996); see Reichman, *From Free Riders to Fair Followers*, *supra* note 31, at 24 (arguing that policymakers in many developed countries take the existing levels of innovative strength for granted and mistakenly promote protectionism).

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

35. For discussions of copyright term extension, see generally EXTENDING MICKEY'S LIFE: *ELDRED V. ASHCROFT* AND THE COPYRIGHT TERM EXTENSION DEBATE (Peter K. Yu ed., forthcoming 2004); Symposium, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 1 (2002).

36. William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 22 (1994) [hereinafter Alford, *How Theory Does—and Does Not—Matter*]; see Dennis S. Karjala, *Copyright, Computer Software, and the New Protectionism*, 28 JURIMETRICS J. 33, 35 (1987) (arguing that policymakers and the judiciary should not automatically apply the existing copyright paradigm to computer software); John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 86 (arguing against the need for copyright in digital media).

work-made-for-hire arrangement, and protection against private copying in the digital environment.³⁷

In sum, it is misleading to argue that copyright piracy is primarily a development issue. Although copyright piracy occurs extensively in less developed countries, there is little evidence that the lack of economic development is the primary cause of extensive copyright piracy. Rather, the economic plight of these countries strongly suggests the need for diversity and sensitivity in developing the international intellectual property regime.³⁸

37. See Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 625-26 (2002).

38. See ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES* 47 (1996) (arguing that less developed countries may be able to modernize if “they manage to grasp the internal dynamic that operates in each of them and devise appropriate economic and technological policies, without neglecting social and political aspects.”); *id.* at 98-142 (outlining a proposal for an intellectual property system in non-industrial countries); LESTER C. THURLOW, *BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* 128 (1999) (arguing that countries with different levels of economic development desire, need, and should have different intellectual property systems); Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333 (2000) (arguing that countries must “agree to disagree” during their negotiation of a multilateral intellectual property regime); Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT’L L. & POL. 109, 129 (1997) (“Differentiation . . . looks desirable in that it permits countries in the Latin tradition to retain a system that responds to their own cultural perceptions of creation and protects the moral and economic rights of all interested parties.”); Claudio Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regimes*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 89 (Mitchel B. Wallerstein et al. eds., 1993) (arguing that countries should tailor their intellectual property system by taking into account their economic needs, productive and research capabilities, and institutional and budgetary constraints); Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 89 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (examining whether intellectual property protection is of net benefit to the less developed countries); Oddi, *supra* note 31, at 866-74 (outlining a proposal for a patent system in less developed countries); Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473 (1999) (explaining how to restructure the patent administration in ways that can maximize the contribution of inventors to economic growth and sustained development); Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 68, 68 (Mitchel B. Wallerstein et al. eds., 1993) (“The first characteristic of the uniform system being proposed is that the specific intellectual property systems of individual countries need not be identical.”); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in *INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM* 155, 156 (George R. Stewart et al. eds., 1994) (“[A] truly successful IP system must be culturally-specific and responsive to the different economic and social realities of each country.”); *id.* at 171 (“[I]t cannot be taken for

In fact, less developed countries, however poor they are, have strong incentives to develop a strong, robust, and dynamic copyright regime. Such a regime will promote modernization and economic development, attract foreign investment, and create new jobs. It will also facilitate transfer of knowledge and technology, promote indigenous authorship and creation, and generate considerable tax revenues for the country.³⁹

C. Misconception #3: Copyright Piracy Is a Past Phenomenon for Technologically-Advanced Countries

In the late eighteenth and early nineteenth centuries, the United States, along with Belgium and the Netherlands,⁴⁰ were the major pirating nations in the world.⁴¹ Section 5 of the 1790 Copyright Act stated explicitly that:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.⁴²

In 1891, more than a century later, Congress finally enacted the Chace Act,⁴³ granting copyright protection to foreign authors from countries that the President proclaimed had offered Americans reciprocal copyright protection.⁴⁴ As Barbara Ringer,

granted that a Western IP system will be either beneficial to or successful in other countries with different cultures.”).

39. See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 62-64.

40. 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY: INTERNATIONAL COPYRIGHT AND INTER-AMERICAN COPYRIGHT* 27 (1938) (describing Belgium and the Netherlands as “the two principal ‘hotbeds’ of French piracies”).

41. BOYLE, *supra* note 33, at 2-3 (noting that the United States used to be a major pirating nation in the late eighteenth and early nineteenth centuries); see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 146 (1997) [hereinafter ALFORD, *Making the World Safe for What?*] (stating that the United States has been “notorious for its singular” and “cavalier attitude toward the intellectual property of foreigners” during the time when it was a less developed country); Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255 (1997) (stating that the United States failed to observe foreign intellectual property rights during its formative period and did not sign any international intellectual property agreements until the end of the nineteenth century).

42. Act of May 31, 1790, ch. 15, § 5, 1 Stat. 124 (1850) (emphasis added).

43. International Copyright Act of 1891 (Chace Act), ch. 565, 26 Stat. 1106 (1891) (repealed by Copyright Act of 1909).

44. *Id.* Section 13 provides:

then-Assistant Register of Copyrights, summarized in the late 1960s:

Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest.⁴⁵

Although commentators generally acknowledge the United States's shameful past as a major copyright pirate, they usually dismiss this unfortunate piece of history by pointing out how times have changed and why the United States's past conduct is irrelevant. They explain that the country's unfortunate past as a pirating nation reflected the zeitgeist of that era, rather than evidenced piracy as a natural—and legitimate—course of development for a less developed country.⁴⁶ After all, it is unfair and unappealing to argue that the United States should stop complaining about slavery and human trafficking today because of its prior acceptance of such inhumane practices.

While this “past phenomenon” argument worked well over the last few decades, recent developments concerning MP3 piracy in the United States significantly weakened the argument.⁴⁷ In this regard, the United States is not much different from a less developed country or from itself two centuries ago. A recent

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

Id. §13. “This system [of Presidential proclamations] has proved cumbersome and ineffective in comparison with the simplicity, certainty, and other advantages offered by multilateral arrangements.” Ringer, *The Role of the United States in International Copyright*, *supra* note 14, at 1058; *see also* Roger C. Dixon, *Universal Copyright Convention and United States Bilateral Copyright Arrangements*, in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 113, 118-23 (Theodore R. Kupferman & Matthew Foner eds., 1955) (discussing the advantages of the Universal Copyright Convention over the system of bilateral proclamation arrangements).

45. Ringer, *The Role of the United States in International Copyright*, *supra* note 14, at 1051.

46. *But see* ENDESHAW, *supra* note 38, at 120 (noting that “[h]istorically, each of the advanced countries today was determined to industrialize first before either ‘opening up’ to forces and interests that they might previously have dreaded and before calling for a stronger international IP system”).

47. *See* Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 374-401 (2003) [hereinafter Yu, *The Copyright Divide*] (discussing music piracy in twenty-first-century cyberspace).

Business Software Alliance study indicated that the U.S. software industry lost \$1.96 billion in the United States alone in 2002, an amount slightly lower than the total retail software revenues lost in China during the same period.⁴⁸ The study also noted that pirated products constituted nearly one-quarter of all computer software used in the United States.⁴⁹ While one understandably might be skeptical of figures supplied by a self-interested industry, few would deny that there is a serious piracy problem on the Internet. Some might even wonder whether the United States will regain its notoriety as the biggest pirate in the world given its leadership in developing cutting-edge reproduction technologies and having the largest Internet population in the world.

D. Misconception #4: Copyright Piracy Is a Necessary Byproduct of Authoritarian Rule

Copyright protection goes hand in hand with freedom of expression. Societies that do not respect individual rights are unlikely to tolerate private expressions or expressive activities.⁵⁰ Thus, authoritarian societies have limited needs for an effective copyright system, as they do not need to provide incentives for people to express themselves. Indeed, commentators note “an intimate link” between individual rights and a copyright system that values and promotes individual creativity.⁵¹ For example,

48. BUSINESS SOFTWARE ALLIANCE, EIGHTH ANNUAL BSA GLOBAL SOFTWARE PIRACY STUDY: TRENDS IN SOFTWARE PIRACY 1994-2002, at 9-10 (2003), available at <http://global.bsa.org/globalstudy/2003GSPS.pdf> [hereinafter BSA GLOBAL SOFTWARE PIRACY STUDY]; see also \$22 Million of Alleged Counterfeit Microsoft Software Seized in Pennsylvania; State Troopers, Following Leads About Stolen Laptops, Uncover Huge Worldwide Counterfeiting Operation, PR NEWswire, June 12, 2000, LEXIS, News Library, Allnews File (reporting on the investigation and discovery of a significant counterfeit distribution operation in Harrisburg, Pennsylvania).

49. BSA GLOBAL SOFTWARE PIRACY STUDY, *supra* note 48, at 7 (stating that twenty-three percent of all software in use in the United States is pirated).

50. See Alford, *How Theory Does—and Does Not—Matter*, *supra* note 36, at 17-18; see also Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT'L & COMP. L. 1, 6-7 (1997) (attributing the delay of implementing copyright law to “China’s concern about the control of publications”). As Dean Garten explained:

If foreign governments do not seek to protect basic human rights, they are more likely to ignore or circumvent other basic laws of great commercial relevance, such as those that protect intellectual property rights, combat corruption, and mandate the disclosure of critical financial information. The arrogance of governments that oppress their people transfers easily to other areas.

Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., May/June 1997, at 67, 75.

51. See Hamilton, *supra* note 24, at 618; Barbara Ringer, *Two Hundred Years of American Copyright Law*, in TWO HUNDRED YEARS OF ENGLISH AND AMERICAN

Professor Marci Hamilton noted that one must accept at least some version of individualism, reward, and commodification to believe in intellectual property rights.⁵²

Consider, for example, China, which has been widely criticized for its lack of intellectual property protection and its authoritarian rule. China's government strictly controls the dissemination of information and distribution of media products⁵³ that it considers instruments of political indoctrination and mass mobilization.⁵⁴ Today, the media and publishing industries remain the most heavily regulated businesses in the country. One can find severe restrictions on imported films,⁵⁵ books and audiovisual products,⁵⁶ and the Internet.⁵⁷ Due to these restrictions, many media products are unavailable despite heavy demand. Consumers therefore have to settle for black market products or pirated goods, which are often inferior to, and sometimes are

PATENT, TRADEMARK & COPYRIGHT LAW 117, 118 (1977) ("We know, empirically, that strong copyright systems are characteristic of relatively free societies.").

52. See Hamilton, *supra* note 24, at 617 ("Individualism, as captured in the Western intellectual property system, is the *sine qua non* for a society to recognize and honor personal liberty.").

53. YUEZHI ZHAO, *MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE* 19 (1998) (noting that the Chinese Communist Party "exercised strict control over its publications from the very beginning"); see Shaozhi Su, *Chinese Communist Ideology and Media Control*, in *CHINA'S MEDIA, MEDIA'S CHINA* 75, 77 (Chin-Chuan Lee ed., 1994) (noting that the Chinese Communist Party "pays utmost attention to ideology"); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 28-29. *But see generally* DANIEL C. LYNCH, *AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND "THOUGHT WORK" IN REFORMED CHINA* (1999) (describing how a combination of property rights reforms, administrative fragmentation, and technological advance has caused the Chinese authorities to lose some of its control over propagandistic communication).

54. ZHAO, *supra* note 53, at 2; Su, *supra* note 53, at 77 (noting that media not only has the ability to create an atmosphere conducive to political development, but also can help mobilize the masses and foster political struggle).

55. See generally Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291-96 (1999) (discussing the importation and censorship of non-Chinese films in China).

56. See Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, in *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA* 127, 148 (Mary L. Riley ed., 1997); Mary L. Riley, *The Regulation of the Media in China*, in *CHINESE INTELLECTUAL PROPERTY*, *supra* note 7, at 355, 377.

57. See Nina Hachigian, *China's Cyber-Strategy*, FOREIGN AFF., Mar./Apr. 2001, at 118; Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate Between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 (1999); Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, THE COMPUTER & INTERNET LAW, Jan. 2001, at 12; Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, GIGALAW.COM, at <http://www.gigalaw.com/articles/2001/you-2001-03-p1.html> (Mar. 2001) (discussing content regulations in the Chinese Internet Industry).

indistinguishable from, the genuine products.⁵⁸ As the Chinese market becomes saturated with infringing substitutes, foreign manufacturers and distributors have a difficult time entering the market, even if the restrictions are removed or relaxed.⁵⁹

Under this theory, government censorship arguably promotes piracy. As one commentator acknowledged:

It is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of “The Lion King”—the factory managers would be sharing a cell with other dissidents in a heartbeat.⁶⁰

However, authoritarian rule is a double-edged sword and can be effective in eradicating social ills. In the early 1990s, Chinese authorities, to the dismay of human rights advocates, enlisted help from some of their toughest law enforcers to clean up pirate factories.⁶¹ To create a deterrent effect and demonstrate their eagerness to eradicate piracy to the West, the Chinese authorities imposed the death penalty and life imprisonment on infringers in severe cases.⁶²

58. PETER K. YU, THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 24 (*Benjamin N. Cardozo School of Law, OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY NO. 11, 2002*); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 31-32.

59. As one commentator explained:

If the Chinese more fully relaxed or lifted barriers to market participation by foreign [intellectual property rights] owners, those foreign owners could sell their own goods in China and thereby displace, at least to some extent, pirate products that now have Chinese markets to themselves. Moreover, absent such barriers, some U.S. producers could both sell their “authentic” products in the Chinese market, and also monitor, if not police, infringement themselves on an in-country basis. Such market access adjustments would have application in a number of areas.

Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1105 (1996).

60. James Shinn, *The China Crunch; Three Crises Loom in the Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1. *But see* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 4-5 (2000) (“[T]here are real political and social costs associated with any serious crackdown on a problem as massive as counterfeiting. Overcoming local protectionism will require the expenditure of considerable political capital and divert limited resources from China's myriad other pressing problems.”).

61. *See* ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE, *supra* note 4, at 143.

62. *See id.* at 91 (stating that China has imposed the death penalty on at least four individuals, life sentences on no fewer than five others, and imprisonment on some 500 people for trademark violations); Tom Korski, *China Sentences Three to Life in Prison for CD Piracy in Harshes Sanction So Far*, PAT. TRADEMARK & COPYRIGHT L. DAILY (BNA), at D-2 (Dec. 11, 1997).

Commentators have expressed concerns over the deterioration of intellectual property protection after China's accession to the World Trade Organization (WTO). In the post-WTO accession environment, China can no longer use traditional barriers and measures to protect its economy. For example, restrictions on export privileges will be greatly reduced. As a result, pirates and counterfeiters may trade more aggressively with countries that have strong markets for low-priced counterfeit goods, such as Southeast Asia and Eastern Europe.⁶³ Thus, although the country has fewer restrictions and barriers because of its entry to the WTO, China's intellectual property protection may not improve.

III. RECONFIGURING THE PUBLIC DEBATE

While it is important to recognize and understand the common misconceptions about copyright piracy, it is more important to put piracy in perspective. To help reconfigure the existing copyright piracy debate, this Article introduces a new construct called the "copyright divide."⁶⁴

A. Understanding the Copyright Divide

The copyright divide is the gap between those who have stakes in the copyright regime and those who do not. The stakeholders are eager to protect what they have under the existing regime. They not only consider piracy annoying, but see it as theft. By contrast, nonstakeholders neither understand copyright laws nor benefit from the regime. Nonstakeholders consider piracy fair, acceptable, and logical. Some of them even perceive piracy as a market-correction mechanism that helps put stakeholders in their rightful position. To these people, piracy is a safeguard that helps prevent the powerful from dominating their less powerful counterparts.

Using this construct, piracy therefore can be seen as a battle between stakeholders and nonstakeholders over the change and retention of the status quo. Unless the nonstakeholders understand that copyright needs to be protected or until they become stakeholders or potential stakeholders, they will not abide by copyright laws or consent to stronger copyright protection.

Stakeholders want to protect what they have, while nonstakeholders are eager to enlarge their share to become

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

64. See generally Yu, *The Copyright Divide*, *supra* note 47.

stakeholders. However, not everybody steals or uses illegal means to enlarge his or her share. Most people do so only when they do not understand the law or when they do not believe in the system—for example, when they perceive the system as grossly unfair.⁶⁵ To help bridge the copyright divide, this Article proposes four areas on which policymakers, government leaders, intergovernmental organization officials, and industry executives can focus their remedial efforts.⁶⁶

First, policymakers must educate nonstakeholders about the copyright system.⁶⁷ They need to make nonstakeholders understand what copyright is, how it is protected, and why they need to protect such property. Policymakers also need to show nonstakeholders the benefits of copyright protection—how such protection can help them and how the lack thereof can hurt them.

An example of such educational material is the controversial “just say yes” to licensing campaign outlined in the Information Infrastructure Task Force White Paper released by the Clinton administration.⁶⁸ As the White Paper explained:

Certain core concepts should be introduced at the elementary school level—at least during initial instructions on computers or the Internet, but perhaps even before such instruction. For example, the concepts of property and ownership are easily explained to children because they can relate to the underlying notions of property—what is “mine” versus what is “not mine,” just as they do for a jacket, a ball, or a pencil.⁶⁹

65. See Litman, *Copyright Noncompliance*, *supra* note 24, at 238-39; Hamilton, *supra* note 24, at 616 (“Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective.”); Faison, *supra* note 24 (“We take copyright violations very seriously, but when it comes to copying a disk, most Chinese people don’t see what’s wrong.” (quoting Xu Guoji, a senior official in Shanghai’s Industrial and Commercial Administration)).

66. The examples in this Part focus primarily on piracy problems in less developed countries. For a discussion on how the entertainment industry can stem the Internet piracy problem, see Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 331, 401-37 (2003).

67. See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 16-17* (2000) [hereinafter *THE DIGITAL DILEMMA*] (“[T]he public welfare would be well served by a program of education explaining why respect for copyright is beneficial for society as a whole . . . and detailing both the privileges and limitations of copyright protection.”).

68. INFORMATION INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 208* (1995) (describing the “just say yes” to licensing campaign).

69. *Id.* at 205.

Although commentators severely criticized this campaign,⁷⁰ the White Paper underscored the need and importance of education in the intellectual property arena. The National Research Council reemphasized this need in a recent study,⁷¹ which stated: “[A] better understanding of the basic principles of copyright law would lead to greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy.”⁷²

This need becomes even more important in countries that lack a sophisticated legal system or that have limited respect for the rule of law. Unfortunately, in these countries, neither the governments of industrialized countries nor multinational corporations are interested in funding and organizing awareness and educational campaigns.⁷³ Political systems of industrialized countries tend to reward short-term results, rather than long-term results. Thus, policymakers are reluctant to focus on long-term policies, such as providing education at the grassroots level. In addition, education is a public good. Most governments and companies tend to free ride on each other’s efforts without incurring any substantial investment.⁷⁴

Second, companies in less developed countries thus far are reluctant to protect intellectual property rights of their foreign joint venture partners. This reluctance is due to both their limited understanding of intellectual property and suspicion of foreign partners and their intentions. Once they learn more about

70. See Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 299 (1996) (noting that the copyright awareness section in the White Paper “is an excellent example of a good idea gone wrong”); Litman, *Copyright Noncompliance*, *supra* note 24, at 243 (criticizing the White Paper).

71. THE DIGITAL DILEMMA, *supra* note 67, at 16-17.

72. *Id.*

73. ALFORD, *Making the World Safe for What?*, *supra* note 41, at 142 (noting that “[f]or all its much ballyhooed expressions of concern, neither the U.S. government nor many of the companies driving [the U.S. foreign intellectual property] policy . . . have made any substantial attempt . . . to communicate to the Chinese why better intellectual property protection would be in their interest . . .”); Chow, *supra* note 60, at 46 (noting that “brand owners are reluctant to commit the amount of resources necessary to achieve these goals or to risk seriously offending the Chinese government”); see also Hu, *supra* note 4, at 111 (“[A]ctive involvement by U.S. companies and lawyers, for example through special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media, will expedite the training process.”). One commentator argued that “U.S. Companies must take a proactive stance and not be content to rely on government for help.” Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 190 (1998).

74. See Yu, *From Pirates to Partners*, *supra* note 22, at 223.

intellectual property and understand their stakes within the copyright system, they may change their perception and position.

The mutual benefit of increasing awareness through education and creating stakes in the industry is exemplified by the following example concerning a U.S.-China joint venture. In the beginning, the Chinese partner was unwilling to allocate a portion of the joint venture profits to the foreign partner for design fees. The Chinese partner's reaction was natural and understandable; it understood neither intellectual property protection nor the intentions behind the foreign partner's action. Once the foreign partner explained to the Chinese manufacturer that it could charge separately for its design work and helped the manufacturer determine the cost of its own design processes, the Chinese partner became receptive to the idea of allocating profits for intellectual property rights. It even actively lobbied local regulators for the right to design fees.⁷⁵

Third, policymakers must help develop intellectual property laws and strengthen enforcement mechanisms. Today, most countries have intellectual property laws that comply with international standards; however, very few of these countries provide strong enforcement of intellectual property laws. Thus, policymakers need to work with their counterparts in these countries to strengthen intellectual property laws and develop effective enforcement mechanisms. The U.S. government used coercive tactics in the past to induce—and perhaps compel—foreign countries to change their laws in the American image. Yet past experience suggests that such changes would not be complete or sustainable until these countries consider themselves stakeholders or potential stakeholders in the international intellectual property system.⁷⁶

Policymakers need to help nonstakeholders develop a stake in the system and understand how they can protect their products and receive royalties. For example, policymakers could help nonstakeholder countries develop a local pharmaceutical industry, or a record industry. By doing so, nonstakeholders will be transformed into stakeholders or potential stakeholders.

75. John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY, *supra* note 7, at 409, 420.

76. See Yu, *From Pirates to Partners*, *supra* note 22, at 207-11; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 4, at 71-72; see also SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 13 (1998) (noting the sharp distinction between overt coercion and persuasion in the American foreign intellectual property and antitrust policies).

Finally, policymakers, in particular those in the copyright industries, must help develop honest and affordable alternatives to meet the needs of the local people. It is disturbing that American software is more expensive abroad—often in less developed countries—than it is in the United States.⁷⁷ As Gene Hoffman, the CEO of Emusic, Inc., said: “We think the best way to stop piracy is to make music so cheap it isn’t worth copying.”⁷⁸ Indeed, it would be hard to imagine why foreign nationals who earn fifty dollars a month would spend half of their monthly salary to buy a twenty dollar book.⁷⁹

Fortunately, many companies already understand this problem and use bargain pricing to fight piracy.⁸⁰ Some movie studios, for example, released audiovisual products dubbed in the local language or with added foreign-language subtitles⁸¹ to make their products more affordable. On the one hand, these bargain products provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the original products in the local language or including subtitles, the studios successfully make the discounted products unappealing to consumers in the English-speaking world. This strategy successfully prevents bargain products from entering the country as parallel imports.⁸²

77. Kenneth Ho, *A Study into the Problem of Software Piracy in Hong Kong and China* ¶ 2.6 (1995), at http://info.gov.hk/ipd/eng/information/studyaid/piracy_hk_china.htm (noting that legitimate copies of software are twenty percent more expensive in Hong Kong than they are in the United States).

78. THE DIGITAL DILEMMA, *supra* note 67, at 80.

79. Alford, *How Theory Does—and Does Not—Matter*, *supra* note 36, at 13 (emphasizing how unlikely a Chinese person “earning fifty dollars a month would be to fork out more than a month’s salary to buy even such an outstanding work as Melville Nimmer and Paul Geller’s treatise on worldwide copyright”); *see also* MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 80 (1998) (“Chinese officials defended the book piracy by claiming that people are too poor to pay for Western books, ‘yet we must obtain this knowledge so that we can develop our economy.’”).

80. *See* RYAN, *supra* note 79, at 80-81; *see also* Donaldson & Weiner, *supra* note 75, at 433 (asserting that one approach to stop piracy is to offer the affected people a legitimate way to earn a living). For discussions of price discrimination in the copyright context, *see generally* Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001).

81. Don Groves, *Warner Bros., MGM Dip into China vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Bros. and MGM have entered a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin).

82. For discussion of gray-market goods, *see generally* Margreth Barrett, *The United States’ Doctrine of Exhaustion: Parallel Imports of Patented Goods*, 27 N. KY. L. REV. 911 (2000) (examining U.S. policy on parallel imports); Shubha Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT’L BUS. L.

B. *The Chicken-or-Egg Problem*

In theory, if policymakers focus on the above areas, they can bridge the copyright divide. In reality, however, it is not easy to transform nonstakeholders into stakeholders or potential stakeholders. Even if policymakers are able to devise a comprehensive strategy, the transformation process will be further complicated by the existence of diverse interests of various stakeholders. A recent study by the National Research Council noted:

The debate over intellectual property includes almost everyone, from authors and publishers, to consumers (e.g., the reading, listening, and viewing public), to libraries and educational institutions, to governmental and standards bodies. Each of the stakeholders has a variety of concerns . . . that are at times aligned with those of other stakeholders, and at other times opposed. An individual stakeholder may also play multiple roles with various concerns. At different times, a single individual may be an author, reader, consumer, teacher, or shareholder in publishing or entertainment companies; a member of an editorial board; or an officer of a scholarly society that relies on publishing for revenue. The dominant concern will depend on the part played at the moment.⁸³

In today's political reality, the United States will likely run into a chicken-or-egg problem. As evidenced by U.S. copyright history, the copyright industry consistently lobbies for legislation that protects their economic interests. Because they are eager to maximize profits for their shareholders, they are unlikely to lobby for a regime that protects nonstakeholders. Unless nonstakeholders have power to lobby for legislation that suits their needs too, they—as Professor Jessica Litman noted—will have a very difficult time getting the legislation they want.⁸⁴ In the end, nonstakeholders will not become stakeholders or potential stakeholders, and they will have no incentive to support stronger copyright protection. Thus, the United States will likely confront a vicious cycle.

373 (1994) (providing an overview of the law and economics of gray markets); Seth Lipner, *Trademarked Goods and Their Gray Market Equivalents: Should Product Differences Result in the Barring of Unauthorized Goods from the U.S. Markets?*, 18 HOFSTRA L. REV. 1029 (1990) (discussing whether gray-market goods are justifiably excluded from U.S. markets).

83. THE DIGITAL DILEMMA, *supra* note 67, at 51.

84. Litman, *Copyright Noncompliance*, *supra* note 24, at 242.

Despite our general aversion toward authoritarian rule and the belief that copyright piracy flourishes in authoritarian countries, the chicken-or-egg problem, ironically, will be largely reduced or absent from command economies. In a command economy, the government can decide the type of economic policy it desires, the type of resources it wants to allocate, or even whether it wants to use copyright piracy as a competitive strategy. When Chinese authorities closed down pirate factories, their efficiency amazed many industry executives. How happy would the recording industry be if copyright owners could close down MP3.com, Napster, and KaZaA without long and arduous legal battles!

Notwithstanding these differences, command economies exist more in name than in practice today. Even China, one of the very few remaining Communist countries in the world, recently joined the WTO and is making the transition from a command economy to a market economy.⁸⁵

IV. CONCLUSION

Today, copyright piracy is a major transnational problem. To generate support for quick legislative and executive actions, the public debate often oversimplifies the issue. It either exaggerates a particular aspect of the problem or offers an abbreviated, easy-to-understand, yet misleading version of the story. Such oversimplification is dangerous. It creates misconceptions that confuse the public as to the cause and extent of the problem. It also misleads policymakers into finding remedies that fail to attack the crux of the piracy problem.

Copyright piracy is not primarily a cultural problem or a development issue. Nor is it a necessary byproduct of authoritarian rule. Rather, copyright piracy is a battle between stakeholders and nonstakeholders over the change and retention of the status quo. It is as relevant today as it was two centuries ago, when the United States was a major pirating nation.

To help reconfigure the misguided public debate on copyright piracy, this Article underscores the need to focus on the copyright divide—the gap between those who have stakes in the copyright regime and those who do not. Until nonstakeholders are

85. For discussions of China's entry into the WTO, see generally GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001); NICHOLAS R. LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* (2002); SUPACHAI PANITCHPAKDI & MARK L. CLIFFORD, *CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE* (2002); Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003).

transformed into stakeholders or potential stakeholders, copyright piracy will remain rampant. If the United States is to avoid the chicken-or-egg problem, its policymakers must start thinking about changing the copyright lawmaking process to account for the interests of both stakeholders and nonstakeholders.